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The Emergence of International Human Rights

INTRODUCTION

Human rights have a logic of their own. This stems from the fact that they have originated in domestic constitutional documents before becoming part of the corpus of international law, and that they regulate the relationships between the State and individuals under their jurisdiction, rather than simply relationships between States. In order to present this logic, this chapter provides an overview of how human rights came to emerge in international law; it discusses the sources of international human rights law; and it locates human rights within general international law. Sections 1 and 2 offer a brief review of the main developments that have occurred at universal and regional levels, leading to the contemporary regime of international human rights. The description of the evolution of the human rights regime, while forming an indispensable background, is left deliberately superficial for the moment. The following chapters shall provide ample opportunity to explore the most controverial issues which have arisen over the course of the emergence of the human rights regime. And the interesting questions arising about the sources of international human rights – such as the role of the emergence of a *jus commune* in human rights law, the status of human rights in customary international law, or the position of human rights in general international law – are explored in further depth in sections 3 and 4 of this chapter. The readers already familiar with the basic instruments of international human rights should move directly to those sections.

Sections 3 and 4 examine the new dilemmas brought about by the rise of international human rights and the strengthening of the institutions of the human rights regime. A first source of tension results from the development of a *jus commune* in the field of international human rights, particularly since the 1990s. This refers to the fact that international and national courts increasingly refer to one another, seeking inspiration in one another's case law, and progressively building a common understanding of the values which – whatever the precise legal source in which they are embodied – they seek to uphold. This movement reinforces the tendency for human rights law to develop as a self-contained regime of international law, to the extent

that the relevance of general principles of international law in the implementation of international human rights is increasingly questioned. Section 3 analyses the emergence of this *jus commune* of human rights, by looking at its manifestations and some of its potential consequences.

Section 4 seeks to locate the place of human rights in general international law. It examines the extent to which general public international law imposes respect for human rights (section 4.1.); whether human rights have a hierarchically superior status in public international law (section 4.2.); whether they impose obligations which States owe to the international community as a whole (section 4.3.); and the place of human rights treaties in the law of treaties as part of general international law (section 4.4.). It also considers the debate on the validity of reservations to human rights treaties, which provides an illustration of the tension between the view that human rights treaties are specific, and the view that they should be subordinated to the general rules of the law of treaties (section 4.5.).

The first question – whether human rights may be derived from customary international law or the general principles of law, rather than only from the treaties which codify them in conventional form – may have far-reaching implications, even now that most of the main human rights treaties have been ratified by a large majority of States: since such treaties are only binding on their signatories – States – we need to identify the sources of international human rights law in general international law in order to hold non-State actors accountable to these rights. The second question requires an examination of the *jus cogens* nature of human rights prescriptions, the consequences of which extend beyond the law of treaties to issues of State responsibility. The third question is relevant, in particular, to the much-debated issue of the *erga omnes* character of human rights norms: while it is uncontested that a State may exercise diplomatic protection where its nationals have their rights violated by another State, it is less clear whether, beyond that specific situation, States have a legal interest in seeking to ensure compliance of other States with their human rights obligations. All these issues may be related to the more fundamental question of whether human rights treaties are specific, and should be treated apart from the rules applicable to other, classical intergovernmental agreements – a question for which the issue of reservations provides an adequate illustration.

1 THE UNIVERSAL LEVEL: THE UNITED NATIONS AND HUMAN RIGHTS

The Charter of the United Nations was adopted on 26 June 1945. It referred to human rights and fundamental freedoms as one of the aims of the Organization, mentioning specifically the right to self-determination of peoples and non-discrimination as belonging to the internationally recognized human rights (see P. G. Lauren, 'First Principles of Racial Equality: the History and Politics and Diplomacy of Human Rights Provisions in the United Nations Charter', 5 *Human Rights Quarterly* (1983), 1; A. Cassese, 'The General Assembly: Historical Perspective 1945–1989' in P. Alston (ed.), *The United Nations and Human Rights: a Critical Appraisal*, second edn (Oxford

University Press, 2004), p. 25). It was understood at the time that the protection of human rights would also enclose the protection of individual members of minorities who, therefore, would no longer need a specific system, as they enjoyed under the League of Nations. The following provisions of the UN Charter are most relevant to the protection of human rights:

Charter of the United Nations, signed in San Francisco, 26 June 1945:

[Preamble]
We the Peoples of the United Nations, determined … to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, …

Chapter I. Purposes and Principles

Article 1
The Purposes of the United Nations are: …
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; …

Chapter IX. International Economic and Social Co-operation

Article 55
With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
1. higher standards of living, full employment, and conditions of economic and social progress and development;
2. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
3. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56
All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

Chapter X. The Economic and Social Council

Article 61
1. The Economic and Social Council shall consist of fifty-four Members of the United Nations elected by the General Assembly …

Article 62

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly to the Members of the United Nations, and to the specialized agencies concerned.
2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.
3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.
4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

Article 68

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

During the negotiations which led to the adoption of the UN Charter, the Foreign Affairs Minister of Panama, Ricardo J. Alfaro, with the support of Cuba, had proposed the inclusion of the 'Statement of Essential Human Rights' produced in 1944 within the American Law Institute, an organization of judges, practitioners, and academics dedicated to the improvement of the rule of law, in whose work Alfaro had participated. The proposal was not retained. Thus, although it includes a number of references to 'human rights and fundamental freedoms' as well as to the principles of non-discrimination and self-determination of peoples, the UN Charter does not contain a catalogue of human rights. However, in order to make progress towards this objective, the Economic and Social Council (Ecosoc), the organ of the UN tasked to promote international co-operation in the area of social and economic development, was mandated under Article 68 of the Charter to create commissions on thematic issues, including human rights.

The Ecosoc first convened in London in January and February 1946. It then established the Commission on Human Rights in a nuclear form, comprising nine members under the chairmanship of Eleanor Roosevelt. The Nuclear Commission thus constituted met first between 29 April and 20 May 1946. At the end of its first session, it made a recommendation that work should begin, as soon as possible, on the drafting of an international Bill of Rights: although, at the first session of the UN General Assembly held in January–February and May–June 1946, the Minister for Foreign Affairs of Panama again proposed to adopt by resolution the draft bill elaborated within the American Law Institute, his proposal had been opposed by Eleanor Roosevelt, on behalf of the United States, in part because the draft had in fact never been adopted by the American Law Institute and would have met opposition from the domestic constituency of the United States (A. W. B. Simpson, *Human Rights and the*

End of Empire (Oxford University Press, 2001), p. 323). So the work was left to be done by the Commission on Human Rights. The Nuclear Commission also proposed that the definitive Commission be established in the form of independent experts, rather than governmental delegates. They were also in favour of it having a strong monitoring role, and not merely a role in drafting legal texts for consideration by the Ecosoc and the General Assembly (see, for more details, P. Alston, 'The Commission on Human Rights' in P. Alston (ed.), *The United Nations and Human Rights: a Critical Appraisal*, second edn (Oxford University Press, 2004), p. 126).

The Nuclear Commission was not followed on these last two points when, in June 1946, the Ecosoc discussed its proposals. The Ecosoc established the Commission on Human Rights as one of its first two 'functional commissions' set up to assist it in its work (Ecosoc Resolution 9(II) of 21 June 1946). But instead of independent experts, the Commission on Human Rights was composed of the representatives of eighteen States, including the five permanent members of the Security Council (China, France, the Soviet Union, the United Kingdom and the United States). It later grew in successive phases, in order to remain representative of the United Nations membership, which significantly expanded and diversified following the decolonization of the 1950s and 1960s. It had fifty-three members in 2006, at the time it was replaced by the Human Rights Council. And until the adoption of Resolutions 1235 (XLII) in 1967 and 1503 (XLVIII) in 1970, the Commission primarily functioned as a drafting forum for the setting of standards, without an effective monitoring role.

Alongside the Commission on Human Rights, the Commission on the Status of Women was established by Ecosoc Resolution 11(II) of 21 June 1946, with the aim of preparing recommendations and reports to the Ecosoc on promoting women's rights in political, economic, civil, social and educational fields. Initially, only a Sub-Commission on the Status of Women had been envisaged, subordinate to the Commission on Human Rights: the enhancement of the status of this body was a victory for women's rights. In addition, Ecosoc Resolution 9(II) of 21 June 1946 created the Sub-Commission on Prevention of Discrimination and Protection of Minorities (renamed in 1999 the Sub-Commission on the Promotion and Protection of Human Rights), as a group of independent experts in charge of undertaking studies and making recommendations to the Commission on Human Rights on important issues of human rights promotion. In 2006, at the time it was replaced when the new Human Rights Council was set up, the Sub-Commission on the Promotion and Protection of Human Rights was composed of twenty-six experts, each with a single alternate.

The first task performed within the Commission on Human Rights was to agree on the text of a Declaration of Rights. It did so within a remarkably short period of time, and was able to adopt a draft at its third session of 24 May–18 June 1948. On 10 December 1948, following agreement achieved within the Ecosoc, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) (GA Res. 217, UN GAOR, 3d sess., UN Doc. A/810 (1948)). The UDHR was adopted by forty-eight votes

to none, with eight abstentions. The abstentions were cast by South Africa, which had just inaugurated its 'apartheid' policy and thus opposed the affirmation of equality without distinction as to race; Saudi Arabia, which opposed the freedom to change one's religion; as well as the USSR and its satellite States which then already formed what was referred to during the Cold War as the 'Soviet Block', who considered that the Declaration could be used as a pretext for interfering with the domestic affairs of the Member States of the United Nations (for detailed histories of the drafting process, see M. A. Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001); J. P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (Dobbs Ferry, NY: Transnational Publishers, 1984); and J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Philadelphia Press, 1999); for a study on the philosophical underpinnings of the Declaration in the views of the drafters, see J. Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press: Pennsylvania Studies in Human Rights, 2009)). The adoption of the UDHR took the form of a non-binding resolution. Nevertheless, a majority of the doctrine takes the view today that, whatever the intent of the governments which voted on the Declaration, the rights stipulated in the UDHR now have acquired the status of customary international law or should be considered as part of the 'general principles of law recognized by civilized nations' mentioned in Article 38(1)(c) of the Statute of the International Court of Justice as a source of international law. This issue is explored in greater depth in section 4.1. of this chapter.

The Universal Declaration of Human Rights was later implemented in the form of binding international treaties open to the ratification of the Member States of the United Nations. The initial idea was to have the Declaration as such transformed into a binding legal instrument, proposed to the ratification of the States. Having one single universal covenant was considered to present one major advantage: it would offer a clear recognition of the fact that all the rights of the Declaration were interconnected and interdependent. Within the Ecosoc, however, the delegates gradually came to consider that civil and political rights, on the one hand, and economic and social rights, on the other hand, called for different methods of implementation. Civil and political rights could be monitored by independent experts and were of immediate applicability since they primarily required from States that they abstain from interfering with the rights of the individual. In contrast, economic and social rights (to which cultural rights were assimilated) called for progressive measures of implementation, since they required legislative action in order to become fully justiciable. They also called for budgetary commitments, and therefore their implementation depended on the resources available to each State and on international co-operation. The General Assembly was finally convinced by these arguments. In 1952, following the position of the Ecosoc, it decided to implement the UDHR by elaborating two separate covenants, each corresponding to one category of rights (A/RES/6/543, 4 February 1952). While both sets of rights were considered of equal

importance and while all agreed on the interdependence and indivisibility of all rights, the view that prevailed was that these sets of rights were sufficiently different from one another to warrant separate treatment, and to be implemented through different legal techniques (see, in the context of this discussion, A. Eide, 'Economic, Social and Cultural Rights as Human Rights' in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights. A Textbook*, second edn (Dordrecht: Martinus Nijhoff, 2001), p. 9). The discussion on whether the distinction thus established between the two categories of rights is justified continued well through the 1990s, and it may be said that it was only – provisionally – closed with the adoption, on 10 December 2008, of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (for an exposition of the arguments against assimilating both sets of rights, see E. W. Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' in *Netherlands Yearbook of International Law*, 9 (1978), 69, and M. Bossuyt, 'La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels', *Revue des droits de l'homme*, 8 (1975), 783, and for a riposte, G. J. H. Van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views' in P. Alston and K. Tomasevski (eds.), *The Right to Food* (Dordrecht: Martinus Nijhoff, 1984), p. 97: this is further discussed in chapter 8, section 1.2., on the justiciability of economic, social and cultural rights).

Still, even once the UN General Assembly had taken the decision that work should be done towards the adoption of two separate treaties, fourteen more years of negotiations were required before the two covenants could be adopted, simultaneously, on 16 December 1966. By then, a vote had already intervened on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted on 21 December 1965 after three years of negotiations. The adoption of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR), following that of the ICERD, launched a period of intense treaty-making activity. Nine treaties are often referred to as the 'core human rights treaties', because they present certain common characteristics. They are all based on the Universal Declaration on Human Rights, the values of which they seek to protect and develop. All but one set up bodies of independent experts in order to monitor them, and progressively to clarify the obligations of States which these treaties define: the only exception is the International Covenant on Economic, Social and Cultural Rights, which only provides for a role of the Ecosoc in such monitoring – although this was largely compensated by the establishment of the Committee on Economic, Social and Cultural Rights, through a resolution (1985/17, of 28 May 1985) of the Economic and Social Council. All of these treaties are based primarily on a reporting procedure by States, which undertake to provide information on a regular basis on the measures they take in order to comply with their obligations. The mechanisms set up under these treaties is explored in greater detail in chapter 9. The treaties are the following:

Treaty	Additional protocols	Entry into force	Membership (on 26 August 2009)
International Convention on the Elimination of All Forms of Racial Discrimination (A/RES/20/2106, 21 December 1965) (660 U.N.T.S. 195)		4 January 1969	173 parties
International Covenant on Economic, Social and Cultural Rights (A/RES/21/2200A, 16 December 1966) (993 U.N.T.S. 3)	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (A/RES/63/117, 10 December 2008)	3 January 1976	160 parties
International Covenant on Civil and Political Rights (A/RES/21/2200A, 16 December 1966) (999 U.N.T.S. 171)	Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) (999 U.N.T.S. 171) Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (A/RES/44/128, 15 December 1989) (1642 U.N.T.S. 414)	23 March 1976	164 parties
Convention on the Elimination of All Forms of Discrimination against Women (A/RES/34/180, 18 December 1979) (1249 U.N.T.S. 13)	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (A/RES/54/4, 6 October 1999) (2131 U.N.T.S. 83)	3 September 1981	186 parties
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) (1465 U.N.T.S. 85)	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (A/RES/57/199, 18 December 2002)	26 June 1987	146 parties
Convention on the Rights of the Child (A/RES/44/25, 20 November 1989) (1577 UNTS 3)	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (A/RES/54/263, 25 May 2000)	2 September 1990	193 parties

Treaty	Additional protocols	Entry into force	Membership (on 26 August 2009)
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (A/RES/45/158, 18 December 1990)		1 July 2003	42 parties
Convention on the Rights of Persons with Disabilities (A/RES/61/106, 13 December 2006)	Optional Protocol to the Convention on the Rights of Persons with Disabilities (A/RES/61/106, 13 December 2006)	3 May 2008	65 parties
International Convention for the Protection of All Persons from Enforced Disappearance (A/RES/61/177, 20 December 2006)		Not yet in force	13 parties

These nine core human rights treaties are not the only ones adopted within the framework of the United Nations in the field of human rights. Mention should also be made, for instance, of the Convention on the Prevention and Punishment of the Crime of Genocide (78 U.N.T.S. 277), adopted on 9 December 1948 by the UN General Assembly, although without any part being played in its elaboration by the Commission on Human Rights. Like other, similar instruments, such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted on 26 November 1968 (754 U.N.T.S. 73)) or the International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted on 30 November 1973 (1015 U.N.T.S. 243)), the 1948 Genocide Convention differs from the core human rights treaties, however, in that it is not monitored by a body of independent experts equipped to build a jurisprudence that gives meaning to its clauses, and thus to contribute to the general development of human rights.

For this reason in particular, the emphasis in this book will be on the core human rights treaties and on the developing law of human rights emanating from their control mechanisms, rather than on these other contributions of the UN to human rights, however important they may be. In addition, even within the core human rights treaties, a certain emphasis has been placed on three instruments, probably the most important whether measured by the scope of the situations they cover or by the output of the monitoring bodies: these are the two covenants adopted in 1966, as a codification into treaty form of the Universal Declaration on Human Rights (on the International Covenant on Civil and Political Rights (ICCPR), see M. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987); S. Joseph *et al.*, *The International Covenant on Civil and Political Rights*, second edn (Oxford University Press, 2004); K. A. Young, *The Law and Process of the UN*

Human Rights Committee (Ardsley, NY: Transnational Publishers, 2002); D. McGoldrick, *The Human Rights Committee. Its Role in the Development of the International Covenant on Civil and Political Rights*, second edn (Oxford: Clarendon Press, 1994); I. Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights. Practice and Procedures of the Human Rights Committee* (Antwerp-Oxford: Intersentia-Hart, 1999); M. Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary*, second edn (Kehl am Rhein: N. P. Engel Verlag, 2005); on the International Covenant on Economic, Social and Cultural Rights, see in particular, K. Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights. Theoretical and Procedural Aspects* (Antwerp-Oxford: Intersentia-Hart, 1999); M. Craven, *The International Covenant on Economic, Social and Cultural Rights: a Perspective on its Development* (Oxford: Clarendon Press, 1995); and A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights. A Textbook*, second edn (Dordrecht: Martinus Nijhoff, 2001)); and the Convention on the Rights of the Child, adopted in 1989 and soon to become the most universally ratified human rights instrument, with 193 States parties at the time of writing: only the United States and Somalia among the members of the UN are not parties to the treaty (on the Convention on the Rights of the Child, see A. Alen *et al.* (eds.), *The UN Children's Rights Convention: Theory Meets Practice* (Antwerp-Oxford: Intersentia-Hart, 2007); P. Alston, St. Parker and J. Seymour (eds.), *Children, Rights and the Law* (Oxford: Clarendon Press, 1992); A. Glenn Mower, Jr., *The Convention on the Rights of the Child. International Law Support for Children* (Westport, Conn.: Greenwood Press, 1997); L. LeBlanc, *The Convention on the Rights of the Child. United Nations Lawmaking on Human Rights* (Lincoln, Nebras.: University of Nebraska Press, 1995)).

2 THE REGIONAL LEVEL

The modesty with which human rights were addressed within the UN encouraged regional organizations to set up their own system for the protection of human rights. Both the Council of Europe and the Organization of American States moved swiftly in this direction. The Organization of African Unity (now renamed the African Union) also established its own mechanism, although later and under a less ambitious form. A brief overview follows. The description here remains deliberately general and superficial: its only purpose is to recall the framework within which human rights developed in regional settings following the Second World War. In addition, the human rights protection mechanisms set up in these respective organizations are the subject of chapter 11, where they are presented in greater detail in their procedural aspects.

2.1 The Council of Europe and human rights

The Statute of the Council of Europe was adopted on 5 May 1949, and it came into force on 3 August 1949. The initial signatories were Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. They were soon followed by Germany, Greece, Iceland, and Turkey, all of which joined the

organization in 1949 or 1950. Austria joined in 1956, Cyprus in 1961, Switzerland in 1963, Malta in 1965, Portugal in 1976, Spain in 1977, Liechtenstein in 1978, San Marino in 1988, and Finland in 1989. But it was with the accession of newly democratized Eastern and Central European States, in the 1990s, that the organization underwent its deepest transformation (see the Information Report on the Enlargement of the Council of Europe (16 June 1992), Doc. 6629 of the Parliamentary Assembly of the Council of Europe). In addition to Andorra, which joined in 1994, the Council of Europe expanded from twenty-three members in 1990 to thirty-eight members in 1995, beginning with Hungary and Poland respectively in 1990 and 1991, and with seven States joining in 1992–3 (Bulgaria, the Czech Republic, Estonia, Lithuania, Romania, Slovakia and Slovenia). In 1996, together with Croatia, the Federation of Russia became a member; seven other States, including Armenia and Azerbaidjan, were added in 1999 and later. The organization now numbers forty-seven members.

The Statute defines as a condition for membership that '[e]very member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council' (Art. 3). Indeed, even prior to the signing of the Statute, it was understood that the organization's first task should be to adopt a Charter on Human Rights, since that was one of the primary aims of the European Movement at the origin of the establishment of the Council of Europe. The negotiations were launched in August 1949, and were finalized by September 1950, allowing the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – the official name of what is usually referred to as the European Convention on Human Rights – to be signed on 4 November 1950; it entered into force on 3 September 1953. The speed at which the negotiations proceeded was truly remarkable, considering the ambitious nature of the text: for the first time, an international jurisdiction, the European Court of Human Rights, was being set up, empowered to receive files submitted by the European Commission on Human Rights for its consideration, on the basis of individual applications by victims of human rights violations. Of course, the jurisdiction of the Court was initially optional, and individuals did not have direct access to the Court: it was the European Commission on Human Rights that, after an examination of the admissibility of the application, presented the case against the State, unless it chose to direct the case for consideration to the Committee of Ministers of the Council of Europe (see further chapter 11, section 1). Still, under the standards of the time, this constituted a major revolution, as important in significance as had been, only two years earlier, the adoption of the Universal Declaration of Human Rights.

The ratification of the Convention is now considered a condition for membership of the Council of Europe. This has not always been the case: France, for instance, although it is among the founding States of the Council of Europe which it hosts, only ratified the European Convention on Human Rights in 1974. The rule linking membership of the Council of Europe to accession to the ECHR appropriately reflects the pre-eminent role played by this instrument on the European continent. This, however, should not

lead to underestimate the other instruments adopted within the organization for the promotion of human rights. Shortly after the ECHR entered into force, it was deemed necessary to pursue work on the implementation of the economic and social rights of the Universal Declaration of Human Rights which, due to their focus on civil and political rights, the drafters of the Convention had essentially neglected. After six years of negotiations, the European Social Charter was signed by thirteen Member States of the Council of Europe in Turin, on 18 October 1961 (CETS No. 35; 529 U.N.T.S. 89), and it entered into force a few years later, on 26 February 1965. Although it is an impressive catalogue of social rights laid out in great detail, the European Social Charter has been almost dormant until the early 1990s, when it was felt necessary to revive it in a context in which the European Communities (now the European Union) were increasingly active in the field of social rights, and in which the shift towards market economy in the Central and Eastern European States seemed to call for a strengthened protection of social rights as a counterweight to large-scale deregulation. These were the main arguments in favour of the 'revitalization' of the Charter, which was formally launched by the Ministerial Conference on Human Rights held in Rome in November 1990 (see further box 11.1., chapter 11).

Although the European Convention on Human Rights and the European Social Charter clearly are the most important human rights instruments adopted within the Council of Europe, other, often innovative systems have been put in place, to improve the monitoring of the conditions in which persons are being held in detention (European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (C.E.T.S., No. 126), signed on 26 November 1987), to protect the rights of minorities (European Charter for Regional or Minority Languages (C.E.T.S., No. 148), signed on 5 November 1992; and Framework Convention for the Protection of National Minorities (C.E.T.S., No. 157), signed on 1 February 1995), or to protect the dignity of the person against the misuse of biology and medicine (Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (C.E.T.S., No. 164), signed on 4 April 1997). In its standard-setting capacity, the Council of Europe has also played an important role in promoting a common approach to certain subjects, such as the protection of the environment through the criminal law, the fight against corruption, or the fight against trafficking of human beings, that present a more indirect relationship to human rights. At the same time, the leading role of the Council of Europe on the European continent is sometimes seen as being threatened by the increasingly important role played by the European Union (EU) in this area, particularly as the competences of the EU have developed over time to include, at present, a large number of domains that are directly related to civil liberties or social rights (see box 1.1.).

2.2 The Organization of American States and human rights

The role of the Organization of American States in the promotion and protection of human rights presents striking similarities with that of the Council of Europe. In 1948

Box 1.1.

The rise of fundamental rights in the European Union

The original treaties establishing the European Communities in 1951 (European Coal and Steel Community) and 1957 (European Atomic Energy Community and European Economic Community) contained no reference to human rights, apart from certain provisions on free movement of workers (including a prohibition of discrimination on grounds of nationality) and on equal pay between men and women, whose primary purpose remained linked to the needs of economic integration. In the late 1960s, however, the Court of Justice of the European Communities (European Court of Justice or ECJ) gradually sought to include fundamental rights among the general principles of European Community law which, on the basis of Article 164 EEC (later Art. 220 EC), it was competent to ensure respect for in the scope of application of the treaties. This case law was developed as a means to reassure the national courts of the EU Member States that the supremacy of European Community law would not oblige these national courts to set aside guarantees relating to human rights set out in the national constitutions. Following a first series of cases where the European Court of Justice firmly resisted the suggestion that the Community would be bound to respect the fundamental rights guaranteed by the constitutions of the Member States (Case 1/58, *Stork* v. *High Authority* [1959] E.C.R. 17 at 25–6; Joined Cases 36, 37, 38 and 40/59, *Geitling* v. *High Auth*ority [1960] E.C.R. 423 at 438–9; Case 40/64, *Sgarlata* v. *Commission* [1965] E.C.R. 215 at 227), and yet affirmed that the national jurisdictions of the Member States should accept the supremacy of EC law (Case 6/64, *Costa* v. *Enel* [1964] E.C.R. 585), the German Federal Constitutional Court (*Bundesverfassungsgericht*) and the Italian Constitutional Court (*Corte costituzionale*) reacted by stating that they would not accept this supremacy where this would oblige them to renounce upholding the provisions relating to fundamental rights in their respective national constitutions, in situations where the implementation of EC law would conflict with those guarantees (see Gerhard Bebr, 'A Critical Review of Recent Case Law of National Courts', *Common Market Law Review* (1974) 408). The resistance it faced led the European Court of Justice to accept that 'fundamental human rights' are 'enshrined in the general principles of Community law and protected by the Court' (Case 29/69, *Stauder* v. *City of Ulm* [1969] E.C.R. 419). The Court announced that it would henceforth identify those fundamental rights by referring to the common constitutional traditions of the Member States, although 'the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community' (Case 11/70, *Internationale Handelsgesellschaft* v. *Einfuhr- und Vorratsstelle Getreide* [1970] E.C.R. 1125).

Since that founding period, the European Court of Justice has sought to ensure respect for fundamental rights, as part of the general principles of law, either as regards the acts adopted by the institutions of the European Union, or as regards any acts adopted by the national authorities of the Member States to the extent that they intervene in the scope of application of EU/EC law, for instance when they take measures to implement EU legislation or when they invoke exceptions allowed by the treaties or the case law of the European Court of Justice (see, among many others, the following cases or opinions: Case C-260/89, *ERT* [1991] E.C.R. I-2925, paragraph 41; Opinion 2/94 [1996] E.C.R. I–1759, paragraph 33; Case C-274/99 P, *Connolly* v.

Commission [2001] E.C.R. I–1611, paragraph 37; Case C-94/00, *Roquette Frères* [2002] E.C.R. I-9011, paragraph 25; Case C-112/00, *Schmidberger* [2003] E.C.R. I-5659, paragraph 71; and Case C-36/02, *Omega* [2004] E.C.R. I-9609, paragraph 33).

This case law was constitutionalized in the Treaty on the European Union, that established the EU in 1992 as a single institutional framework for the European Communities and for co-operation in areas of justice and home affairs and in foreign and security policy. Article 6(3) of the EU Treaty reads: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.' The explicit mention in this provision of the European Convention on Human Rights is of course no accident. The ECHR is recognized a 'special significance' in this case law: it is *de facto* treated by the European Court of Justice as if it were binding on the EU, and the ECJ systematically seeks to align itself on the interpretation of the European Court of Human Rights. However, other treaties, such as the International Covenant on Civil and Political Rights or the Convention on the Rights of the Child, also have been relied upon by the Court of Justice (on the selective use of international human rights law by the ECJ, see I. de J. Butler and O. De Schutter, 'Binding the EU to International Human Rights Law', *Yearbook of European Law*, 27 (2008), 277).

The dependency of the case law of the European Court of Justice in the field of fundamental rights on the protection afforded to these rights in the national constitutions of the EU Member States has remained a significant factor to this day. Indeed, in its 'Solange' ('so long as') decision of 1974, the German Federal Constitutional Court insisted that, despite the 1969–70 judgments of the European Court of Justice in the cases of *Stauder* and *Internationale Handelsgesellschaft*, it did not consider that it was bound to accept unconditionally the supremacy of EC law, as long as the European Community did not possess a catalogue of rights offering the same legal certainty as the German Constitution (*Grundgesetz*) (BVerfG, judgment of 29 May 1974, [1974] 2 C.M.L.R. 551). Later, following the confirmation of the case law of the European Court of Justice and the political support it received from the then nine EC Member States (Joint Declaration of the Council, of the European Parliament and of the Commission on human rights, O.J. 1977 C103/1), the German Federal Constitutional Court somewhat relaxed its approach, agreeing to abstain from controlling the compatibility with fundamental rights of EC law it was asked to implement, as long as the level of protection of fundamental rights within the European Community would remain satisfactory (BVerfG, judgment of 22 October 1986, 2 BvR 197/83, 73 BVerfGE 339 [1987] 3 C.M.L.R. 225 ('*Solange II*' judgment)). This position was confirmed in the 'Maastricht' judgment delivered on 12 October 1993, (2 BvR 2134/92 and 2159/92, 89 BVerfGE [1993] 1 C.M.L.R. 57). Other supreme courts in the EU Member States have adopted the same attitude (e.g. the Danish Supreme Court, see *Hanne Norup Carlsen and others* v. *Prime Minister Poul Nyrup Rasmussen* [1999] 3 C.M.L.R. 854). Finally in a judgment of 7 June 2000, the German Federal Constitutional Court again slightly amended its view, agreeing to establish a presumption of compatibility of EU law with the requirements of fundamental rights: it is therefore up to the applicant, or to the court referring a case to the Constitutional Court, to bring forward elements

justifying that this presumption will be reversed (BVerfG, 2 BvL 1/97). This background explains why the European Court of Justice has consistently sought to achieve a high level of protection of fundamental rights in the EU legal order, on the basis of a comparison between the constitutional traditions of the EU Member States and seeking inspiration from the international human rights instruments they are parties to.

The sequence briefly described above also explains why, during the first semester of 1999 (as Germany was presiding over the European Union), the idea was proposed that the European Union prepare a Charter of Fundamental Rights codifying and making visible to the citizen the *acquis* of the Union in this field. The proposal to adopt such a catalogue of fundamental rights was in part a reaction to the doubts expressed by the German Federal Constitutional Court about the solidity and irreversibility of this *acquis*. The adoption of a Charter of Rights, it was thought, would provide European integration with precisely this important building block, the absence of which the Constitutional Court had deplored in its first 'Solange' judgment of 1974, and which surfaced again in the 1986 and 1993 decisions it delivered on this issue. It would thus strengthen the legitimacy of further steps towards European integration, and justify further integration in the eyes of national constitutional or supreme courts.

Following the political decision to prepare a catalogue of rights for the EU, which was adopted at the Cologne European Council of June 1999, discussions on the content of the Charter of Fundamental Rights took place between December 1999 and September 2000. On 7 December 2000, the Charter of Fundamental Rights of the European Union was proclaimed at the Nice European Council (O.J. 2000 C364/1). It lists both civil and political rights and economic and social rights, and it also includes certain rights specifically linked to the citizenship of the Union and economic freedoms protected under the European treaties. Inspired by the fundamental rights recognized by the European Court of Justice among the general principles of law it ensures respect for, and by the international human rights instruments binding upon the EU Member States, the Charter is now the single most authoritative restatement of the *acquis* of the Union in the field of fundamental rights. Its main impact is not as a legal document, however – indeed, the Charter had no binding force when it was initially proclaimed, and only with the most recent reforms of the European treaties did it acquire formal legal authority (the Reform Treaty, signed at Lisbon on 13 December 2007 in force since 1 December 2009, contains a reference to the Charter, thus confirming its status as a legally binding instrument for the institutions of the Union and for the Member States when they implement Union law: see Article 6(1) of the Treaty on European Union as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ 2007 C306/1) (referring to the EU Charter of Fundamental Rights in the revised form it has been proclaimed on 12 December 2007 (OJ 2007 C303/1)). Rather, the influence of the Charter has primarily been felt in the transformation it brought about in the culture and the practice of the European institutions: for the European Parliament and the European Commission, in particular, it has become routine to invoke fundamental rights in drafting or discussing policies and laws, now that there exists a document, prepared under conditions which guarantee it a high degree of legitimacy, listing the said rights.

the Pan American Union was renamed the Organization of American States (OAS), a 'regional arrangement' within the new United Nations world architecture (see generally on this organization, A. V. W. Thomas and A. J. Thomas, *The Organization of American States* (Dallas: Southern Methodist University Press, 1963)). At the time, it had twenty-one members, including the United States. The membership expanded gradually. A number of small English-speaking island nations of the Caribbean joined in the 1960s, after they achieved independence; Canada acceded in 1990. The OAS today comprises thirty-six Member States: Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba (although its participation in the OAS was suspended between 1962 and 2009, because of an alleged incompatibility between its adoption of Marxism-Leninism and the principles and purposes of the OAS Charter), Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras (whose participation was suspended after the *coup d'état* of June 2009), Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, St Kitts and Nevis, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela.

In April 1948, at the same time that it established the OAS, the Ninth International Conference of American States held in Bogotá, Colombia, adopted the American Declaration on the Rights and Duties of Man. The Declaration was initially not intended to be a binding instrument. In 1959, however, in part in reaction to the Cuban revolution, the Inter-American Commission on Human Rights was established by a resolution of the Fifth Meeting of Consultation of Ministers for Foreign Affairs. The resolution was adopted on the basis of Article 5(j) (now Article 3(l)) of the OAS Charter, in which the Member States 'reaffirm' and 'proclaim' as a principle of the Organization 'the fundamental rights of the individual without distinction as to race, nationality, creed or sex'. When the Statute of the Inter-American Commission on Human Rights was adopted the following year, it defined the 'human rights' the Commission was to 'further respect' as the rights contained in the American Declaration on the Rights and Duties of Man.

Prior to the adoption of the American Convention in 1969 (see below), the Commission applied the American Declaration to all Member States of the OAS. By becoming a Member State of the OAS, a State implicitly recognized the competence of the Commission to receive individual petitions alleging human rights violations attributable to the Member States. Today the Commission continues to apply the American Declaration, as a default instrument, to those States that have not yet become parties to the American Convention. It thus considers that it is competent to examine violations of the rights set forth by the Declaration, however, once the Convention has entered into force in relation to a State, it is the Convention and not the Declaration that becomes the specific source of law to be applied, as long as the petition alleges violation of substantially identical rights enshrined in both instruments and a continuing situation is not involved (see, e.g. IACHR, Annual Report 2000, *Amílcar Ménendez et al.* v. *Argentina*, Case 11.670, Report No. 3/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 95, para. 41).

The American Convention on Human Rights (ACHR) itself was adopted in San José, Costa Rica, on 22 November 1969, although it did not enter into force until 18 July 1978. It is the most important human rights instrument in the inter-American system. Largely inspired by the European Convention on Human Rights (as it then was, in its original version of 1950) (see for comparisons J. Frowein, 'The European and the American Conventions on Human Rights: a Comparison', *Human Rights Law Journal*, 1 (1980), 44; T. Buergenthal, 'The American and European Conventions on Human Rights: Similarities and Differences', *American Universities Law Review*, 40 (1980), 155), it created the Inter-American Court of Human Rights, which has its seat in San José, Costa Rica. With the exception of Cuba, which was not participating in the OAS at the time the ACHR was adopted, every Spanish-speaking Member State of the OAS, as well as Brazil, has ratified the American Convention and accepted the compulsory jurisdiction of the Court. Of the thirty-six Member States of the OAS, twenty-four are States parties to the American Convention, as of 1 July 2009. These are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. Trinidad and Tobago was a State party but denounced the American Convention on 26 May 1998, as a result of the decision adopted by the Judicial Committee of the Privy Council in *Pratt and Morgan* v. *Attorney General for Jamaica* [1994] 2. A.C. 1 (see box 1.5.). Ten other Member States of the OAS have not ratified the Convention: Antigua and Barbuda, the Bahamas, Belize, Canada, Cuba, Dominica, Guyana, St Kitts and Nevis, St Vincent and the Grenadines, and the United States. As its membership indicates, the system of the ACHR has largely succeeded in establishing its credibility within the Latin American context. In contrast, most of the English-speaking Member States have not yet become States parties to the American Convention, including, notably, the United States and Canada (although the United States signed the ACHR in 1977). Of the English-speaking Member States of the OAS, only Barbados, Grenada and Jamaica are States parties to the American Convention, but of these three only Barbados accepted the compulsory jurisdiction of the Court, in 2000. The mechanisms of the Inter-American Commission and Court of Human Rights are described in greater detail in chapter 11 (section 2).

The 1948 American Declaration on the Rights and Duties of Man and the 1969 American Convention on Human Rights are not the only instruments adopted within the OAS that contribute to the promotion and protection of human rights, however. The Convention itself was complemented in 1988 by an Additional Protocol in the area of Economic, Social and Cultural Rights, called the San Salvador Protocol after the city in which it was signed. It had fourteen States parties on 1 July 2009. While the Additional Protocol provides that only the rights stated in Article 8 a) (trade union rights) and Article 13 (right to education) may lead to the filing of individual petitions before the Inter-American Commission or Court of Human Rights, a reporting system is established for all the economic, social and cultural rights codified in the Additional Protocol. In 1990, another Protocol to the ACHR was adopted,

this time to abolish the death penalty. Separate from the ACHR, the Inter-American Convention to Prevent and Punish Torture was adopted in 1985, entering into force two years later. On 1 July 2009 it had seventeen parties to it. It mirrors in many respects the 1984 UN Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment. A Convention on the Forced Disappearance of Persons was adopted in 1994, and entered into force in 1996. It had thirteen States parties on 1 July 2009. Under the Convention, the States parties undertake to punish those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories, and to co-operate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; the Convention lists the measures States should take in order to render this prohibition effective.

2.3 The African Union and human rights

The trajectory followed by the Organization of African Unity (OAU) – now the African Union – was slightly different. The Charter founding the OAU, signed in Addis-Abeba on 25 May 1963, stated that one of the objectives of the new organization was to 'promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights' (Art. 2(1), e)). That reference was mainly symbolic: in fact, the principle of non-interference in domestic affairs was much more highly valued, as the OAU members had only recently obtained their independence and were particularly sensitive to affirming their sovereignty. Only later would human rights be put on the agenda of the organization, when certain dictatorships fell in 1979 and democratic movements gained visibility throughout the continent. The African (Banjul) Charter on Human and Peoples' Rights was adopted on 27 June 1981, and it entered into force on 21 October 1986 (OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)). It had fifty-three States parties on 1 July 2009. Initially, the African Charter was monitored exclusively by the African Commission on Human and Peoples' Rights. The system was further strengthened by the entry in force, in 2004, of the 1998 Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, although it is too early still to evaluate the effectiveness of this reform (see further chapter 11, section 3). In addition, a Protocol to the African Charter on the Rights of Women in Africa was adopted on 11 July 2003 in Maputo and entered into force in 2005.

In the Preamble of the African Charter, the OAU members state that they are 'taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights'. Indeed, the Charter presents a number of specificities that, to a certain extent, distinguish it from the other comparable human rights instruments (see J. Matringe, *Tradition et modernité dans la Charte africaine des droits de l'homme et des peuples* (Brussels: Bruylant, 1996); F. Ouguergouz, *La Charte africaine des droits de l'homme et des peuples: une approche juridique entre tradition et modernité* (Geneva: IUHEI and Paris: P.U.F., 1993); and F. Viljoen, 'The African Regional Human

Rights System' in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: a Textbook* (Abo Akademi University Institute for Human Rights, 2009), p. 503, at pp. 518–25). Thus, the African Charter lists a number of social and economic rights, that are treated as equivalent, as regards their justiciability, to civil and political rights (see, for instance, the *Ogoniland* case, discussed in chapter 3, section 1). It also insists on duties, alongside rights, on the basis that 'the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone' (Preamble, 7th Recital). However, whether this really distinguishes the African Charter from other, equivalent instruments, is doubtful. In practice, the 'duties' component means that States parties should take measures that ensure that individuals are imposed obligations that allow the rights of others to be effectively enjoyed. While the wording may differ, the substance is not truly distinct from what follows from the obligation to protect human rights imposed on States parties to other international human rights instruments (on the obligation to protect, see chapter 4; on the specificity of the African Charter as regards the notion of 'duties', see M. wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: an Evaluation of the Language of Duties', *Virginia Journal of International Law*, 35 (1995), 339).

Perhaps the most significant characteristic of the African Charter is the importance it affords to the collective rights of peoples, in addition to the human rights of the individual. The African Charter thus recognizes the right of peoples to existence, to self-determination (including the right to dispose of their natural resources), to development, to international peace and security, and to a generally satisfactory environment. Such rights are not unique to the African Charter, of course: international human rights law recognizes the right to self-determination of peoples in the UN Charter and in Article 1 of both Covenants adopted in 1966 to implement the Universal Declaration of Human Rights (see chapter 7, section 5.1.); and the right to development has been affirmed in the 1986 Declaration on the Right to Development adopted by the UN General Assembly (see chapter 2, section 2.4.). What is remarkable, rather, is that these rights – sometimes referred to as 'third generation' rights both because they are rights of peoples and because they are, for the most part, dependent on international solidarity for their realization – are treated in the Charter on a par with other 'first' and 'second' generation rights, leading the African Commission on Human and Peoples' Rights to sometimes bold and innovative interpretations that go beyond what has been achieved at universal level.

The achievements of the OAU in the field of human and peoples' rights are not limited to the adoption and implementation of the Banjul Charter. On 11 July 1990, the African Charter on the Rights and Welfare of the Child was adopted, in order to ensure the transposition, in the African regional context, of the 1989 UN Convention on the Rights of the Child (OAU Doc. CAB/LEG/24.9/49 (1990)). The African Children's Rights Charter sets up a monitoring body, the African Children's Rights Committee, which has the power to examine state reports, as well as to receive individual communications and to launch investigations. The system entered into force on 29 November 1999. It currently has forty-five States parties.

As the African Charter on Human and Peoples' Rights progressively established its credibility through the 1990s, the OAU mutated into the African Union. Article 4 of the African Union Constitutive Act adopted in Lomé on 11 July 2002 enumerates the principles on which the AU is founded. These include 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity', 'promotion of gender equality', and 'respect for democratic principles, human rights, the rule

Box 1.2. Human rights in South-East Asia: the ASEAN Intergovernmental Commission on Human Rights

At its Ministerial Meeting of 20 July 2009, the Association of South-East Asian Nations (ASEAN) agreed on the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR). This remains a very modest step towards implementing human rights effectively in the region. The AICHR is an intergovernmental body, composed of the representatives of the ASEAN Member States, with purely consultative powers: they may neither receive complaints, nor take decisions, nor conduct investigations. The tasks of the AICHR are promotional in nature: it should contribute to capacity-building, promote awareness, provide advisory services, prepare studies, and favour dialogue between the Members. According to the Terms of Reference adopted on 20 July 2009, five sets of principles should guide the action of the AICHR. A first set of principles are 'respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States'; 'non-interference in the internal affairs of ASEAN Member States' and 'respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion'; 'adherence to the rule of law, good governance, the principles of democracy and constitutional government'; 'respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice'; 'upholding the Charter of the United Nations and international law, including international humanitarian law, subscribed to by ASEAN Member States'; and 'respect for different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity'. The other sets of principles are first, 'respect for international human rights principles, including universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms, as well as impartiality, objectivity, non-selectivity, non-discrimination, and avoidance of double standards and politicisation'; second, the 'recognition that the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State'; third, 'pursuance of a constructive and non-confrontational approach and cooperation to enhance promotion and protection of human rights'; and fourth, 'adoption of an evolutionary approach that would contribute to the development of human rights norms and standards in ASEAN'. In sum, the AICHR is a human rights council at regional level, but with neither special procedures that can ensure an independent monitoring of compliance with human rights standards, nor a peer review of the performances of States in the field of human rights (on the mechanisms at the disposal of the UN Human Rights Council, see chapter 10).

of law and good governance' (paras. (h), (l) and (m), respectively). While the standing and visibility of human rights in the structure of the African Union thus has been enhanced – and rebalanced against the principle of non-interference with domestic affairs – it remains to be seen which concrete implications shall be drawn.

3 THE EMERGING *JUS COMMUNE* OF HUMAN RIGHTS

Since the 1990s, a movement towards the building of a transnational *jus commune* of human rights has become increasingly visible. The formation of this common law is the result of increasingly frequent cross-references between various international and domestic courts interpreting provisions which, although found in different treaties or domestic constitutions, are similarly worded and have their common inspiration in the Universal Declaration on Human Rights (see S. Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation', *Indiana Law Journal*, 74 (1999) 819; S. H. Cleveland, 'Our International Constitution', *Yale Journal of International Law*, 31 (2006) 1; L. Henkin, 'The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation', *Harvard Law Revie*w, 114 (2001) 2049; C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', *Oxford Journal of Legal Studies*, 20 (2000) 499–532; A.-M. Slaughter, 'Judicial Globalization', *Virginia Journal of International Law*, 40 (2000) 1103; A.-M. Slaughter, 'A Global Community of Courts', *Harvard International Law Journal*, 44 (2003) 191). A number of factors have encouraged this development. The single most important factor still has to do with the content and origins of the legal rules themselves. The Universal Declaration of Human Rights was derived from a comparison between the liberal constitutions of the Western nations. The initial draft, prepared by the Human Rights Division of the UN Secretariat under the supervision of its first director, the Canadian international law expert John P. Humphrey, 'may not have included every conceivable right, but it provided the drafting committee with a distillation of nearly two hundred years of efforts to articulate the most basic human values in terms of rights. It contained the first-generation political and civil rights found in the British, French, and American revolutionary declarations of the seventeenth and eighteenth centuries: protections of life, liberty, and property; and freedoms of speech, religion, and assembly. It also included the second-generation economic and social rights found in late-nineteenth- and early-twentieth-century constitutions such as those of Sweden, Norway, the Soviet Union, and several Latin American countries: rights to work, education, and basic subsistence. Each draft article was followed by an extensive annotation detailing its relationship to rights instruments then in force in the UN's member states, already numbering fifty-five and rising' (M.-A. Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) pp. 57–8).

Whether they are adopted at the universal or at the regional levels, all human rights treaties are derived from the UDHR, from which they borrow, sometimes quite literally, much of their language. It is therefore quite natural for international courts or

quasi-judicial bodies, whether they belong to regional or to universal systems, to cite one another, and to entertain a dialogue with national courts applying human rights recognized in constitutional instruments, where the wording is similar or identical. In addition, with the development of an international human rights jurisprudence, which brings life into the sometimes vague provisions of international human rights instruments which are thereby made more concrete, the impact of international human rights law on the practice of national courts has increased, a phenomenon which the growing recognition of the direct applicability of international human rights treaties before national authorities further increased (on the influence of the case law, including views adopted on individual communications, general comments, and concluding observations, of the UN human rights treaty bodies, see Committee on International Human Rights Law and Practice of the International Law Association, *Final Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals*, adopted at the 2004 Berlin Conference; and H. Niemi, *National Implementation of Findings by United Nations Human Rights Treaty Bodies. A Comparative Study* (Institute for Human Rights, Abo Akademi University, December 2003) (examining the national implementation of UN treaty body findings, including final views, concluding observations, and general comments, in Australia, Canada, the Czech Republic, Finland, Spain and Sweden); on the impact of the case law of the European Court of Human Rights on the national courts of the Member States of the Council of Europe, see J. Polakiewicz, 'The Status of the Convention in National Law' in R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe. The ECHR and its Member States, 1950–2000* (Oxford University Press, 2001), at pp. 31–53).

Other factors still have further encouraged this movement towards the building of a *jus commune* in the field of international human rights. The internet and the proliferation of legal databases have immensely facilitated the task of seeking information about the practices followed by other jurisdictions, from which inspiration may be sought. Non-governmental organizations have been increasingly present as *amici curiae* before certain human rights courts, both at regional and at national level, and they have been particularly eager to present those jurisdictions with comparative law materials, identifying the best practices available as a benchmark for all courts to achieve, and encouraging national courts to use international law to develop their own powers (see O. De Schutter, 'L'émergence de la société civile dans le droit international: le rôle des associations devant la Cour européenne des droits de l'homme', *Journal européen du droit international/European Journal of International Law*, 7 (1996), 372–410). Entering this global interjurisdictional conversation may be attractive to judges, finally, because by doing so, they gain in legitimacy, and they can emancipate themselves from the straightjacket of the texts which they are to interpret.

Exceptionally, courts may be directed to take into account the fact that the human rights provisions they are applying stem from a broader conversation in which both international and national bodies take part. For instance, the Commission and Court in charge of monitoring the African Charter on Human and Peoples' Rights are directed to 'draw inspiration from international law on human and people's rights, particularly

from ... the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members' (African Charter on Human and People's Rights, Art. 60). This has led the African Commission of Human and Peoples' Rights to seek inspiration, primarily, from the European human rights system, and constitutes a powerful counter-weight to the tendency to emphasize the unique nature of the values of the African Charter. Similarly, section 35(1) of the interim South African Constitution provides that 'In interpreting the provisions of [the Bill of Rights contained in a chapter of the Constitution] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.' In the case of *S* v. *Makwanyane and another* presented to the Constitutional Court, Chaskalson P made the following comment about this provision:

Constitutional Court of South Africa, *S* v. *Makwanyane and another* 1995 (3) S.A. 391 (CC), 1995 (6) B.C.L.R. 665 (CC):

[P]ublic international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights included in the South African Constitution] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].

Most often, however, the reference to human rights as recognized in general international law, particularly as embodied in the Universal Declaration of Human Rights, is made *sua sponte* by the organs concerned, which may find in such a reference a source of legitimacy for the interpretation they propound. In this process, judicial interpretation is increasingly detached from the text to be interpreted; instead, it resembles a conversation between jurisdictions, which are collectively engaged in the task of giving meaning to generally worded human rights provisions whose significance can only be discovered in the course of implementation in a variety of settings. This development has sometimes been controversial. Reliance on foreign human rights norms or judgments seems to presuppose a universalistic view of human rights, in which the solutions which are correct in one jurisdiction should be replicated elsewhere, rather

than a relativistic one, in which the broad principles of human rights should be applied differently depending on the specific context of each society. In addition, the development of a *jus commune* of human rights seems to revive the idea of human rights as natural law, detached from the positivist view of law as the set of norms that is recognized as valid in a specific jurisdiction as a result of institutional processes. Finally, and perhaps most obviously, this development favours judicial activism, at the expense of fidelity to the intent of the authors of the text – whether the human rights treaty or the domestic bill of rights – to be interpreted. This, it has been argued, may ultimately threaten the effectiveness of human rights protection, because it undermines the legitimacy of the positions adopted by human rights bodies interpreting specific treaties. In the context of the American Convention on Human Rights, for instance:

Gerald L. Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights', *European Journal of International Law*, 19, No. 1 (2008), 101 at 115:

Ignoring the role of the states [by interpreting the ACHR broadly, in line with universal trends, without seeking to ensure that the interpretation conforms with the evolving consensus among the OAS Member States] raises issues both of legitimation and of effectiveness. The character of a positive human rights treaty entails the involvement of states (jointly) in the design of the system, including the choice of rights to be protected and the means of enforcement. The OAS states went to considerable effort to negotiate and adopt their own regional human rights treaty. They did not reduce the treaty to a local enforcement mechanism for the global Covenants, and they did not simply delegate to the Court the task of adopting whatever standards it chooses from a future corpus of soft law texts. Ongoing partnership between the Court and the member states bolsters the Court's authority to define state obligations. The 'humanization' of international law has not proceeded so far as to make international human rights tribunals self-legitimating on the basis of their direct relationship with individual human rights. Moreover, accepting state influence on the evolution of human rights norms is important for the effectiveness of the system, a major factor in institutional interpretation. Making a human right more 'effective' does not necessarily mean giving the right a broader meaning. It means making the enjoyment of the right more of a reality, and that may require defining the positive content of the right in a manner that facilitates its implementation at a particular historical moment within the particular region … When states within the region participate in the progressive evolution of a right, their actions make national enforcement more feasible and provide insights into the methods of implementation that may succeed. States will also be more likely to assist the Court in influencing a fellow member state to comply with standards to which they themselves already subscribe.

In order to assess the conflicting claims about the merits and dangers of judicial comparativism in this area, it is necessary, however, to distinguish carefully between the different uses of foreign judgments before human rights courts. Consider the following typology proposed by McCrudden:

Christopher McCrudden, 'Judicial Comparativism and Human Rights', *Oxford Legal Studies Research Paper* No. 29/2007, also published as a chapter in E. Örücü and D. Nelken (eds.), *Comparative Law: a Handbook*, (Oxford: Hart Publishing, 2007), p. 371 at pp. 378–9:

There are four uses of this type that are frequently not sufficiently distinguished. The first is where a court in jurisdiction 'X' quotes from a court in jurisdiction 'Y' a particular phrase or way of describing an issue that appears to the judge particularly apposite or elegant. Some judges in some jurisdictions have had a way with words that is deemed by other judges to be particularly worth quoting. This can be termed the 'rhetorical' use of 'foreign' material and is akin to using quotations from Shakespeare or the Bible. The second is where a court in jurisdiction 'X' cites 'foreign' material such as a judicial decision in jurisdiction 'Y' as part of the evidence to support an empirical conclusion that a particular approach is or is not workable in practice, or has particular unintended effects. The fact that it is a judicial opinion that is part of the evidence is, essentially, neither here nor there; it is merely a convenient source of the empirical information ... [The] third and fourth uses are the most controversial [because they treat foreign judgments as having some persuasive authority]. Both involve the use of a judicial decision in jurisdiction 'Y', or some other legal norm, that is not legally binding in jurisdiction 'X' (such as an unratified human rights convention), as part of a judicial decision regarding what is the legal position in jurisdiction 'X'. In both, the 'foreign' material is part of a normative argument, in a judicial context that is, in any event, often controversial. But there are significant differences within that general category. One use (our third approach) involves the citation of a 'foreign' material as establishing a reason (however attenuated) why a human rights claim against a governmental entity should not succeed. Another (our fourth approach), and probably the most controversial, involves the use of 'foreign' material in a similar context where it establishes a reason (however attenuated) why a rights claim should succeed.

One underestimated aspect of the emergence of this *jus commune* is that human rights have been autonomized from international law. The conversation of which this *jus commune* is a product has increasingly involved national constitutional courts, established outside international law, and whose interpretation of the human rights norms they are to apply, in most cases, take no account of the broader principles of general international law, even where the human rights they apply originate in international law. As a result, human rights have established themselves as a separate regime of international law, but one which increasingly borrows its methodology, including its methods of interpretation, to domestic constitutional law. Both for this reason and because they have developed their own specialized institutions, human rights therefore provide a good illustration of the problem of fragmentation of international law into a number of self-contained regimes, each with their own norms and dispute-settlement mechanisms, and relatively autonomous both *vis-à-vis* each other and *vis-à-vis* general international law (on this debate, see in particular, B. Simma, 'Self-Contained Regimes', *Netherlands Yearbook of International Law*, 16 (1985), 111; and the Report of the Study Group of the International Law Commission (chaired by

Martti Koskenniemi), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. doc. A/CN.4/L.702, 18 July 2006 (also reproduced in the Report on the work of the fifty-eighth session (1 May–9 June and 3 July–11 August 2006) of the International Law Commission to the UN General Assembly, Official Records, sixty-first session, Supplement No. 10 (A/61/10), chapter 12)). In practice, this autonomization of international human rights law, accelerated by the formation of a *jus commune* as a result of the conversation between judicial and non-judicial bodies applying human rights law, has favoured a certain activism of the specialized courts of expert bodies concerned. The example of the binding nature of interim measures indicated by human rights bodies illustrates this (see box 1.3.).

Unavoidably, risks of instrumentalization are present in this development. For example, this aspect of the jurisprudence of the European Court of Human Rights has been described as follows:

James G. Merrill, *The Development of International Law by the European Court of Human Rights*, second edn (Manchester University Press, 1993), p. 218:

Although the task of the [European Court of Human Rights] is to interpret the Convention, light can often be shed on its meaning by comparing it with other treaties, and the Court has made extensive use of this assistance. The situations in which it has done so, and which provide further evidence of its resourcefulness in developing the law, fall into three types. [1] When a provision needing interpretation was inspired by an earlier instrument dealing with the subject, the Court has naturally turned to the other treaty for guidance. [2] When, on the other hand, the Convention omits certain rights guaranteed in another treaty, the Court may refer to the other treaty to justify an interpretation holding that a right is not protected. [3] Finally, in cases falling into neither of the preceding categories, the Court may refer to another treaty to show that a particular interpretation is in harmony with other obligations in the human rights field.

The second attitude ([2]) is illustrated in the case law of the European Court of Human Rights by cases such as *Kosiek* v. *Germany*, in which the Court concludes that the ECHR cannot be read as including a right of everyone to equal access to public service in his or her country since, in contrast to the Universal Declaration of Human Rights (Art. 21 para. 2) and the International Covenant on Civil and Political Rights (Art. 25), neither the European Convention nor any of its Protocols sets forth a right of everyone to equal access to public service in his country, and that the omission of such a right was deliberate when Protocol No. 7 was drafted (Eur. Ct. HR (plenary), *Kosiek* v. *Germany*, judgment of 28 August 1986, para. 34); or by the refusal of the Court in the 1986 case of *Johnston* v. *Ireland* to recognize a right to the dissolution of marriage in the ECHR, since, in contrast to Article 16 of the Universal Declaration on Human Rights, Article 12 ECHR does not refer to the dissolution of marriage, an omission which the Court considers to be deliberate (Eur. Ct. HR, *Johnston* v. *Ireland*, judgment of 18 December 1986, at paras. 52–3). But this method of interpretation is clearly not immune from a certain selectivity: in

Box 1.3.

The binding nature of interim measures indicated by human rights bodies

Should the provisional measures adopted by human rights bodies or courts be treated as obligatory for the parties to whom they are addressed? The controversy about this issue illustrates how the idea of a *jus commune* of human rights can encourage an activist attitude by human rights bodies. While they set up judicial or quasi-judicial bodies which may receive individual communications or applications from victims of human rights violations, the major international human rights treaties are silent about the possibility of these bodies granting provisional measures, protecting the alleged victims until a decision is made on the merits of their complaint. However, the idea has gradually emerged that this power of human rights bodies is inherent in their jurisdiction, and that it should be recognized in the name of an effective protection of human rights.

This development was inaugurated under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. When, acting in accordance with Article 18(2) of the Convention, the Committee against Torture adopted its Rules of Procedure, it included a Rule 108 §9 enabling it to adopt provisional measures in proceedings brought by individuals alleging a violation of the Convention against Torture. In the case of *Cecilia Rosana Núñez Chipana* v. *Venezuela*, it took the view that non-compliance with such provisional measures should be considered a violation of the Convention, as 'the State party, in ratifying the Convention and voluntarily accepting the Committee's competence [to examine individual communications] under article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee' (Committee against Torture, *Cecilia Rosana Núñez Chipana* v. *Venezuela*, final views of 10 November 1998 Communication No. 110/1998 (CAT/C/21/D/110/1998)). The Human Rights Committee followed this lead. Under Rule 86 of its rules of procedure, which the Human Rights Committee adopts in accordance with Article 39(2) of the ICCPR, the Human Rights Committee 'may, prior to forwarding its views on the communication to the State party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation'. The Human Rights Committee considered unanimously in its final views of 19 October 2000 adopted in the case of *Dante Piandiong, Jesus Morallos and Archie Bulan* v. *The Philippines*, that a refusal of a State to comply with such measures, 'especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol [providing for the possibility of individual complaints filed by alleged victims of violations of the ICCPR]' (Human Rights Committee, final views adopted on the Communication n°869/1999 (U.N. doc. CCPR/C/70/D/869/1999), *Annual Rep.* I, p. 181). It has repeated this statement since (see, e.g. Human Rights Committee, *Weiss* v. *Austria*, communication No. 1086/02, final views of 8 May 2003 (CCPR/C/77/D/1086/2002)), confirming its view that the States parties to the Covenant could be under an obligation to comply with the interim measures indicated by the Committee,

despite the fact that the power to adopt such interim measures was not attributed to the Committee under the text of the Covenant itself.

In a judgment of 4 February 2005, the European Court of Human Rights considered for the first time in a final judgment that a refusal by a State party to the European Convention on Human Rights to comply with an interim measure indicated by a Chamber of the Court or its President on the basis of Article 39 of the Rules of the Court constitutes a violation of Article 34 of the Convention, which imposes an obligation on the Contracting Parties 'not to hinder in any way the effective exercise' of the right to individual application (European Court of Human Rights (Grand Chamber), judgment of 5 February 2005 in the case of *Mamatkulov and Askarov* v. *Turkey*, Appl. Nos. 46827/99 and 46951/99). This represented a shift in attitude from the part of the Court. In its previous case law, while finding that there existed a general practice of States parties to the Convention to comply with such interim measures, the Court fell short from identifying the emergence of a rule of a customary nature in the application of the European Convention on Human Rights. Instead, it held: 'The practice of Contracting Parties in this area shows that there has been almost total compliance with Rule 36 indications [indications given by the European Commission of Human Rights or its President that, in the interest of the proceedings, the parties should refrain from adopting certain measures, based on Rule 36 of the Rules of Procedure of the European Commission of Human Rights]. Subsequent practice could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision (see, mutatis mutandis, [the *Soering* v. *United Kingdom*, judgment of 7 July 1989], Series A No. 161, 40–41, §103, and Article 31 §3 (b) of the Vienna Convention of 23 May 1969 on the Law of Treaties) but not to create new rights and obligations which were not included in the Convention at the outset ... In any event, as reflected in the various recommendations of the Council of Europe bodies [calling upon the States parties to the Convention to agree to recognizing the Court has a power to adopt provisional measures of a binding character], *the practice of complying with Rule 36 indications cannot have been based on a belief that these indications gave rise to a binding obligation* ... It was rather a matter of good faith co-operation with the Commission in cases where this was considered reasonable and practicable' (*Cruz Varas* v. *Sweden*, judgment of 20 March 1991, Series A No. 201, at para. 100 (emphasis added)) (for comments, see, e.g. R. Bernhardt, 'Interim Measures of Protection under the European Convention on Human Rights', in R. Bernhardt (ed.), *Interim Measures Indicated by International Courts* (Berlin: Springer Verlag, 1994), p. 102; R. St. J. Mcdonald, 'Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights', 52(3–4) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 703 (1992)).

There was good reason for the Court to be cautious. The Rules of the Court are adopted by the plenary Court under Article 26 of the European Convention on Human Rights. They are thus not agreed upon by the States parties to the Convention. Their status therefore differs markedly from that of Article 41 of the Statute of the International Court of Justice, which the International Court of Justice interpreted in the *LaGrand (Germany* v. *United States)*, judgment of 27 June 2001 as imposing on the States parties to a dispute before the Court an

obligation to comply with the provisional measures indicated under that provision, despite the vague character of the wording of that provision (Art. 41 of the Statute of the International Court of Justice provides: '1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council'). Nor may Article 39 of the Rules adopted by the European Court of Human Rights be considered equivalent to Article 63(2) of the American Convention on Human Rights, which provides explicitly for a power of the Inter-American Court of Human Rights to adopt provisional measures 'in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons'. Both the Statute of the International Court of Justice and the American Convention on Human Rights are international treaties to whose terms the States parties have agreed. No equivalent clause exists in the European Convention on Human Rights. However, in *Mamatkulov and Askarov* v. *Turkey*, the Court considered that the precedents set by the Committee against Torture and the Human Rights Committee authorized it to consider, like these expert bodies, that the obligatory character of interim measures should be considered as a condition of the effectiveness of the protection provided to the individual by a system of individual communications. The episode offers a clear example of human rights bodies developing a doctrine, motivated perhaps by the need to ensure an effective protection of human rights, but which is difficult to reconcile with an orthodox (some might say conservative) view of international law. That this development was made possible by a number of human rights bodies moving in the same direction and, in part, legitimizing their interpretative inventivity by referring to one another's case law, seems hardly contestable.

the case of *Burghartz* v. *Switerland*, the Court noted: 'Unlike some other international instruments, such as the International Covenant on Civil and Political Rights (Article 24 para. 2), the Convention on the Rights of the Child of 20 November 1989 (Articles 7 and 8) or the American Convention on Human Rights (Article 18), Article 8 of the Convention does not contain any explicit provisions on names. As a means of personal identification and of linking to a family, a person's name nonetheless concerns his or her private and family life [and thus deserves protection under Art. 8 ECHR]' (Eur. Ct. HR, *Burghartz* v. *Switzerland*, judgment of 22 February 1994, para. 24). We can safely assume that the European Court of Human Rights has agreed to include the protection of the name of the individual in Article 8 of the European Convention on Human Rights, despite the absence of an explicit reference to the name in that provision, because other international human rights instruments do contain such a reference and ensure such a protection: once the 'right to the name' (whatever its specific implications) is recognized under at least some human rights treaties, reading it into the Convention is easier to justify. This seems to illustrate rather the third of the three attitudes ([3]) distinguished by Merrill, in which the Court draws on the existing corpus of international human rights law to develop the interpretation of the ECHR in line with the content of other human

rights instruments, since all these instruments have their common source of inspiration in the Universal Declaration of Human Rights.

Or consider the reasoning followed by the European Committee of Social Rights, to justify setting aside the appendix to the European Social Charter which explicitly states that the Charter only benefits nationals of the Contracting parties:

European Committee on Social Rights, *International Federation for Human Rights (FIDH)* v. France, Collective Complaint No. 14/2003, decision on the merits of 8 September 2004:

[Paragraph 1 of the Appendix to the Revised European Social Charter provides that a wide range of social rights protected under the Charter, including the right to social and medical assistance (Art. 13 para. 1) and the right to the protection of the child (Art. 17), at stake in this case, cover foreigners 'only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned'. The complaining non-governmental organization nevertheless considered that the Revised European Social Charter had been violated by France, since French law excluded the provision of medical assistance to children of undocumented migrants on French territory, except as regards treatment for emergencies and life threatening conditions. The Committee set aside the limitation imposed on the scope of application *ratione personae* of the Charter:]

26. The present complaint raises issues of primary importance in the interpretation of the Charter. In this respect, the Committee makes it clear that, when it has to interpret the Charter, it does so on the basis of the 1969 Vienna Convention on the Law of Treaties. Article 31§1 of the said Convention states: '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.'

27. The Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention of Human Rights.

28. Indeed, according to the Vienna Declaration of 1993, all human rights are 'universal, indivisible and interdependent and interrelated' (para. 5). The Committee is therefore mindful of the complex interaction between both sets of rights.

29. Thus, the Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter.

30. As concerns the present complaint, the Committee has to decide how the restriction in the Appendix ought to be read given the primary purpose of the Charter as defined above. The restriction attaches to a wide variety of social rights in Articles 1–17 and impacts on them differently. In the circumstances of this particular case, it treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment.

31. Human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights and health care is a prerequisite for the preservation of human dignity.

32. The Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.

This example and that of interim protection granted by human rights bodies (see box 1.3.) are both episodes in which the reference to case law from other courts or quasi-judicial bodies, or to the corpus of international human rights law, has served to expand the power of the courts or bodies tasked with the function of monitoring. In other cases, such references serve to economize judicial resources, by borrowing solutions from other jurisdictions which those jurisdictions are presumed to have carefully weighed, and which can be trusted in developing appropriate solutions. Or they may be a means to ensure that advanced democracies shall move together in the same direction, without excessive differences in approach to similar issues. Consider the following examples:

United States Supreme Court, *Lawrence et al.* v. *Texas*, 539 U.S. 558 (2003):

[The case has its source in the conviction for deviate sexual intercourse of Lawrence and Gardner, two adult men who were found engaging in a private, consensual sexual act, in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct. Although, in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), a similar statute had been considered not to be in violation of the Due Process Clause of the Fourteenth Amendment to the United States Federal Constitution, the Court here reconsiders this holding, which, it is now led to conclude, was wrongly decided. Instead, the Court now finds, the liberty protected by the United States Constitution allows homosexual persons the right to choose to enter into relationships in the confines of their homes and their own private lives and still retain their dignity as free persons. The excerpts below illustrate the role played by the reference to the jurisprudence of the European Court of Human Rights in the reasoning of the United States Supreme Court.]

Justice Kennedy delivered the opinion of the Court.

It must be acknowledged ... that the Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.' *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 850 (1992) ...

Chief Justice Burger joined the opinion for the Court in Bowers and further explained his views as follows: 'Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards.' 478 U.S., at 196 ...

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, §1.

Of even more importance, almost five years before Bowers was decided the European Court of Human Rights considered a case with parallels to Bowers and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon* v. *United Kingdom*, 45 Eur. Ct. H.R. (1981) §52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in Bowers became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the Bowers decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances ...

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* v. *Hardwick* should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.' Casey, *supra*, at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind

us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The following cases relate to assisted suicide and whether this constitutes an unreasonable restriction to the liberty of the individual. They too illustrate the reliance on comparative law in order to adjudicate human rights claims.

United States Supreme Court, *Washington* v. *Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258 (1997):

[At issue in this case was the criminalization of assisted suicide in the State of Washington. The State made '[p]romoting a suicide attempt' a felony, and provided: 'A person is guilty of [that crime] when he knowingly causes or aids another person to attempt suicide.' Petitioners before the Court sought a declaration that the ban on physician-assisted suicides is, on its face, unconstitutional. They argued that the Fourteenth Amendment's Due Process Clause protected a liberty interest extending to a personal choice by a mentally competent, terminally ill adult to commit physician assisted suicide. The Supreme Court disagreed. It found that the asserted right to commit suicide and to be assisted in doing so had no trace in the United States' traditions, given the country's consistent, almost universal, and continuing rejection of the right, even for terminally ill, mentally competent adults. Rehnquist, C.J. delivered the opinion for a unanimous Court. Referring to the concern of the State of Washington that 'permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia', the Court noted:]

This concern is further supported by evidence about the practice of euthanasia in the Netherlands. The Dutch government's own study revealed that in 1990, there were 2,300 cases of voluntary euthanasia (defined as 'the deliberate termination of another's life at his request'), 400 cases of assisted suicide, and more than 1,000 cases of euthanasia without an explicit request. In addition to these latter 1,000 cases, the study found an additional 4,941 cases where physicians administered lethal morphine overdoses without the patients' explicit consent. Physician Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady, at 12–13 (citing Dutch study). This study suggests that, despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia. Id., at 16–21; see generally C. Gomez, Regulating Death: Euthanasia and the Case of the Netherlands (1991); H. Hendin, Seduced By Death: Doctors, Patients, and the Dutch Cure (1997). The New York Task Force, citing the Dutch experience, observed that 'assisted suicide and euthanasia are closely linked', New York Task Force 145, and concluded that the 'risk of ... abuse is neither speculative nor distant,' id., at 134.

The issue of assisted suicide was presented before European courts in the case of Dianne Pretty. Ms Pretty was suffering from a progressive neuro-degenerative disease of motor cells within the central nervous system, for which there was no treatment available.

Because of the weakness affecting the voluntary muscles of the body, she was unable to commit suicide herself, although she considered that her situation was intolerable, as she was essentially paralysed from the neck downwards, was tube-fed, and would soon die in undignified conditions. However, in English law it was a crime to assist another to commit suicide (section 2(1) of the Suicide Act 1961), and Ms Pretty had failed to obtain from the Director of Public Prosecutions an undertaking not to prosecute her husband should he assist her to commit suicide in accordance with her wishes (for a fuller examination of this case, see chapter 4, section 2.4.). In their successive judgments on this case, both the House of Lords in the United Kingdom and the European Court of Human Rights rejected the claims of Ms Pretty based on the European Convention on Human Rights. Both also referred to the judgment of the Supreme Court of Canada in *Rodriguez* v. *Attorney General of Canada* [1993] 3 S.C.R. 519. The appellant in that case, Sue Rodriguez, suffered from a disease similar to that afflicting Ms Pretty. Invoking section 7 of the Canadian Charter of Rights and Freedoms (which states that 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'), she had sought an order which would have allowed a qualified medical practitioner to assist her to commit suicide at a time of her choosing. While suicide in Canada was not a crime, section 241(b) of the Criminal Code was effectively identical to section 2(1) of the English 1961 Act: it contained a blanket prohibition of assistance to suicide. Ms Rodriguez failed in her claim that such prohibition was unconstitutional. The majority of the Supreme Court took the view that the prohibition in section 241(b) fulfils the government's objective of protecting the vulnerable, and that it reflects the policy of the state that human life should not be depreciated by allowing life to be taken, which itself stems from the recognition of the sanctity of life – the fact that, in Dworkin's terms, human life is seen to have a deep intrinsic value of its own (R. Dworkin, *Life's Dominion: an Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Alfred Knopf, 1993)). The Supreme Court also noted that a blanket prohibition on assisted suicide similar to that in section 241(b) seemed to be the norm among Western democracies, and that such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights. The following excerpts illustrate the role of comparative jurisprudence in achieving a consensus on the issue of assisted suicide, and in maintaining the distinction between passive and active forms of intervention in the dying process:

Supreme Court of Canada, *Rodriguez* v. *British Columbia (Attorney General)* [1993] 3 S.C.R. 519 (opinion for a plurality of the Court by Sopinka J):

A brief review of the legislative situation in other Western democracies demonstrates that in general, the approach taken is very similar to that which currently exists in Canada. Nowhere is assisted suicide expressly permitted, and most countries have provisions expressly dealing with assisted suicide which are at least as restrictive as our s. 241 [citing provisions from criminal legislation in Austria, Italy, and Spain].

The relevant provision of the Suicide Act, 1961 of the United Kingdom punishes a 'person who aids, abets, counsels or procures the suicide of another or an attempt by another, to commit suicide', and this form of prohibition is echoed in the criminal statutes of all state and territorial jurisdictions in Australia (M. Otlowski, "Mercy Killing Cases in the Australian Criminal Justice System" (1993) 17 Crim. L.J. 10). The U.K. provision is apparently the only prohibition on assisted suicide which has been subjected to judicial scrutiny for its impact on human rights prior to the present case. In the Application No. 10083/82, *R.* v. *United Kingdom*, July 4, 1983, D.R. 33, p. 270, the European Commission of Human Rights considered whether s. 2 of the Suicide Act, 1961 violated either the right to privacy in Article 8 or freedom of expression in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The applicant, who was a member of a voluntary euthanasia association, had been convicted of several counts of conspiracy to aid and abet a suicide for his actions in placing persons with a desire to kill themselves in touch with his co-accused who then assisted them in committing suicide. The European Commission held (at pp. 271–72) that the acts of aiding, abetting, counselling or procuring suicide were 'excluded from the concept of privacy by virtue of their trespass on the public interest of protecting life, as reflected in the criminal provisions of the 1961 Act', and upheld the applicant's conviction for the offence. Further, the Commission upheld the restriction on the applicant's freedom of expression, recognizing (at p. 272): 'the State's legitimate interest in this area in taking measures to protect, against criminal behaviour, the life of its citizens particularly those who belong to especially vulnerable categories by reason of their age or infirmity. It recognises the right of the State under the Convention to guard against the inevitable criminal abuses that would occur, in the absence of legislation, against the aiding and abetting of suicide.'

Although the factual scenario in that decision was somewhat different from the one at bar, it is significant that neither the European Commission of Human Rights nor any other judicial tribunal has ever held that a state is prohibited on constitutional or human rights grounds from criminalizing assisted suicide.

Some European countries have mitigated prohibitions on assisted suicide which might render assistance in a case similar to that before us legal in those countries. In the Netherlands, although assisted suicide and voluntary active euthanasia are officially illegal, prosecutions will not be laid so long as there is compliance with medically established guidelines. Critics of the Dutch approach point to evidence suggesting that involuntary active euthanasia (which is not permitted by the guidelines) is being practised to an increasing degree. This worrisome trend supports the view that a relaxation of the absolute prohibition takes us down 'the slippery slope'. Certain other European countries, such as Switzerland and Denmark, emphasize the motive of the assistor in suicide, such that the Swiss Penal Code, art. 115, criminalizes only those who incite or assist a suicide for a selfish motive, and the Danish Penal Code, art. 240, while punishing all assistance, imposes a greater penalty upon those who act out of self-interest. In France, while no provision of the Penal Code addresses specifically the issue of assisted suicide, failure to seek to prevent someone from committing suicide may still lead to criminal sanctions under art. 63, para. 2 (omission to provide assistance to a person in danger) or art. 319 (involuntary homicide by negligence or carelessness) of that Code. Moreover, the Loi no 87–1133 du 31 décembre 1987 introduced two new articles to the Penal Code, arts. 318–1 and 318–2, which criminalize the provocation of suicide. This offence, which requires a form of incitement over and above merely aiding in the commission of a suicide, was adopted in response to the macabre impact of the book Suicide, mode d'emploi (1982).

Similarly, a few American jurisdictions take into account whether the accused caused the victim to commit suicide by coercion, force, duress or deception in deciding whether the charge should be murder, manslaughter or assisted suicide (Connecticut, Maine and Pennsylvania) or whether the person is guilty of even assisted suicide (Puerto Rico and Indiana). See C. D. Shaffer, 'Criminal Liability for Assisting Suicide' (1986), 86 Colum. L. Rev. 348, at pp. 351–53, nn. 25–26, 35–36. As is the case in Europe and the Commonwealth, however, the vast majority of those American states which have statutory provisions dealing specifically with assisted suicide have no intent or malice requirement beyond the intent to further the suicide, and those states which do not deal with the matter statutorily appear to have common law authority outlawing assisted suicide (Shaffer, supra, at p. 352; and M. M. Penrose, 'Assisted Suicide: A Tough Pill to Swallow' (1993), 20 Pepp. L. Rev. 689, at pp. 700–701). It is notable, also, that recent movements in two American states to legalize physician-assisted suicide in circumstances similar to those at bar have been defeated by the electorate in those states. On November 5, 1991, Washington State voters defeated Initiative 119, which would have legalized physician-assisted suicide where two doctors certified the patient would die within six months and two disinterested witnesses certified that the patient's choice was voluntary. One year later, Proposition 161, which would have legalized assisted suicide in California and which incorporated stricter safeguards than did Initiative 119, was defeated by California voters (usually thought to be the most accepting of such legal innovations) by the same margin as resulted in Washington – 54 to 46 percent. In both states, the defeat of the proposed legislation seems to have been due primarily to concerns as to whether the legislation incorporated adequate safeguards against abuse (Penrose, supra, at pp. 708–14). I note that, at least in the case of California, the conditions to be met were more onerous than those set out by McEachern C.J.B.C. in the court below and by my colleagues the Chief Justice and McLachlin J.

Overall, then, it appears that a blanket prohibition on assisted suicide similar to that in s. 241 is the norm among Western democracies, and such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights. Recent attempts to alter the status quo in our neighbour to the south have been defeated by the electorate, suggesting that despite a recognition that a blanket prohibition causes suffering in certain cases, the societal concern with preserving life and protecting the vulnerable rendered the blanket prohibition preferable to a law which might not adequately prevent abuse.

House of Lords (United Kingdom), *R. (on the Application of Mrs Dianne Pretty (Appellant))* v. *Director of Public Prosecutions (Respondent) and Secretary of State for the Home Department (Interested Party)*, judgment of 29 November 2001 [2001] UKHL 61, leading judgment by Lord Bingham of Cornhill:

23. It is evident that all save one of the judges of the Canadian Supreme Court were willing to recognise section 7 of the Canadian charter as conferring a right to personal autonomy extending even to decisions on life and death. Mrs Pretty understandably places reliance in particular on the judgment of McLachlin J. [who expressed a dissenting opinion], in which two other members of the court concurred. But a majority of the court regarded that right as outweighed on the facts by the principles of fundamental justice. The judgments were moreover

directed to a provision with no close analogy in the European Convention. In the European Convention the right to liberty and security of the person appears only in article 5(1), on which no reliance is or could be placed in the present case. Article 8 contains no reference to personal liberty or security. It is directed to the protection of privacy, including the protection of physical and psychological integrity: *X and Y* v. *Netherlands* [judgment of 26 March 1985]. But article 8 is expressed in terms directed to protection of personal autonomy while individuals are living their lives, and there is nothing to suggest that the article has reference to the choice to live no longer.

European Court of Human Rights (4th sect.), *Pretty* v. *United Kingdom* (Appl. No. 2346/02), judgment of 29 April 2002, para. 66:

In the case of *Rodriguez* v. *Attorney General of Canada* ([1994] 2 L.R.C. 136), which concerned a not dissimilar situation to the present, the majority opinion of the Supreme Court considered that the prohibition on the appellant in that case from receiving assistance in suicide contributed to her distress and prevented her from managing her death. This deprived her of autonomy and required justification under principles of fundamental justice. Although the Canadian court was considering a provision of the Canadian Charter framed in different terms from those of Article 8 of the Convention, comparable concerns arose regarding the principle of personal autonomy in the sense of the right to make choices about one's own body.

1.1. Questions for discussion: the role of comparative jurisprudence in human rights adjudication

1. What are the advantages and the dangers associated with an increased use of judgments or materials from other jurisdictions in human rights litigation? Are certain uses of comparative jurisprudence legitimate, while others are not?
2. If there is a need to distinguish between different functions of comparative jurisprudence in human rights litigation, is the typology proposed by Ch. McCrudden complete? Can you think of uses of foreign materials that are not captured by this typology?
3. Is there a risk of selectivity in the reference to foreign jurisprudence? Consider the use of foreign examples in the 1993 case of *Rodriguez* v. *Attorney General of Canada* decided by the Supreme Court of Canada. Why are examples from Europe or from the United States primarily referred to? Within Europe itself, why do certain countries seem to matter most in shaping a consensus? Is there a principled way to guide the reference to foreign jurisprudence, for instance the notion of 'Western democracies'?
4. Should the courts making use of comparative jurisprudence adopt a static or a dynamic approach to the material examined? Should they seek to identify some sort of mathematical average between jurisdictions, or should they instead seek to pay attention to the tendency identified in most recent changes?

5. Are the House of Lords and the European Court of Human Rights in disagreement about the relevance of the 1993 case of *Rodriguez* v. *Attorney General of Canada* decided by the Supreme Court of Canada, or do they differ, rather, on the interpretation to be given to that case?

4 HUMAN RIGHTS LAW AS PART OF INTERNATIONAL LAW

This section discusses the relationship of human rights law to general international law. It first examines the extent to which human rights are protected under general international law, beyond the specific treaties embodying them (section 4.1.). Whether they base their argument on the customary nature of the rights enumerated in the Universal Declaration of Human Rights, on the status of human rights as general principles of law, or on the recognition by the UN Charter of human rights and fundamental freedoms as objectives all the Members of the United Nations have to co-operate in achieving, most authors consider that human rights treaties are the embodiment, in treaty form, of obligations which are already imposed on States. This does not extend, of course, to the monitoring mechanisms which such treaties may include. But, insofar as the substantive rights are concerned, human rights treaties would simply codify already existing obligations: they would not create entirely new obligations for their States parties.

Next, this section examines the status of human rights norms in the hierarchy of international law (section 4.2.). Because of the combination of Articles 55 and 56 of the UN Charter and Article 103 of the Charter, and due to the *jus cogens* nature of at least certain of the internationally recognized human rights, human rights treaties may be considered to be hierarchically superior to other norms of international law, whether they have their source in treaties, in custom, or in general principles of law – all three of which are sources of international law, according to Article 38(1) of the Statute of the International Court of Justice. In addition, serious breaches of peremptory norms of international law – i.e. 'a gross or systematic failure by the responsible State to fulfil the obligation' forming part of *jus cogens* – entail specific obligations on other States to contribute to a cessation of the violation.

Third, human rights norms present certain characteristics which distinguish them from other rules of international law. Whether they are based on custom or on other sources of international law, and whether or not they have the nature of *jus cogens* norms, human rights are often considered to impose obligations *erga omnes* – obligations, that is, towards all the States of the international community (section 4.3.). In addition, human rights treaties are not concluded in order to grant reciprocal advantages to the contracting States: their object, rather, is to protect individuals under the jurisdiction of each State, and this may result in the Vienna Convention on the Law of Treaties being inadequate, in certain respects, as regards human rights treaties (section 4.4.). However, while there exists substantial agreement on these general propositions, both their precise significance and the consequences they entail remain disputed.

Finally, the issue of reservations to human rights treaties is included in this section, as it provides a good illustration of the unsettled relationship of international human rights law to general international law (section 4.5.).

4.1 Human rights beyond treaties

(a) Human rights in the UN Charter

Whether or not they have ratified the relevant treaties which have proliferated since the 1950s at international and regional levels, all States are bound to respect internationally recognized human rights. The Universal Declaration of Human Rights may be seen in this respect as simply clarifying the meaning of the provisions of the UN Charter which refer to human rights as a purpose to be achieved by the Organization and by its Member States. In particular, Article 55 of the Charter imposes on the United Nations a duty to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'; under Article 56, all Members of the United Nations 'pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55'.

Scholars have sometimes questioned whether these provisions in fact imposed legal obligations, or simply defined in general terms a programme of action for the organization (see, e.g. M. O. Hudson, 'Integrity of International Instruments', *American Journal of International Law*, 42 (1948), 105–8; H. Kelsen, *The Law of the United Nations* (London: The London Institute of World Affairs, 1950), pp. 29–32; in favour of seeing in these provisions of the UN Charter the source of legal obligations, see in particular H. Lauterpacht, *International Law and Human Rights* (New York; Frederick Praeger, Inc., 1950), at pp. 147–9). The sceptical views, however, were often confusing the question whether the Charter's provisions were self-executing, with the question whether they were legally binding; and they were premised on the indeterminate character of the content of the 'human rights and fundamental freedoms' referred to in the Charter, which the Universal Declaration of Human Rights precisely sought to make explicit. The International Court of Justice seems to have definitively put an end to the controversy when it delivered its 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)*, where it stated that 'to 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 is a flagrant violation of the purposes and principles of the Charter' (I.C.J. Reports 1971, 16). Although the statement was made in relation to the obligations of South Africa as a mandatory power in South West Africa, there is no reason to restrict it to this hypothesis: instead, it would seem to follow from the Opinion that the UN Charter imposes on all States that they comply, at a minimum, with a core set of human rights, which the Charter refers to without listing them exhaustively (see E. Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter', *American Journal of International Law*, 66, No. 2 (1972), 337–51, esp. 348–9).

Even if we accept that the UN Charter imposes compliance with human rights to all the Member States of the Organization, it still is only addressed, in principle, to States and the institutions of the UN, rather than to all subjects of international law. However, at the same time that they were codified in international treaties, human rights have also been recognized as binding upon all subjects of international law as part of general international law, either because they are part of customary international law, or because they constitute general principles of law.

(b) Human rights as part of customary international law

The growing consensus is that most, if not all, of the rights enumerated in the Universal Declaration of Human Rights have acquired a customary status in international law (see in particular L. Henkin, *The Age of Rights* (New York: Columbia University, 1990), p. 19; N. S. Rodley, 'Human Rights and Humanitarian Intervention: the Case Law of the World Court', *International and Comparative Law Quarterly*, 38 (1989), at 321, esp. 333; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989); L. B. Sohn, 'The Human Rights Law of the Charter', *Texas International Law Journal*, 12 (1977), 129 at 132–4; H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, 25 (1995–1996), 287). Custom in principle requires, to be established, both consistent identifiable state practice, and evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio juris sive necessitatis*). The classic definition is that adopted by the International Court of Justice in the *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark* and *Federal Republic of Germany* v. *Netherlands)* (I.C.J. Reports 1969, 44, para. 77): 'Not only must the acts concerned amount to settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to their legal obligation. The frequency or even habitual character of the acts is not in itself enough.'

It has been argued, however, that, in the field of human rights, evidence of custom could be based on the resolutions of the UN General Assembly and statements made within other international organizations, demonstrating a clear commitment of the international community towards certain values, while inconsistent State practice on the other hand would not be an obstacle to the identification of such custom. For instance, the fact that the universal periodic review performed by the UN Human Rights Council takes as a reference, in the review of each State, not only the Charter of the United Nations, but also the Universal Declaration of Human Rights, as well as the human rights instruments to which a State is party (appendix to the Human Rights Council Resolution 5/1 'Institution-building of the United Nations Human Rights Council' (18 June 2007): see further chapter 10), provides as least an indication of the expectation of the international community that all States should comply with a basic corpus

of human rights as contained in the UDHR, whichever treaties they have ratified. Some authors have gone so far as to suggest that State 'practice', for the purposes of custom determination in the field of human rights, is composed of official declarations and participation in the negotiation of human rights instruments, as well as of incorporation of human rights within the national legal orders. Consider for instance the attitude adopted by the 1987 *Restatement (Third) of the Foreign Relations Law of the United States* (for an exposé of the background assumptions underlying this position, see the Hague Academy course of Oscar Schachter: O. Schachter, 'International Law in Theory and Practice: General Course in Public International Law', *Recueil des cours*, 178 (1982–V), 2 at 333–42), or the position expressed by Theodor Meron:

American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, Minn.: American Law Institute Publishers, 1987):

[§701, n. 2] Practice accepted as building customary human rights law includes: virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles by states in regional organizations in Europe, Latin America, and Africa …; general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and law; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states.

[Applying this criterion, the *Restatement* concludes in §702 that:] A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), p. 93:

[T]he initial inquiry must aim at the determination whether, at a minimum, the definition of the core norm claiming customary law status and preferably the contours of the norm have been widely accepted. In this context my own preferred indicators evincing customary human rights are, first, the degree to which a statement of a particular right in one human rights instrument,

especially a human rights treaty, has been repeated in other human rights instruments, and second, the confirmation of the right in national practice, primarily through the incorporation of the right in national laws ... It is, of course, to be expected that those rights which are most crucial to the protection of human dignity and of the universally accepted values of humanity, and whose violation triggers broad condemnation by the international community, will require a lesser amount of confirmatory evidence.

Essentially two arguments have been put forward in favour of this position. First, it can be said that the 'practice' of a State towards its own population (the rights of which it is the purpose of the international human rights regime to protect) would be difficult if not impossible to ascertain for practical reasons (violations committed by a State within its borders frequently go unnoticed), so that customary international law could only be determined, not by reference to how States actually behave, but by the justifications they provide for the way they behave: in this view, 'even massive abuses do not militate against assuming a customary rule as long as the responsible author state seeks to hide and conceal its objectionable conduct instead of justifying it by invoking legal reasons' (C. Tomuschat, *Human Rights Between Idealism and Realism* (Oxford University Press, 2003), p. 34). Second, this view about the identification of practice as building customary human rights law is also related to the fact that States have no subjective interest in other States complying with their human rights obligations, except in those rare instances where the rights of the nationals of the first States are at stake. As a result, there is little State practice on the basis of which to identify the formation of a custom, since most instances of human rights violations do not give rise to protests by other States of the international community (O. Schachter, 'International Law in Theory and Practice: General Course in Public International Law', *Recueil des cours*, 178 (1982–V), at 334).

Thus, a 'modern' view of custom has gained some acceptance in the field of human rights (for a discussion, see M. Akehurst, 'Custom as a Source of International Law', *British Yearbook of International Law* (1974–5), 1 *et seq.*; L. Henkin, 'Human Rights and State 'Sovereignty'', 25 *Georgia Journal of International Law* 37 (1995–1996)). This view presents itself as a substitute to the classical view as reflected in Article 38(1) of the Statute of the International Court of Justice. In the 'modern' approach, State 'practice' in the usual sense of 'behaviour' is less determinative than authoritative statements made by governments or intergovernmental bodies. This turn is favoured in part by a general identity crisis of custom as a source of international law. It has been encouraged by well-intentioned authors, eager to provide human rights law with a standing in customary law which would compensate for what was perceived in the 1970s and 1980s as the lack of enthusiasm of States in the ratification of human rights treaties. However, this 'modern' view results in distorting the classical notion of custom in such a way that the notion is barely even recognizable under its new disguise. Philip Alston and Bruno Simma have also argued that it may be ideologically biased

towards the recognition of certain particular human rights as forming part of customary international law. The result of the 'new' approach, it turns out, which emphasizes deduction from statements instead of induction from State behaviour, is that those civil and political rights which are recognized in United States constitutional law and which the United States invokes against other States are included, while other rights, equally essential and whose status is identical within the international bill of rights, are excluded. These authors therefore suggest that a certain 'sub-conscious chauvinism' may be at work, for instance, in the list of human rights recognized as customary international law in the *Restatement*. They ask whether 'any theory of human rights law which singles out race but not gender discrimination, which condemns arbitrary imprisonment but not capital punishment for crimes committed by juveniles or death by starvation and which finds no place for a right of access to primary health care, is not flawed in terms both of the theory of human rights and of United Nations doctrine' (B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles', 12 *Australian Yearbook of International Law* 82 (1988–1989), at 94–5).

The dissatisfaction with the substitution of a 'modern' view of custom to the 'traditional' view has led, in turn, to two reactions. One part of the doctrine has sought to accommodate the competing claims of the 'traditional' and the 'modern' views of custom. Thus for instance, Frederic Kirgis has put the requirements of State practice and *opinio juris*, which compete for influencing the emergence of custom, on a sliding scale: whereas, at one end of the scale, highly consistent State practice should suffice to establish the existence of *opinio juris*, conversely and at the other end, strong indications that there exists a consensus among States about the unacceptability of certain forms of behaviour may establish custom, even if State practice is inconsistent (F. Kirgis, 'Custom on a Sliding Scale', *American Journal of International Law*, 81 (1987), 146; see also, for other attempts in this direction, J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', *Oxford Journal of Legal Studies*, 16 (1996), 85, and A. E. Roberts, 'Traditional and Modern Approaches to Customary International Law: a Reconciliation', *American Journal of International Law*, 95 (2001), 757). But, alternatively, we may turn to other arguments in order to ground human rights law in general international law. The most promising avenue in this direction, and the one preferred by P. Alston and B. Simma, is to identify human rights as general principles of international law.

(c) Human rights as general principles of law

This means of recognizing the Universal Declaration of Human Rights as a source of legal obligations is encouraged by the approach adopted by the International Court of Justice itself. The Court has refrained from stating that the Declaration as such, in the totality of its articles, should be considered as customary international law. But it did refer to the Declaration on a number of occasions, albeit always with respect to a specific right and without always clarifying the source of the authority

of the Declaration. For instance, alluding to the prohibition of arbitrary arrest or detention stipulated in Article 9 of the Universal Declaration of Human Rights, it stated in the *Tehran Hostages* case 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' (*United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran) (merits)* (I.C.J. Reports 1980, at 42). The language referring to such 'fundamental principles' is not new. Already in the *Corfu Channel* case, the Court mentioned 'obligations ... based ... on certain general and well-recognized principles', among which it mentioned what it labelled 'elementary considerations of humanity' (*Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland-Albania)* (I.C.J. Reports 1949, 4 at 22)). In the Advisory Opinion it delivered on the issue of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, it referred to 'the principles underlying the Convention' as 'principles which are recognized by civilized nations as binding on States, even without any conventional obligation' (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, 19 (28 May 1951)). Almost identical language may be found in later cases. In its Advisory Opinion on the *Legality of Threat or Use of Nuclear Weapons*, referring to the *Corfu Channel* dictum, the Court 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"..., that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law' (I.C.J. Reports 1996, 226, at 257 (para. 79)). Similarly, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court had mentioned the 'fundamental general principles of humanitarian law' as the source of obligations for the defendant State (I.C.J. Reports 1986, 14, at 113–14). The *Case Concerning East Timor (Portugal* v. *Australia)* similarly referred to the 'principle' of self-determination as 'one of the essential principles of contemporary international law' (I.C.J. Reports 1995, 90, at 102 (para. 29)).

Although these statements refer, for the most part, to otherwise unspecified 'principles of international law' rather than to the 'general principles of law recognized by civilized nations' mentioned by Article 38(1)(c) of the Statute of the International Court of Justice, they nevertheless have been interpreted as implying that human rights should qualify among the latter principles, and thus as forming part of general international law (see B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles', cited above, at 102–8; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press,

1989), at p. 88). Indeed, enthusiastic as they are about the grounding of international human rights law in customary international law, the reporters of the *Restatement (Third) of the Foreign Relations of the United States* note that 'there is a willingness to conclude that prohibitions [against human rights violations] common to the constitutions or laws of many states are general principles that have been absorbed into international law' (para. 701, n. 1). This conclusion also may be seen to follow from the fact that the Universal Declaration of Human Rights has been implemented, or even sometimes almost literally reproduced, in a large number of bill of rights in the world (H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, 25 (1995–1996), 287, at 351–2).

(d) The significance of human rights as part of general international law

Does it matter that international human rights have their source both in general public international law, and in specific treaties concluded at universal or regional level? The expansion of the membership of States in international human rights treaties particularly in the 1990s – the Convention on the Rights of the Child has achieved almost universal ratification, and treaties such as the two 1966 Covenants or the International Convention for the Elimination of All Forms of Discrimination against Women have also been very widely ratified – may have created the impression that the controversy about how solid the foundations of human rights law are in general international law, as opposed to treaty law, is not worth the efforts of legal doctrine today, as it might have been in the 1980s. We should resist this impression, however. First, we are far from having achieved universal ratification for all human rights treaties. Second, ratifications by States may be accompanied by reservations about specific rights or about the scope of application of the treaty: grounding the guarantees of the treaty in customary international law or in other sources of general international law may serve to overcome such restrictions. Third, it is increasingly acknowledged that States are not the only addressees of human rights law. As subjects of international law, international organizations are bound by general international law (see further on this issue chapter 2, section 4), and some authors believe this could be extended to transnational corporations (see chapter 4, section 1.2.): in order to impose human rights obligations on such private non-State actors, these obligations must have their source elsewhere than in treaties, which as a rule only States may ratify.

The view that human rights treaties merely embody, in treaty form, pre-existing obligations of States – which have their source in customary international law or in the general principles of law, and which are not at the disposal of States – also has guided the approach of human rights bodies on the question of the denunciation of human rights treaties and of State succession, especially after the dismantling of the former Soviet Union or of the former Federal Republic of Yugoslavia, and the separation of Czechoslovakia into two distinct entities. Box 1.4. discusses this issue.

Box 1.4.

The continuity of human rights obligations

On 5 March 1993, the Commission on Human Rights adopted Resolution 1993/23, entitled 'Succession of States in respect of International Human Rights Treaties', in which it encouraged successor States to confirm officially that they continued to be bound by obligations under relevant international human rights treaties and urged those that had not yet done so to ratify or to accede to those international human rights treaties to which the predecessor States had not been parties. It also adopted Resolution 1994/16 of 25 February 1994, in which it emphasized the special nature of the treaties aimed at the protection of human rights and reiterated its call to successor States which had not yet done so to confirm that they continued to be bound by obligations under international human rights treaties. Probably emboldened by these resolutions, the Human Rights Committee expressed the following views on the question of denunciation of the International Covenant on Civil and Political Rights, as well as on the question of State succession:

Human Rights Committee, General Comment No. 26, *Continuity of Obligations* (8 December 1997) (CCPR/C/21/Rev.1/Add. 8/Rev.1):

1. The International Covenant on Civil and Political Rights does not contain any provision regarding its termination and does not provide for denunciation or withdrawal. Consequently, the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. On this basis, the Covenant is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty.
2. That the parties to the Covenant did not admit the possibility of denunciation and that it was not a mere oversight on their part to omit reference to denunciation is demonstrated by the fact that article 41(2) of the Covenant does permit a State party to withdraw its acceptance of the competence of the Committee to examine inter-State communications by filing an appropriate notice to that effect while there is no such provision for denunciation of or withdrawal from the Covenant itself. Moreover, the Optional Protocol to the Covenant, negotiated and adopted contemporaneously with it, permits States parties to denounce it. Additionally, by way of comparison, the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted one year prior to the Covenant, expressly permits denunciation. It can therefore be concluded that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation. The same conclusion applies to the Second Optional Protocol in the drafting of which a denunciation clause was deliberately omitted.
3. Furthermore, it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant codifies in treaty form the

universal human rights enshrined in the Universal Declaration of Human Rights, the three instruments together often being referred to as the 'International Bill of Human Rights'. As such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.

4. The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, 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.
5. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.

This position expressed in General Comment No. 26 is clearly based on the view that human rights treaties are specific among international treaties (in favour of this view, see M. Kamminga, 'State Succession in Respect of Human Rights Treaties', *European Journal of International Law*, 7 (1996) 469, at 482–3; R. Higgins, 'The International Court of Justice and Human Rights' in K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy* (Leiden: Martinus Nijhoff, 1998), p. 691, at pp. 696–7; see also the separate opinion of Judge Weeramantry to the 11 July 1996 judgment of the International Court of Justice in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, I.C.J. Reports 1996, 595). But it seems to contradict the rule established under customary international law for other international law treaties in cases of succession of States, where the solution generally favoured is that succeeding States may choose whether or not to be bound by the treaties to which the predecessor State had acceded (see, for example, *Restatement (Third) of the Foreign Relations Law of the United States (1987),* para. 210(3), Reporters' Note 4; I. Brownlie, *Principles of Public International Law*, fifth edn (Oxford University Press, 1998), p. 663; A. Cassese, *International Law*, second edn (Oxford University Press, 2005), p. 78; M. Shaw, *International Law*, fifth edn (Cambridge University Press, 2003), p. 875; M. Koskenniemi and P. M. Eisemann (eds.), *State Succession: Codification Tested Against the Facts* (The Hague: Hague Academy of International Law, Martinus Nijhoff, 2000). Even the 1978 Vienna Convention on Succession of States in respect of Treaties, which is not generally considered to faithfully represent customary international law, does not anticipate automatic succession to treaties, at least as regards newly independent States. And, indeed, the General Comment of the Human Rights Committee on the continuity of obligations has been taken issue with, including from within the Committee itself.

Vienna Convention on Succession of States in respect of Treaties (23 August 1978) (excerpts):

Article 16. Position in respect of the treaties of the predecessor State

A newly independent State [defined by the Convention as 'a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible'] is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.

Article 34. Succession of States in cases of separation of parts of a State

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist: (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed; (b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.
2. Paragraph 1 does not apply if: (a) the States concerned otherwise agree; or (b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Human Rights Committee, *Kuok Koi* v. *Portugal*, Communication No. 925/2000 (final views of 22 October 2001) (CCPR/C/73/D/925/2000) (individual opinion of Mr Nisuke Ando):

Personally, I agree with the Committee's view [as expressed in para. 4 of General Comment No. 26 on the *Continuity of Obligations under the International Covenant on Civil and Political Rights*] as a matter of policy statement, but I cannot agree with it as a statement of a rule of customary international law. As far as State practice with respect to the Covenant is concerned, only in the cases of the dismemberment of the former Yugoslavia and that of Czechoslovakia, each of the newly born States in Central and Eastern Europe except Kazakhstan [which consistently refused to accept that it succeeded automatically to the human rights treaties concluded formerly by the Soviet Union] indicated that it 'succeeds to' the Covenant. All the other seceding or separating States indicated that they 'accede to' the Covenant, which implies that they are not succeeding to the former States' Covenant obligations but are newly acceding to the Covenant obligations on their own. The corresponding State practice with respect to the Optional Protocol makes it clear that only the Czech Republic and Slovakia 'expressly' succeeded to the Optional Protocol obligations. Certainly the State practice shows that there is no 'automatic' devolution of the Covenant obligations, to say nothing of the Optional Protocol obligations, to any State. A State needs to make an

'express' indication as to whether or not it accepts obligations under the Covenant and/or the Optional Protocol. Absent such an indication, it should not be assumed that the State has accepted the obligations.

1.2. Questions for discussion: custom and general principles of law as sources of human rights

1. Are there dangers associated with adapting the classic definition of custom as a source of international law to the specificity of human rights, considering especially the fact that the indivisibility, interdependence and equal importance of all human rights – including both civil and political and economic, social and cultural rights – have been regularly reaffirmed in various UN resolutions and at successive world conferences on human rights?
2. Should human rights, as part of general international law, be identified preferably as part of customary international law, or as part of general principles of law? Or does the best approach consist in seeing human rights – as listed in the Universal Declaration of Human Rights – as imposed under the UN Charter, particularly under Articles 55 and 56?
3. Does it follow from the fact that respect for human rights is obligatory for States, whichever the human rights treaties they have ratified, that States parties to a human rights treaty should not be allowed to denounce it unless the said treaty explicitly provides for this possibility? Does it follow that any successor State is bound by the human rights treaties concluded by the State to which it succeeds, even when it is a newly independent State? Consider that, as recalled by the International Court of Justice, '[t]he fact that the [principles of customary and international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions' (case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)* I.C.J. Reports 1984, 424, para. 73 (judgment of 26 November 1984 on the jurisdiction of the Court and on the admissibility of the application)), so that 'customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content' (concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)* I.C.J. Reports 1986, 14, para. 179 (judgment of 27 June 1986 on the merits)).

4.2. Human rights in the hierarchy of international law

It has sometimes been argued that human rights norms occupy a superior position in international law due to their specific status. The case of the *Sawhoyamaxa Indigenous Community* presented to the Inter-American Court of Human Rights provides a useful starting point. In this case, the State alleged it could not give effect to the indigenous community's right to property over their ancestral lands because, among other reasons,

these lands now belonged to a German investor, protected by a bilateral investment treaty. The Court answered:

Inter-American Court of Human Rights, case of *The Sawhoyamaxa Indigenous Community* v. *Paraguay* (judgment of 29 March 2006, Series C No. 146).

137. ... [The] Court has ascertained that the arguments put forth by the State to justify non-enforcement of the indigenous people's property rights have not sufficed to release it from international responsibility. The State has put forth three arguments: 1) that claimed lands have been conveyed from one owner to another 'for a long time' and are duly registered; 2) that said lands are being been adequately exploited, and 3) that the owner's right 'is protected under a bilateral agreement between Paraguay and Germany[,] which ... has become part of the law of the land.' ...

140. ... [W]ith regard to the third argument put forth by the State, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but, according to the State, said convention allows for capital investments made by a contracting party to be condemned or nationalized for a 'public purpose or interest', which could justify land restitution to indigenous people. Moreover, the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.

141. Based on the foregoing, the Court dismisses the three arguments of the State described above and finds them insufficient to justify non-enforcement of the right to property of the Sawhoyamaxa Community.

This position implies, albeit implicitly, that human rights treaties – due to their specific nature as having a 'normative' character, which distinguishes them from treaties which are merely an exchange of rights and obligations between States – occupy a superior position in international law, and that any treaties conflicting with them should therefore be set aside in situations of conflict. Which weight should we recognize to such an assertion?

(a) The arguments in favour of hierarchy

Two arguments are traditionally put forward in order to justify the view that human rights occupy a hierarchically superior position among the norms of international law (see generally I. Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (Antwerp-Oxford: Intersentia-Hart, 2001)). First, Article 103 of the UN Charter provides that 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' Since one of the purposes of the UN Charter is to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms

for all without discrimination (Art. 1(3)), and since Article 56 of the Charter clearly imposes obligations both on the organization itself and on its Member States to contribute to the fulfilment of this objective, it would follow, then, that any international obligation conflicting with the obligation to promote and protect human rights should be set aside, in order for this latter objective to be given priority.

Second, although the norms of international law (custom, treaties, and the 'general principles of law recognized by civilized nations', as expressed in the list of sources of international law by Art. 38(1) of the Statute of the International Court of Justice) are otherwise not hierarchically ordered according to their various sources, certain norms are specific in that they embody a form of international public policy. In the context of the law of treaties, the Vienna Convention on the Law of Treaties states that any treaty which, at the time of its conclusion, is in violation of a peremptory norm of general international law (also referred to as belonging to *jus cogens*), is to be considered void. A peremptory norm of general international law 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 and which can be modified only by a subsequent norm of general international law having the same character' (Art. 53; Art. 64 of the Vienna Convention on the Law of Treaties adds that 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'). The existing judicial practice shows that such *jus cogens* norms are those which ensure the safeguard of two fundamental interests of the international community: those of its primary subjects, the States, whose essential prerogatives are preserved by the recognition of their equal sovereignty and by the prohibition of the use of force in conditions other than those authorized by the UN Charter; and those of the international community in the preservation of certain fundamental human rights (P.-M. Dupuy, 'L'unité de l'ordre juridique international. Cours général de droit international public', *Recueil des cours*, 297 (2002), at 303).

In theory, the sanctions attached to the hierarchical principle will differ according to whether it is based on Article 103 of the Charter or on the nature of the superior norms recognized as *jus cogens*: whereas a treaty found to be in violation of a *jus cogens* norm becomes void, a treaty incompatible with obligations flowing from membership in the United Nations does not disappear, but shall not be applied to the extent of such an incompatibility (see the Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, cited above, para. 41). However, the logics under which each of these mechanisms operate are not systematically opposed to one another: where a treaty is not *per se* in violation of a *jus cogens* requirement but may lead to certain decisions being adopted which result in such a violation, only those decisions shall have to be considered invalid, while the treaty itself will remain in force (compare J. Combacau, 'Logique de la validité contre logique d'opposabilité dans la Convention de Vienne sur le droit des traités' in *Mélanges M. Virally* (Paris: Pedone, 1991), pp. 195–203). As noted by the International Law Commission in the course of the discussion of the Draft Articles on State Responsibility: 'one might envisage a conflict

arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen' (*Official Records of the General Assembly, Fifty-sixth Session, Supplement 10* (A/56/10), commentary to Art. 40 of the Draft Articles on State Responsibility, para. (3); also reproduced in J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, (Cambridge University Press, 2002), at p. 187).

Should the two mechanisms be ranked according to an order of priority? It has been stated that a conflict between the primacy asserted by Article 103 of the UN Charter – which extends to the decisions adopted by the Security Council acting under the Charter (International Court of Justice, Order of 14 April 1992 (provisional measures), *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)*, I.C.J. Reports 1992, 15, para. 39) – and *jus cogens* norms was difficult to contemplate. The Study Group of the International Law Commission on the fragmentation of international law for instance remarks that: 'The United Nations Charter has been universally accepted by States and thus a conflict between *jus cogens* norms and Charter obligations is difficult to contemplate. In any case, according to Article 24(2) of the Charter, the Security Council shall act in accordance with the Purposes and Principles of the United Nations which include norms that have been subsequently treated as *jus cogens*' (Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, cited above, at p. 24, para. 40 of the conclusions). This view is, unfortunately, too optimistic, for times such as ours when the UN Security Council may use its powers in ways which may lead to violations of internationally recognized human rights. When such conflicts do occur – as they do in fact – they should be resolved in favour of the primacy of *jus cogens* even over the UN Charter or measures adopted in accordance with the Charter. Article 103 of the UN Charter, after all, has the status of a provision included in a treaty establishing an international organization, whatever the unique character of this organization:

International Court of Justice, Order of 8 April 1993 on the request for the indication of provisional measures in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, separate opinion of Judge *ad hoc* Elihu Lauterpacht (I.C.J. Reports 1993, 440, para. 100):

The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and

jus cogens. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent.

This is also the reasoning followed by the Court of First Instance of the European Communities (now renamed the EU's General Court) when it was asked to annul Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, implementing UN Security Council Resolution 1390 (2002).

Court of First Instance of the European Communities, Case T-315/01, *Yassin Abdullah Kadi* v. *Council of the EU and Commission of the European Communities*, judgment of 21 September 2005:

226 [Although the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and although the Court has no authority to call in question, even indirectly, their lawfulness in the light of EU law, nonetheless] the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.

227 In this connection, it must be noted that the Vienna Convention on the Law of Treaties, which consolidates the customary international law and Article 5 of which provides that it is to apply 'to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation', provides in Article 53 for a treaty to be void if it conflicts with a peremptory norm of general international law (*jus cogens*), defined as 'a norm accepted and recognised 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 international law having the same character'. Similarly, Article 64 of the Vienna Convention provides that: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'

228 Furthermore, the Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person. In the preamble to the Charter, the peoples of the United Nations declared themselves determined to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person'. In addition, it is apparent from Chapter I of the Charter, headed 'Purposes and Principles', that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms.

229 Those principles are binding on the Members of the United Nations as well as on its bodies. Thus, under Article 24(2) of the Charter of the United Nations, the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act 'in accordance with the Purposes and Principles of the United Nations'. The Security Council's powers of sanction in the exercise of that responsibility must therefore be wielded in compliance with international law, particularly with the purposes and principles of the United Nations.

230 International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.

231 The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, highly exceptionally, extend to determining whether the superior rules of international law falling within the ambit of *jus cogens* have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute 'intransgressible principles of international customary law' (Advisory Opinion of the International Court of Justice of 8 July 1996, *The Legality of the Threat or Use of Nuclear Weapons*, Reports 1996, p. 226, paragraph 79).

The Court of First Instance of the European Communities went on to examine whether the fact that there is no judicial remedy available to the organizations or individuals against which restrictive measures are taken, against the sanctions decided by the Sanctions Committee established under the authority of the Security Council, is in violation of *jus cogens* norms. It concluded that it is not, based on the consideration that the right of access to the courts is subject to certain limitations which, in this case, appear to be imposed for legitimate objectives and remain proportionate to the ends pursued. This question was not addressed again in subsequent proceedings before the European Court of Justice, since this Court took the view, based on its understanding of its role as defined in the European Treaties, that it has no competence to review the lawfulness of a resolution adopted by an international body such as the UN Security Council, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*. Rather, its role was to review the lawfulness of the implementing Community measure, in particular as regards the fundamental rights included among the general principles of Community law. On the basis of such a review, the European Court of Justice arrived at the conclusion that Regulation No. 881/2002 must be annulled so far as concerns the appellants, by reason of the breach of principles applicable in the procedure followed when the restrictive measures introduced by that regulation were adopted (Joined Cases C-402/05 P and C-415/05 P, judgment of 3 September 2008).

(b) Human rights as *jus cogens* norms

Reliance on the notion of *jus cogens* norms is made difficult, however, by two factors. First, the list of human rights included among norms of that nature remains ill defined. Norms which have the status of *jus cogens* are to be identified on the basis of the evolution of the understanding of the international community – the element of State practice plays here a far less significant role than for the emergence of custom. This list is therefore in constant evolution, and it would be both erroneous and counter-productive

to seek to provide an authoritative classification. There is a consensus, however, about the *jus cogens* nature of a number of prohibitions formulated in international human rights law (for an extensive discussion, see I. Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (Antwerp-Oxford: Intersentia-Hart, 2001), at pp. 66–105). These include at a minimum the prohibition of aggression, slavery and the slave trade, genocide (International Court of Justice, case of the *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, judgment of 3 February 2006 (Jurisdiction of the Court and Admissibility of the Application), para. 64), racial discrimination, apartheid and torture (see the references provided below in para. 153 of the judgment of 10 December 1998 delivered by the International Criminal Tribunal for former Yugoslavia (ICTY), Trial Chamber, in the case of *Prosecutor* v. *Anto Furundzija*, judgment of 10 December 1998), as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination (*Official Records of the General Assembly, Fifty-sixth Session, Supplement 10* (A/56/10), commentary to article 40 of the draft articles on State Responsibility prepared by the International Law Commission, paras. (4)–(6) (also reproduced in J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge University Press, 2003), at p. 188)). Other candidates for future recognition as peremptory norms of international law are the application of the death penalty to juveniles (if not the precise age of majority for purposes of capital punishment) (see Inter-American Commission on Human Rights, Resolution No. 3/87, Case 9647 [1987] *Inter-American Yearbook on Human Rights* 260) and the prohibition of refoulement, i.e. of returning a person to a territory where she runs a risk of torture or of being ill-treated: it is, indeed, well established that even where an extradition treaty would in principle allow for, or prescribe, the extradition of a person to another State, the extraditing State is prohibited from doing so in the presence of such a risk, the Institute of International Law noting in this respect that 'extradition treaties should not be enforced if enforcement would violate a human rights norm external to the treaty', and that 'the notion that there are certain higher norms in the field of human rights which take precedence over extradition treaties owes its origin to the notion of *jus cogens*' (*Yearbook of the Institute of International Law*, 60 (1983), p. 214, at pp. 223–4; see I. Seiderman, *Hierarchy in International Law* (Antwerp-Oxford: Intersentia-Hart, 2001), at pp. 101–5).

However, apart from the evolving nature of this list of norms having acquired *jus cogens* status, there are certain doctrinal uncertainties concerning the recognition criteria of such norms. It remains controversial, in particular, whether the emergence of peremptory norms could be regional, rather than universal and resulting from the consent of the international community as a whole. The Vienna Convention on the Law of Treaties seems to refer only to *jus cogens* of a universal nature. But this may be too restrictive: certain values may be central to a group of States of a particular region, and this may lead to the invalidation of treaties concluded by the States of that region which conflict with the said norm (see G. Gaja, '*Jus Cogens* beyond the Vienna Convention', *Recueil des cours*, 172–III (1981), 271 *et seq.*, at 284; F. Domb,

'*Jus Cogens* and Human Rights', *Israel Yearbook of Human Rights*, 6 (1976), 104, at 110; J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: a Critical Appraisal* (Vienna, New York: Springer, 1974), at pp. 107–8). For instance, in his concurring opinion to the judgment delivered on 7 July 1989 by the European Court of Human Rights in *Soering* v. *United Kingdom*, Judge De Meyer made the following comment about the second sentence of Article 2 §1 of the Convention, which states that 'no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law', thereby recognizing that the imposition of the death penalty may be acceptable:

European Court of Human Rights, *Soering* v. *United Kingdom*, judgment of 7 July 1989, concurring opinion of Judge De Meyer:

The second sentence of Article 2 §1 of the Convention was adopted, nearly forty years ago, in particular historical circumstances, shortly after the Second World War. In so far as it still may seem to permit, under certain conditions, capital punishment in time of peace, it does not reflect the contemporary situation, and is now overridden by the development of legal conscience and practice.

Such punishment is not consistent with the present state of European civilisation.

De facto, it no longer exists in any State Party to the Convention.

Its unlawfulness was recognised by the Committee of Ministers of the Council of Europe when it adopted in December 1982, and opened for signature in April 1983, the Sixth Protocol to the Convention, which to date has been signed by sixteen, and ratified by thirteen, Contracting States.

No State Party to the Convention can in that context, even if it has not yet ratified the Sixth Protocol, be allowed to extradite any person if that person thereby incurs the risk of being put to death in the requesting State.

Extraditing somebody in such circumstances would be repugnant to European standards of justice, and contrary to the public order of Europe.

The recognition criteria for *jus cogens* norms are sufficiently vague to allow for the list of human rights norms having this status to be permanently adapted. For instance, the Inter-American Court of Human Rights has asserted that the general principle of equality – understood as the obligation to implement human rights without discrimination – has reached the status of a peremptory norm of international law, because of its close link to human dignity and because of its universal recognition:

Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September 2003, requested by the United Mexican States on the *Juridical Condition and Rights of the Undocumented Migrants*:

97. The Court now proceeds to consider whether [the principle of equality and non-discrimination] is a *jus cogens* principle ...

100. In particular, when referring to the obligation to respect and ensure human rights, regardless of which of those rights are recognized by each State in domestic or international norms, the Court considers it clear that all States, as members of the international community, must comply with these obligations without any discrimination; this is intrinsically related to the right to equal protection before the law, which, in turn, derives 'directly from the oneness of the human family and is linked to the essential dignity of the individual'. The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons.

101. Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens.*

Uncertainty about the list of human rights which have acquired the status of peremptory norms of international law is further increased by the tendency of a number of commentators to base the inclusion of at least certain basic rights in the list of *jus cogens* prescriptions on statements by international courts – particularly the International Court of Justice – which do not mention *jus cogens*, although they do identify certain obligations as having an *erga omnes* character. Thus, in the *Barcelona Traction* Case, the International Court of Justice famously remarked in an *obiter dictum* that:

International Court of Justice, case concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, Second phase (judgment), judgment of 5 February 1970, I.C.J. Reports 1970, 3 at 32 (paras. 33–4):

An essential distinction should be drawn between the obligation of a State towards the international community as a whole, and those arising vis-à-vis another State ... By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of

acts of agression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character.

International Court of Justice, case concerning *East Timor (Portugal* v. *Australia)*, judgment of 30 June 1995, I.C.J. Reports 1995, 90 at 102 (para. 29):

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.

Although, as already mentioned, it seems beyond dispute that the rules referred to (if not all the 'principles and rules concerning the basic rights of the human person', at least the prohibition of aggression, of genocide, of slavery, of racial discrimination, and of the denial of the right of peoples to self-determination) have now acquired the status of *jus cogens* norms, these statements by the World Court in fact only pertain to their *erga omnes* character, implying that they are obligations owed to all States and which all States have a legal interest in seeking to enforce. But these notions are not interchangeable. They refer to different consequences: while the *jus cogens* character of a norm implies that it is hierarchically superior to any other norm of international law which does not possess the same character, the *erga omnes* nature of an obligation simply means that all States may be recognized as having a legal interest in the obligation being complied with. And, while all peremptory norms of international law also are owed to the community of States as a whole and thus are *erga omnes*, the reverse is not true, as 'not all *erga omnes* obligations are established by peremptory norms of general international law' (Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, cited above, para. 38).

A second obstacle to relying more systematically on *jus cogens* is that the consequences attached to the classification of certain human rights among *jus cogens* norms remain debated. Articles 53 and 64 of the Vienna Convention on the Law of Treaties prescribe that treaties which contradict peremptory norms of international law are void. But the Vienna Convention of course only refers to the consequences in the law of treaties of such a conflict. Unless we accept to take these provisions as mere tautologies (of the form 'no derogation shall be permitted to a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'), the *jus cogens* nature of a norm must be seen as based on something else than on the sense of the international community that no derogation is to be allowed

to those norms; and therefore, other consequences may follow, from the recognition that rules of that nature occupy a higher rank among the norms of international law – and indeed, as will be seen in paragraph (c) below in this section, it is recognized that serious breaches of peremptory norms of international law entail certain specific consequences in the area of State responsibility. It has been stated, for instance, that human rights prescriptions which figure among the *jus cogens* norms oblige States not only to respect, protect and fulfil the rights in question, but also to take measures ensuring that those rights will not be infringed, and that a State should be held in violation of its obligations whenever such measures are not adopted, *even if the violation does not materialize*: given the importance of the basic rights forming part of *jus cogens*, in other terms, State responsibility results not only from actual breaches, but also from merely *potential* breaches which result from State action or inaction. In addition, legal acts adopted by States seeking to legitimize or authorize a violation of *jus cogens* – for example, amnesty laws where acts of torture have been committed, or unilateral measures resulting in a violation of the right to self-determination – should not be recognized or given effect to by any other State. Third, where *jus cogens* violations are concerned, due both to the *erga omnes* character of the corresponding obligations and to their universal condemnation, the traditional restrictions to the extraterritorial jurisdiction of States may have to be disregarded: in particular, any State should have jurisdiction to prosecute and punish individuals responsible for *jus cogens* violations which are found on its territory, even where the violations have been committed outside the national territory and present no other connecting factor to the State exercising such extraterritorial jurisdiction. The following cases discuss certain of these implications of *jus cogens* norms.

International Criminal Tribunal for former Yugoslavia (ICTY), Trial Chamber, *Prosecutor* v. *Anto Furundzija*, judgment of 10 December 1998, paras. 147–57:

147. There exists today universal revulsion against torture: as a USA Court put it in *Filartiga* v. *Peña-Irala*, 'the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an enemy of all mankind' (*Filartiga* v. *Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980)). This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination. The prohibition against torture exhibits three important features, which are probably held in common with the other general principles protecting fundamental human rights.

(a) The prohibition even covers potential breaches

148. Firstly, given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in

place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in *Soering* [where the Court stated, in its *Soering* v. *United Kingdom* judgment of 7 July 1989: 'It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him, if implemented, be contrary to Article 3 [prohibiting torture and inhuman or degrading treatment] by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article' (para. 90)], international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.

149. Let us consider these two aspects separately. Normally States, when they undertake international obligations through treaties or customary rules, adopt all the legislative and administrative measures necessary for implementing such obligations. However, subject to obvious exceptions, failure to pass the required implementing legislation has only a potential effect: the wrongful fact occurs only when administrative or judicial measures are taken which, being contrary to international rules due to the lack of implementing legislation, generate State responsibility. By contrast, in the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, States must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.

150. Another facet of the same legal effect must be emphasised. Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (lato sensu) only when such legislation is concretely applied [see Mariposa Development Company and others, Decision, US-Panama General Claims Commission, 27 June 1933, UN Reports of International Arbitral Awards, Vol. VI, pp. 340–1; *German Settlers in Upper Silesia*, Advisory Opinion of 10 September 1923, PCIJ, Series B, No. 6, pp. 19–20, 35–8; the arbitral award of 1922 in the *Affaire de l'impôt sur les benefices de guerre*, in UN Reports of International Arbitral Awards, vol. I, pp. 302–5]. By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect.

(b) The prohibition imposes obligations *erga omnes*

151. Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

152. Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner.

(c) The prohibition has acquired the status of *jus cogens*

153. While the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules [see also the *General Comment No. 24: Issues relating to Reservations made upon Ratification or Accession to the Covenant [on Civil and Political Rights] or the Optional Protocol thereto, or in relation to Declarations under Article 41 of the Covenant*, issued on 4 November 1994 by the United Nations Human Rights Committee, para. 10 ('the prohibition of torture has the status of a peremptory norm'). In 1986, the United Nations Special Rapporteur, P. Kooijmans, in his report to the Commission on Human Rights, took a similar view (E/CN. 4/1986/15, p. 1, para 3). That the international proscription of torture has turned into *jus cogens* has been among others held by US courts in *Siderman de Blake* v. *Republic of Argentina*, 965 F. 2d 699 (9th Cir. 1992), cert. denied, *Republic of Argentina* v. *de Blake*, 507 U.S. 1017, 123L. Ed. 2d 444, 113 S. Ct. 1812 (1993); *Committee of US Citizens Living in Nicaragua* v. *Reagan*, 859 F. 2d 929, 949 (D.C. Cir. 1988); *Xuncax et al.* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Cabiri* v. *Assasie-Gyimah*, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996); and *In re Estate of Ferdinand E. Marcos*, 978 F. 2d 493 (9th Cir. 1992), cert. denied, *Marcos Manto* v. *Thajane*, 508 U.S. 972, 125L. Ed. 2d 661, 113 S. Ct. 2960 (1993)]. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

154. Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.

155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio* [Art. 53 Vienna Convention on the Law of Treaties, 23 May 1969], and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. [As for amnesty laws, it bears mentioning that in 1994 the United Nations Human Rights Committee, in its General Comment No. 20 on Art. 7 of the ICCPR stated the following: 'The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to

investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.'] If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: 'individuals have international duties which transcend the national obligations of obedience imposed by the individual State' [I.M.T., 1 (1946), p. 223].

156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court in *Demjanjuk*, 'it is the universal character of the crimes in question i.e. international crimes which vests in every State the authority to try and punish those who participated in their commission' [*Attorney General of the Government of Israel* v. *Adolf Eichmann*, 36 I.L.R. 298; *In the Matter of the Extradition of John Demjanjuk*, 612].

157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.

House of Lords (United Kingdom), *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 3)*, judgment of 24 March 1999 [2000] A.C. 147:

[In this case, the House of Lords held that the former President of Chile, Senator Pinochet, could be extradited to Spain in respect of charges which concerned conduct that was criminal in the

United Kingdom at the time when it was allegedly committed. The majority of the Law Lords considered that extraterritorial torture did not become a crime in the United Kingdom until section 134 of the Criminal Justice Act 1988 came into effect. As regards the crimes of torture committed outside the United Kingdom after that date, the argument was submitted by the defence of Pinochet that, since under Part II of the State Immunity Act 1978 a former head of State enjoyed immunity from the criminal jurisdiction of the United Kingdom for acts done in his official capacity, Mr Pinochet should benefit such immunity. The Law Lords rejected this argument. Instead, they took the view that torture was an international crime and prohibited by *jus cogens*, and therefore such immunity could not be invoked.]

Lord Browne-Wilkinson (leading judgment) (excerpts):

In general, a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries. If a person who is alleged to have committed a crime in Spain is found in the United Kingdom, Spain can apply to the United Kingdom to extradite him to Spain. The power to extradite from the United Kingdom for an 'extradition crime' is now contained in the Extradition Act 1989. That Act defines what constitutes an 'extradition crime'. For the purposes of the present case, the most important requirement is that the conduct complained of must constitute a crime under the law both of Spain and of the United Kingdom. This is known as the double criminality rule.

Since the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states. The most important of such international crimes for present purposes is torture which is regulated by the International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. The obligations placed on the United Kingdom by that Convention ... were incorporated into the law of the United Kingdom by section 134 of the Criminal Justice Act 1988. That Act came into force on 29 September 1988. Section 134 created a new crime under United Kingdom law, the crime of torture. As required by the Torture Convention 'all' torture wherever committed world-wide was made criminal under United Kingdom law and triable in the United Kingdom. No one has suggested that before section 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law. Nor is it suggested that section 134 was retrospective so as to make torture committed outside the United Kingdom before 29 September 1988 a United Kingdom crime. Since torture outside the United Kingdom was not a crime under UK law until 29 September 1988, the principle of double criminality which requires an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law at the date it was committed ...

[In] my view only a limited number of the charges relied upon to extradite Senator Pinochet constitute extradition crimes since most of the conduct relied upon occurred long before 1988. In particular, I do not consider that torture committed outside the United Kingdom before 29 September 1988 was a crime under UK law. It follows that the main question discussed at the earlier stages of this case – is a former head of state entitled to sovereign

immunity from arrest or prosecution in the UK for acts of torture – applies to far fewer charges. But the question of state immunity remains a point of crucial importance since, in my view, there is certain conduct of Senator Pinochet (albeit a small amount) which does constitute an extradition crime and would enable the Home Secretary (if he thought fit) to extradite Senator Pinochet to Spain unless he is entitled to state immunity. Accordingly, having identified which of the crimes alleged is an extradition crime, I will then go on to consider whether Senator Pinochet is entitled to immunity in respect of those crimes ...

I must ... consider whether, in relation to these two surviving categories of charge [torture and conspiracy to torture after 29 September 1988], Senator Pinochet enjoys sovereign immunity. But first it is necessary to consider the modern law of torture.

Torture

Apart from the law of piracy, the concept of personal liability under international law for international crimes is of comparatively modern growth. The traditional subjects of international law are states not human beings. But consequent upon the war crime trials after the 1939–45 World War, the international community came to recognise that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity. Although there may be legitimate doubts as to the legality of the Charter of the Nuremberg Tribunal, in my judgment those doubts were stilled by the Affirmation of the Principles of International Law recognised by the Charter of Nuremberg Tribunal adopted by the United Nations General Assembly on 11 December 1946. That Affirmation affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal and directed the Committee on the codification of international law to treat as a matter of primary importance plans for the formulation of the principles recognised in the Charter of the Nuremberg Tribunal. At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law. In the early years state torture was one of the elements of a war crime. In consequence torture, and various other crimes against humanity, were linked to war or at least to hostilities of some kind. But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became an international crime on its own: see Oppenheim's *International Law* (Jennings and Watts edition) vol. 1, 996; note 6 to Article 18 of the I.L.C. Draft Code of Crimes Against Peace; *Prosecutor* v. *Furundzija Tribunal for Former Yugoslavia*, Case No. 17-95-17/1-T. Ever since 1945, torture on a large scale has featured as one of the crimes against humanity: see, for example, UN General Assembly Resolutions 3059, 3452 and 3453 passed in 1973 and 1975; Statutes of the International Criminal Tribunals for former Yugoslavia (Article 5) and Rwanda (Article 3).

Moreover, the Republic of Chile accepted before your Lordships that the international law prohibiting torture has the character of *jus cogens* or a peremptory norm, i.e. one of those rules of international law which have a particular status [quoting from Furundzija].

The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution': *Demjanjuk* v. *Petrovsky* (1985) 603 F. Supp. 1468; 776 F. 2d. 571.

... [L]ong before the Torture Convention of 1984 state torture was an international crime in the highest sense. But there was no tribunal or court to punish international crimes of torture. Local courts could take jurisdiction: see *Demjanjuk* (supra); *Attorney General of Israel* v. *Eichmann* (1962) 36 I.L.R.S. But the objective was to ensure a general jurisdiction so that the torturer was not safe wherever he went. For example, in this case it is alleged that during the Pinochet regime torture was an official, although unacknowledged, weapon of government and that, when the regime was about to end, it passed legislation designed to afford an amnesty to those who had engaged in institutionalised torture. If these allegations are true, the fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power: a totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not dependent upon the local courts where the torture was committed. In the event, over 110 states (including Chile, Spain and the United Kingdom) became state parties to the Torture Convention. But it is far from clear that none of them practised state torture. What was needed therefore was an international system which could punish those who were guilty of torture and which did not permit the evasion of punishment by the torturer moving from one state to another. The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal – the torturer – could find no safe haven. Burgers and Danelius (respectively the chairman of the United Nations Working Group on the 1984 Torture Convention and the draftsmen of its first draft) say, at p. 131, that it was 'an essential purpose [of the Convention] to ensure that a torturer does not escape the consequences of his act by going to another country' [J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Leiden: Martinus Nijhoff, 1988)].

The Torture Convention

Article 1 of the Convention defines torture as the intentional infliction of severe pain and of suffering with a view to achieving a wide range of purposes 'when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiesence of a public official or other person acting in an official capacity.' Article 2(1) requires each state party to prohibit torture on territory within its own jurisdiction and Article 4 requires each state party to ensure that 'all' acts of torture are offences under its criminal law. Article 2(3) outlaws any defence of superior orders. Under Article 5(1) each state party has to establish its jurisdiction over torture (a) when committed within territory under its jurisdiction (b) when the alleged offender is a national of that state, and (c) in certain circumstances, when the victim is a national of that state. Under Article 5(2) a state party has to take jurisdiction over any alleged offender who is found within its territory. Article 6 contains provisions for a state in whose territory an alleged torturer is found to detain him, inquire into the position and notify the states referred to in Article 5(1) and to indicate whether it intends to exercise jurisdiction. Under Article 7 the state in whose territory the alleged torturer is found shall, if he is not extradited to any of the states mentioned in Article 5(1), submit him to its authorities for the purpose of prosecution. Under Article 8(1) torture is to be treated as an extraditable offence and under Article 8(4) torture shall, for the purposes of extradition, be treated as having been committed not only in the place where it occurred but also in the state mentioned in Article 5(1) ...

Universal jurisdiction

There was considerable argument before your Lordships concerning the extent of the jurisdiction to prosecute torturers conferred on states other than those mentioned in Article 5(1). I do not find it necessary to seek an answer to all the points raised. It is enough that it is clear that in all circumstances, if the Article 5(1) states do not choose to seek extradition or to prosecute the offender, other states must do so. The purpose of the Convention was to introduce the principle *aut dedere aut punire* – either you extradite or you punish: Burgers and Danelius p. 131. Throughout the negotiation of the Convention certain countries wished to make the exercise of jurisdiction under Article 5(2) dependent upon the state assuming jurisdiction having refused extradition to an Article 5(1) state. However, at a session in 1984 all objections to the principle of *aut dedere aut punire* were withdrawn. 'The inclusion of universal jurisdiction in the draft Convention was no longer opposed by any delegation': Working Group on the Draft Convention U.N. Doc. E/CN. 4/1984/72, para. 26. If there is no prosecution by, or extradition to, an Article 5(1) state, the state where the alleged offender is found (which will have already taken him into custody under Article 6) must exercise the jurisdiction under Article 5(2) by prosecuting him under Article 7(1).

I gather the following important points from the Torture Convention:

(1) Torture within the meaning of the Convention can only be committed by 'a public official or other person acting in an official capacity', but these words include a head of state. A single act of official torture is 'torture' within the Convention;
(2) Superior orders provide no defence;
(3) If the states with the most obvious jurisdiction (the Article 5(1) states) do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction.
(4) There is no express provision dealing with state immunity of heads of state, ambassadors or other officials.
(5) Since Chile, Spain and the United Kingdom are all parties to the Convention, they are bound under treaty by its provisions whether or not such provisions would apply in the absence of treaty obligation. Chile ratified the Convention with effect from 30 October 1988 and the United Kingdom with effect from 8 December 1988.

State immunity

This is the point around which most of the argument turned. It is of considerable general importance internationally since, if Senator Pinochet is not entitled to immunity in relation to the acts of torture alleged to have occurred after 29 September 1988, it will be the first time so far as counsel have discovered when a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes.

Given the importance of the point, it is surprising how narrow is the area of dispute. There is general agreement between the parties as to the rules of statutory immunity and the rationale which underlies them. The issue is whether international law grants state immunity in relation to the international crime of torture and, if so, whether the Republic of Chile is entitled to claim such immunity even though Chile, Spain and the United Kingdom are all parties to the Torture Convention and therefore 'contractually' bound to give effect to its provisions from 8 December 1988 at the latest.

It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself. The diplomatic representative of the foreign state in the forum state is also afforded the same immunity in recognition of the dignity of the state which he represents. This immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted *ratione personae*.

What then when … the head of state is deposed? … In my judgment at common law a former head of state … loses immunity *ratione personae* on ceasing to be head of state: see Watts, 'The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers' [*Recueil des cours*, 247 (1994–III), 40, at 88] p. 88 and the cases there cited. He can be sued on his private obligations: *Ex-King Farouk of Egypt* v. *Christian Dior* (1957) 24 I.L.R. 228; *Jimenez* v. *Aristeguieta* (1962) 311 F. 2d 547. As ex head of state he cannot be sued in respect of acts performed whilst head of state in his public capacity: *Hatch* v. *Baez* [1876] 7 Hun. 596. Thus, at common law, … the former head of state … enjoy[s] immunity for acts done in performance of [his] functions whilst in office.

… Accordingly, in my judgment, Senator Pinochet as former head of state enjoys immunity *ratione materiae* in relation to acts done by him as head of state as part of his official functions as head of state.

The question then which has to be answered is whether the alleged organisation of state torture by Senator Pinochet (if proved) would constitute an act committed by Senator Pinochet as part of his official functions as head of state. It is not enough to say that it cannot be part of the functions of the head of state to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity ratione materiae. The case needs to be analysed more closely.

Can it be said that the commission of a crime which is an international crime against humanity and *jus cogens* is an act done in an official capacity on behalf of the state? I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function … I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as jus cogens was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction. Further, it required all member states to ban and outlaw torture: Article 2. How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises? Thirdly, an essential feature of the international crime of torture is that it must be committed 'by or with the acquiesence

of a public official or other person acting in an official capacity'. As a result all defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention.

Finally, and to my mind decisively, if the implementation of a torture regime is a public function giving rise to immunity ratione materiae, this produces bizarre results. Immunity *ratione materiae* applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing the official who, for example, actually carried out the torture when a claim against the head of state would be precluded by the doctrine of immunity. If that applied to the present case, and if the implementation of the torture regime is to be treated as official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who actually did the torturing. Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the State of Chile is prepared to waive its right to its officials immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention – to provide a system under which there is no safe haven for torturers – will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.

For these reasons in my judgment if, as alleged, Senator Pinochet organised and authorised torture after 8 December 1988, he was not acting in any capacity which gives rise to immunity *ratione materiae* because such actions were contrary to international law, Chile had agreed to outlaw such conduct and Chile had agreed with the other parties to the Torture Convention that all signatory states should have jurisdiction to try official torture (as defined in the Convention) even if such torture were committed in Chile ...

For these reasons, I would allow the appeal so as to permit the extradition proceedings to proceed on the allegation that torture in pursuance of a conspiracy to commit torture, including the single act of torture which is alleged in charge 30, was being committed by Senator Pinochet after 8 December 1988 when he lost his immunity.

There exists a large literature surrounding the *Pinochet* case, including a number of important book-length publications (see, e.g. D. M. Ackerman, *Pinochet Extradition Case: Selected Legal Issues* (Washington DC: Congressional Research Service, 1999); H. Ahlbrecht and K. Ambos (eds.), *Der Fall Pinochet (S). Auslieferung Wegen Staatsverstärkter Kriminalität?* (Baden-Baden: Nomos Verlagsgesellschaft, 1999); S. Brett (ed.), *When Tyrants Tremble: the Pinochet Case* (New York: Human Rights Watch, October 1999); R. Brody and M. Ratner (eds.), *The Pinochet Papers: the Case of Augusto Pinochet in Spain and Britain* (The Hague: Kluwer Law International, 2000); H. Fischer, C. Kress, and S. R. Luder (eds.), *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin: Berlin Verlag Arno

Spitz, 2001); M. Lattimer and P. Sands (eds.), *Justice for Crimes against Humanity* (Oxford: Hart Publishing, 2003); S. Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press, 2004)). The case was widely seen as heralding a new era in international human rights, one in which national courts would be assuming new and far-reaching responsibilities in the prosecution of human rights violations, by relying both on the notion that human rights, due to their *jus cogens* status, could justify setting aside conflicting norms of international law that impose obstacles to such prosecution, and on the tool of extra-territorial (or in some cases universal) jurisdiction, allowing prosecutions against non-nationals for serious violations of international law committed abroad.

The question of the relationship between – on the one hand – the prosecution of human rights violations or the filing of civil claims by victims of such violations, and – on the other hand – international rules relating to immunity, was also discussed in other contexts. In the following case, the Grand Chamber of the European Court of Human Rights arrives at the conclusion that, although the prohibition of torture is of overriding importance and may be considered to have acquired the status of *jus cogens*, it does not follow that foreign States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The decision was adopted by a very narrow margin, nine votes against eight. Among the eight judges who dissented were a number of specialists of international law, who considered that the reasoning of the majority did not effectively recognize the primacy of *jus cogens* on any other norms of international law.

European Court of Human Rights (GC), *Al-Adsani* v. *United Kingdom* (Appl. No. 35763/97), judgment of 21 November 2001:

[The applicant, a dual British/Kuwaiti national, went to Kuwait in 1991 as a pilot to serve as a member of the Kuwaiti Air Force and, after the Iraqi invasion, he remained behind as a member of the resistance movement. During that period he came into possession of sex videotapes involving a Sheikh related to the Emir of Kuwait. By some means these tapes entered general circulation, for which the applicant was held responsible by the Sheikh. After the Iraqi armed forces were expelled from Kuwait, in May 1991, the Sheikh and others on two separate occasions took him at gunpoint in a government car and he was beaten and tortured. On 17 May 1991, the applicant returned to the United Kingdom, where he spent six weeks in a hospital recovering from the various ill-treatments inflicted upon him. On 29 August 1992 the applicant instituted civil proceedings in England for compensation against the Sheikh and the State of Kuwait in respect of injury to his physical and mental health caused by torture in Kuwait in May 1991 and threats against his life and well-being made after his return to the United Kingdom on 17 May 1991. The action failed, however, because as a sovereign foreign State, Kuwait could claim immunity of jurisdiction under the State Immunity Act 1978. Article 15 of the 1972 European Convention on State Immunity (Basle Convention), to which the United Kingdom is a party, provides that a Contracting State shall be entitled to immunity if the

proceedings do not fall within one of the exceptions exceptions stated in the Convention; Article 11 of the Basle Convention excludes State immunity for proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred: this exception is replicated in section 5 of the 1978 State Immunity Act. In its judgment of 21 November 2001, the majority of the Court takes the view that a) any positive obligation imposed on the basis of Article 3 ECHR, either to prevent violations of this provision or to provide a remedy when a violation does take place, does not extend to such violations which may have been committed outside the jurisdiction of the United Kingdom; and that b) the right of access to a court (under Art. 6 ECHR) may be limited where this is justified by the need to grant sovereign immunity to a State in civil proceedings, in accordance with the generally recognized rules of public international law on State immunity.]

[The alleged violation of Article 3 of the Convention (prohibiting torture and inhuman or degrading treatments or punishments)]

40. The applicant does not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence. In these circumstances, it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities.

41. It follows that there has been no violation of Article 3 of the Convention in the present case.

[The alleged violation of Article 6 of the Convention (right to a fair trial)]

53. The right of access to a court [implicit in the guarantees of Art. 6 of the Convention (right to a fair trial): see the *Golder* v. *United Kingdom* judgment of 21 February 1975, Series A No. 18, 13–18, §§28–36] is not [...] absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 §1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy* v. *Germany* [GC], No. 26083/94, §59, ECHR 1999–I).

54. The Court must first examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

55. The Court must next assess whether the restriction was proportionate to the aim pursued. It reiterates that the Convention has to be interpreted in the light of the rules set out

in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31 §3 (c) of that treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, *mutatis mutandis*, *Loizidou* v. *Turkey* (merits), judgment of 18 December 1996, *Reports* 1996–VI, 2231, §43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.

56. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 §1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

57. The Court notes that the 1978 Act, applied by the English courts so as to afford immunity to Kuwait, complies with the relevant provisions of the 1972 Basle Convention, which, while placing a number of limitations on the scope of State immunity as it was traditionally understood, preserves it in respect of civil proceedings for damages for personal injury unless the injury was caused in the territory of the forum State. Except insofar as it affects claims for damages for torture, the applicant does not deny that the above provision reflects a generally accepted rule of international law. He asserts, however, that his claim related to torture, and contends that the prohibition of torture has acquired the status of a *jus cogens* norm in international law, taking precedence over treaty law and other rules of international law.

58. Following the decision to uphold Kuwait's claim to immunity, the domestic courts were never required to examine evidence relating to the applicant's allegations, which have, therefore, never been proved. However, for the purposes of the present judgment, the Court accepts that the ill-treatment alleged by the applicant against Kuwait in his pleadings in the domestic courts, namely, repeated beatings by prison guards over a period of several days with the aim of extracting a confession ..., can properly be categorised as torture within the meaning of Article 3 of the Convention ...

59. Within the Convention system it has long been recognised that the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances ... Of all the categories of ill-treatment prohibited by Article 3, 'torture' has a special stigma, attaching only to deliberate inhuman treatment causing very serious and cruel suffering ...

60. Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. Thus, torture is forbidden by Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment requires, by Article 2, that each State Party should take effective legislative, administrative, judicial or other measures to prevent torture in any territory

under its jurisdiction, and, by Article 4, that all acts of torture should be made offences under the State Party's criminal law ... In addition, there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens.* For example, in its judgment of 10 December 1998 in *Furundzija* ..., the International Criminal Tribunal for the Former Yugoslavia referred, *inter alia*, to the foregoing body of treaty rules and held that '[b]ecause of the importance of the values it protects, this principle [proscribing torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules'. Similar statements have been made in other cases before that tribunal and in national courts, including the House of Lords in the case of *ex parte Pinochet (No. 3)* ...

61. While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in *Furundzija* and *Pinochet*, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred to (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Articles 2 and 4 of the UN Convention) relates to civil proceedings or to State immunity.

62. It is true that in its Report on Jurisdictional Immunities of States and their Property ... the working group of the International Law Commission noted, as a recent development in State practice and legislation on the subject of immunities of States, the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition on torture. However, as the working group itself acknowledged, while national courts had in some cases shown some sympathy for the argument that States were not entitled to plead immunity where there had been a violation of human rights norms with the character of *jus cogens*, in most cases (including those cited by the applicant in the domestic proceedings and before the Court) the plea of sovereign immunity had succeeded.

63. The ILC working group went on to note developments, since those decisions, in support of the argument that a State may not plead immunity in respect of human rights violations: first, the exception to immunity adopted by the United States in the amendment to the Foreign Sovereign Immunities Act (FSIA) which had been applied by the United States courts in two cases [this exception, introduced by section 221 of the Anti-Terrorism and Effective Death Penalty Act of 1996, applies in respect of a claim for damages for personal injury or death caused by an act of torture, extra-judicial killing, aircraft sabotage or hostage-taking, against a State designated by the Secretary of State as a sponsor of terrorism, where the claimant or victim was a national of the United States at the time the act occurred]; secondly, the *ex parte Pinochet (No. 3)* judgment in which the House of Lords 'emphasised the limits of immunity in respect of gross human rights violations by State officials'. The Court does not, however, find that either of these developments provides it with a firm basis on which to conclude that the immunity of States *ratione personae* is no longer enjoyed in respect of civil liability for claims of acts of

torture, let alone that it was not enjoyed in 1996 at the time of the Court of Appeal's judgment in the present case.

64. As to the amendment to the FSIA, the very fact that the amendment was needed would seem to confirm that the general rule of international law remained that immunity attached even in respect of claims of acts of official torture. Moreover, the amendment is circumscribed in its scope: the offending State must be designated as a State sponsor of acts of terrorism, and the claimant must be a national of the United States. The effect of the FSIA is further limited in that after judgment has been obtained, the property of a foreign State is immune from attachment or execution unless one of the statutory exceptions applies ...

65. As to the *ex parte Pinochet (No. 3)* judgment ..., the Court notes that the majority of the House of Lords held that, after the UN Convention and even before, the international prohibition against official torture had the character of *jus cogens* or a peremptory norm and that no immunity was enjoyed by a torturer from one Torture Convention State from the criminal jurisdiction of another. But, as the working group of the ILC itself acknowledged, that case concerned the immunity *ratione materiae* from criminal jurisdiction of a former head of State, who was at the material time physically within the United Kingdom. As the judgments in the case made clear, the conclusion of the House of Lords did not in any way affect the immunity *ratione personae* of foreign sovereign States from the civil jurisdiction in respect of such acts (see in particular, the judgment of Lord Millett ...). In so holding, the House of Lords cited with approval the judgments of the Court of Appeal in *Al-Adsani* itself.

66. The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

67. In these circumstances, the application by the English courts of the provisions of the 1978 Act to uphold Kuwait's claim to immunity cannot be said to have amounted to an unjustified restriction on the applicant's access to a court.

[The Court decided by nine votes to eight that Article 6 §1 ECHR has not been violated. A joint dissenting opinion was filed by Mr Rozakis and Mr Caflisch joined by Mr Wildhaber, Mr Costa, Mr Cabral Barreto and Mrs Vajić. Two separate dissenting opinions were filed, in addition, by Mr Ferrari Bravo and Mr Loucaides. Excerpts of the first dissenting opinion follow.]

Joint dissenting opinion filed by Mr Rozakis and Mr Caflisch joined by Mr Wildhaber, Mr Costa, Mr Cabral Barreto and Mrs Vajić:

By accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognise that it is hierarchically higher than any other rule of international law, be it general or particular, customary or conventional, with the exception, of course, of other *jus cogens* norms. For the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.

The Court's majority do not seem, on the other hand, to deny that the rules on State immunity; customary or conventional, do not belong to the category of *jus cogens*; and rightly so, because it is clear that the rules of State immunity, deriving from both customary and conventional international law, have never been considered by the international community as rules with a hierarchically higher status. It is common knowledge that, in many instances, States have, through their own initiative, waived their rights of immunity; that in many instances they have contracted out of them, or have renounced them. These instances clearly demonstrate that the rules on State immunity do not enjoy a higher status, since *jus cogens* rules, protecting as they do the '*ordre public*', that is the basic values of the international community, cannot be subject to unilateral or contractual forms of derogation from their imperative contents.

The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions. In the circumstances of this case, Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of that jurisdiction (the United Kingdom) cannot accept a plea of immunity, or invoke it *ex officio*, to refuse an applicant adjudication of a torture case. Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of *jus cogens*.

The majority, while accepting that the rule on the prohibition of torture is a *jus cogens* norm, refuse to draw the consequences of such acceptance.

In the following case, the dissenting opinion of ad hoc judge Van den Wyngaert relies on the *jus cogens* character of war crimes and crimes against humanity to conclude that the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs should be set aside in favour of allowing for prosecution to take place where such crimes are concerned. Her reasoning echoes to a large extent that of the House of Lords in the *Pinochet* case and that of the dissenting opinion appended to the judgment of the European Court of Human Rights in *Al-Adsani*.

International Court of Justice, case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v. *Belgium)*, I.C.J. Reports 2002, 3 (judgment of 14 February 2002):

[The DRC filed an application against Belgium following the issuance of an international arrest on 11 April 2000 by a Belgian investigating judge against the then Minister for Foreign Affairs

in office of the Democratic Republic of the Congo, Mr Abdulaye Yerodia Ndombasi. The application contended that Belgium had violated the 'principle that a State may not exercise its authority on the territory of another State', the 'principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations', as well as 'the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations'. The arrest warrant delivered by the Belgian investigating judge charged him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity. These crimes were punishable in Belgium under the Law of 16 June 1993 concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto, as amended by the Law of 10 February 1999 concerning the Punishment of Serious Violations of International Humanitarian Law, which provides for a universal jurisdiction of Belgian courts to prosecute certain international crimes.

The International Court of Justice concluded by thirteen votes to three that 'the issue against Mr Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law'. Without reaching the issue of whether Belgium was authorized to apply an extraterritorial legislation, the Court took the view, first, 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. That immunity and that inviolability protect the individual concerned against any act of authority of another State would hinder him her in the performance of his or her duties' (para. 54). It then found, having 'carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation', that it was 'unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity' (para. 58).]

Dissenting opinion of Judge Van den Wyngaert, judge *ad hoc* (para. 28):

The Court ... adopts a formalistic reasoning, examining whether there is, under customary international law, an international crimes exception to the – wrongly postulated – rule of immunity for incumbent Ministers under customary international law (judgment, para. 58). By adopting this approach, the Court implicitly establishes a hierarchy between the rules on immunity (protecting incumbent former Ministers) and the rules on international accountability (calling for the investigation of charges against incumbent Foreign Ministers charged with war crimes and crimes against humanity).

By elevating the former rules to the level of customary international law in the first part of its reasoning, and finding that the latter have failed to reach the same status in the second part of its reasoning, the Court does not need to give further consideration to the status of the principle of international accountability under international law. As a result, the Court does not further examine the status of the principle of international accountability. Other courts, for example the House of Lords in the *Pinochet* case [see above] and the European Court of Human Rights in the *Al-Adsani* case [see above], have given more thought and consideration to the balancing of the relative normative status of international *jus cogens* crimes and immunities.

Questions concerning international accountability for war crimes and crimes against humanity and that were not addressed by the International Court of Justice include the following. Can international accountability for such crimes be considered to be a general principle of law in the sense of Article 38 of the Court's Statute? Should the Court, in reaching its conclusion that there is no international crimes exception to immunities under international law, not have given more consideration to the factor that war crimes and crimes against humanity have, by many, been considered to be customary international law crimes (see: American Law Institute, *Restatement of the Law Third. The Foreign Relations Law of the United States* (St Paul, Minn.: American Law Institute Publishers, 1987), vol. 1, para. 404, Comment; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (The Hague, Kluwer Law International, 1999); T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989); T. Meron, 'International Criminalization of Internal Atrocities', *American Journal of International Law* 89 (1995), 558; A. H. J. Swart, *De berechting van internationale misdrijven* (Deventer: Gouda Quint, 1996), p. 7; ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Tadic*, paras. 96–127 and 134 (common Art. 3))? Should it not have considered the proposition of writers who suggest that war crimes and crimes against humanity are *jus cogens* crimes (M. C. Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', *Law and Contemporary Problems*, 59 4 (1996), 63–74; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (The Hague: Kluwer Law International, 1999), pp. 210–17; C. J. R. Dugard, *Opinion In: Re Bouterse*, para. 4.5.5, to be consulted at: www.icj.org/objectives/opinion.htm; K. C. Randall, 'Universal Jurisdiction under International Law', *Texas Law Review*, 66 (1988), 829–32; ICTY, judgment, 10 December 1998, *Furundzija*, para. 153 (torture)), which, if it were correct, would only enhance the contrast between the status of the rules punishing these crimes and the rules protecting suspects on the ground of immunities for incumbent Foreign Ministers, which are probably not part of *jus cogens*?

1.3. Question for discussion: human rights as *jus cogens* norms and the normative hierarchy theory

Both the dissenting opinion of ad hoc Judge Van den Wyngaeert and the dissent expressed in the *Al-Adsani* v. *United Kingdom* case are based on the idea that rules regarding immunity should be set aside in order to recognize the primacy of human rights norms that have acquired the status of *jus cogens*. Indeed, although *Al-Adsani* v. *United Kingdom* was heavily debated

among the members of the European Court of Human Rights, other cases presented to the Court that raised a question of immunity were far less controversial, because at stake were ECHR rights other than the right not to be subjected to torture or inhuman or degrading treatment or punishment (for a discussion of this range of cases, see M. Kloth, 'Immunities and the Right of Access to Court under the European Convention on Human Rights', *European Law Review*, 27 (2002), 33). Yet, if the Court in *Al-Adsani* had arrived at the conclusion that the ECHR was violated by the United Kingdom, would this have opened the floodgates for a large number of claims unrelated to torture or inhuman or degrading treatment or punishment? Would the position adopted by the dissenting judges in *Al-Adsani* be practical? Consider the following view:

Lee M. Caplan, 'State Immunity, Human Rights, and *Jus Cogens*: a Critique of the Normative Hierarchy Theory', *American Journal of International Law*, 97 (2003), 741 at 773:

The undefined character of *jus cogens*, coupled with the general applicability of the normative hierarchy theory, which invests all peremptory norms with immunity-stripping potential, may present problems for the courts. Requiring application of the theory beyond cases of genocide, slavery and torture would place national courts in an awkward position. The theory not only would deprive the forum state of its right to regulate access to its own courts, but also would oblige them to determine whether a particular norm of international law had attained the status of *jus cogens*, a task that international legal scholars have grappled with for decades with only limited success. Further, the normative hierarchy theory logically requires courts to treat all violations of peremptory norms uniformly, even violations of norms that do not implicate human rights but are arguably *jus cogens*, such as *pacta sunt servanda*. In addition, allowing the courts to determine the parameters of *jus cogens* through application of the normative hierarchy theory may undermine the principle of separation of powers, in some case inappropriately transferring foreign-policymaking power from the political branches of government to the judiciary. Finally, ... adoption of the normative hierarchy theory could be the first step on a slippery slope that begins with state immunity from jurisdiction but could quickly extend to state immunity from execution against sovereign property and ultimately threaten the 'orderly international co-operation' between states.

(c) Serious breaches of *jus cogens* norms

The International Law Commission's Articles on Responsibility of States for internationally wrongful acts provide that a 'serious breach' by a State of an obligation arising under a peremptory norm of general international law – i.e. 'a gross or systematic failure by the responsible State to fulfil the obligation' – imposes on all States an obligation to co-operate in order to put an end to such a breach; an obligation not to recognize as lawful a situation created by such a breach; and an obligation not to 'render aid or assistance in maintaining that situation' (Arts. 40 and 41 of the ILC's Articles on Responsibility of States for internationally wrongful acts, *Official Records*

of the General Assembly, Fifty-sixth Session, Supplement 10 (A/56/10)). This seems to be the position expressed by the International Court of Justice in the Advisory Opinion it delivered on 9 July 2004 on the question of the legal consequences of the construction of a wall in the Occupied Palestinian Territory (for a reminder of the circumstances in which the Advisory Opinion was delivered, see chapter 2, section 1). After having found that the construction of the wall on Palestinian territory amounts to a violation of the right of the Palestinian peoples to self-determination, the Court states the following:

International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, 136 at 199:

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

1.4. Questions for discussion: treating human rights as *jus cogens* norms

1. There remain controversies both about the list of human rights that have acquired the status of *jus cogens*, and about the consequences that follow such characterization. Are the two questions linked? Should the list of norms considered to be peremptory norms of international law vary, depending on the precise consequence that one seeks to attach to this qualification? For instance, could there be a long list of human rights norms treated as *jus cogens* for the purpose of finding void any treaty conflicting with such norms, but a shorter list of norms which could justify setting aside rules relating to immunity where such rules appear to create obstacles to their full implementation?
2. What do the cases above teach us about how a norm – such as, in these cases, the prohibition of torture – evolves into one which is considered to have acquired the status of *jus cogens*? Has

the prohibition of torture evolved into a norm 'accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted', as defined in Article 53 of the Vienna Convention on the Law of Treaties, or is this rather the result of judicial law-making? Is there anything specific to the prohibition of torture, distinguishing it from other human rights norms, that would justify treating it, like a few other such norms, as *jus cogens*, while excluding other human rights norms from this qualification?

3. In the case of *Al-Adsani* v. *United Kingdom*, how would you characterize the disagreement between the majority of the European Court of Human Rights and the dissenting judges? Does this disagreement stem from a difference in opinion as regards the consequences to be drawn from the *jus cogens* character of the prohibition of torture? Or is it rather that the issue presented to the Court was framed differently by the majority and by the dissenting judges?
4. If indeed the prohibition of torture has the status of a *jus cogens* norm, this means, at a minimum, that any treaty conflicting with this prohibition will be treated as void: this would be the case, for instance, of a treaty through which two States would mutually undertake to extradite individuals suspected of having committed certain crimes even though they may be subjected to torture in the State requesting the extradition. But the cases above illustrate that the consequences of the *jus cogens* character of the prohibition of torture reach much further. What are the limits to such an extension? Does the *jus cogens* character of a norm justify setting aside all other rules of international law that may be an obstacle to its effective implementation, for example rules relating to the limits of State jurisdiction or to immunities? May a State ignore all such rules, in the name of seeking to improve compliance with a norm having a *jus cogens* status?

4.3 The *erga omnes* character of human rights obligations

Human rights treaties do not have as their primary goal the exchange of reciprocal rights and obligations between the contracting States (see further section 4.4. below). In contrast to diplomatic protection – which one State has a right to exercise in favour of its nationals under the jurisdiction of another State – the respect for human rights in one State therefore is of interest to no other State in particular. It is perhaps paradoxical therefore that such respect is of interest to the international community as a whole, allowing each State to pursue remedies against the State alleged to have violated its obligations under the human rights recognized under customary international law or as general principles of law. Article 48(1)(b) of the International Law Commission's Articles on the Responsibility of States for internationally wrongful acts (invocation of responsibility by a State other than an injured State), provides that 'Any State other than an injured State is entitled to invoke the responsibility of another State ... if ... the obligation breached is owed to the international community as a whole.' Any State therefore 'may claim from the responsible State: (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition ...; and (b) Performance of the obligation of reparation ..., in the interest of the injured State

or of the beneficiaries of the obligation breached'. As noted above, the International Court of Justice has mentioned, among the obligations which are *erga omnes* (owed to the international community as a whole), not only the prohibition of acts of aggression and of genocide, but also the right to self-determination; the rules of humanitarian international law applicable in armed conflict; and even 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination' (Case concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, Second phase (judgment of 5 February 1970), I.C.J. Reports 1970, 3, 32 (paras. 33–34): see above, section 4.2., b)).

International Court of Justice, *Legal Consequences cf the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, 136, at 199:

155. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes.* As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature 'the concern of all States' and, 'In view of the importance of the rights involved, all States can be held to have a legal interest in their protection' *(Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment,* I.C.J. Reports 1970, 32, para. 33). The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

156. As regards the first of these, the Court has already observed ... that in the *East Timor* case, it described as 'irreproachable' the 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' (I.C.J. Reports 1995, 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), ... 'Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle ...'

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* it stated that '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" ...', that they 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' (I.C.J. Reports 1996 (I), 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.

Whether all human rights obligations recognized in general public international law are 'owed to the international community as a whole' remains debated. It would be incorrect to limit the range of rights imposing *erga omnes* obligations to those which have the status of *jus cogens*, which constitutes a narrower category, as stated by G. Arangio-Ruiz: '... the concept of *erga omnes* obligation is not characterized by the

importance of the interest protected by the norms – this aspect being typical of *jus cogens* – but rather by the "legal indivisibility" of the content of the obligation, namely by the fact that the rule in question provides for obligations which bind simultaneously each and every addressee with respect to all others. This legal structure is typical not only of peremptory norms, but also of other norms of general international law and of a number of multilateral treaty rules (*erga omnes partes* obligations)' (Fourth Report on State Responsibility, A/CN.4/444/Add. 1, at 31 (1992)). Neither should too much weight be attached to the adjective 'basic' before the expression 'rights of the human person' in the *dictum* of the *Barcelona Traction* Case, since such an expression is generic and should be seen as a mere paraphrase to designate the notion of human rights as 'fundamental' in the guarantees they provide. On the other hand, although some authors have taken the view that all human rights internationally recognized should be considered as imposing *erga omnes* obligations (F. Ermacora, in B. Simma *et al*. (eds.), *The Charter of the United Nations: a Commentary* (Oxford University Press, 1995), at pp. 152–3; I. Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (Antwerp-Oxford: Intersentia-Hart, 2001), chapter IV), this would seem to be contradicted by the judgment delivered by the International Court of Justice in the *Barcelona Traction* Case itself. While recognizing that human rights include protection against denial of justice, the Court then added:

International Court of Justice, case concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, Second phase (judgment), I.C.J. Reports 1970 3, 47 (para. 91):

However, 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; thus, within the Council of Europe, of which Spain is not a member [at the time of the judgment], the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim.

This statement would be in complete contradiction with para. 34 of the same judgment referring to 'the principles and rules concerning the basic rights of the human person' as imposing *erga omnes* obligations if there were no distinction between core human rights which do impose such obligations, and other rights of the individual, which may only be protected in inter-State proceedings through the traditional channel of diplomatic protection: the right of the shareholders to the protection of the investments made through the establishment of a company with a separate legal personality, which were at stake in *Barcelona Traction* litigation, clearly belongs to the second category. It is true that Section 703(2) of the 1987 *Restatement* of the American Law Institute does provide that all human rights recognized in customary international law impose

obligations *erga omnes*: 'Any State may pursue international remedies against any other state for a violation of the customary law of human rights rights', it notes, since 'the customary law of human rights are *erga omnes*'. The comment attached to this clause explains that, as regards human rights recognized in customary international law, 'the international obligation runs equally to all other states, with no state a victim of the violation more than any other. Any state, therefore, may make a claim against the violating state.' However, the list of rights concerned, as we have seen (section 4.1., b)), is in fact quite limited, and certainly does not encompass the full range of the rights listed in the international bill of rights.

The effect of obligations being *erga omnes* concerns the question of standing: all States have a legal interest in using any available remedies in order to ensure that the obligations are complied with. However, in order for remedies to be used against the infringing State, the forum must have jurisdiction over the issue. For instance, while a number of international and regional human rights instruments provide for the possibility of inter-State complaints, these typically require a declaration of acceptance by the defending State, and are subject to a condition of reciprocity (for details, see chapter 9). Article 41 of the International Covenant on Civil and Political Rights thus provides that any State party to this instrument 'may at any time declare ... that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.' The Human Rights Committee would not be authorized, under the pretext that the civil and political rights enumerated in the ICCPR impose obligations *erga omnes*, to ignore the limits to its jurisdiction which are imposed by this provision, for instance in order to deal with a communication presented by a State which has not itself accepted inter-state communications to be directed against it.

The *erga omnes* character of human rights obligations sometimes has been linked to the fact that human rights are a recognized exception to the principle of non-interference with the domestic affairs of States, as expressed in Article 2(7) of the UN Charter. Consider for instance the Resolution adopted on 13 September 1989 by the International Law Institute, which concerns all measures – 'diplomatic, economic and other' – which may be adopted by any State, where human rights are violated in another State:

International Law Institute, 'The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States', *Institut de Droit International Annuaire*, 63 (1989), 338:

The Institute of International Law, ...

Considering [that] the protection of human rights as a guarantee of the physical and moral integrity and of the fundamental freedom of every person has been given expression in both the

constitutional systems of States and in the international legal system, especially in the charters and constituent instruments of international organizations;

That the members of the United Nations have undertaken to ensure, in co-operation with the Organization, universal respect for and observance of human rights and fundamental freedoms, and that the General Assembly, recognizing that a common understanding of these rights and freedoms is of the highest importance for the full realization of this undertaking, has adopted and proclaimed the Universal Declaration of Human Rights on 10 December 1948;

That frequent gross violations of human rights, including those affecting ethnic, religious and linguistic minorities, cause legitimate and increasing outrage to public opinion and impel many States and international organizations to have recourse to various measures to ensure that human rights are respected;

That these reactions, as well as international doctrine and jurisprudence, bear witness that human rights, having been given international protection, are no longer matters essentially within the domestic jurisdiction of States;

That it is nonetheless important, in the interest of maintaining peace and friendly relations between sovereign States as well as in the interest of protecting human rights, to define more precisely the conditions and limitations imposed by international law on the measures that may be taken by States and international organizations in response to violations of human rights

Adopts the following Resolution:

Article 1. Human rights are a direct expression of the dignity of the human person. The obligation of States to ensure their observance derives from the recognition of this dignity as proclaimed in the Charter of the United Nations and in the Universal Declaration of Human Rights.

This international obligation, as expressed by the International Court of Justice, is '*erga omnes*'; it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world.

Article 2. 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.

Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations in case of violation of the obligations assumed by the members of the Organization, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any other State which has violated the obligation set forth in Article 1, provided such measures are permitted under international law and do not involve the use of armed force in violation of the Charter of the United Nations. These measures cannot be considered an unlawful intervention in the internal affairs of that State.

Violations justifying recourse to the measures referred to above shall be viewed in the light of their gravity and of all the relevant circumstances. Measures designed to ensure the collective protection of human rights are particularly justified when taken in response to especially grave violations of these rights, notably large-scale or systematic violations, as well as those infringing rights that cannot be derogated from in any circumstances.

Article 3. Diplomatic representations as well as purely verbal expressions of concern or disapproval regarding any violations of human rights are lawful in all circumstances.

Article 4. All measures, individual or collective, designed to ensure the protection of human rights shall meet the following conditions:

(1) except in case of extreme urgency, the State perpetrating the violation shall be formally requested to desist before the measures are taken;
(2) measures taken shall be proportionate to the gravity of the violation;
(3) measures taken shall be limited to the State perpetrating the violation;
(4) the 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.

Article 5. An offer by a State, a group of States, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies to another State in whose territory the life or health of the population is seriously threatened cannot be considered an unlawful intervention in the internal affairs of that State. However, such offers of assistance shall not, particularly by virtue of the means used to implement them, take a form suggestive of a threat of armed intervention or any other measure of intimidation; assistance shall be granted and distributed without discrimination.

States in whose territories these emergency situations exist should not arbitrarily reject such offers of humanitarian assistance.

Article 6. The provisions of this Resolution apply without prejudice to the procedures prescribed in matters of human rights by the terms of or pursuant to the constitutive instruments and the conventions of the United Nations and of specialized agencies or regional organizations.

Article 7. It is highly desirable to strengthen international methods and procedures, in particular methods and procedures of international organizations, intended to prevent, punish and eliminate violations of human rights.

4.4 Human rights treaties as non-contractual in nature

Human rights treaties have an 'objective' character in that they are not reducible to bilateral exchanges of advantages between the contracting States (on the specificity of human rights treaties from this point of view, see E. Schwelb, 'The Law of Treaties and Human Rights', *Archiv des Völkerrechts*, 16 1 (1973), reprinted in W. M. Reisman and B. Weston (eds.), *Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal* (New York: Free Press, 1976), at p. 262; or M. Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', *European Journal of International Law*, 11, No. 3 (2000), 489–519). The principle has been put concisely by the Human Rights Committee: 'Such treaties, and the [International Covenant on Civil and Political Rights] specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights' (Human Rights Committee, General Comment No. 24 (1994), *Issues relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant*, at para. 17). The idea is not a new one. Consider the following statements:

International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, 19 (28 May 1951):

[The 1948 Convention on the Prevention and Punishment of the Crime of Genocide] was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.

European Commission on Human Rights, *Austria* v. *Italy (the 'Pfunders' Case)*, Appl. No. 788/60, *European Convention on Human Rights Yearbook*, 4 (1961), 116 at 140:

[The] purpose of the High Contracting Parties in concluding the [European Convention on Human Rights] was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realize the aims and ideals of the Council of Europe ... and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideas, freedom and the rule of law. [Thus,] 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.

Inter-American Court of Human Rights, *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, 24 September 1982, Inter-American Court of Human Rights (Series A) No. 2 (1982) at para. 29:

[M]odern 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.

The Vienna Convention on the Law of Treaties recognizes the specificity of human rights treaties by stating in Article 60(5) that the principle according to which the material breach of a treaty by one party authorizes the other party to terminate or suspend the agreement does not apply to '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'. The reason for this is obvious: the rule allowing termination or suspension of a treaty in cases of material breach is based on the idea of reciprocity, where the obligations imposed on one party are set for the benefit of the other parties to the treaty. But the beneficiaries of human rights treaties are not the other parties: they are the population under the jurisdiction of the States concerned. It would not only be unjustifiable for State A to take the population under its jurisdiction as hostages (threatening to violate their rights if State B violates the rights of its own peoples); this would also be totally ineffective as a means of dissuading States from breaching their obligations: why would State B care about the sake of the population under the jurisdiction of State A, if that population is led to suffer as a result of counter-measures adopted by that State? See further on this, R. Higgins, 'Human Rights: Some Questions of Integrity' (mistakenly titled 'The United Nations: Still a Force for Peace' due to an editorial error), *Modern Law Review*, 52, No. 1 (1989), 1–21 at 11.

An important consequence of this specific character of human rights treaties is the role which monitoring bodies, or courts, are to play in the supervision of human rights treaties. This role shall be particularly important under such treaties since the other States parties can hardly be counted upon to exercise the kind of horizontal control which, in usual treaties, provides the required disciplining function. This is illustrated, for instance, by the relatively few objections raised to the reservations filed by States upon entering a human rights treaty, or by the striking underuse by States of mechanisms allowing for inter-State complaints, both at the universal level and even, with some exceptions, at the regional level. It is therefore fitting that, in international human rights law, the function of international judicial or quasi-judicial bodies has been so prominent, in comparison to the classical (diplomatic) means of treaty supervision and interpretation. The controversies surrounding the question of reservations to human rights treaties provide an excellent illustration of this. It is to these controversies that we now turn.

4.5 Reservations to human rights treaties

A reservation is 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State' (Article 2 §1(d) of the Vienna Convention on the Law of Treaties of 23 May 1969). What matters is the intention of the State, rather than the form of the instrument, as noted by the Human Rights Committee: 'If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty

in its application to the State, it constitutes a reservation. Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation' (General Comment No. 24, *Issues relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant*, 4 November 1994, para. 4). The question whether reservations to multilateral human rights treaties should be treated under the same regime as reservations to classical treaties is one to which the International Court of Justice made an important contribution when it delivered its Advisory Opinion on the reservations to the Genocide Convention (a). The Vienna Convention on the Law of Treaties subsequently confirmed the solution proposed by the International Court of Justice. However, it has been recognized, both by the Inter-American Court of Human Rights and by the European Court of Human Rights, that human rights treaties were specific and that the general rules regarding reservations to multilateral treaties might therefore not apply to those instruments (b). These positions have led to a considerable discussion in doctrine (see, e.g. B. Simma, 'Reservations to Human Rights Treaties – Some Recent Developments', in Gerhard Hafner *et al.* (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern* (The Hague: Kluwer Law International, 1998), pp. 659–82; J. P. Gardner and C. Chinkin (eds.), *Human Rights as General Norms and a State's Right to Opt out: Reservations and Objections to Human Rights Conventions* (London: British Institute of International and Comparative Law, 1997), p. 207; and R. Baratta and I. Ziemele (eds.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Leiden: Martinus Nijhoff, 2004), p. 319). When the Human Rights Committee transposed the doctrine regarding the specificity of human rights treaties in the context of the International Covenant on Civil and Political Rights, this was resisted by States, who denounced this position as exceeding the competence of the Committee under the ICCPR (c).

(a) The regime of reservations in international law

We may take as departure point the Advisory Opinion adopted by the International Court of Justice in response to the request of the UN General Assembly, which sought the opinion of the Court on the following questions relating to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification, the General Assembly asked: 'I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others? II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and: (a) The parties which object to the reservation? (b) Those which accept it? III. What would be the legal effect as regards the answer to Question I if an objection to a reservation is made: (a) By a signatory which has not yet ratified? (b) By a State entitled to sign or accede but which has not yet done so?' The following excerpts concern the first of these questions:

International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, 19 (28 May 1951):

It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison d'etre of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.

This concept, which is directly inspired by the notion of contract, is of undisputed value as a principle. However, as regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention. Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations-all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.

It must also be pointed out that although the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations. This observation is confirmed by the great number of reservations which have been made of recent years to multilateral conventions.

In this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. Account should also be taken of the fact that the absence of such an article or even the decision not to insert such an article can be explained by the desire not to invite a multiplicity of reservations. The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.

Although it was decided during the preparatory work not to insert a special article on reservations, it is none the less true that the faculty for States to make reservations was contemplated at successive stages of the drafting of the Convention ...

Furthermore, the faculty to make reservations to the Convention appears to be implicitly admitted by the very terms of Question I.

The Court recognizes that an understanding was reached within the General Assembly on the faculty to make reservations to the Genocide Convention and that it is permitted to conclude therefrom that States becoming parties to the Convention gave their assent thereto. It must now determine what kind of reservations may be made and what kind of objections may be taken to them.

The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, inter se, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). 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 obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'etre of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

The foregoing considerations, when applied to the question of reservations, and more particularly to the effects of objections to reservations, lead to the following conclusions.

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and 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 make, 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.

It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.

On the other hand, it has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view, however, cannot prevail if, having regard to the character of the convention, its purpose and its mode of adoption, it can be established that the parties intended to derogate from that rule by admitting the faculty to make reservations thereto.

It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law. The considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits one to state that such a rule exists, determining with sufficient precision the effect of objections made to reservations. In fact, the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule. It cannot be recognized that the report which was adopted on the subject by the Council of the League of Nations on June 17th, 1927, has had this effect. At best, the recommendation made on that date by the Council constitutes the point of departure of an administrative practice which, after being observed by the Secretariat of the League of Nations, imposed itself, so to speak, in the ordinary course of things on the Secretary-General of the United Nations in his capacity of depositary of conventions concluded under the auspices of the League. But it cannot be concluded that the legal problem of the effect of objections to reservations has in this way been solved. The opinion of the Secretary-General of the United Nations himself is embodied in the following passage of his report of September 21st, 1950: 'While it is universally recognized that the consent of the other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State's objecting to a reservation.'

It may, however, be asked whether the General Assembly of the United Nations, in approving the Genocide Convention, had in mind the practice according to which the Secretary-General, in exercising his functions as a depositary, did not regard a reservation as definitively accepted until it had been established that none of the other contracting States objected to it. If this were the case, it might be argued that the implied intention of the contracting parties was to make the effectiveness of any reservation to the Genocide Convention conditional on the assent of all the parties.

The Court does not consider that this view corresponds to reality. It must be pointed out, first of all, that the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom. It must also be pointed out that there existed among the American States members both of the United Nations and of the Organization of American States, a different practice which goes so far as to permit a reserving State to become a party irrespective of the nature of the reservations or of the objections raised by other contracting States. The preparatory work of the Convention contains nothing to justify the statement that the contracting States implicitly had any definite practice in mind. Nor is there any such indication in the subsequent attitude of the contracting States: neither the reservations made by certain States nor the position adopted by other States towards those reservations permit the conclusion that assent to one or the other of these practices had been given. Finally, it is not without interest to note, in view of the preference generally said to attach to an established practice, that the debate on reservations to multilateral treaties which took place in the Sixth Committee at the fifth session of the General Assembly reveals a profound divergence of views, some delegations being attached to the idea of the absolute integrity of the Convention, others favouring a more flexible practice which would bring about the participation of as many States as possible.

It results from the foregoing considerations that Question I, on account of its abstract character, cannot be given an absolute answer. The appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case.

The Advisory Opinion of the International Court of Justice on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* sparked an important literature (see, e.g. W. W. Bishop, 'Reservations to the Convention on Genocide. International Court of Justice, Advisory Opinion, May 28, 1951', *American Journal of International Law*, 45 (1951), 579–90; Sir G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points', *British Yearbook of International Law*, 33 (1957), 202–93, esp. 272–93; H. Lauterpacht, 'Some Possible Solutions to the Problem of Reservations to Treaties' in *The Grotius Society Transactions for the Year 1953*, 39 (1954), 97–118; P.-H. Imbert, *Les réserves aux traités multilatéraux. Evolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de justice le 28 mai 1951* (Paris: Pedone, 1979)). When the Vienna Convention on the Law of Treaties was drafted, Articles 19–23 relating to reservations clearly sought to echo the Court's views:

Vienna Convention on the Law of Treaties

Article 19 Formulation of reservations

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.

Article 20 Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
   (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
   (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
   (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.
5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21 Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
   (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
   (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When 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.

Article 22 Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.
2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.
3. Unless the treaty otherwise provides, or it is otherwise agreed:
   (a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;
   (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23 Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.
2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.
3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.
4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

(b) Reservations in the Inter-American and European systems

The position of the Inter-American Court of Human Rights

Article 75 of the American Convention on Human Rights allows for reservations provided they are 'in conformity with the provisions of the Vienna Convention on the Law of Treaties [of 1969]'. The explicit reference to the Vienna Convention would suggest a strict adherence to the general regime of reservations for multilateral treaties. The Inter-American Commission of Human Rights requested an Advisory Opinion of the Court concerning the consequences of reservations on the entry into force of the Convention. In its application, the Commission noted that under the general regime – and particularly under the provisions of Article 20(4)(c) and (5) of the Vienna Convention – a treaty's entry into force could depend on the acceptance of the reservation by other States. In deciding that this was not the case, the Court relied on the special nature of human rights treaties:

Inter-American Court of Human Rights, Advisory Opinion OC-2/82 of 24 September 1982 on the effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75), Series A, No. 2:

26. Having concluded that States ratifying or adhering to the Convention may do so with any reservations that are not incompatible with its object and purpose, the Court must now determine which provisions of Article 20 of the Vienna Convention apply to reservations made to the Convention. The result of this inquiry will of necessity also provide the answer to the question posed by the Commission. This is so because, if under the Vienna Convention reservations to the Convention are not deemed to require acceptance by the other States Parties, then for the here relevant purposes Article 74 of the Convention applies and a State ratifying or adhering to it with or without a reservation is deemed to be a State Party as of the date of the deposit of the instrument of ratification or adherence. [Vienna Convention, Art. 20 (1)] On the other hand, if acceptance of the reservation is required under the Vienna Convention, a reserving State would be deemed to become a State Party only on the date when at least one other State Party has accepted the reservation either expressly or by implication. [Vienna Convention, Art. 20(4)(c) and (5)] ...

28. In deciding whether the Convention envisages the application of paragraph 1 or paragraph 4 of Article 20 of the Vienna Convention, the Court notes that the principles enunciated in Article 20(4) reflect the needs of traditional multilateral international agreements which have as their object the reciprocal exchange, for the mutual benefit of the States Parties, of bargained for rights and obligations. In this context, and given the vastly increased number of States comprising the international community today, the system established by Article 20(4) makes considerable sense ...

29. The Court must emphasize, however, 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 ...

31. These views about the distinct character of humanitarian treaties and the consequences to be drawn therefrom apply with even greater force to the American Convention whose first two preambular paragraphs read as follows:

'Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states.'

32. It must be emphasized also that the Convention, unlike other international human rights treaties, including the European Convention, confers on private parties the right to file a petition

with the Commission against any State as soon as it has ratified the Convention. (Convention, Art. 44.) By contrast, before one State may institute proceedings against another State, each of them must have accepted the Commision's jurisdiction to deal with inter-State communications. (Convention, Art. 45.) This structure indicates the overriding importance the Convention attaches to the commitments of the States Parties vis-à-vis individuals, which can be readily implemented without the intervention of any other State.

33. Viewed in this light and considering that the Convention was designed to protect the basic rights of individual human beings irrespective of their nationality, against States of their own nationality or any other State Party, the Convention must be seen for what in reality it is: a multilateral legal instrument of framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction.

34. In this context, it would be manifestly unreasonable to conclude that the reference in Article 75 to the Vienna Convention compels the application of the legal regime established by Article 20(4), which makes the entry into force of a ratification with a reservation dependent upon its acceptance by another State. A treaty which attaches such great importance to the protection of the individual that it makes the right of individual petition mandatory as of the moment of ratification, can hardly be deemed to have intended to delay the treaty's entry into force until at least one other State is prepared to accept the reserving State as a party. Given the institutional and normative framework of the Convention, no useful purpose would be served by such a delay.

35. Accordingly, for the purpose of the present analysis, the reference in Article 75 to the Vienna Convention makes sense only if it is understood as an express authorization designed to enable States to make whatever reservations they deem appropriate, provided the reservations are not incompatible with the object and purpose of the treaty. As such, they can be said to be governed by Article 20(1) of the Vienna Convention and, consequently, do not require acceptance by any other State Party.

The Inter-American Court also discussed the issue of reservations in the case of *Hilaire* v. *Trinidad and Tobago*. That case was filed before the Inter-American Court by the Inter-American Commission on Human Rights one day before the denunciation by Trinidad and Tobago of the American Convention on Human Rights – a result of the ruling of the Judicial Committee of the Privy Council in *Pratt and Morgan* v. *Attorney General for Jamaica* (Privy Council Appeal No. 10/1993, 2 November 1994) (see below, box 1.5.) – took effect. In its application, the Inter-American Commission sought a statement from the Court to the effect that the mandatory death penalty was incompatible with the American Convention. In its ruling on preliminary objections, the Inter-American Court considered whether a reservation made to the recognition of compulsory jurisdiction of the Court was compatible with the object and purpose of the treaty. In accepting the jurisdiction of the Court, Trinidad and Tobago had declared that '[a]s regards Article 62 of the Convention, the Government of the Republic of Trinidad and Tobago, recognizes the compulsory jurisdiction of the Inter-American Court of Human Rights, as stated in the said article, only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of

Trinidad and Tobago; and provided that Judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen'. Article 62(2) of the American Convention allows States to accept the jurisdiction of the Court on the 'condition of reciprocity, for a specified period, or for specific cases'. The reservation made by Trinidad and Tobago went considerably further, and in fact amounted to making the exercise of jurisdiction by the Court conditional upon its compatibility to that State's internal legal order.

Inter-American Court of Human Rights, case of *Hilaire* v. *Trinidad and Tobago*, Preliminary Objections, judgment of 1 September 2001, Series C, No. 80:

82. Interpreting the Convention in accordance with its object and purpose, the Court must act in a manner that preserves the integrity of the mechanism provided for in Article 62(1) of the Convention. It would be unacceptable to subordinate the said mechanism to restrictions that would render the system for the protection of human rights established in the Convention and, as a result, the Court's jurisdictional role, inoperative ...

86. [The] purported 'reservation' contains two parts. The first intends to limit the recognition of the Court's compulsory jurisdiction in the sense that said recognition is only valid to the extent that it is 'consistent with the relevant sections' of the Constitution of Trinidad and Tobago. These expressions can lead to numerous interpretations. Nonetheless, it is clear to the Court that they cannot be given a scope that would impede this Tribunal's ability to judge whether the State had or had not violated a provision of the Convention. The second part of the purported restriction relates to the State's 'recognition' of the Court's compulsory jurisdiction so that its judgments do not 'infringe, create or abolish any existing rights or duties of any private citizen' (*sic*). Again, though the precise meaning of this condition is unclear, without a doubt it cannot be utilized with the purpose of suppressing the jurisdiction of the Court to hear and decide an application related to an alleged violation of the State's conventional obligations ...

88. The Court observes that the instrument of acceptance of the Court's compulsory jurisdiction on the part of Trinidad and Tobago is not consistent with the hypothesis stipulated in Article 62(2) of the American Convention. It is general in scope, which completely subordinates the application of the American Convention to the internal legislation of Trinidad and Tobago as decided by its courts. This implies that the instrument of acceptance is manifestly incompatible with the object and purpose of the Convention. As a result, the said article does not contain a provision that allows Trinidad and Tobago to formulate the 'restriction' it made ...

92. The declaration formulated by the State of Trinidad and Tobago would allow it to decide in each specific case the extent of its own acceptance of the Court's compulsory jurisdiction to the detriment of this Tribunal's compulsory functions. In addition, it would give the State the discretional power to decide which matters the Court could hear, thus depriving the exercise of the Court's compulsory jurisdiction of all efficacy.

93. Moreover, accepting the said declaration in the manner proposed by the State would lead to a situation in which the Court would have the State's Constitution as its first point of reference, and the American Convention only as a subsidiary parameter, a situation which would cause a fragmentation of the international legal order for the protection of human rights, and which would render illusory the object and purpose of the Convention.

94. The American Convention and the other human rights treaties are inspired by a set of higher common values (centered around the protection of the human being), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties. The latter govern mutual interests between and among the States parties and are applied by them, with all the juridical consequences that follow there from for the international and domestic systems ...

98. For the foregoing reasons, the Court considers that Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory jurisdiction of the Inter-American Court of Human Rights in virtue of what has been established in Article 62 of the American Convention, because this limitation is incompatible with the object and purpose of the Convention. Consequently, the Court considers that it must dismiss the second and third arguments in the preliminary objection submitted by the State insofar as they refer to the Court's jurisdiction.

The position of the European Court of Human Rights

The views expressed by the Inter-American Court of Human Rights imply both that certain reservations may be invalid, since they would run counter to the object and purpose of the American Convention on Human Rights or to the recognition of the compulsory jurisdiction of the Court, and that it is for the Inter-American Court itself, rather than for the other States parties by the classic mechanism of objections, to decide on the validity of any reservations which any State may have expressed upon ratification or notification of its acceptance of the jurisdiction of the Court. The European Court of Human Rights was even more explicit in the *Belilos* v. *Switzerland* case of 1988 (Eur. Ct. H.R. (plen.), *Belilos* v. *Switzerland*, judgment of 29 April 1988, Series A No. 132). This judgment sparked a number of comments on the doctrine, because it constituted an implicit, albeit unmistakeable, departure from an understanding of the European Convention on Human Rights as a treaty of a traditional kind (see I. Cameron and F. Horn, 'Reservations to the European Convention: the *Belilos* Case', *German Yearbook of International Law*, 33 (1990), 69; S. Marks, 'Reservations Unhinged: the *Belilos* Case before the European Court of Human Rights', *International and Comparative Law Quarterly*, 39 (1990), 300; H. J. Bourguigon, 'The *Belilos* Case: New Lights on Reservations to Multilateral Treaties', *Virginia Journal of International Law*, 29 (1989), 347). In contrast to what is generally the case for multilateral treaties, States parties to human rights instruments generally omit to object to any reservations made by States upon acceding to such instruments, since a human rights treaty does not primarily grant them rights or advantages: rather, as we have seen, such a treaty has an 'objective' character, stipulating rights for the benefit of persons under the jurisdiction of the States parties (see above, section 4.4.). In addition, human rights treaties are often seen as merely embodying, in treaty form, obligations of States which are pre-existing, whether they have their source in customary international law or in the general

principles of law, and which are not at the disposal of States (see above, section 4.1.). These characteristics of human rights treaties may explain the attitude of the European Court of Human Rights in *Belilos* which, after it found the Swiss reservation to Article 6 §1 of the Convention to be invalid, considered that it should be 'severed' from the main undertakings of Switzerland under the Convention.

The context was the following. Upon ratifying the European Convention on Human Rights on 28 November 1974, Switzerland made the following declaration on the interpretation of Article 6 para. 1: 'The Swiss Federal Council considers that the guarantee of fair trial in Article 6, paragraph 1 of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge.' In the *Belilos* case, the Court was called upon to examine this reservation under then Article 64 of the Convention (now 57), which states:

1. Any State may, when signing the Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.
2. Any reservation made under this Article shall contain a brief statement of the law concerned.

The Court considered that it had jurisdiction to examine the validity of the Switzerland's reservation to the ratification of the Convention, citing in this regard Articles 19, 45 and 49 of the Convention, which relate to the powers of the Court (para. 50 of the judgment). It found that the reservation did not comply with the conditions imposed under Article 64 (now 57) of the Convention. The wording of the Swiss declaration, the Court noted, did 'not make it possible for the scope of the undertaking by Switzerland to be ascertained exactly, in particular as to which categories of dispute are included and as to whether or not the "ultimate control by the judiciary" takes in the facts of the case. They can therefore be interpreted in different ways, whereas Article 64 §1 requires precision and clarity. In short, they fall foul of the rule that reservations must not be of a general character' (para. 55); in addition, Switzerland has not included in its reservation a 'brief statement of the law concerned' as required by Article 64 para. 2 (now 57 para. 2) of the Convention, whereas the purpose of this provision, said the Court, 'is to provide a guarantee – in particular for the other Contracting Parties and the Convention institutions – that a reservation does not go beyond the provisions expressly excluded by the State concerned. This is not a purely formal requirement but a condition of substance. The omission in the instant case therefore cannot be justified even by important practical difficulties' (para. 59). The Court concluded that it could go on to proceed with the examination of whether Article 6 para. 1 ECHR had been violated (para. 60):

> [T]he declaration in question does not satisfy two of the requirements of Article 64 of the Convention, with the result that it must be held to be invalid. At the same time, 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 recognised the Court's competence to determine the latter issue, which they argued before it. The Government's preliminary objection must therefore be rejected.

(c) From regional to universal human rights treaties: the doctrine of the Human Rights Committee

The position adopted by the European Court of Human Rights in *Belilos* inspired the Human Rights Committee when it was confronted with the wide-ranging reservations appended by the United States to their accession to the International Covenant on Civil and Political Rights:

Reservations, understandings, and declarations entered by the United States upon ratifying the International Covenant on Civil and Political Rights (8 June 1992):

Reservations:

(1) That article 20 [of the Covenant, providing in particular that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'] does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

(2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age. [As stated in the initial report submitted by the United States to the Human Rights Committee, this reservation has been adopted in consideration of the fact that 'approximately half the states have adopted legislation permitting juveniles aged 16 and older to be prosecuted as adults when they commit the most egregious offences, and because the Supreme Court has upheld the constitutionality of such laws' (CCPR/C/81/Add. 4, 24 August 1994, para. 148)].

(3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States. [Again, the initial report submitted by the United States to the Human Rights Committee states: 'As such proceedings and practices have repeatedly withstood judicial review of their constitutionality in the United States, it was determined to be appropriate for the United States to condition its acceptance of the United Nations Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment on a formal reservation to the effect that the United States considers itself bound to the extent that "cruel, inhuman treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States. For the same reasons, and to ensure uniformity of interpretation as to the obligations of the United States under the Covenant and the Torture Convention on this point, the United States took the [reservation above] to the Covenant' (CCPR/C/81/Add. 4, 24 August 1994, para. 148)].

(4) That because US law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of article 15 [according to which: 'If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby'].

(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14. The United States further reserves to these provisions with respect to States with respect to individuals who volunteer for military service prior to age 18.

Understandings [(5), which relates to the responsibility of the federal government for the measures to be adopted by states and local authorities, has been omitted here: see chapter 2, box 2.1.]:

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status – as those terms are used in article 2, paragraph 1 and article 26 – to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination, in time of public emergency, based 'solely' on the status of race, colour, sex, language, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

(2) That the United States understands the right to compensation referred to in articles 9(5) and 14(6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

(3) That the United States understands the reference to 'exceptional circumstances' in paragraph 2(a) of article 10 to permit the imprisonment of an accused person with

convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.

(4) That the United States understands that subparagraphs 3(b) and (d) of article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3(e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause …

Declarations:

(1) That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.

(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to article 19, paragraph 3 which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

(3) That the United States declares that the right referred to in article 47 [right of all peoples to enjoy and utilize fully and freely their natural wealth and resources] may be exercised only in accordance with international law.

In reaction, the Human Rights Committee adopted a General Comment on the issue of reservations to the International Covenant on Civil and Political Rights (for a discussion, see C. J. Redgwell, 'Reservations to Treaties and Human Rights Committee General Comment No. 24(52)', *International and Comparative Law Quarterly*, 46 (1997), 390–412; on the question whether the specificity of human rights treaties justifies the approach of the Human Rights Committee, see R. Baratta, 'Should Invalid Reservations to Human Rights Treaties be Disregarded?', *European Journal of International Law*, 11 (2000), 413; K. Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights', *European Journal of International Law*, 13 (2002), 437).

Human Rights Committee, General Comment No. 24, *Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994 (CCPR/C/21/Rev.1/Add. 6):

[General approach of the Committee]

6. The absence of a prohibition on reservations [in the text of the Covenant] does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19(3) of the Vienna Convention on the Law of Treaties provides relevant guidance. It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.

[The object and purpose of the Covenant]

7. In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. 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.

9. Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (article 2(1)) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (article 2(2)).

10. The Committee has further examined whether categories of reservations may offend the 'object and purpose' test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character – the prohibition of torture and arbitrary deprivation of life are examples. While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. The Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy. The Covenant also envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, 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.

12. The intention of the Covenant is that the rights contained therein should be ensured to all those under a State party's jurisdiction. To this end certain attendant requirements are likely to be necessary. Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level. Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted.

And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

13. The issue arises as to whether reservations are permissible under the first Optional Protocol [the text of which is silent on the issue of reservations] and, if so, whether any such reservation might be contrary to the object and purpose of the Covenant or of the first Optional Protocol itself. It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognize the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a 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. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.

14. The Committee considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose. The Committee must control its own procedures as specified by the Optional Protocol and its rules of procedure. Reservations have, however, purported to limit the competence of the Committee to acts and events occurring after entry into force for the State concerned of the first Optional Protocol. In the view of the Committee this is not a reservation but, most usually, a statement consistent with its normal competence *ratione temporis.* At the same time, the Committee has insisted upon its competence, even in the face of such statements or observations, when events or acts occurring before the date of entry into force of the first Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date. Reservations have been entered which effectively add an additional ground of inadmissibility under article 5, paragraph 2, by precluding examination of a communication when the same matter has already been examined by another comparable procedure. In so far as the most basic obligation has been to secure independent third party review of the human rights of individuals, the Committee has, where the legal right and the subject-matter are identical under the Covenant and under another international instrument, viewed such a reservation as not violating the object and purpose of the first Optional Protocol ...

[The competence of the Committee to determine the validity of the reservations made to the Covenant or to an additional protocol, and the consequences attached to a finding of invalidity]

16. The Committee finds it important to address which body has the legal authority to make determinations as to whether specific reservations are compatible with the object and purpose of the Covenant. As for international treaties in general, the International Court of Justice has indicated in the Reservations to the Genocide Convention Case (1951) that a State which objected to a reservation on the grounds of incompatibility with the object and purpose of a treaty could, through objecting, regard the treaty as not in effect as between itself and the reserving State. Article 20, paragraph 4, of the Vienna Convention on the Law of Treaties 1969 contains provisions most relevant to the present case on acceptance of and objection to reservations. This provides for the possibility of a State to object to a reservation made by another State. Article 21 deals with the legal effects of objections by States to reservations made by other States. Essentially, a reservation precludes the operation, as between the reserving and other States, of the provision reserved; and an objection thereto leads to the reservation being in operation as between the reserving and objecting State only to the extent that it has not been objected to.

17. As indicated above, it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such 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 [inter-state communications]. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party none the less does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States *inter se*. However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.

18. It 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. In order to know the scope of its duty to examine a State's compliance under article 40 or a

communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. 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.

[Requirements of specificity and transparency of reservations]

19. Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. When considering the compatibility of possible reservations with the object and purpose of the Covenant, States should also take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law. States should not seek through reservations or interpretative declarations to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any other international treaty body.

20. States should institute procedures to ensure that each and every proposed reservation is compatible with the object and purpose of the Covenant. It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for maintaining reservations is periodically reviewed, taking into account any observations and recommendations made by the Committee during examination of their reports. Reservations should be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdraw reservations.

Probably the most important affirmations of the general comment were that the Human Rights Committee had the power to decide on the validity of a reservation to the ICCPR, and that an invalid reservation could be detached from the main commitment to the ICCPR as expressed by its ratification. This position was heavily contested (see, in particular, Observations by France on General Comment 24, 4 *International Human Rights*

Reports, 4 (1997), 6; Observations by the United Kingdom on General Comment 24, 3 *International Human Rights Reports*, 3 (1996), 261; Observations by the United States on General Comment 24, *International Human Rights Reports*, 3 (1996), 265). In 1997, the International Law Commission (ILC) considered the question of the unity or diversity of the juridical regime for reservations. Stating to be 'aware of the discussion currently taking place in other forums on the subject of reservations to normative multilateral treaties, and particularly treaties concerning human rights', the ILC proposed the following conclusions:

International Law Commission, The unity or diversity of the juridical regime for reservations, Preliminary Conclusions of 1997:

1. The Commission reiterates its view that articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations;
2. The Commission considers that, 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;
3. The Commission considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions govern reservations to such instruments;
4. The Commission nevertheless considers that the establishment of monitoring bodies by many human rights treaties gave rise to legal questions that were not envisaged at the time of the drafting of those treaties, connected with appreciation of the admissibility of reservations formulated by States;
5. The Commission also considers 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;
6. The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties;
7. The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation;
8. The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role;

9. The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future;
10. The Commission notes also that, in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty;
11. The Commission expresses the hope that the above conclusions will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights;
12. The Commission emphasizes that the above conclusions are without prejudice to the practices and rules developed by monitoring bodies within regional contexts.

The Human Rights Committee was not deterred. Following the adoption of these 'Preliminary Conclusions' of the International Law Commission, the Chair of the Human Rights Committee, Ms Christine Chanet, wrote a letter to the Chair of the International Law Commission as well as to the Special Rapporteur on the issue of reservations to treaties, expressing her disagreement (UN Doc. A/53/40, vol. I, p. 95). Upon examining the initial report of the United States of America under the International Covenant on Civil and Political Rights, the Human Rights Committee listed among its 'principal subjects of concern' the following:

Concluding Observations of the Human Rights Committee: United States of America, 3 October 1995 (CCPR/C/79/Add. 50)):

279. The Committee regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also 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.

In its most recent Concluding Observations regarding the United States, the Human Rights Committee 'welcomes the Supreme Court's decision in *Roper* v. *Simmons* [543 U.S. 551] (2005), which held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when

their crimes were committed. In this regard, the Committee reiterates the recommendation made in its previous concluding observations, encouraging the State party to withdraw its reservation to article 6(5) of the Covenant' (CCPR/C/USA/CO/3/Rev.1, 18 December 2006).

In expressing the view in its 1997 preliminary conclusions that 'in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action' (para. 10), the International Law Commission clearly questions what may be called the 'severability thesis' held both by the European Court of Human Rights and subsequently by the Human Rights Committee – i.e. allowing the treaty to be binding on a State party even though the reservation attached by that State to its ratification might be invalid. It has been remarked, however, that this thesis could in fact better respect the requirements of State consent, since the costs involved by the opposite, 'non-severability' thesis – obliging the State to withdraw from the treaty, and to re-enter without the reservation attached – might on average impose higher reputational costs on States:

Ryan Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent', *American Journal of International Law*, 96 (2002), 531 at 556:

The record of state treaty practice strongly suggests that error costs derived from a nonseverance presumption exceed those from a presumption favoring severance. In most of the cases, states have consented to having aspects of their legal system modified by international legal developments. In the strongest cases of this kind – newly established democracies – states often prefer locking as much of their domestic fates as practicable into international structures. An adjudicator's erroneous expulsion of a state from a treaty risks significant costs along two dimensions: international (e.g. a sovereignty impact from the state's expulsion against its will, reputational costs to the state's international standing, loss of a leadership or participatory role in the regime) and domestic (e.g. the unhinging of a wide array of judicially enforceable civil and political rights protections, facilitation of illiberal rollbacks). The result would probably involve significant transaction costs in the process of reratifying the agreement.

On the other hand, erroneous severance by the adjudicator, maintaining the state's membership in the treaty, would also risk significant, but seemingly more limited, costs: international (e.g. a sovereignty impact from the state's being held against its will) and domestic (e.g. the creation of legal obligations the state was not prepared to accept; the potential infringement of 'counter-rights', such as limiting freedom of speech in the name of regulating hate speech). In this situation, however, the state has a relatively easy recourse: withdrawal. This back-end solution helps prevent such errors from producing severe impacts. There are potential reputational costs to withdrawal, but these should be balanced against the fact that the state would have preferred expulsion in the first place.

Box 1.5. The denunciation by Trinidad and Tobago of the ICCPR and the American Convention on Human Rights

The position of the Human Rights Committee as expressed in its General Comment No. 24 was reaffirmed after Trinidad and Tobago decided to denounce the Optional Protocol on 26 May 1998, and then immediately re-entered this instrument on 26 August 1998, the day when the denunciation became effective. That denunciation, as well as the denunciation by Trinidad and Tobago of the American Convention on Human Rights, also notified on 26 May 1998, were alleged to be the only means the State concerned had at its disposal in order to comply with the ruling of the Judicial Committee of the Privy Council in *Pratt and Morgan* v. *Attorney General for Jamaica* (Privy Council Appeal No. 10/1993, 2 November 1994). This ruling determined that capital sentence appeals should be heard within a reasonable delay (twelve months from conviction), and that it should be possible for the international human rights bodies, such as the United Nations Human Rights Committee and the Inter-American Commission on Human Rights, to dispose of complaints submitted to them in death penalty cases at most within eighteen months, or the detention following conviction to the death penalty could be considered inhuman or degrading treatment. As the possibility of appeals before the Inter-American Commission and Court could exceed this delay by a large margin – the Inter-American Commission of Human Rights could not provide assurances that, in death penalty cases, the petitions would be expedited in order to meet the time-frame requirements set by the Judicial Committee of the Privy Council – the State considered itself obliged to denounce the American Convention on Human Rights. For similar reasons, Trinidad and Tobago alleged it had to denounce the Optional Protocol to the International Covenant on Civil and Political Rights.

When re-entering the Optional Protocol to the ICCPR, Trinidad and Tobago included a reservation under the terms of which it 're-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith'.

A further decision of the Judicial Committee of the Privy Council was announced in March 1999. According to this decision, the execution of any death sentences should be stayed until the Human Rights Committee or the Inter-American Commission and Court of Human Rights have been provided an opportunity to examine the merits of communications filed with them (Judicial Committee of the Privy Council, *Thomas and Hilaire* v. *Attorney General and others*, Privy Council Appeal No. 60 of 1998, appeal from the Court of Appeal of Trinidad and Tobago, 17 March 1999). The decision was based essentially on the reasoning that 'The appellants are contending that their trials were unfair, and hope in due course to obtain binding rulings from the [Inter-American Court of Human Rights] that their convictions should be quashed or their sentences should be commuted. For the Government to carry out the sentences of death before the petitions have been heard would deny the appellants their constitutional right to due process.' This decision also introduced an exception to the time-limits for the execution of the

death penalty introduced in *Pratt and Morgan* v. *Attorney General for Jamaica* [1994] 2 A.C. 1 at 33: the Judicial Committee noted 'the delay occasioned by the slowness of the international bodies in dealing with such petitions', but they took the view that such delays 'should not prevent the death sentence from being carried out. Where, therefore, more than 18 months elapses between the date on which a condemned man lodges a petition to an international body and its final determination, [they] would regard it as appropriate to add the excess to the period of 18 months allowed for in *Pratt*.'

Despite these justifications, the reservation attached by Trinidad and Tobago when it re-entered the Optional Protocol to the International Covenant on Civil and Political Rights prompted a number of objections from the EU Member States. And in *Kennedy* v. *Trinidad and Tobago*, following a communication submitted by a person sentenced to the death penalty, the Human Rights Committee decided that the reservation cited above was incompatible with the object and purpose of the Optional Protocol, and that accordingly the Committee was not precluded from considering the communication under the Optional Protocol; on 2 November 1999, it therefore declared the communication admissible. Trinidad and Tobago took the view that 'in registering the communication and purporting to impose interim measures under rule 86 of the Committee's rules of procedure, the Committee has exceeded its jurisdiction, and the State party therefore considers the actions of the Committee in respect of this communication to be void and of no binding effect'. On 27 March 2000, with effect on 27 June 2000, Trinidad and Tobago denounced the Optional Protocol to the ICCPR a second time. The Human Rights Committee nevertheless examined the merits of the communication, on which it adopted a decision on 26 March 2002 (see *Kennedy* v. *Trinidad and Tobago*, Communication No. 845/1998, CCPR/C/74/D/845/1998 (2002)). The Committee noted that the communication was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000 and that, in accordance with article 12(2) of the Optional Protocol, it therefore continued to be subject to the application of the Optional Protocol. It found that the case revealed a number of violations of the Covenant and that, therefore, the State party was under an obligation to provide the author of the communication with an effective remedy, including compensation and consideration of early release.

1.5. Questions for discussion: reservations to human rights treaties

1. Arguably, the intention of the International Court of Justice in adopting its Advisory Opinion of 1951 on the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, was to achieve a compromise between two conflicting objectives: (1) to make accession to the Convention attractive even for States which felt they might not be able immediately to comply with all the obligations imposed by that instrument, and (2) to impose certain limits as to which reservations are acceptable, based on whether or not they are compatible with the object and purpose of the treaty. Has the Court succeeded? Was the position of the Court

guided primarily by the humanitarian character of the Genocide Convention, or by the fact that it was a multilateral treaty seeking to achieve as wide a ratification as possible?

2. Does the Vienna Convention on the Law of Treaties express correctly the position of the International Court of Justice in its Advisory Opinion on the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide? Are the articles of the Vienna Convention on reservations adapted to the needs of human rights treaties?
3. The 1965 International Convention for the Elimination of All Forms of Racial Discrimination provides that 'A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it' (Art. 20(2)). Is this solution more appropriate than the one adopted for the International Covenant on Civil and Political Rights by the Human Rights Committee?
4. In its General Comment No. 24, the Human Rights Committee takes the view that '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' (para. 8). Is this statement compatible with the principle recalled by the International Court of Justice – and already referred to above – that 'customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content' (case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States*) [1986] I.C.J. Reports 14, para. 179 (judgment of 27 June 1986 on the merits))? Is a State entering a reservation related to a guarantee codified in the International Covenant on Civil and Political Rights where this guarantee is part of customary international law 'reserving the right' to violate this guarantee, or is it merely excluding the possibility for the Committee to monitor compliance with that obligation?
5. In general international law, the compatibility of the reservation to a multilateral treaty with its object and purpose is based on the recorded objections to the said reservation expressed by other parties to the multilateral treaty. The shift away from these objections and towards the independent evaluation role of judicial or non-judicial bodies is justified, as regards human rights treaties, by the fact that States parties to multilateral human rights treaties generally show little interest in sanctioning non-compliance with those treaties by other parties. However, is this distrust also justified where objections are in fact expressed? Should such objections be determinative, when they are formulated by a sufficiently representative number of parties? In other terms, should human rights monitoring bodies be bound to conclude that a reservation cannot be accepted, where it has led to a large number of objections being raised?
6. Once a reservation is found to be invalid, how should we balance the respective merits of the 'severability' and 'non-severability' theses, as regards the consequences of such finding? Is the option of withdrawal from a treaty always realistic, politically and legally, for a State whose reservation expressed upon acceding to a multilateral human rights treaty is found invalid?