MORTEN BERGSMO
(EDITOR)

HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN

ESSAYS IN HONOUR OF ASBJØRN EIDE

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Morten Bergsmo (editor)

Norsk Senter for Menneskerettigheter
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Preface

This book has been prepared to honour Asbjørn Eide in his 70th year. It is a collection of essays by leading experts in international human rights and international criminal law. The authors all know Asbjørn and his distinguished work.

Clusters of essays have naturally emerged: on international criminal law; on economic, social and cultural rights; on minority rights; and on other international human rights issues. This substantive concentration reflects the wide scope of Asbjørn's professional activities, as well as the fundamental conceptual contributions he has made in different areas over the years. It is hoped that this concentration helps making this volume a book in its own right.

I would like to thank Dr. Christine Gray, Justice Hanne Sophie Greve, and Dr. Bertrand G. Ramcharan for their encouragement and advice. Gilbert Bitti and also Nils A. Butenschøn and Xavier Tracol are thanked for their kind assistance. For Markus Benzing, a further expression of appreciation: without his capable assistance it would have been very difficult to combine editorial work with other responsibilities. He is an unusually promising young lawyer.

Finally, the long-suffering of my wife Nikan is gratefully recorded.

Morten Bergsmo

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Foreword

I am very pleased to have this opportunity to salute the efforts of a long-standing champion of human rights, Asbjørn Eide. I have only recently started my tenure as High Commissioner and have not known Asbjørn long, but I have already come to know of the sterling work he has done over the years in the academic field and as a member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights. On behalf of my colleagues in the Office of High Commissioner, and on my own behalf, I would like to extend our deep appreciation to him.

The vision of the United Nations Charter is of a world in which peace would be built on the foundations of respect for human rights and of development and economic and social justice. Asbjørn Eide has contributed to all of these dimensions. As an eminent international lawyer, he has written extensively on the law of peace and the law of war. As Director of the Oslo Peace Research Institute he worked assiduously for peace and to uphold the principles of the United Nations Charter.

Asbjørn Eide understood that if we are to sustain peace we must strive for equality, the protection of minorities, and the protection of indigenous populations. To name but two areas, his reports on the protection of minorities have generated new thinking in this area, and as the first chairperson of the United Nations Working Group on the human rights of indigenous populations, he helped lay the foundations for United Nations work in this area over the past two decades.

On issues of development and economic and social rights Asbjørn Eide has led in scholarship on the implementation of core economic, social and cultural rights and he has been assiduous and persistent in pioneering work on the implementation of the right to food. He has steered United Nations publications on this topic, written reports for the Sub-Commission, and been active in stimulating co-operation within the wider United Nations system on the practical implementation of the right to food. His work in this area is widely, and rightly, hailed.

Asbjørn Eide has also been a leader when it comes to the *protection* of human rights. He has championed many causes as a member of the Sub-Commission and has spoken out courageously on more than one occasion.

As I begin my tenure as High Commissioner, I am conscious of the many champions who have held aloft the flame of human rights over the

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years. My thoughts are those of gratitude and respect to them all. Asbjørn Eide stands prominently among these individuals and it is my distinct privilege and honour to be given this opportunity to extend to him the appreciation of the human rights movement for his many contributions.

Sergio Vieira de Mello
High Commissioner for Human Rights

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Part One:

International Criminal Law

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I

The origin and evolution of crimes against humanity: an uneasy encounter between positive law and moral outrage

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1. Introduction

The prohibition against crimes against humanity is, beyond doubt, one of the most fundamental norms of international law. It is widely considered as a part of *jus cogens*,[1] an expression of moral outrage at conduct that so shocks the conscience of humankind that its repression becomes a matter of concern to the international community as a whole. Yet, exactly because of the extreme core values that it protects, crimes against humanity has always had a tenuous existence as a norm of positive law. It was the monstrousness of Nazi crimes that first compelled the Allied Powers to disregard the positivist strictures imposed by the *nullum crimen sine lege* principle through inclusion of crimes against humanity in Article 6(c) of the 1945 Nürnberg Charter.[2] In contemporary international law, the status of crimes against humanity has been amply vindicated as numerous international instruments – including the Statutes of the ICTY, ICTR and ICC – have reaffirmed its validity. Therefore, the application of *ex post facto* criminal law is no longer a matter of controversy.

However, because of its intrinsic characteristic as a broadly construed crime of moral turpitude, crimes against humanity continues to push the boundaries of the *nullum crimen sine lege* principle, this time in terms of a requirement of normative precision and certainty. Defined essentially by an elusive factor of scale and gravity, crimes against humanity is situated at the threshold of vagueness in positive law's oscillation between extremes of certainty and indeterminacy. Against the more exacting requirements of *lex certa* in the attribution of individual criminal liability – let alone for the most serious international crimes – this tendency is particularly discernible and its potential consequences more pronounced. This tension is considered below through a brief examination of the origins of crimes against humanity and its

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1 See, *e.g.*, M. Cherif Bassiouni, "Sources and theory of international criminal law", in: M. Cherif Bassiouni (ed.), *International Criminal Law* (2nd ed., 1999), 68.

2 Charter of the International Military Tribunal, Article 6(c), in: 1 *Trial of the Major War Criminals Before the International Military Tribunal Nuremberg* 10, 11 (1947).

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contemporary evolution through ICTY and ICTR jurisprudence, and under the ICC Statute.

2. Origins of crimes against humanity

Despite some earlier historical antecedents, crimes against humanity effectively emerged as a norm of international law during the International Conference on Military Trials, held in London from 26 June to 8 August 1945. In the process leading to the establishment of the International Military Tribunal at Nürnberg, it had become apparent that the laws and customs of war did not cover atrocities where the victims and perpetrators possessed either the same nationality, or the respective nationalities of two or more States that were either allied or otherwise not belligerents, or if the victims were stateless. Consequently, some of the most horrid crimes such as the persecution and extermination of Jews who were nationals of Germany or nationals of the Axis Powers or their allies would go unpunished if only the laws of war were to be applied. During the War, various declarations indicated the intention of the Allied Powers to punish crimes against civilian populations that did not qualify as violations of the laws of war.

In 1943-44 for instance, the London International Assembly recommended that in defining the scope of the Allied Powers' retributive actions, "a comprehensive view should be taken, including not only the customary violations of the laws of war ... but any other serious crime against the local law, committed in time of war, the perpetrator of which has not been visited by appropriate punishment".[3] In particular, with respect to Jewish persecution, it was recommended that "punishment should be imposed not only when the victims were Allied Jews, but even when the crimes had been committed against stateless Jews or any other Jews in Germany or elsewhere".[4]

Similarly, the United Nations War Crimes Commission had recommended that the punishment of war criminals by the Allied Powers "should not be restricted to what was traditionally considered a war crime in the technical sense, namely, a violation of the laws and customs of war".[5] The Commission thus proposed that atrocities not covered by the laws of war be included under the category of "crimes against humanity" which could be committed "against any person without regard to nationality, stateless per-

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3 *The Punishment of War Criminals, Recommendations of the L.I.A.* (London International Assembly), Report of Commission I, at p. 7; quoted in E. Schwelb, "Crimes Against Humanity", 23 *British Yearbook of International Law* 178, 184 (1946).

4 *Id.*

5 *Id.*, at 184-185.

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sons included, because of race, nationality, religious or political belief, irrespective of where they have been committed".[6]

Since crimes against humanity was not established as a matter of either treaty or customary law, the legitimacy of its inclusion under the Nürnberg Charter required some buttressing. Despite some limited State practice[7] and the extensive deliberations on inclusion of this crime in the Charter however, "[n]owhere in the London drafting history is there any clear statement of the juridical basis upon which crimes against humanity rest".[8] Nor does the Judgment of the Tribunal make any reference to the sources underlying the crime.[9] The portion of the Indictment pertaining to crimes against humanity

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6 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the laws of war* (1948), at 176.

7 See, *e.g.*, the Declaration of France, Great Britain and Russia of 24 May 1915, condemning the massacre of Armenians in Turkey by Ottoman authorities as "crimes against humanity and civilization for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres" (cited in: E. Schwelb, "Crimes against humanity", 23 *British Yearbook of International Law* 178, 181 (1946); it appears that the date of 28 May 1915 in this article is a misprint). In a report dated 29 March 1919, the majority of the Commission of Fifteen Members of the Preliminary Peace Conference referred to the prosecution of those "guilty of offenses against the laws and customs of war or the laws of humanity" (see Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, *reprinted in* Pamphlet No. 32, Carnegie Endowment for International Peace). The two United States members of the Commission, Robert Lansing and James Scott Brown, dissented on the grounds that US cooperation in the enterprise "was frustrated by the insistence on the part of the majority that criminal liability should, in excess of the mandate of the Conference, attach to the laws and principles of humanity, in addition to the laws and customs of war..." (see Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities). Because of disagreement, the recommendation of the majority to include crimes against humanity in the Treaty of Versailles concluded between the Allied Powers and Germany was defeated, although the Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sèvres), 10 August 1920, *reprinted in* 15 *American Journal of International Law* 179 (1921), contained provisions requiring the prosecution of persons accused of "crimes against the laws of humanity". But the Treaty was never ratified or implemented, and was replaced by The Treaty with Turkey and Other Instruments, 24 July 1923 (Treaty of Lausanne), *reprinted in* 18 *American Journal of International Law* 1 (1924), which eliminated the provisions on prosecutions and instead conferred an amnesty for Turkish officials. See generally V.N. Dadrian, "Genocide as a problem of national and international law: The World War I Armenian case and its contemporary ramifications" 14 *Yale Journal of International Law* 221 (1989).

8 See R.S. Clark, "Crimes against humanity", in: G. Ginsburgs and V.N. Kudriavtsev, *The Nuremberg Trial and International Law* (1990), 193.

9 See 22 *The Trial of German Major War Criminals*, 467 (1950); for a critique of the Tribunal's failure to address this fundamental question, see, *e.g.*, R.S. Clark, "Crimes against humanity", in: G. Ginsburgs and V.N. Kudriavtsev, *The Nuremberg Trial and International Law* (1990):

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refers broadly to "violations of international conventions, of internal penal laws, [and] of the general principles of criminal law as derived from the criminal law of all civilized nations".[10] Since, unlike war crimes, there are no references to particular international conventions, it may be presumed that the prosecution relied on a combination of internal penal laws and general principles of law as justifications for crimes against humanity. This is confirmed in the internal correspondence of the prosecution in attempting to reconcile crimes against humanity with the *nullum crimen sine lege* principle.[11] Some tribunals went so far as to dispense with such contrivances, suggesting instead that the prohibition against *ex post facto* laws was simply

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> Given that all the "state practice" that might be cited in favor of the development of a rule of customary international law prohibiting crimes against humanity was that occurring in 1915 [*i.e.*, the Declaration of France, Great Britain, and Russia] and 1919 [*i.e.*, Report of the Commission on Responsibility of the Authors of the War] – which was somewhat thin, at that – the only logical way to go was that of the indictment and reliance on the "general principles" that could be extrapolated from the unanimous condemnation in domestic legal systems of homicide and some lesser forms of persecutions. The intellectual feat of extrapolating from domestic systems beyond the homicide area was no doubt a daunting one, but not one beyond the capabilities of mortals. It is to be regretted that the authors of the judgement of the Tribunal did not attempt to do so. (at 193-194).

[10] Indictment, Count Four, in 1 *Trial of the Major War Criminals Before the International Military Tribunal Nuremberg* 65 (1947).

[11] See Memorandum dated 29 December 1944 for the United States Attorney-General (Biddle) from the Assistant Attorney-General (Herbert Wechsler), cited in B. Smith, *The American Road to Nuremberg: The Documentary Record 1944-1945* (1982), 84, 86:

> It may be [suggested] that any treaty definition which goes beyond the laws of war would have retroactive application in violation of the principle *nullum crimen sine lege*, a principle that the Nazis rejected in Germany but that would ordinarily weigh with us. I think it a sufficient answer that the crime charged involves so many elements of criminality under the accepted laws of war and the penal laws of all civilized states that the incorporation of the additional factors in question does not offer the type of threat to innocence which the prohibition of *ex post facto* laws is designed to prevent.

See, also, *Attorney-General of Israel v. Adolf Eichmann,* 36 *International Law Reports* 277, where the Israel Supreme Court observed that crimes against humanity:

> Constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by *civilised* nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct.
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> (...)
>
> Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilised nations" (at 291-292).

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inapplicable to "international common law" because it would result in the strangulation of new law at birth.[12]

This unprecedented and opportune reliance on general principles was so far-reaching in its normative claims that it had a significant impact on subsequent definitions of the principle of legality in international human rights law. A particular result was the insertion of Article 15(2) in the International Covenant on Civil and Political Rights,[13] in order to affirm the compatibility of "general principles of law recognized by the community of nations" with the *nullum crimen sine lege* principle. Despite the contention that "[n]o court should be allowed to convict an individual by applying vague general principles", the *travaux préparatoires* of the Covenant indicate that this provision was retained primarily to "eliminate any doubts regarding the legality of the

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[12] See the reasoning of the US Military Tribunal on crimes against humanity in the *Justice Case, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1946-1949*, Vol. III (1951):

> Whatever view may be held as to the nature and source of our authority under C.C.Law 10 and under common international law, the *ex post facto* rule, properly understood, constitutes no legal nor moral barrier to prosecution in this case.
>
> Under written constitutions the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. Even in the domestic field the prohibition of the rule does not apply to the decisions of common law courts, though the question at issue be novel. International law is not the product of statute for the simple reason that there is as yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. *It would be sheer absurdity to suggest that the ex post facto rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event.* To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth.
>
> (...)
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> C.C.Law 10 is not limited to the punishment of persons guilty of violating the laws and customs of war in the narrow sense; furthermore, it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law. *The force of circumstance, the grim fact of worldwide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law"* (at 974-975, 979; emphasis added).

[13] Adopted 16 December 1966, entered into force 23 March 1976, GA Res. 2200A (XXI), UN doc. A/6316 (1966), 999 UNTS 171. Article 15 reads in relevant part as follows:

> (1) No one shall be held guilty of any criminal offence on account of any act of omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. (...)
>
> (2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

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judgement rendered by the Nürnberg and the Tokyo Tribunals", to "confirm and strengthen those principles", and to "ensure that if in the future crimes should be perpetrated similar to those punished at Nürnberg, they would be punished in accordance with the same principles".[14] Through this contrivance, the *ex post facto* legitimacy of Nürnberg's *ex post facto* law on crimes against humanity was secured.

Evidently, the sheer magnitude of the Holocaust prompted the Allied Powers to dispense with strict positivist inhibitions in order to accommodate the overwhelming need for international criminalization of the underlying conduct. In the intervening years, the prohibition of crimes against humanity has been enshrined as a fundamental norm of international law and its controversial origins have been relegated to a matter of historical curiosity. Nonetheless, the uneasy encounter between positive law and moral outrage that characterized its inception continues to shape and influence its definition in contemporary international law. Crimes against humanity continue to revolve around the same elusive factor of extreme "scale and gravity"[15] that first prompted its introduction into the Nürnberg Charter. Ironically, the exceptional stigma attached to such conduct both prompts certainty in definition to avoid arbitrariness and necessitates a considerable degree of indeterminacy to allow for flexible application.

Perhaps the most significant development in the law of crimes against humanity since Nürnberg is the elimination of a nexus requirement with international armed conflict. As discussed below, this has rendered the factor of scale or gravity even more central to its definition than before. Under Article 6(c) of the Nürnberg Charter crimes against humanity had to be committed "in connexion with or in execution of" war crimes or crimes against peace. This requirement of a nexus with international armed conflict was a means of restricting the scope of this then unprecedented norm and its intrusion into the hitherto sacrosanct domain of state sovereignty and domestic jurisdiction. The revolutionary extension of international humanitarian protection to civilian populations irrespective of their nationality was attenuated and made more palatable by a strategic linkage with the well-established *jus in bello* and *jus ad bellum*.

3. Contemporary evolution through international jurisprudence

Despite the tremendous advances which crimes against humanity represented, the requirement of a nexus with armed conflict created a significant

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[14] See M. Bossuyt, *Guide to the Travaux Préparatoires of the ICCPR*, at 331.

[15] See, *e.g.*, *Prosecutor v. Kupreškić, Judgement*, ICTY Case No. IT-95-16-T, T. Ch. II, 14 January 2000, para. 543, noting that in addition to its basic elements, acts qualifying as crimes against humanity "considered as a whole, must be of a certain scale and gravity".

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lacuna in international criminal law. In effect, if massive or systematic human rights violations were committed outside of armed conflict, they would not fall within the reach of crimes against humanity. Although Article 5 of the ICTY Statute required a nexus with armed conflict, "whether internal or international in character", Article 3 of the ICTR Statute did not contain a comparable element. This apparent inconsistency was resolved in the *Tadić* Case where the Appeals Chamber opined by way of *obiter dicta* that:

> as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.[16]

The Appeals Chamber concluded that "[i]t is now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict".[17] Coming on the eve of negotiations leading to the adoption of the ICC Statute, this precedent played a significant role in emancipating crimes against humanity from the nexus with armed conflict requirement. Indeed, the inclusion of such an element was considered but rejected based on the view of delegates that the "precedent of the statute of the ad hoc Tribunal for Rwanda and the recent decision of the ad hoc Tribunal for the former Yugoslavia in the *Tadić* case" were among the post-Nürnberg developments "which militated in favour of the exclusion of any requirement of an armed conflict".[18] Thus, Article 7 of the ICC Statute does not contain any reference to a nexus with armed conflict in its definition of crimes against humanity.[19]

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[16] *Prosecutor v. Tadić*, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, ICTY Case No. IT-94-1-AR72, App. Ch., 2 October 1995, para. 141.

[17] *Id.*

[18] See *Report of the* ad hoc *Committee on the Establishment of an International Criminal Court*, GAOR, 50th Sess., Supp. No. 22, UN doc. A/50/22 (1995), para. 79.

[19] It should be noted that in the context of armed conflict, the term "civilian" population includes all persons *hors de combat* and not only civilians as such. With respect to Article 6(c) of the Nürnberg Charter, it may be noted that the UN War Crimes Commission (see United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the laws of war* (1948), at 193) stated that: "The words '*civilian* population' appear to indicate that 'crimes against humanity' are restricted to inhumane acts committed against civilians as opposed to members of the armed forces" (emphasis in original). But see, *e.g.*, *Prosecutor v. Blaškić*, *Judgement*, ICTY Case No. IT-95-14-T, T. Ch. I, 3 March 2000, para. 214, observing that:

> Crimes against humanity (...) do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants — regardless of whether they wore wear uniform or not — but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army

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4. The ICC Statute

Absent a nexus with armed conflict, the only distinction between ordinary crimes of murder, rape, etc., ordinarily punishable under domestic law, and crimes against humanity is the requirement of a certain scale and gravity. The same applies to war crimes where armed conflict is involved. This distinction is expressed in Article 7 of the ICC Statute in the stipulation that for crimes against humanity, the underlying acts of murder, etc., must be committed "as part of a widespread or systematic attack directed against a civilian population".[20] In drafting Article 7 of the ICC Statute, delegates:

> attributed particular importance to the general criteria for crimes against humanity to distinguish such crimes from ordinary crimes under national law and to avoid interference with national court jurisdiction with respect to the latter.[21]

That this requirement is central to the legal character of crimes against humanity cannot be overemphasized. It is the large-scale or exceptional

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or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian. Finally, it can be concluded that the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population.

20 As early as 1943, the UN War Crimes Commission underscored the fundamental importance of this element of scale or gravity by stating that, "[a]s a rule systematic mass action ... was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law" (see United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the laws of war* (1948), at 179). Article 6(c) of the Nürnberg Charter did not expressly contain a requirement of a "widespread or systematic attack". It merely provided that the acts of murder, extermination, etc., be directed against a "civilian population". A 1949 Memorandum of the UN Secretary-General notes that the term "population" in Article 6(c) "does not mean that the entire population must be affected. It seems to imply, however, that a larger body of victims are involved" (see *The Charter and Judgement of the Nürnberg Tribunal, history and analysis (Memorandum submitted by the Secretary-General* (1949), at 67). Similarly, Article 5 of the ICTY Statute only contains the term "civilian population" without the corresponding term "widespread or systematic". Nonetheless, the Trial Chamber in the *Tadić Case* held that "it is now well established that the requirement that the acts be directed against a civilian 'population' can be fulfilled if the acts occur on either a widespread basis or in a systematic manner" (see *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997, at para. 646). Unlike the Nürnberg Charter and ICTY Statutes however, the requirement that crimes against humanity be committed on a "widespread or systematic" scale is express in Article 3 of the ICTR Statute and Article 7 of the ICC Statute.

21 See *Report of the* ad hoc *Committee on the establishment of an International Criminal Court*, GAOR, 51st Sess., Supp. No. 22, UN doc. A/51/22 (1996), at para. 84.

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gravity and not the inhumane nature of isolated or random acts of murder, rape, etc. that triggers the application of this norm. The International Law Commission remarks that:

> The hallmarks of such crimes lie in their large-scale and systematic nature [and the] particular forms of unlawful acts (murder, enslavement, deportation, torture, rape, imprisonment etc.) are less crucial to the definition [than] the factors of scale and deliberate policy.[22]

The expression "widespread or systematic" may be understood as excluding "random or isolated acts".[23] The term "widespread" has been interpreted as referring to a multiplicity of victims whereas "systematic" has been interpreted as referring to a methodical plan or policy.[24] The multiplicity of

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[22] See *Report of the International Law Commission on the work of its forty-third session* (1991) GAOR, 46th Sess., Supp. No. 10, UN doc. A/46/10, at 265.

[23] See, *e.g.*, *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997, at para. 648, where the respective ICTY Trial Chamber noted that it is "the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement" that acts be directed against a civilian population on a widespread or systematic scale. Similarly, see, *e.g.*, *Prosecutor v. Akayesu, Judgment*, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, at para. 579, where the respective ICTR Trial Chamber held that the term "widespread or systematic" implies a large-scale and "not just a random act of violence". Article 7 of the ICC Statute therefore, was drafted on the premise that crimes against humanity "usually involved a widespread or systematic attack against the civilian population *rather than isolated offences*" (see *Report of the* ad hoc *Committee on the establishment of an International Criminal Court*, GAOR, 51st Sess., Supp. No. 22, UN doc. A/51/22 (1996), at 17).

[24] See, *e.g.*, the comments of the International Law Commission on the terms "systematic" or "large scale" (*i.e.*, corresponding to "widespread or systematic") with respect to crimes against humanity in Article 18 of the Draft Code of Crimes Against the Peace and Security of Mankind in *Report of the International Law Commission on the work of its forty-eighth session 6 May – 16 July 1996*, GAOR, 51st Sess., Supp. No. 10, UN doc. A/51/10:

> The first alternative requires that the inhumane acts be *committed in a systematic manner* meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy. The Nürnberg Charter did not include such a requirement. None the less the Nürnberg Tribunal emphasized that the inhumane acts were committed as part of the *policy of terror* and were "in many cases ... organized and systematic" in considering whether such acts constituted crimes against humanity. The second alternative requires that the inhumane acts be *committed on a large scale* meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim. The Nürnberg Charter did not include this second requirement either. None the less the Nürnberg Tribunal further emphasized that the policy of terror was "certainly carried out on a vast scale" in its consideration of inhumane acts as possible crimes against humanity (at 94-95).

See, also, *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997, at para. 648, where the Trial Chamber held that the term "widespread" refers "to the number of victims" whereas the term "systematic" indicates that "a pattern or me-

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victims may include both "the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude".[25] Article 7(2)(a) of the ICC Statute has also stipulated the related requirement that crimes against humanity consists of "a course of conduct involving the multiple commission" of the enumerated acts "pursuant to or in furtherance of a State or organizational policy to commit such attack". Despite this requirement however, the policy need not be formalized[26] and does not necessarily require the involvement of a State.[27] Furthermore, crimes against humanity may be geographically localized.[28]

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thodical plan is evident"; and *Prosecutor v. Akayesu, Judgment*, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, at para. 580, where the concept of "widespread" is defined as "massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims" whereas "systematic" is defined as "thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources".

25 See commentary of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind in *Report of the International Law Commission on the work of its forty-eighth session 6 May – 16 July 1996*, GAOR, 51st Sess., Supp. No. 10, UN doc. A/51/10, at 95, cited with approval in, *e.g.*, *Prosecutor v. Blaškić, Judgment*, Case No. IT-95-14-T, T. Ch. I, 3 March 2000, at para. 206.

26 See, *e.g.*, *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997, at para. 653, noting that although crimes against humanity require "some form of policy":

> such a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not.

See, also, *Prosecutor v. Blaškić, Judgment*, Case No. IT-95-14-T, T. Ch. I, 3 March 2000, at para. 204, noting that a methodical plan "need not necessarily be declared expressly or even stated clearly and precisely. It may be surmised from the occurrence of a series of events … ".

27 See, *e.g.*, *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997, at para. 655, observing that "although a policy must exist to commit [crimes against humanity], it need not be the policy of a State". See, also, commentary of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind in *Report of the International Law Commission on the work of its forty-eighth session 6 May – 16 July 1996*, GAOR, 51st Sess., Supp. No. 10, UN doc. A/51/10, at 94, noting that crimes against humanity is intended to exclude situations in which:

> an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization. … The instigation or direction of a Government or *any* organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State (emphasis added).

See, also, *Report of the International Law Commission on the work of its forty-third session* (1991) GAOR, 46th Sess., Supp. No. 10, UN doc. A/46/10, at 266, pointing out that crimes against humanity "does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or group might also commit" inhumane acts on a widespread or systematic scale.

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Unlike the nexus with armed conflict in the case of war crimes, the requirement of a "widespread or systematic" attack is not solely an objective element of crimes against humanity. Rather, this factor of scale and gravity is an essential aspect of its subjective element. Whereas this element was implicit in the ICTY and ICTR Statutes, Article 7 of the ICC Statute expressly requires that the accused have "knowledge of the attack". As indicated by the *Kupreškić* Case, such knowledge constitutes one of two aspects of the mental element:

> [T]he requisite *mens rea* for crimes against humanity appears to be comprised by: (1) the *intent* to commit the underlying offence [*e.g.*, murder, etc.], combined with (2) *knowledge* of the broader context in which that offence occurs.[29]

In other words, it is this knowledge of the link between the accused's acts and a broader context of a widespread or systematic attack[30] that trans-

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Consistent with the foregoing, Article 7(2)(a) of the ICC Statute expressly provides that crimes against humanity may be committed "pursuant to or in furtherance of a State or *organizational* policy" (emphasis added). But see M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1992), at 248-249, maintaining that crimes against humanity:

> are collective crimes which cannot be committed unless they are part of a given state's policy because their commission requires the use of the state's institutions, personnel and resources in order to commit, or refrain from preventing the commission of [the enumerated inhumane acts]. ...
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> ...
>
> The rationale for this requisite of "state action or policy" is that "crimes against humanity," like other international crimes such as genocide ... cannot be committed without it because of the nature and scale of the crime. Thus, this element is not due to any exigency pertaining to each of the specific crimes (*e.g.* murder) contained within the meaning of this criminal category, but because the commission of such specific crimes against a large number of persons (i.e. "extermination", "persecution") cannot take place without pre-existing "state action or policy" requiring reliance on the powers of the State in order to be carried out.

[28] See, *e.g.*, *Prosecutor v. Nikolić, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*, Case No. IT-94-2-R61, T. Ch., 20 October 1995, where by way of an interlocutory ruling, the Trial Chamber held that:

> The implementation of that discriminatory policy, commonly referred to as "ethnic cleansing", over the region of Vlasenica [*i.e.*, in Bosnia-Herzegovina] *alone* seems to have been so widespread as to fall within the Tribunal's jurisdiction under Article 5 [*i.e.*, the provision on crimes against humanity] (emphasis added).

[29] *Prosecutor v. Kupreškić et al., Judgment*, Case No. IT-95-16-T, T. Ch. II,14 January 2000, at para. 556 (emphasis in original).

[30] See *Prosecutor v. Kayishema and Ruzindana, Judgment*, Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999, for a useful elaboration of this "knowledge" requirement:

> The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. ... Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater

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forms an underlying ordinary crime of murder, rape, etc. to the more serious category of crimes against humanity. The ICTY Appeals Chamber has observed that:

> Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population ... and that the accused knew that his crimes were so related.[31]

Knowledge of the broader context of an attack on a civilian population does not mean that the accused must individually commit multiple or methodical crimes, or expressed conversely, that a single act cannot constitute a crime against humanity. It is sufficient if there is a subjective link between such a single act and the broader context of a widespread or systematic attack against a civilian population.[32] Furthermore, provided that such knowledge is established, the motives of the accused in participation in such an attack are irrelevant and may even be purely personal.[33] The *mens rea* of crimes against humanity:

> Does not require that the agent be identified with the ideology, policy or plan in whose name mass crimes were perpetrated nor even that he supported it. It suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan.[34]

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dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some sort of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused (at paras. 133-134).

31 *Prosecutor v. Tadić*, *Judgment*, Case No. IT-94-1-A, App. Ch., 15 July 1999, at para. 271 (emphasis in original).

32 See, *e.g.*, *Prosecutor v. Tadić*, *Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997, where the Trial Chamber observes that:

> [c]learly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian *population* and thus "[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution" (at para. 649; footnotes omitted).

33 See *Prosecutor v. Tadić*, *Judgment*, Case No. IT-94-1-A, App. Ch., 15 July 1999, at para. 272.

34 See *Prosecutor v. Blaškić*, *Judgment*, Case No. IT-95-14-T, T. Ch. I, 3 March 2000, at para. 257.

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Nor is it necessary for the accused to have a complete or intricate knowledge of the attack. The ICC Elements of Crimes provide that this element:

> should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause ... indicates that this mental element is satisfied if the perpetrator intended to further such an attack.[35]

Although the requirement of "widespread or systematic" scale is an essential ingredient of crimes against humanity, in practice it is a highly elusive concept. ICTY jurisprudence has observed that:

> The quantitative criterion is not objectively definable as witnessed by the fact that neither international texts nor international and national case-law set any threshold starting with which a crime against humanity is constituted.[36]

Of course, there is no objective criterion because it would necessarily require a disquietingly arbitrary circumscription of what qualifies as scale and gravity sufficient to constitute crimes against humanity. Indeed, how is it possible to determine what constitutes widespread or systematic in practice? Does the "multiplicity of victims" refer to one hundred or one thousand victims? Does methodical plan or systematic policy reference to ten, one hundred, or one thousand incidents of a similar nature? Does the term "course of conduct" imply a temporal frame? If so, does it consist of one week, one month, or one year? Do the responses to these questions differ depending on the characteristic of the vicitimization? Would there, for example, be a lower numerical, methodical, or temporal threshold if the underlying crime was murder rather than imprisonment? Invariably, such determinations are based on relatively arbitrary conceptions of moral revulsion sufficient to transform an otherwise ordinary crime under domestic law to the exceptional opprobrium reserved for crimes against humanity. Given the massive nature of the conduct that this crime aims to penalize, a considerable degree of flexibility may be unavoidable. Considering the exceptional moral stigma of this crime however, this degree of indeterminacy is troubling from the viewpoint of the *nullum crimen sine lege* principle and its requirement of certainty.

Crimes against humanity is ultimately founded on a factor of scale or gravity that justifies the intrusion of international criminal law into matters

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[35] See *Report of the Preparatory Commission for the International Criminal Court, Addendum, Elements of Crimes*, UN doc. PCNICC/2000/1 (2000), Article 7, at 9.

[36] *Prosecutor v. Blaškić, Judgment*, Case No. IT-95-14-T, T. Ch. I, 3 March 2000, at para. 207.

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that otherwise fall within the purview of war crimes or ordinary crimes under domestic law. As noted above, the impulse underlying its incorporation into the Nürnberg Charter was the immense magnitude of the Holocaust combined with the inadequacy of war crimes in capturing its essential aspects. Egon Schwelb observes that:

> The unprecedented record of crimes committed by the Nazi régime and the other Axis Powers, not only against Allied combatants but also against the civilian populations of the occupied countries and of the Axis countries themselves, made it necessary to provide that these crimes also should not go unpunished.[37]

Even prior to the adoption of the Nürnberg Charter, the UN War Crimes Commission made it clear that the underlying basis of crimes against humanity was an exceptional degree of moral turpitude, justifying an international normative response:

> Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims. [38]

Despite the vast elaboration of crimes against humanity since the Nürnberg Charter and Judgement, this view remains essentially the same in contemporary jurisprudence. In the *Kambanda* Case for instance, the respective ICTR Trial Chamber noted that crimes against humanity "are crimes which particularly shock the collective conscience".[39] It would appear therefore, that the term "widespread or systematic attacks against a civilian population" is merely an attempt to clothe the morally potent but ambiguous threshold test of what "shocks the conscience of mankind" in the positivist semblance of legal precision and certainty. In the words of the Trial Chamber in the *Tadić* Case:

> The reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population.[40]

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[37] Egon Schwelb, "Crimes Against Humanity", 23 *British Yearbook of International Law* 178, at 185 (1946).

[38] *History of the United Nations War Crimes Commission and the development of the laws of war* (1948), at 179 (emphasis added).

[39] *Prosecutor v. Kambanda, Judgment and Sentence*, Case No. ICTR 97-23-S, T. Ch. I, 4 September 1998, at para. 14.

[40] *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997, at para. 653 (emphasis added).

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5. Conclusion

The uneasy encounter between positive law and moral outrage embodied by the concept of crimes against humanity is not a cause for alarm or despair. It is more a cause for reflection on the acute tension between certainty and indeterminacy in the jurisprudence of such crimes of extreme scale and gravity. On the one hand, pretensions of objectivity in arriving at strict or incontestable interpretations of positive law become tenuous. On the other hand, the pitfalls of unbridled subjectivity founded on moral outrage rather than legal reasoning become particularly stark. Reducing crimes of such inscrutable magnitude to the rational confines of law "explode[s] the limits of the law" – as Hannah Arendt famously remarked about the Nürnberg Judgment[41] – while also exposing the potentialities of justice.

[41] See Arendt to Karl Jaspers, 17 August 1946, in Lotte Kohler and Hans Saner (eds.), *Hannah Arendt – Karl Jaspers Correspondence, 1926-1969* (1992), at 51, 54.

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II

The influence of the European Court of Human Rights on international criminal tribunals – some methodological remarks

Antonio Cassese*

1. Introduction: the international criminal judge and the sources of law

Before entering into an analysis of the specific issues raised in this paper, it is necessary, as a premise, to introduce a number of general concepts and make a series of distinctions based on some principles of jurisprudence and legal logic.

1.1. The sources from which international criminal judges can draw

International criminal law is still very rudimentary. This is true for both the norms defining the categories of international crime and the provisions governing international criminal proceedings. Indeed, many penal concepts are not defined by the relevant normative texts, whence the need for the international judge to have recourse to other international legal standards or texts, where applicable, or to case law.

The International Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), the subject of this analysis, are international courts. It follows that they are required to apply international law, even though, unlike the Statute of the International Criminal Court, their Statutes do not contain any provisions enumerating the sources of law to be used and their order of precedence. In particular, they must apply international law such as it is derived from the sources enumerated in Article 38 of the Statute of the International Court of Justice (ICJ) and the corresponding customary law rule. Therefore, they must apply, first and foremost, their respective Statutes, which are international instruments adopted by the United Nations Security Council under Chapter VII of the United Nations Charter. Clearly, this is second degree "international legislation", because these international instruments were formulated under authority granted to the Security Council by an international treaty, the UN Charter. In addition, the Tribunals must apply the international treaties to which the Statutes refer explicitly, such as the

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Geneva Conventions of 1949 relating to the humanitarian law of armed conflicts, as well as customary rules of international law. Where these texts do not resolve a problem, or do so in an ambiguous, contradictory or unclear manner, the Tribunals are authorised to refer to either the general principles of international criminal law or the general principles of international law. Finally, should such principles be found wanting or incomplete, reference may be made to a subsidiary source of law, namely the general principles of (criminal) law recognised in the major legal systems of the world. This list of sources of law and the hierarchical order in which they may be used was set out by an ICTY Trial Chamber in *Furundžija*.[1]

1.2. Two methods for relying on a legal *corpus* other than the Statutes, relevant international treaties and customary international rules

If one refers to legal logic on the one hand, and to the judicial practice of the two Tribunals in question on the other, it becomes apparent that there are two different ways in which international courts make use of national laws, national or international case law and other legal texts: the "wise approach", which may be contrasted with the "wild approach" (of course, I have borrowed the famous distinction between "*coutume sage et coutume sauvage*" made by R.-J. Dupuy with respect to international custom).[2]

1.2.1. The "wise" approach

This approach implies a *rigorous* legal conception of the role and functions of international tribunals and the sources of law from which they may draw.

The fundamental premise for this approach is that international criminal judges may only use national and international case law as a "supplementary means of determining" an international legal rule (Article 38(1)(d) of the ICJ Statute). Consequently, the judges in question may only refer to such case law (or even, where necessary, national legislation), in order to *establish (i) whether a customary international rule has formed,* or *(ii) whether a general principle of international law exists,* or to determine *(iii) whether the interpretation of an international rule adopted by another judge is convincing and, if so, applicable.* While national case law may prove more pertinent when clarifying the general principles of criminal law common to the major legal systems of the world, international case law is of greater importance when it comes to establishing the existence of customary rules, general principles of international criminal procedure and general principles of interna-

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1 See the Judgement of 10 December 1998, paras. 177 and 183-4.

2 See R.-J.Dupuy, "Coutume sage et coutume sauvage" in *Mélanges offerts à Ch. Rousseau*, Paris: Pedone (1974), 75-87.

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tional law, or even in establishing the precise interpretation of an international norm.

Clearly, this approach assumes that the international criminal judge is aware of the *pre-eminence* of international law with respect to national law. International courts (i) only take national law into account where it constitutes one of the factors indicating the formation of an international rule or principle, and (ii) only take national law into consideration if, by virtue of an international rule, international judges must look for convergence between the major legal systems of the world on a specific point. Even though, in the latter case, international law "feeds off" national law, it is authorised to do so by international law.

This approach also implies the *pre-eminence* of the law governing the international court in question (in this case, the International Criminal Tribunals), with respect to *other international legal systems* (such as the system established by the European Convention on Human Rights). Indeed, international criminal judges may only take account of the case law of the Strasbourg Court if it helps to show the existence of a rule or principle of international law that may be applied by those judges, or if it contains an interpretation of an international rule that the judges in question consider to be convincing.

It may be added that this approach is necessary not only for reasons of *legal rigour*, but also to satisfy the fundamental requirements of the *principle of fair trial*, especially the obligation, derived from this principle, to respect the rights of the accused. Indeed, the adoption of a legally rigorous approach reduces the margin for arbitrary decisions by the international judge (*arbitrium judicis*): if the defence knows in advance the legal logic that can and will be followed by the judges, their conclusions may reasonably be anticipated. If, on the contrary, the judges proceed a little "too rapidly", their reasoning is less foreseeable, and the defence is deprived of the means to reasonably anticipate the judges' conclusions.

1.2.2. The "wild" approach

If one considers the judgements pronounced by the two International Tribunals, it quickly becomes apparent that the international judges have often adverted to and applied the case law of other international or national courts, not in order to establish the existence of a rule of customary international law or a general principle of law, but rather directly to resolve the legal problem before them. At other times, they have simply quoted national or international judgements in support of a conclusion that they had already reached by other means of legal reasoning, without indicating (or even so much as

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raising the question of) the value or significance of their reference to the case law of other national or international courts.

This approach, especially the first of the two variants set out above, does not appear to be justified by any legal principles or logic, because it does not take account of the facts, (1) that international tribunals belong to a *totally distinct legal system from that of national courts*, a legal sphere with its own rules, time-frame and institutions, and (2) that even where international criminal tribunals apply the case law of other international courts, such as the European Court, international criminal proceedings display their own specific characteristics which cannot be ignored.

It is easy to see why judges from common law backgrounds tend to prefer this approach, as their mentality and legal training lead them to act as if they were working within a court in the United States, the United Kingdom or Australia. Thus, often they tend to apply the doctrine of judicial precedent and follow the case law of other courts as if they were national judges in a common law country. Often, however, this approach to the problem is also followed by judges from civil law backgrounds, as the following example shows.

In *Jean-Bosco Barayagwisa* the accused appealed to the ICTR Appeals Chamber against a Trial Chamber decision rejecting an interlocutory plea contesting the legality of his arrest and detention. In its Decision of 3 November 1999, the Appeals Chamber held that the accused's rights had been breached, dismissed the criminal proceedings definitively and ordered that the accused be released immediately. To support this decision, the Chamber repeatedly referred to national case law to solve the legal problems raised by this international trial. For example, Article 40 of the ICTR Rules provides that the indictment must be presented within 20 days following the arrest of the accused. To establish whether the ICTR had respected the accused's right to be informed of the charges against him promptly, the Chamber had to decide whether the period during which the accused was held in custody in Cameroon at the request of the ICTR Prosecutor should be counted, even though the accused was not yet under the physical control of the Prosecutor. For this purpose, the Appeals Chamber quoted several judgements by United States Courts and a judgement by a Singapore Court for concluding that the accused had been detained in Cameroon under the authority of the Tribunal (paras. 56-59). The Chamber did not explain *why* and *under what authority* it had relied upon the case law of these two States (both common law countries). In that case, the Chamber adopted the same approach in establishing whether the rights of the accused had been breached because the Prosecutor had not informed him immediately of the charges against him, or had not undertaken the investigation with all due diligence, or due to the fact that the Trial Chamber had not reviewed the legality of his detention. In resolving

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these issues, the Chamber relied on the "abuse of process" doctrine, a concept of Anglo-Saxon origin which it interpreted in the light of English and United States case law (paras. 74-77). The Chamber notably relied on common law countries' case law when it considered the duty of the Prosecutor to act with all due diligence (paras. 92-97). It should be noted, however, that the Chamber was a little more forthcoming as to the reasons for its reliance on national case law when it ordered the immediate unconditional release of the accused "with prejudice to the Prosecutor". Indeed, it immediately added that "[s]uch a finding is consistent with the case law of many national systems", quoting cases from Canada, the Philippines, the United States and Zimbabwe (paras. 108-111).

This approach was also taken by the Appeals Chamber in response to the Prosecutor's Motion for review in the same case.[3] The question was whether the four criteria for Appeals Chamber review of a judgement, set out in ICTR Rule 120, had been met and, in particular, whether the discovery of a new fact had resulted from an initial lack of diligence by the party concerned. In that case, the prosecution had already been aware of the "new" fact it raised before the Appeals Chamber. In such a situation, the Chamber held that "[i]n the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice", it would interpret the said condition as not being of a peremptory nature (para. 65). The Chamber added that "[t]here is precedent for taking such an approach", quoting an English and a Canadian decision (paras. 67-68). Finally, it felt the need to further justify itself:

> The Appeals Chamber does not cite these examples as authority for its actions in the strict sense. The International Tribunal is a unique institution, governed by its own Statute and by the provisions of customary international law, where these can be discerned. However, the Chamber notes that the problems posed by the Request for Review have been considered by other jurisdictions, and that the approach adopted by the Appeals Chamber here is not unfamiliar to those separate and independent systems. To reject the facts presented by the Prosecutor, in the light of their impact on the Decision, would indeed be to close ones eyes to reality. (para. 69).

Clearly, the Chamber, albeit acting under the influence of civil law judges, had recourse to national case law solely to corroborate a legal conclusion that it had already reached, although the actual means by which it arrived at that conclusion and the underlying legal reasoning remain unclear. The solution suggested instead, with his usual legal acumen, by Judge Shahabuddeen in his Separate Opinion makes even clearer the failings in the legal reasoning used by the Chamber. The Judge invoked "the superior de-

[3] Decision of 31 March 2000.

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mands of justice" to justify his concurring conclusions on that point (paras. 49-54). He considered, indeed, that the two cases referred to by the Chamber only served to confirm a *general principle of justice* or a *general principle of criminal law*, valid in both domestic and international criminal proceedings, according to which, in exceptional circumstances, the overriding requirements of justice may justify review of a decision based on a new fact even though that fact was already known to the party concerned.

Plainly, in general the "wild" approach tends to place law that is "external" to the international criminal court (national law and national or European Court case law, in this case) on the same level as the law governing that court. In other words, the International Criminal Tribunal makes reference to, or applies, national and European Court case law without distinguishing it from the decisions of the Tribunal itself or of other international criminal courts. The end result of this approach is to efface the pre-eminence of the applicable law of international criminal courts, described above concerning the "wise" approach.

2. A transversal analysis of the influence of the European Court on the case law of the international criminal tribunals

2.1. The importance of reliance on the case law of the European Court

The general methodological considerations set out above form the basis of the following analysis of the influence of the Strasbourg Court. Before examining the subject in detail, however, it is worth considering *why* the case law of the European Court is of such great importance compared with the other bodies of international case law available to the International Tribunals. There are three main reasons.

In the first place, the European Court is an international court applying international law; therefore, its judgements belong to the same category as the decisions of International Criminal Tribunals. Consequently, its case law has far greater legal value than that of national tribunals.

In the second place, the ICTY and the ICTR, in fulfilling their mission of ensuring that persons responsible for serious violations of international humanitarian law are arrested and prosecuted, must guarantee respect for fundamental human rights of the persons concerned. In particular, they must fully respect the rights of suspects and accused and ensure fair and expeditious trials, while also taking account of the need to protect victims. This mission is defined in Articles 20 and 21 of the ICTY Statute, which are clearly based on the provisions of the European Convention (and the United Nations Covenant on Civil and Political Rights), especially Articles 5 and 6 of the Convention.

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The European Court is endowed, *inter alia*, with the task of ensuring respect for Articles 5 and 6 of the European Convention by Member States. These Articles set out, respectively, the principles to be complied with in cases of lawful detention and the essential guarantees of fair trial. Of course, these two fundamental provisions limit State action in national legal systems: the 44 Member States are required to implement these essential principles with respect to the detention of private individuals and the administration of justice. These rules and the related case law are not transposable, as such, to international criminal courts. Nevertheless, they state general principles that may prove to be relevant even at the international level. It is perfectly natural, therefore, that in fulfilling their mission, international judges should take inspiration from the experience of the European Court.

In the third place, by elucidating principles common to all 44 of its Member States, the European Court also provides an indication of the principles applicable within those countries. Some of these countries have common law based legal systems, while others are based on the civil law legal tradition. European Court case law thus represents *an extremely interesting "sample of legal systems" from the comparative law viewpoint*. In contributing to the harmonisation of the legal systems of all of these countries, the case law of the European Court is of great significance in elucidating the general principles of criminal justice common to the major legal systems of the world, because it clarifies the principles that are observed, or should be observed, by 44 European States. This essential aspect of the Strasbourg Court's case law makes it far more interesting for the ICTs than the case law of the American Court of Human Rights, where almost all member States belong to the civil law tradition (whereas the "findings" of the United Nations Human Rights Committee, albeit just as interesting as Strasbourg judgements on the merits, do not have the same stature as the case law of a truly judicial body).

Let us now consider how the judges in The Hague and Arusha rely on the case law of the Strasbourg Court.[4]

First and foremost, it should be noted that the main influence of European Court case law has been with respect to *international criminal procedure*. The ICT judges have found it necessary to resort to Strasbourg case law in defining the rights of the accused during arrest and pre-trial detention, as well as the conditions for ensuring the impartiality of the tribunal and implementation of the principle of "equality of arms". In this respect, the case

[4] On this point, see also A. Cassese, "The Impact of the European Convention on Human Rights on the International Criminal Tribunal for the former Yugoslavia", in *Mélanges à la mémoire de R. Ryssdal*, Carl Heymanns Verlag: Köln-Berlin-Bonn-München (2000), 213-236.

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law relating to Articles 5 and 6 of the European Convention has proven very useful to the judges in The Hague and Arusha.

However, the influence of Strasbourg has also been felt on questions of *substantive criminal law*. The ICTs have jurisdiction to try persons responsible for serious violations of humanitarian law. However, the crimes set out in their Statutes are not precisely defined, generally referring back to international humanitarian law and customary rules of international criminal law. Given the imprecision of the crimes defined in the Statutes, the judge has an important role to play in searching for the elements that may be of aid in interpreting the relevant provisions. Of course, the European Convention is one of those elements, but the influence of the Strasbourg Court cannot be explained solely by the imprecision of the Statutes. It is also due to the similitude between the interests protected by the European Court and the two *ad hoc* criminal tribunals. The exceptionally serious nature of the acts incriminated by the Statutes is comparable, in some ways, to the particularly strong protection afforded to human dignity in Article 3 of the European Convention, through the prohibition of torture and inhuman or degrading treatment. Consequently, the influence of the European Court may also be of assistance in clarifying the nature of violations of the interest protected by the incrimination and even the constitutive elements of some of the crimes involved, such as torture, inhuman treatment and rape.

2.2. Outline of the paper

Rather than providing an overview of the case law of the International Criminal Tribunals based on the principal subject matter influenced by the European Court, this paper takes a more "*transversal*" approach to this case law, placing the emphasis on the *approach* adopted by the Tribunals and the *manner* in which they have used the case law of the European Court. This rapid and admittedly incomplete exposition should allow readers to understand the legal reasons for which the two tribunals have drawn upon European case law, but also the mechanisms through which Strasbourg has made an impact on The Hague and Arusha as well as the limits thereof.

2.3. The judges in The Hague and Arusha are aware of the limits of reliance on other judicial bodies, imposed by the specific nature of international criminal proceedings

An introductory remark is necessary. The Tribunals in question are well aware of the *limits* of reliance on the case law of the European Court (and more generally on that of all national and international courts). They understand perfectly the need to take the specificity of international criminal justice into consideration.

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The decision by the Appeals Chamber in *Tadić* concerning the concept of a "*tribunal established by law*" illustrates the will of the ICTY judges to incorporate the guarantees provided by the European Convention while at the same time keeping their distance from the case law of the European Court. The ICTY recognises the existence of a "right to a tribunal established by law", but rejects the interpretation of this right by the European Court based on the separation of powers, proposing instead an autonomous interpretation better adapted to the international situation.

In *Tadić*,[5] the issue was whether the creation of the International Criminal Tribunal contravened the general principle according to which tribunals must be "established by law". For the appellant, the right to a tribunal "established by law", "forms part of international law as a 'general principle of law recognized by civilized nations', one of the sources of international law in Article 38 of the Statute of the International Court of Justice". Defence counsel emphasised "the fundamental nature of the 'fair trial' or 'due process' guarantees afforded in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights". They were argued to be "minimum requirements in international law for the administration of criminal justice".

The Appeals Chamber recognised that a general principle of law may be derived by reference to these three conventions, *i.e.*, an international obligation. However, according to the Chamber this principle, as applied to national administrations, must be adapted to the specificity of the International Criminal Tribunal. Thus, the Chamber did not apply the European Court's interpretation of the expression "established by law", according to which a tribunal must be established by the legislative power and not the executive, because the case law on the European Convention concerns national systems, applying the principle of the separation of powers, whereas the international framework of the ICTY is not based on this principle. The Appeals Chamber examined a second possible interpretation according to which the expression, "established by law", might "refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions". It considered that the Security Council does make binding decisions when it acts under Chapter VII of the United Nations Charter. Finally, it explored a third possible interpretation of this notion, under which the creation of a tribunal must be "in accordance with the rule of law". This idea is more appropriate to the context of international repression: "[t]his does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied

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5 ICTY, *Tadić*, Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, paras. 42-47.

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in the relevant international instruments. Then the court may be said to be 'established by law'". "For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments". The Chamber confirms this analysis by reference to the UN Covenant: "what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and that it observes the requirements of procedural fairness". The Appeals Chamber concluded that the Tribunal fulfils this third criterion.

Equally in *Tadić*, but in another Decision (in 1999), the ICTY also made a point of taking the specificity of the international criminal trial into consideration as regards "*equality of arms*".

Before the Appeals Chamber, defence counsel had argued a breach of this principle due to the fact that, in the absence of co-operation from some governments, it had not been possible to organise the appearance of certain defence witnesses, whereas prosecution witnesses had not faced the same problems. As a result, the accused had not had the sufficient time and means to prepare his defence as compared with the prosecution.[6]

At the outset, the Chamber stated that Article 20(1) offers the same guarantees as regional and international human rights instruments (including Article 6(1) of the European Convention).[7] Then it noted that, in accordance with Human Rights Committee findings, the decisions of the European Commission (*Morael* v. *France*, 8 January 1993) and Article 14 of the United Nations Covenant, the right to a fair trial covers the principle of equality of arms. Finally, in order to determine the scope of this principle, the Chamber considered it necessary to refer to international case law (especially that of the European Court introduced by defence counsel, set out in note 6), concluding that equality of arms requires the judicial body to ensure that none of the parties be placed at a disadvantage in the course of presenting their case. The Chamber observed, however, that the case law concerns proceedings before national courts which have the capacity, if not directly, then at least through other State institutions, to control the material elements affecting the fairness of the trial. On the contrary, an international Tribunal

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6 The defence relied on the case law of the European Court (referring to the following Judgements: *Dombo Beheer,* 27 October 1993; *Neumeister,* 27 June 1968; *DelCourt,* 17 January 1970; *Borgers,* 19 April 1989; *Albert et Le compte*, 10 February 1983; *Bendenoun,* 24 February 1994; *Kaufman,* 9 December 1986; *X and Y v. Austria,* 8 May 1962), to illustrate the principle of "equality of arms" guaranteed by Article 20(1) of the Statute; in particular, defence counsel considered that this principle extends not only to procedural equality before the Tribunal, but also substantive equality in the interest of ensuring a fair trial (see paras. 30-31, especially note 54).

7 ICTY, *Tadić,* Appeal Judgement, 15 July 1999, paras. 29-54.

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must rely on the co-operation of States, and has no power to oblige them to do so by coercive measures. Consequently, the principle does not have the same scope before the ICTY as before national courts. In this context, equality of arms implies that, the parties having the right to equality before the Tribunal, the latter must satisfy the requests of the parties to the extent possible. The Chamber then enumerated all the powers at its disposal to ensure the presence of witnesses. It noted that the appellant complained of not having had a fair trial due to lack of evidence resulting from a lack of co-operation from some State authorities. However, there was no suggestion that the Chamber had been negligent. Consequently, the latter concluded that the principle of equality of arms had not been violated.

Clearly, the ICTY Appeals Chamber was fully aware of the *specificity of international criminal courts* and, therefore, the limits on the extent to which general principles of national law may be transposed to the international sphere.

The same is true for issues related to the *legality of the arrest of an accused*. In *Dokmanović* the accused complained, *inter alia*, of the methods used to arrest him. He maintained that his arrest was illegal because, through a ruse employed to get him to Croatia, the arrest was, in reality, kidnapping or unlawful detention. The Trial Chamber considered, on the contrary, that recourse to a "ruse" is compatible with international law principles. The Chamber came to this conclusion essentially on the basis of an analysis of the European Convention and the case law of the Strasbourg Court. In spite of the silence of the ICTY Statute and Rules, the Chamber recognised that the arrest must be made "in accordance with procedures prescribed by law" under Article 5(1) of the European Convention (and 9(1) of the United Nations Covenant) as interpreted by the European Court.[8] Quoting *Stocké v. Germany* (19 March 1991) and *Bozano v. France* (18 December 1986) at length, the Chamber noted that the European Court considers the resort to certain stratagems illegal.[9] Nevertheless, it found that the examples drawn from the Strasbourg case law were not pertinent here, because the situation was not the same:

> The cases from the European Court of Human Rights and the Human Rights Committee [United Nations], interpreting Articles 5(1) of the ECHR and 9(1) of the ICCPR [UN Covenant], respectively, discuss illegality of arrest in relation to violations of specific, established procedures for obtaining custody of a suspect (often relating to an extradi-

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8 ICTY, *Mrksić, Dokmanović et al.*, Trial Chamber, *Decision on the Motion for Release by the Accused Slavko Dokmanović*, 22 October 1997, paras. 59-60.

9 In these cases (quoted at paras. 62-65), the European Court held that "irregular" arrest may result from violation of established procedures (whether national procedures in another State or extradition proceedings).

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> tion treaty) or in relation to forcible kidnapping, which has been considered manifestly arbitrary. There is, however, no such extradition treaty or cooperation agreement between the International Tribunal or UNTAES [United Nations Transitional Administration for Eastern Slavonia] and the FRY. Obviously, neither the International Tribunal nor UNTAES are States and thus do not have the power to conclude extradition treaties with other States. ... In addition, there was no forcible kidnapping in the case at bar, which could be seen as manifestly arbitrary. The Trial Chamber finds that the procedures for arrest established by the Tribunal were followed by the body carrying out the arrest, UNTAES.[10]

Consequently, in this case, the reference to the European Convention was used to retain a principle that is not set out expressly in the Statute or Rules: the need for arrests to be legal. Rightly, however, the case law of the European Court relating to this principle was not considered to be perfectly *transposable* to the circumstances of the case, due to the specificity of international criminal justice.

Another area in which the international criminal judges have been aware of the need to take account of the specific nature of international criminal trials is that of the *applicability of the principle* jura novit curia. Thus, for example, in the *Kupreškić et al.* case, an ICTY Trial Chamber[11] declared that the Tribunal is not free to change the legal characterisation of the crimes charged in the indictment. Even though this capacity is recognised in certain international proceedings (such as those before the European Court: *Neumeister,* 27 June 1968, *Handyside,* 7 December 1976), the same rule cannot apply before the ICTY, where the rights of an individual accused are at stake, such as the right to be "informed promptly and in detail" of the "nature and cause" of the charges against him or her.

Therefore, in these cases, the ICTs have not mechanically transposed notions established by the European Court and other international or internal courts. In fact, some judges and certain Chambers of these Tribunals have shown that they are fully aware of the problems arising from reliance on concepts established by national law or laid down by the case law of other tribunals. This emerges most clearly from the dissenting opinion of one of the members of the ICTY Appeals Chamber in *Erdemović*,[12] whose argu-

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[10] *Mrksić, Dokmanović et al.*, *supra*, note 8, para. 67.

[11] Judgement of 14 January 2000, para. 740.

[12] I refer to my separate and dissenting opinion in the *Erdemović* case. In criticising the importation of notions drawn from national law into international criminal trials, I wrote that one of the reasons for opposing this tendency was that it:

> may alter or distort the specificity of these proceedings. International trials exhibit a number of features that differentiate them from national criminal proceedings. All these features are linked to the fact that international criminal justice is dispensed in a general setting markedly different from that of national courts: international criminal

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ments were later retained by a Trial Chamber of the ICTY in the *Furundžija* Judgement of 10 December 1998 (para. 178).

2.4. Recourse to the case law of the Strasbourg Court has served to clarify concepts that are not defined in the relevant international texts

In some cases, ICTY and ICTR Chambers have drawn upon Strasbourg case law in order to clarify concepts that are ambiguous or unclear in international law. This was the case, for example, concerning the *guarantees required for arrest of an accused.*

In *Dokmanović*[13] the question was *where* the latter had been arrested: in Croatia, or (illegally) in the Federal Republic of Yugoslavia? Indeed, Dok-

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courts are not part of a State apparatus functioning on a particular territory and exercising an authority of which courts partake. International criminal courts operate at the inter-State level. They discharge their functions in a community consisting of sovereign States. The individuals over whom these courts exercise their jurisdiction are under the sway and control of sovereign States. Many important consequences follow from this state of affairs. Here I shall confine myself to stressing only the most striking one: an international criminal court has no direct means at its disposal of enforcing its orders, summonses, and other decisions; to compel individuals under the sovereignty of a State to comply with its injunctions, it must rely on the cooperation of that State. To lose sight of this fundamental condition, and thus simply transplant into international law notions originating in national legal systems, might be a source of great confusion and misapprehension. The philosophy behind all national criminal proceedings, whether they take a common-law or a civil-law approach, is unique to those proceedings and stems from the fact that national courts operate in a context where the three fundamental functions (law-making, adjudication and law enforcement) are discharged by central organs partaking of the State's direct authority over individuals. That logic cannot be simply transposed onto the international level: there, a different logic imposed by the different position and role of courts must perforce inspire and govern international criminal proceedings. (Appeals Chamber, Decision of 7 October 1997, Dissenting Opinion, para. 5).

After having expressed these doubts, I proposed the following method:

Any time international provisions include notions and terms of art originating in national criminal law, the interpreter must first determine whether these notions or terms are given a totally autonomous significance in the international context, i.e., whether, once transposed onto the international level, they have acquired a new lease of life, absolutely independent of their original meaning. If the result of this enquiry is in the negative, the international judge must satisfy himself whether the transplant onto the international procedure entails for the notion or term an adaptation or adjustment to the characteristic features of international proceedings. This exploration should be undertaken by examining whether the general context of international proceedings and the object of the provisions regulating them delineate with sufficient precision the scope and purpose of the notion and its role in the international setting. Only if this enquiry leads to negative conclusions is one warranted to draw upon national legislation and case-law and apply the national legal construct or terms as they are conceived and interpreted in the national context. (*ibid.*, para. 6).

[13] *Mrksić, Dokmanović et al.*, *supra*, note 8.

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manović was enticed by ruse to the frontier between the two countries and boarded a vehicle of the United Nations Transitional Administration for Eastern Slavonia (UNTAES), believing he was being taken to an appointment with General Klein. Instead, he was driven across the border to the UNTAES military base at Erdut in Croatia, where armed "Administration" soldiers made him leave the vehicle and handcuffed him.

To decide this point, the Trial Chamber had to define the concept of arrest. In order to do so, it referred to "international law", under which, the Chamber observed that, "a restraint upon a person's free movement is seen as a necessary component of an arrest". For added precision, the Chamber then quoted Article 5(1) of the European Convention, holding that "an arrest or detention, in the sense of Article 5, is an extreme form of restriction upon freedom of movement ... When a law enforcement officer, by physical restraint, conduct or words indicates to an individual that he or she is not free to leave, there is an arrest for the purposes of Article 5". After having mentioned the relevant legislation in three countries (the United Kingdom, the United States and Australia) as well as the United Nations Covenant, the Chamber deduced that the arrest occurred in Erdut.[14]

In the above case, the reference to the European Convention was used to *define and clarify* a concept included in the Statute and Rules, without specifying the legal value of the reference to the Convention (and national legislation).

The same applies with respect to the *conditions for provisional release.*

In *Delalić et al.* an ICTY Trial Chamber had to determine whether "exceptional circumstances" justified the provisional release of an accused under Rule 65(B). The Chamber held that for this purpose, three elements must be considered: (i) "there is reasonable suspicion that he [the accused] committed the crime or crimes as charged", (ii) "his alleged role in the said crime or crimes" and, finally, (iii) "the length of the accused's detention". It then examined each of these elements at length, in light of a detailed analysis of Strasbourg case law, and concluded that for the detention to remain lawful, it is not sufficient that there was reason to suspect that the accused committed the crime at the time of his arrest; to justify continued detention, those reasons must remain valid.[15]

In this case, the references to European Court case law served to *establish the constitutive elements of a concept* ("exceptional circumstances" justifying release of an accused) *that the Rules did not specify.* While the reference to the Strasbourg judgements was undoubtedly useful, if not indispensable, it may be regretted, nevertheless, that the Chamber did not point out

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[14] *Ibid.*, paras. 27-32.

[15] ICTY, *Delalić et al.*, Trial Chamber, *Decision relating to the Request for Provisional Release by the Accused*, 25 September 1996, paras. 19-31.

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the legal value and scope of its reference to the case law of the European Court.

The ICTY has also referred to Strasbourg case law to clarify the concept of *judicial impartiality*, which the Statute does not define.

The ICTY Statute guarantees the high moral character, impartiality and integrity of judges (Article 13). ICTY Rule 15 provides that a judge shall not sit in any case in which he has a personal interest or concerning which the judge has, or has had, any association which might affect his or her impartiality.

The similarity between the guarantee of impartiality in the Statute and in Article 6(1) of the European Convention has led the ICTY judges to refer to the abundant case law of the European Court on this theme, all the more so because the statutory provisions do not provide answers in all cases.

For example, Judge Odio-Benito was criticised for having cumulated her judicial function with an elected political office as Vice-President of the Republic of Costa Rica. The Bureau of the ICTY, assigned to resolve the dispute, having observed that the question of judicial impartiality had been examined by the European Court, undertook an analysis of the case law of the Court (*Hauschildt,* 24 May 1989; *Campbell and Fell,* 28 June 1984; and *Sramek,* 22 October 1984).[16] It considered that these cases, "although originating in different systems, are useful in that they show that the simple fact that a person who holds judicial office is, to a certain extent, subject to the control of the executive, in another function, is not in itself incompatible with the independence of justice". The Bureau went on to note that, in reality, Judge Odio Benito did not effectively take up her duties as Vice-President during the exercise of her judicial function. Consequently, she did not have to recuse herself.

Later, Judge Mumba was attacked due to her involvement in the United Nations Commission on the Status of Women and declarations concerning the crimes alleged to have been committed in the former Yugoslavia. The ICTY Appeals Chamber, before which the issue was raised in the *Furundžija* appeal, began by setting out the statutory rules on impartiality as a guarantee of a fair trial.[17] These provisions being of a general nature, the Chamber decided to interpret them. For this purpose, it referred to the abundant case law of the European Court developing both subjective and objective approaches to impartiality.[18] The Chamber also observed that the interpretation of the

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[16] ICTY, *Delalić*, Bureau, *Decision of the Bureau on Motion on Judicial Independence*, 4 September 1998.

[17] ICTY, *Furundžija,* Appeal Judgement, 21 July 2000, paras. 182-191; these rules are contained in Articles 13(1) and 21 of the Statute; the Chamber also referred, *inter alia*, to Article 6 of the European Convention (note 39).

[18] References were made to *Le Compte,* 23 June 1981; *Piersack,* 1 October 1982; *Campbell and Fell*, 28 June 1984; *Sramek,* 22 October 1984; *Cubber,* 26 October 1984; *Hauschildt,*

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concept within national systems generally corresponds with that of the European Court, before going on to study a number of national cases. The Chamber deduced a *general rule* from this analysis according to which a judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. It specifically noted that an absence of impartiality can result where the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias. Finally, it considered that ICTY Rule 15(a) must be interpreted according to the abovementioned principles. After having applied all of these tests to the case at hand, the Chamber found the Judge to be impartial.[19]

Similarly, the judges in The Hague have used the Strasbourg case law relating to "*equality of arms*", notably in determining *whether they could oblige defence counsel to disclose preliminary depositions by defence witnesses to the Prosecutor.* In principle, the ICTY Rules do not impose the same obligations on the prosecution and the defence concerning the communication of evidence before the trial. In particular, under Rules 66 and 67, when preparing the trial, the Prosecutor must provide the defence with the evidence annexed to the request for confirmation of the indictment and copies of the declarations by witnesses to be called to give evidence, as well as all evidence contained in written depositions, books or documents and the names of all the prosecution witnesses. The Prosecutor must even, by virtue of ICTY Rule 68, inform defence counsel of all evidence in favour of the accused. On the other hand, under ICTY Rule 67, the defence need only inform the Prosecutor of alibis and special defences before the beginning of the trial.

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24 May 1989; *Bulut,* 22 February 1996; *Incal,* 9 June 1998; *Castillo Algar,* 28 October 1998.

19 According to Judge Robinson, the Chamber should have sought a customary rule on the principle of impartiality. It should not have contented itself with affirming the existence of a general principle (Declaration annexed to the Judgement, paras. 19-22). In another Declaration, Judge Shahabuddeen adopted a different approach. In his opinion, it was not necessary "to consider whether there has emerged a customary norm as to the standard by which a determination is to be made as to whether the principle of impartiality has been breached in particular circumstances. The duty of the Appeals Chamber is the same as that of any court charged with responsibility for implementing a principle. That duty is to interpret, and to apply the principle as interpreted, to the circumstances of the particular case. In discharging that duty, the Appeals Chamber may see value in consulting the experience of other judicial bodies with a view to enlightening itself as to how the principle is to be applied in the particular circumstances before it. However, in doing that, it does not have to undertake a comparative review designed to show whether a new customary norm has come into being on the basis of general concordance of state practice." (para. 4).

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In *Delalić et al.*[20] the issue was whether, in the absence of any specific provision, the judges could order advance disclosure by defence counsel to the Prosecutor of the names of witnesses to be called by the defence in the course of the trial, so as to give the prosecution time to prepare a constructive cross-examination. Having noted the absence of any provision applicable at that particular stage of the trial, the Trial Chamber decided to apply ICTY Rule 54. This provision grants the Chamber a general power to fill gaps in the Rules. Does it authorise the Tribunal to make such an order? In answering this question, the Chamber based its decision on the principles of free trial, the efficient administration of proceedings, equality of arms and the right to due hearing by all parties to the trial. It relied heavily on the case law of the European Court concerning contradictory proceedings (*Ruiz-Mateos,* 23 June 1993) and the principle of equality of arms (*Neumeister,* 27 June 1968). As for the latter principle, the Chamber did not consider it to be a reciprocal principle but rather the guarantee of a just balance between the parties. It concluded, thus, that the defence could be ordered to provide the prosecution with the list of witnesses it intended to call at trial, *for the efficiency of cross-examination and for a rapid and equitable trial*, all the more so because the prosecution, also dependent on State co-operation, is *not necessarily in a more advantageous position than the defence.*

Thus it would seem that the Chamber, confronted with an extremely complicated problem that was not resolved by the relevant international rules, rightly relied on *general procedural principles* developed in the Strasbourg case law.

The International Criminal Tribunals have drawn upon the case law of the European Court not only as concerns international criminal procedure, but also with respect to substantive criminal law. This is particularly true for the definition of the crimes of *"outrages upon personal dignity" and torture.*

The ICTY has referred to Strasbourg case law to define the concepts of outrage upon personal dignity and humiliating and degrading treatment, to which Article 3 of the Statute of the Tribunal refers implicitly.[21]

As regards Article 3 of the Statute, relating to violations of the laws or customs of war, in the *Aleksovski* case, an ICTY Trial Chamber referred to the "legislative" context of the provision in holding it to be a general proscription of inhuman treatment.[22] To this end, the Chamber found that the purpose of Article 3 was to protect inherent human dignity by reference to

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[20] ICTY, *Delalić et al.*, Trial Chamber, *Decision on the Prosecutor's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence*, 4 February 1998, paras. 31-48.

[21] Article 3 is a framework provision referring, for example, to the prohibition of outrage upon personal dignity contained in paragraph (1)(c) of Common Article 3 to the four Geneva Conventions: ICTY, *Aleksovski,* Trial Judgement, 25 June 1999, para. 48.

[22] ICTY, *Aleksovski*, Trial Judgement, 25 June 1999, paras. 47-55.

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the provisions of the four 1949 Geneva Conventions, common Article 3 of which prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment". However, it also referred to the general definition of the expression "inhuman treatment" laid down by the European Court, the only international institution to have defined the expression, which is based on the degree of suffering by the victim (*Ireland v. United Kingdom*; *Ribitsch v. Austria*).[23] The Chamber noted, in particular, that the European Court has (i) established the test of the "level of suffering endured by the victim"; (ii) found that "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (ECHR)"; and (iii) specified that "[t]he assessment of this minimum is, in the nature of things, relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc". The Chamber continued its analysis by underlining that the outrages upon personal dignity covered by Article 3 of the Statute violate the most important value protected by international human rights law and international humanitarian law: respect for the human personality. The Chamber went on to determine the *actus reus* and *mens rea* of the crime of outrage upon personal dignity (although the ICTs refer, with parsimony, to European case law relating to the material element of some international crimes, this is not the case as regards the mental element for, clearly, Strasbourg case law is not pertinent to this subject).

In this case, the reference to the European Convention and the case law of the Court of Strasbourg went towards *determining the protected interest as well as the criteria for the* actus reus *of the crime.* It would seem, thus, that in this case, although it never explicitly considered the validity of such recourse to the judgements of the European Court, the Chamber admitted implicitly that the case law is based on a general concept of "outrage upon personal dignity" which constitutes a *general principle* of international human rights law and, as such, is capable of assimilation by international criminal law.

The reference to Strasbourg case law has also been of use in relation to the *definition of the crime of torture.*

In *Furundžija* a Trial Chamber[24] noted that, while torture is not directly mentioned in Article 3 of the Statute, relating to violations of the laws or customs of war, that Article covers the whole body of rules making up international humanitarian law, including the prohibition of torture.[25] In addition,

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[23] ECHR, *Ireland v. United Kingdom*, 18 January 1978, Series A, vol. 25, para. 14; ECHR; *Ribitsch v. Austria*, 4 December 1995, Series A, vol. 336, para. 38.

[24] ICTY, *Furundžija*, Trial Chamber, *Judgement*, 10 December 1998, paras. 158-160.

[25] *Furundžija*, *ibid.*, para. 158; see also ICTY, *Tadić*, Appeals Chamber, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction,* 2 October 1995, paras. 86-94, ac-

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torture is expressly referred to in Article 2(b) of the Statute, which refers to the Geneva Conventions of 12 August 1949, and in Article 5(f) of the Statute relating to crimes against humanity. However, international humanitarian law does not define torture. The Chamber thus examined the definition of this crime in Article 1 of the 1984 United Nations Convention against Torture,[26] a wider definition than that set out in the 1975 United Nations General Assembly Declaration and the 1985 Inter-American Convention. In any case, these definitions are very similar and, according to the Chamber, are "in line with the definition suggested or acted upon by such international bodies as the European Court of Human Rights and the Human Rights Committee" (reference to the *Ireland v. United Kingdom* case[27] and the *Greek Case*[28]). It concluded that

> [t]he broad convergence of the aforementioned international instruments and international jurisprudence demonstrates that there is now general acceptance of the main elements contained in the definition set out in article 1 of the Torture Convention.

In this case, therefore, Strasbourg case law has been used as *one of the elements leading to the conclusion as to the existence of an international, customary law, definition of torture.*

The Chamber also made reference to Strasbourg case law in the same case, when concluding that rape may constitute a form of torture. The Chamber accepted a wide concept of torture based on the international protection of personal dignity. It observed that international case law, especially that of the European Court (references to the *Aksoy*, 18 December 1996 and *Aydin*, 25 September 1997, cases), as well as the reports of various committees, define the practice of rape during detention and questioning as torture when it is used as a means of punishing, intimidating, constraining or dis-

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cording to which Article 3 of the ICTY Statute is a residual, or umbrella, rule making an open-ended reference to all serious violations of international humanitarian law.

[26] "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or from a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[27] ECHR, 18 January 1978, Series A, vol. 25, para. 167: "torture is inhuman treatment deliberately causing serious and cruel suffering".

[28] 12 *Yearbook of the European Convention on Human Rights*, p. 186 (1969), where the Commission finds that torture has an aim, for example: obtaining information or confessions, or inflicting a punishment; it is thus an aggravated form of inhuman treatment.

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gracing the victim, or in order to obtain information or confessions from him or a third person (*Aydin* case).

The influence of the European Court only intervened in this context in order to *clarify the protected interest and one of the constitutive elements of rape.*

2.5. Strasbourg case law has often been used solely to support or corroborate conclusions based on the relevant international law, in the search for a sort of *a posteriori* legitimacy

This was the case, for example, with regard to "equality of arms", particularly in *establishing whether the right of defence counsel to call witnesses and submit evidence in support of the case may be limited.*

In *Delalić*,[29] during a Status Conference organized by the Chamber, counsel for the accused was invited to limit redundant testimony and, for that purpose, to prepare a list of witnesses accompanied by a summary of the aspects of the indictment to which the testimony of each witness would be directed and an estimate of the length of each testimony. However, considering that counsel for the accused had not responded to this invitation, during a later Status Conference, the Chamber threatened to draw up the list itself. The Motion was based on this point.

Debate before the Chamber focused on the practical application of the principle of equality of arms. For the defence, the rights of the accused included that to question, or have questioned, prosecution witnesses and to call and examine defence witnesses *under the same conditions as for prosecution witnesses*. Following this view, the Chamber had no power to regulate or intervene in the exercise of this right by defence counsel. In a way, the defence was arguing the absolute nature of the accusatory principle. The Chamber, after having quoted the applicable provisions (Articles 20 and 21 of the Statute and Rules 54, 89, 95, 96 and 98; Article 14 of the United Nations Covenant; Article 6 of the European Convention), held that it had power to control proceedings and, in particular, to call witnesses, issue warrants, admit relevant evidence or exclude any evidence obtained without guarantees ensuring fair trial, in such a way as to render it unreliable or contrary to the fair administration of justice. At the same time, the Chamber must respect the rights of the accused set out in Article 20(1) of the Statute, a synthesis of various aspects of the accusatorial and inquisitorial systems that is consistent with the provisions of the United Nations Covenant and the European Convention. The right guaranteed in Article 21(4)(e) is subject to

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[29] ICTY, *Delalić et al.*, Trial Chamber, *Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence Dated 24 May 1998*, 12 June 1998, paras. 22-40.

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the power conferred on the Chamber by Article 20(1) to ensure a fair and expeditious trial and its power to refuse any irrelevant or repetitious testimony. Article 21(4)(e) must be construed within the context of both the accusatorial and inquisitorial systems.

In support of its decision, the Chamber referred to the case law of the European Commission, according to which Article 6(3)(d) of the European Convention does not guarantee a general right to call witnesses and may justify the refusal to call irrelevant witnesses (*Austria v. Italy*, decision of the European Commission, 11 January 1961; *X v. Austria*, decision of the Commission, 19 December 1961; and *X v. FRG*, decision of Commission, 24 September 1963).

The defence also claimed that the prosecution had not been subject to the same restrictions, thus breaching the principle of equality of arms. The Chamber replied that the defence had not been "*placed at any disadvantage*" (an implicit reference to the case law of the European Court). The right to question is not unlimited.

In summary, in this case, the Chamber made reference to Strasbourg case law simply, and specifically, to *support and corroborate* an interpretation it had already adopted on the basis of the provisions of its Statute and Rules.

The same approach was taken concerning the *right of the accused to be informed of the nature and cause of the charges against him.*

Both the ICTY and ICTR Statutes, as well as the European Convention, recognise and regulate the right to be informed of the charges laid by the prosecution. A question remains, however, as to the level of precision required in an indictment.

To resolve this issue, a Chamber of the ICTY in *Blaškić* considered that it must interpret the texts of its own Statute and Rules in light of the decisions rendered both by the ICTY and other courts.[30] A literal interpretation of these texts led the Chamber to observe that information concerning the facts of the case may be stated concisely. Conversely, the nature and cause of the charges must be stated in detail. The purpose of these provisions is to guarantee that the accused is informed of the charges against him so as to be able to prepare his defence in due time. However, the Chamber recognised that everything depends on the stage of proceedings in question. Where the information is given during an initial appearance, the statement of facts must necessarily be concise.

Next, in conformity with the invitation by the UN Secretary-General in his preliminary report on the adoption of the ICTY Statute, the Chamber studied the international instruments of reference: Article 14(3)(a) of the

[30] ICTY, *Blaškić*, Trial Chamber, *Decision on the Defence Motion to Dismiss the Indictment based upon Defects thereof*, 4 April 1997, para. 8.

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United Nations Covenant and Article 6(3)(a) of the European Convention. As regards the latter provision, the Chamber held that the information required by the accused need not appear only in the indictment (after reference to the relevant case law of the European Court).[31] Similarly, an ICTY Trial Chamber has referred to the case law of the European Court in support of its conclusions regarding *the right of the suspect and the accused to a fair interview by the investigating authorities.*

ICTY procedure authorises the Prosecutor to question suspects or have them questioned by any competent State authority (ICTY Rule 39). The rights of the accused during questioning by the Prosecutor are set out in Article 18 of the ICTY Statute and Rules 42 and 43. As for questioning by State authorities, no provision lays down any specific guarantees.

In *Delalić et al.* the question arose whether questioning of the accused in Austria by both the Austrian authorities and staff of the Office of the Prosecutor was admissible, assuming that: (i) he had not been offered the assistance of a lawyer before being interviewed; (ii) the rights accorded by Austrian legislation are not necessarily the same as those guaranteed by the ICTY; (iii) his rights may not have been sufficiently explained; and (iv) he may have been subjected to oppressive questioning.

Apparently, the defence arguments were not based on the European Convention. However, the prosecution maintained that in many countries, some of which are European States, there is no right to counsel during questioning and that this is neither contrary to fundamental human rights nor in breach of the European Convention.

The Chamber[32] considered that Article 42 of the Statute sets out the fundamental provisions of the right to a fair interview as required by Article 6(3)(c) of the European Convention. Thus, a declaration taken in violation of Article 42 of the Rules cannot satisfy the provisions of Article 95, which aims to protect the integrity of the proceedings by excluding any evidence obtained by doubtful means. As a result, the criteria for admissibility of evidence provided by persons other than the investigators from the Office of the Prosecutor are those set out not only in Rule 42 but also in Rule 95. The Chamber then compared the Austrian rules of procedure with those in Rules 42 and 95. Regarding the absence of counsel during police questioning, the Chamber held that this breached Article 18 of the Statute and Rule 42, which require the presence of counsel before questioning. The Chamber quoted the case law of the European Court in support of this position (the *Imbriosca* decision of the Commission, 24 November 1993; the

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[31] See *Kamasinski v. Austria,* 19 December 1989; *De Salvador Torres v. Spain*, 24 October 1996; and *Gea Catalán v. Spain*, 10 February 1995.

[32] ICTY, *Delalić et al.*, Trial Chamber, *Decision on Zdravko Mucić's Motion for the Exclusion of Evidence*, 2 September 1997, paras. 48-60.

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Artico case, 13 May 1980; and the *Campbell and Fell* case, 28 June 1984). In particular, in the *Imbriosca* and *Artico* cases, the right to the assistance of counsel is recognised as from the time of indictment and throughout the proceedings.

As regards the admissibility of the interview conducted by ICTY investigators, the defence affirmed that the accused was unable to appreciate the scope and meaning of his rights under Rule 42 when they were read to him. Thus, due to cultural differences and a lack of familiarity, the investigators should have clarified these rights. The Chamber refuted this argument and stressed the fact that Rule 42 "is an adaptation *mutatis mutandis* of Article 6(3) of the European Convention on Human Rights and Article 14(3) of the United Nations Covenant. These are supranational [*sic*] conventions based on the most elementary and fundamental provisions for the protection of individual human rights. The former Yugoslavia was a party to the ICCPR. It will, therefore, be anomalous to rely on cultural differences for their interpretation".

In this case, the Chamber seems to have consistently used Strasbourg case law to *reinforce its interpretation* of the relevant provisions of its Statute and Rules. It would seem to follow, therefore, that the insistent, explicit reference to the Convention and the European Court of Human Rights served principally to corroborate a conclusion at which the Chamber would have been able to arrive on the sole basis of its own governing law.

The international criminal tribunals have shown the same attitude to the problem of *reconciling the rights of the accused and the witnesses.*[33]

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[33] See ICTY, *Delalić et al.*, Trial Chamber, *Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" Through to "M"*, 28 April 1997, para. 27. The Tribunals referred to the case law of the European Court on this point in *Delalić et al.* The problem was to reconcile Article 22 of the ICTY Statute, which guarantees protective measures for victims and witnesses, and Article 21 of the Statute, which guarantees the right to a public trial and the right to question witnesses. According to the ICTY judges, the applicable provisions of the Statute and Rules must be construed, *inter alia*, in light of Article 31 of the Vienna Convention on the Law of Treaties, as well as findings relating to the United Nations Covenant and the case law of the European Court. Accordingly, the decisions of the European Court (and the UN Human Rights Committee) "have been found to be authoritative and applicable. This approach is consistent with the view of the Secretary-General that many of the provisions in the Statute are formulations based upon provisions found in existing international Instruments". For example, as regards the issue of non-disclosure of the identity of witnesses to the public, the Chamber quoted, *inter alia,* the European Court decision in *Pretto & Ors v. Italy* (8 December 1983), which recognised the value of publicity for a fair trial. However, the Chamber stressed that the Court accepts limits on publicity. As for the protection of witnesses from the accused through non-disclosure of their identity, the Chamber quoted the rule laid down by the Strasbourg Court in *Kostovski v. The Netherlands* (20 November 1989), according to which all evidence must, to the extent possible, be produced in the presence of the accused during the hearing, thus enabling confrontation. The Chamber

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The same applies for the *right not to testify against oneself*. In *Delalić et al.*, concerning the obligation to produce a handwriting sample, the influence of the European Court turned out to be ambiguous and partial. The prosecution had requested an order requiring the defence to produce a handwriting sample, allowing it to formally establish that one of the accused was the author of a letter. The question was whether such an order would breach the right not to testify against oneself, a fundamental guarantee of fair trial, under the terms of Article 21(4)(g) of the Statute. For the prosecution, the request was in conformity with this provision of the Statute, itself based on Article 14(3)(g) of the UN Covenant, Article 8(2)(g) of the American Convention on Human Rights and, implicitly, Article 6 of the European Convention. The prosecution argued that the handwriting sample was not a means of obtaining a declaration containing a confession, or leading to conclusions concerning specific facts; therefore, in providing it, the accused would not be testifying against himself. It followed that by granting the order, the Chamber would not breach the rights of the accused.

Moreover, the prosecution affirmed that if the accused refused to comply with such an order, the Chamber should draw all the appropriate conclusions from his refusal, as indicated by the European Court in *Murray v. United Kingdom* (8 February 1996), which held that an accused's right to silence is not absolute where the triers of fact are experienced judges, and they draw common sense adverse inferences from an accused person's silence during police interrogation or trial. The defence countered that such an order was not expressly authorised by the Statute and was contrary to the right of the accused not to testify against himself. It based its argument on, *inter alia*, the European Court decision in *Funke v. France* (25 February 1993). In that case the accused had been convicted by a French tribunal of having refused to produce documents required by customs officials in order to force him to provide evidence of the infringements he was alleged to have committed. The European Court held that the particularities of customs law could not justify a breach of the right of every accused "to remain silent and not contribute to his own incrimination".

After having enumerated the provisions protecting the rights of the accused and the relevant international human rights norms, the Trial Chamber[34] also examined Article 6(1) of the European Convention and the two relevant cases decided by the Strasbourg Court (*Funke* and *Murray*). The

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held that no exception should be made to the right of the accused to see the person accusing him or her, except in the public interest and to uphold public policy. Yet again, it quoted a European Court case in support of its argument (*Unterpertinger v. Austria*, 24 November 1986), as well as an American Supreme Court decision (*ibid.*, paras. 34-55).

34 ICTY, *Delalić et al.*, Trial Chamber, *Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample*, 19 January 1998, paras. 21, 43, and 45-46.

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Chamber cited the former decision with approval, noting that "[i]t is significant that though absent express words in the ECHR, the provisions of Article 6 sub-para. 1, which protect the right to fair hearing, have been extended to include the right to protection from self-incrimination. The consideration is that it is an inherent element of any fair trial" (para. 45). As for the *Murray v. United Kingdom* decision, on the contrary, the Chamber noted that it went against the provisions of the Rules of the Tribunal, if not its Statute, adding that "*Murray* cannot, therefore, be a reliable authority for the facts of this case. Besides, the International Tribunal is not bound by national rules of evidence". Therefore the Chamber rejected the request by the prosecution.

Finally, the same sort of reference to Strasbourg case law may be found concerning the *power of control by the Chambers.*[35]

2.6. Strasbourg case law is sometimes referred to purely *ad abundantiam*

In some cases, the international judges have quoted Strasbourg case law despite the fact that the interpretation of the international rule in question was clear and the reference was not necessary, as such. They have undoubtedly preferred such references to the case law of the European Court in order to show that the solution they have adopted is not only correct but also consistent with the views of other international judges.

One example is the *right of suspects and the accused to be immediately informed of the charges against them.*[36] The ICTs have used the same approach concerning the *right to freely choose court appointed counsel.*[37]

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[35] See ICTY, *Delalić et al.*, Trial Chamber, *Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence*, 12 June 1998, paras. 38 and 47. The defence complained of the fact that the judge had ordered limits on its right to call witnesses. Defence counsel argued that such a power would force the Chamber to descend into the arena of the trial. The Chamber replied that it was simply fulfilling its obligation to ensure an expeditious trial (Articles 20(1) and 21(4)(e) of the ICTY Statute). The Chamber concluded by underscoring that the fairness of a trial can only be considered "within the plenitude of the trial as a whole", curiously referring to the Supreme Court of Nigeria, but also to a decision of the European Court under which the court could "conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to the decision" (*Kraska v. Switzerland*, 19 April 1993). The Chamber concluded that it "accepts and adopts this view as correctly expressing the role of the Trial Chamber pursuant to Art. 20(1) of the Statute".

[36] This right is set out in Article 20(2) of the ICTY Statute, when a person is arrested, and Article 21(4)(a) of the Statute when a person is indicted. As these provisions are similar to those in Articles 5(2) and 6(3) of the European Convention, they have been interpreted in light of the case law of the European Court. For example, in the *Semanza* case, the ICTR Appeals Chamber held that the time limit for being informed of the charges must be examined in accordance with norms laid down by international human rights law, such as Articles 9(2) of the UN Covenant, 5(2) of the European Convention and 7(4) of the

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The same is true with regard to *habeas corpus proceedings*. Neither the Statutes, nor the Rules of the ICTs expressly mention such proceedings. Nevertheless, in *Barayagwiza*[38] as well as in *Semanza*,[39] the ICTR judges asserted that the right of a prisoner to contest the legality of his detention before an independent judicial authority is well established in the Statute and Rules.[40]

The ICTs have also cited Strasbourg case law *ad abundantiam* with respect to *equality of arms*.

For example, as regards the *principle of due hearing*, in the *Kayishema and Ruzindana* case,[41] the ICTR Appeals Chamber had to deal with a claim by defence counsel, based on several cases decided before the Strasbourg Court, to the effect that the Trial Chamber had not respected the due hearing principle. The Chamber rejected this claim, noting that it shared the opinion of the European Court in *Brandstetter v. Austria* (20 August 1991), as followed in *Ruiz-Mateos v. Spain* (23 June 1993), not only on the finding that the principle of equality of arms includes the right to "confrontation" in criminal proceedings, but also on the manner in which such confrontation must be interpreted. The Chamber added that "due hearing as envisaged by the Statute and the Rules goes in the same direction".

American Convention on Human Rights. Consequently, the right to be informed arises upon arrest and placement of a suspect in custody (ICTR, *Semanza*, Appeals Chamber, 31 May 2000, paras. 78 and 87). However, the reference to the European Convention stops there. The Appeals Chamber goes on to find that a period of 18 days between the arrest and receiving information concerning the nature of the charges against the prisoner is in breach of this right. Yet, curiously, the judges then refer to the *Barayagwiza* Judgement, in which the ICTR quoted a European Court decision that a maximum period of 24 hours was not excessive.

37 No provision specifically deals with this question, which has mainly arisen before the ICTR. Thus, in the *Kambanda* case, the ICTR held that "in the light of a textual and systematic interpretation of the provisions of the Statute and the Rules, read in conjunction with relevant decisions from the Human Rights Committee and the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ... the right to free legal assistance by counsel does not confer the right to choose one's counsel." (ICTR, *Kambanda*, Appeals Chamber, 19 October 2000, para. 33).

38 It is a fundamental right which one finds in all international norms for the protection of fundamental rights, such as, *inter alia*, Article 5(4) of the European Convention. It is "a fundamental right and is *enshrined* in international human rights norms": ICTR, *Barayagwiza*, Appeals Chamber, 3 November 1999, paras. 87-90.

39 *Semanza* Appeal Judgement, 31 May 2000.

40 After having examined briefly the expression of this right in the American Convention on Human Rights and its interpretation by the European Court, the ICTR judges noted that the right, as recognised in the European Convention, is not only the right to make a claim, but also the right to be heard. See ICTR, *Barayagwiza*, Appeals Chamber, 3 November 1999; ICTR, *Semanza*, Appeals Chamber, 31 May 2000, para. 112 and, in particular, note 148.

41 ICTR, Appeals Chamber, *Decision*, 1 June 2001, paras. 79-80.

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The European Convention was also referred to in the *Tadić* case (on Appeal), solely to confirm that the wording of one of its provisions corresponded to the substantial contents of the relevant norm in the Statute of the ICTY, concerning the *power of a Trial Chamber to order the disclosure of a prior defence witness statement.*[42]

The same attitude is manifest in the Tribunal's reasoning when faced with the question whether *the fact that defence witnesses testified before an incomplete Chamber, whereas the prosecution witnesses had appeared before the full Chamber, was in breach of the principle of equality of arms.*[43]

Similarly, it would seem that the reference to Strasbourg case law was not indispensable as regards the binding force of ICT judgements (*stare decisis*).[44]

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[42] The Appeals Chamber considered *a priori* that this question could not be resolved by reference to the principle of equality of arms. After having noted that no provision of its Statute or Rules governed this problem directly, it found, nevertheless, that the solution could be based on certain provisions of Article 21 of the Statute which correspond to Article 14 of the UN Covenant and Article 6 of the European Convention: ICTY, *Tadić*, Appeals Chamber, *Judgement*, 15 July 1999, paras. 320-321.

[43] In the *Kupreškić* case, the President of the Trial Chamber decided that two defence witnesses could testify despite the absence of one of the judges for a few days, in the interests of justice in a fair, expeditious trial within the meaning of Article 71 of the Rules. One of the objections raised by the appellant against this decision was that it deprived him of the right to examine his witnesses under the same conditions as the prosecution witnesses, since all of the latter had testified in person before a full Trial Chamber. The Appeals Chamber affirmed that Article 21 of the Statute, setting out the rights of the accused, "finds its origin in Article 14 of the UN Covenant and Article 6 of the European Convention" (the Chamber went on to conclude that it does not follow that the application of the relevant Rules requires prosecution and defence testimony to be collected in exactly the same manner).

In this case, the reference to the European Convention simply served to *indicate the historical origin* of the relevant provisions of the ICTY Statute. See ICTY, *Kupreškić*, Appeals Chamber, *Decision on Appeal by Dragan Papić against Ruling to Proceed by Deposition,* 15 July 1999, para. 23-24.

[44] See ICTY, *Aleksovski* Appeals Chamber, 24 March 2000, paras. 92-97. The ICTY dealt with the question whether the Appeals Chamber is bound by its own previous decisions in this case (on appeal). Nothing in the Statute or Rules deals with this question. The Chamber immediately launched into a comparative law study covering both national law and the case law of international judicial bodies. Accordingly, it observed that "[t]raditionally common law jurisdictions have recognised the principle of *stare decisis*", although with some limitations. It further observed that, in practice, the courts in civil-law systems accord some obligatory force to precedents. Finally, it quoted scholarly writings concerning the European Court and one of its decisions (*Cossey*, 27 September 1990), which stated that the Court will normally follow its previous decisions and would only depart from them if there were "cogent reasons" for doing so (*ibid.*, para. 95). The Tribunal also quoted scholarly writings concerning the operation of the International Court of Justice, concluding that as a general trend, the highest courts, "whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances". Curiously, the Chamber went on to state that "references to

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2.7. In some cases, the International Criminal Tribunals have ignored Strasbourg case law

While sometimes the Tribunals have taken inspiration from Strasbourg case law without citing it,[45] in other cases they have simply ignored the Strasbourg case law.

This was the case, for example, concerning the *right of an arrested person to be brought before a judge expeditiously*, guaranteed by Articles 20(2) and (3) of the ICTY Statute, in similar terms to Article 5(3) of the European Convention. Before the ICTY, this right is implemented through the procedure of transfer of the suspect to the Tribunal (ICTY Rules 40*bis* and 55-59*bis*) for an initial appearance during which he or she is formally charged (Rule 62).

It would seem that the ICTY judges have not made direct reference to the case law of the European Court in determining the acceptable period for presentation of an arrested person before a judge.

Problems of this nature have mostly arisen before the ICTR. In the *Barayagwiza* case,[46] a person was placed in pre-trial detention on 19 November 1997, but the initial appearance was only held on 23 February 1998 (96 days later, reduced to 76 days). In its decision of 3 November 1999, the

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the law and practice in various countries and in international institutions are not necessarily determinative of the question as to the applicable law". It concluded that the question is to be resolved through an examination of the Tribunal's Statute and Rules, and "a construction of them which gives due weight to the principles of interpretation (good faith, textuality, contextuality, and teleology) set out in the 1969 Vienna Convention on the Law of Treaties". After examination of the Statute in light of its text and purpose, the Chamber concluded that, "in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice". In other words, it reverted to the conclusions drawn from the comparative study.

It would appear that this excursion of the Appeals Chamber for the purpose of identifying the value of judicial decisions need not have been based on an examination of *dicta* from other courts. A reference to the general principles of international trials would have sufficed, as is confirmed by the clear reasoning developed by a Trial Chamber of the very same ICTY on this subject, in the *Kupreškić et al.* case.

45 The ICTY has often taken implicit inspiration from the case law of the European Court in examining the conditions for *provisional release*. Thus, in the *Simić* case, without quoting the relevant case law of the Strasbourg Court, an ICTY Trial Chamber applied a general principle regularly stated by the Court (*e.g. W. v. Switzerland*, para. 30; and *van der Tang*, para. 55), according to which, "a determination as to whether release is to be granted must be made in the light of the particular circumstances of each case": ICTY, *Simić*, Trial Chamber, *Decision on Milan Simić's Application for Provisional Release*, 29 May 2000, p. 4.

46 ICTR, *Barayagwiza*, Appeals Chamber, *Decision on Prosecutor's Request for Review or Reconsideration*, 31 March 2000.

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Appeals Chamber held that this period breached the rights of the accused.[47] The Appeals Chamber decision included an important Separate Opinion by Justice Shahabuddeen regarding the determination of this period.[48] His approach would indeed seem consistent with the position adopted by the European Court which, in *Brogan and others* (29 November 1988),[49] did not confirm European Commission findings based on the nature of the alleged crimes (common law crimes and egregious crimes such as terrorism, breaches of State Security, etc.).[50]

It would also appear that the international criminal judges could have referred to the case law of the Strasbourg Court in interpreting the *extent of the right of appeal,* especially the concept of "error of fact which has occasioned a miscarriage of justice". Indeed, no reference is made to the case law of the European Court in the *Tadić* Appeal Judgement of 15 July 1999, despite the fact that this is a fundamental provision of the ICTY Statute, especially for the rights of the accused.[51]

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47 ICTR, *Barayagwiza,* Appeals Chamber, *Decision*, 3 November 1999 granting an appeal against the Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect.

48 *Ibid.*, *Separate Opinion*, paras. 27-38. This Judge considered, in particular, that ICTR Rules 40*bis* and 42, which grant the accused the right to be presented expeditiously before a tribunal and to be informed of the charges against him so as to prepare his defence, reflect the internationally recognised standards governing the right of a prisoner to be presented before a judicial authority without delay. He then referred to the European Court's conception of this right. He also compared the periods in question with those found to be unacceptable by the United Nations Human Rights Committee (35 days, but not 50 hours) and by the European Court: 15 days (extradition); 7 days (soldier); 5 days (soldier); 6 days and 6 and a half hours (terrorism). He noted that the European Court examines the period with respect to the feasibility of judicial review, allowing the introduction of a margin of appreciation. However, in the case before the European Court, the fight against serious crime (combating terrorism in this case), was held not to be a sufficient criterion. The Judge concluded that the determination of an acceptable period must not be examined by reference to the nature of the crimes in question, but with respect to difficulties with investigation, preparation or presentation.

49 Series A.145.b).

50 See also ICTR, *Kajelijeli*, Trial Chamber, *Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused*, 8 May 2000, paras. 11 and 45. Defence counsel affirmed, before the ICTR, that a delay of 281 days before the initial appearance in Court was contrary to Article 20(4)(a) of the Statute and Rule 62, but also Article 9(4) of the UN Covenant, Article 5(4) of the European Convention and Article 8 of the Universal Declaration of Human Rights, but without providing any further details. The Chamber rejected this argument because the delay was related to difficulty finding court appointed counsel, which was exacerbated by the attitude of the accused.

51 Moreover, some of the general principles laid down in cases such as *Ekbatani* (26 May 1988, para. 24), *Kremzow* (21 September 1993, para. 24) and *Botten* (19 February 1996, para. 39), could well have proved pertinent.

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Finally, the European Convention could have been put to use in cases concerning the *legality of arrest*, such as the question that arose in *Simić*.[52]

2.8. In some cases, international criminal judges have gone beyond Strasbourg case law

This has been particularly clear as regards the *definition of torture*. In *Furundžija*, a Trial Chamber relied on the European Convention to elucidate the concept of torture, then went beyond the (already very advanced) Strasbourg case law.[53]

The Chamber examined the case law of the European Court to determine, among the main elements of the prohibition of torture under international law, whether this prohibition covers potential breaches. Through reference to the *Soering* case (7 July 1989), where one means of preventing torture was not to extradite a person to a country where he ran a risk of being tortured, the Chamber held that States must not only punish, but also take all measures to prevent recourse to torture: "international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture".

However, the Chamber's conclusions in the case before the ICTY (which are *obiter dicta*) go much further than those of the European Court.

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[52] ICTY, *Simic et al.*, Trial Chamber, *Decision on Motion for Judicial Assistance to be Provided by SFOR and Others*, 18 October 2000. The issue there was whether a Trial Chamber could order the SFOR, or other military and security forces present in Bosnia and Herzegovina, to provide the defence with documents and witnesses relating to the arrest of the accused and his transfer from the Federal Republic of Yugoslavia to the Tuzla Airbase in Bosnia and Herzegovina, with a view to introducing them as evidence during the hearing relating to the legality of this arrest. The defence raised the decision of the European Court in *Stocké v. FRG* (19 March 1991) in support of its motion (*ibid.*, para. 24; in that case the German authorities had led an investigation to determine whether its officers had acted illegally). Defence counsel for one of the accused, Todorović, claimed that by refusing to divulge information allowing confirmation or invalidation of the alleged facts, the SFOR was trying to avoid any such investigation. In a separate opinion, Judge Robinson came to a conclusion that appears to be more solidly grounded, by reference to *habeas corpus* proceedings. Although such proceedings are not provided for in the Statute, they are contained "in all Human Rights instruments", including the European Convention, and international customary law (see paras. 2 and 3 of the Opinion and the *Barayagwiza* case). In support of his argument, Judge Robinson found that the case at hand was comparable to situations before municipal courts: (i) the documents sought by the accused were similar to those typically sought by an accused in domestic proceedings challenging the legality of an arrest; failing such a competence, the right to challenge the legality of one's arrest might well be rendered nugatory and without substance; (ii) the constitutional history of the SFOR showed that its functions had evolved. It had acquired a role comparable to that of a police force in some domestic legal systems in relation with the prosecuting authorities and the courts in those systems.

[53] Decision of 10 December 1998, paras. 148-149, and 150-157.

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Indeed, the Chamber held that the prohibition of torture: (i) is a rule of *customary law*; (ii) applies to both individuals and States; (iii) is an absolute prohibition which cannot be derogated from (a peremptory norm or *jus cogens*, *i.e.*, a norm that enjoys a higher rank in the international hierarchy than treaty law and other customary rules); (iv) obliges States to take *all necessary measures* to both punish and *prevent torture*; and (v) imposes obligations on States with regard to the entire international community (*erga omnes*). Furthermore, this prohibition: (vi) justifies *universal jurisdiction* in criminal cases; (vii) means that torture may not be covered by a *statute of limitations*; and (viii) must not be excluded from extradition under any *political offence exemption*.

3. Concluding remarks

The first, most obvious observation is that the case law of the Strasbourg Court has proven to be a *rich source of concepts, notions, legal constructs and extremely useful interpretations* for the international criminal courts. These courts have thus been able to elicit or refine implicit concepts, poorly enunciated in the relevant international texts, or clarify legal categories that are only sketchily outlined in international criminal rules.

The contribution of Strasbourg to the case law of The Hague and Arusha has also been precious in another way. As the Strasbourg Court is the international organ that protects, and therefore promotes, human rights more than any other, its impact on international criminal courts has *served to strengthen an insistence on respect for human rights* which is already strong in the Statutes of the two Tribunals.

However, the international Tribunals have been circumspect in their reference to Strasbourg case law, well aware that international criminal proceedings exhibit a *specificity* calling for great prudence when it comes to applying concepts elaborated with respect to national law at the international level. One such fundamental difference is that the ICTs, being criminal courts, must always adopt a *strict interpretation* of the applicable substantial rules. They do not, thus, have the same freedom of appreciation and, especially, the freedom to choose the sort of *progressive interpretation* applied by the European Court in the extremely important decision in *Selmouni v. France* (28 July 1999). In that case, the Court, after having reiterated that the European Convention is a "living instrument which must be interpreted in the light of present-day conditions", considered that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future" (para. 101). Instead, any progressive interpretation, by the ICTY or the ICTR, of the objective and subjective elements of the crimes within their jurisdiction, seems excluded

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because it would be in breach of the rights of the accused. Indeed, by virtue of the principle *nullum crimen sine lege* the criminal judge cannot widen the scope of a substantial criminal norm or apply it extensively to the disadvantage of the accused. As the European Court acknowledged in *Kokkinakis v. Greece* (25 May 1993), the individual must be able to "know from the wording of the relevant [penal] provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable." (para. 52). At the very most, the criminal judge may, as authoritatively held by the European Court in *S.W. v. United Kingdom* (22 November 1995), undertake a "gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen." (para. 36).

It must nevertheless be admitted that, in many cases, the two criminal tribunals have preferred a "*wild*" *approach* to the case law of the European Court, to return to the expression used in the introduction to this paper. As noted above, recourse to such case law should only serve to establish the existence of rules of customary international law, or to elucidate general principles of international procedure and principles of criminal law common to the major legal systems of the world. Lastly, such recourse may contribute to establishing the precise interpretation of international conventional or customary norms that are obscure, incomplete or ambiguous. In other words, the case law of the European Court should never be applied as such, but only as a supplementary means of elucidating rules or principles of international law. In light of these requirements, the recourse by the two Tribunals to the decisions of the Strasbourg Court in some cases does not appear to have been entirely satisfactory. True, they have often referred to this case law in support of an interpretation they had already adopted (a sort of *a posteriori* legitimisation), or to find a legal solution to specific unresolved problems, which is perfectly legitimate. Nevertheless, the Chambers of the two Tribunals have not always sought to determine whether the transposition of European Court case law was appropriate, nor the correct means of doing so. This approach, which does not appear to be based on rigorous legal reasoning, implies that the judges are not always aware of the *pre-eminence* (from the point of view of international justice, of course) of international criminal law as compared with "sectoral" international law (international human rights law) and national legal systems. When using the "wild" approach described above, the international criminal judges have sometimes appeared ready to efface or ignore the difference between international legal systems or "jurisdictional zones", on the one hand, and "sectoral" or national systems, on the other.

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Nevertheless, the frequent reference to Strasbourg case law has had the great benefit of moderating, if not restraining, the tendency of some judges to draw freely from the internal case law of common law countries in the search for legal solutions, on the basis that, as ICT proceedings are largely based on the accusatory system, it is reasonable to adopt the solutions elaborated by common law judges. The reference to decisions rendered by the Court of Strasbourg has thus set up *a sort of legal barrier against this tendency*.

Moreover, if the case law of the ICTs and the manner in which they have recourse to Strasbourg case law is examined in the light of the categories suggested by M. Delmas-Marty (hegemony of a single legal system, rapprochement of legislative texts, harmonisation, hybridisation, etc.),[54] it seems clear that, in most cases, the criminal judges have rightly avoided either the hegemony of common law legal systems (which would assuredly be contrary to the logic of an international court), on the one hand, or harmonisation on the other (at least in those cases where the specificity of international criminal proceedings make this undesirable). Rather, in matters of criminal proceedings, they have given priority to what M. Delmas-Marty refers to as *hybridisation* of legal systems,[55] *i.e.*, the attempt to combine the best of each legal system. Indeed, the case law of the European Court has allowed the two tribunals to apply international criminal law and humanitarian law in such a way as to take constant account of the need to respect human rights and, in many cases, interpret vague concepts in conformity with standards and criteria established in Strasbourg. This has been a fruitful process which may lead to the gradual elaboration of a body of international criminal law widely concordant with the fundamental principles of criminal law common to the major legal systems of the world, *i.e.*, a sort of synthesised, common criminal law.

In addition, despite all its limits and defaults, the recourse by the two ICTs to the case law of another international court, specialised in the clearly delimited framework of human rights, appears to *confirm two salutary and positive current trends within the international community*: firstly, the tendency for different sectors or areas of international law to abandon their iso-

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[54] See, *inter alia*, M. Delmas-Marty, *Towards a Truly Common Law*, Cambridge University Press: Cambridge (forthcoming, 2002); and M. Delmas-Marty (ed.), *Corpus juris*, Economica: Paris (1997), 13-43; "Besoins et moyens de création d'un droit pénal européen", in B. Huber (ed.), *Das Corpus Juris als Grundlage eines europäischen Strafrechts,* Ed. iuscrim, Freiburg (2000), 33-46; M. Delmas-Marty, J.A.E. Vervaele (eds.), *La Mise en oeuvre du Corpus Juris dans les Etats membres,* Volume I, intersentia (2000), 30-31; see also A. Jeammaud, "Unification, uniformisation, harmonisation, de quoi s'agit-il ?", in *Vers un code européen de la consommation*, Bruxelles: Bruylant (1998), 35 *et seq.*

[55] See M. Delmas-Marty, "Le rôle du droit comparé dans l'émergence d'un droit commun", *Dalloz*, n°17, 26 avril 2001, 1326-1328.

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lation, or "sectoral" approach, in order to mutually influence each other, if not merge; and secondly, the tendency of the human rights sector to exercise an ever greater ascendancy over the other spheres of international law.

Finally, an important point must be made: as the case law of the two ICTs develops and enriches itself, the need for references to the decisions of the European Court will gradually lessen. These citations will be replaced by references to general principles, the relevant Rules of the two Tribunals as interpreted by the Tribunals themselves in their own precedents. This process has already commenced. For example, in the *Kayishema and Ruzindana* Appeal Judgement of 1 June 2001, where the Appeals Chamber dealt with several aspects of the concept of fair trial with hardly any reference to the case law of the European Court. The Tribunals now prefer to cite directly the preceding ICT cases that lay down principles or adopt interpretations, rather than the Strasbourg case law upon which those earlier decisions were based. Furthermore, the preoccupations of the ICTs have evolved with time and current needs (especially the need for expeditious trial of the growing number of accused in pre-trial detention). All these considerations lead to the conclusion that the courts in The Hague and Arusha appear less and less preoccupied with "laying down the law" than with "doing justice".

Yet, the fact that references to Strasbourg case law by the Tribunals in The Hague and Arusha are becoming rarer in no way diminishes the incredible, salutary influence of the European Court on the International Criminal Tribunals.

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III

Criminalizing individuals for acts of aggression committed by States

Rolf Einar Fife*

As we celebrate the contributions of Asbjørn Eide to international law, it is only fitting to pause to reflect on the expression "conflict entrepreneurs".[1] He originally coined this term to describe persons who, in order to further various objectives, cynically exploit latent or visible tensions involving minorities. The expression also encapsulates the case of political leaders and high officials who instigate and wage aggressive wars against other States. Intuitively, it is not difficult to understand why efforts are devoted to defining and ensuring prosecution of such conduct. Renewed efforts are currently being made within the framework of negotiations on the International Criminal Court, which formally came into being on 1 July 2002. This article focuses on some thorny dilemmas facing negotiators who are engaged in attempts to find an agreeable formula which could ultimately allow the Court to exercise jurisdiction over the crime of aggression.

1. The leap from establishing a principle to grappling with its contents

It is well established that the crime of aggression, more generally categorised as a "crime against the peace",[2] is a violation of international law, which may give rise to direct criminal responsibility for the individuals responsible. Such responsibility was first intimated in article 227 of the Versailles Peace Treaty of 1919 with Germany, which accused Kaiser Wilhelm II but was never implemented.[3] However, the Nuremberg Tribunal's enforcement of

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1 Asbjørn Eide, *Peaceful and Constructive Resolution of Situations Involving Minorities*, United Nations University, 10 (1995).

2 The crime of aggression is generally considered as the principal, if not the exclusive, crime against the peace, see for instance Benedetto Conforti, *Diritto Internazionale*, Naples, 2002, 6th ed., p. 211, and the background provided by Bert V.A. Röling, "Crimes Against Peace", in Antonio Cassese (ed.), *The Current Legal Regulation of the Use of Force*, Dordrecht, 1986, pp. 385-394.

3 For an analysis of this inconclusive attempt made after World War I, see Emmanuel Decaux, "Les Gouvernants", in Hervé Ascensio, Emmanuel Decaux and Alain Pellet (ed.), *Droit international pénal*, Paris, 2000, pp. 184-187.

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individual criminal responsibility after World War II became a turning point in the history of international law. The Tribunal's Charter confirmed the criminal responsibility for crimes against the peace, "namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".[4] The doctrine of "Acts of State", as a deduction from absolute sovereignty, would not shield officials acting under the authority of a Government from such criminal liability under international law.[5]

Considering that the destructive consequences of aggressive war are not confined to the belligerent States, but affect the whole world, the Nuremberg Tribunal noted, in an often-quoted dictum:

> To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[6]

The jurisprudence of the Nuremberg Tribunal was supplemented by that of the Tokyo Tribunal, which was set up to prosecute the major war criminals in the Far East.[7] The principles commonly referred to as the "Nuremberg law" were swiftly consecrated by the General Assembly of the United Nations.[8] These principles were further developed through the trials 1946-

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4 Article 6 (a) of the Charter of the International Military Tribunal, annexed to the London Agreement of 8 August 1945 for the Prosecution and Punishment of the Major War Criminals of the European Axis, United Nations, Treaty Series, vol. 82, respectively p. 279 and p. 284.

5 *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945 - 1 October 1946, published at Nuremberg, Germany, 1947 (hereinafter Nuremberg Judgement) p. 221. On this issue, see for instance Quincy Wright, "The Law of the Nuremberg Trial", 41 *American Journal of International Law* (1947) pp. 38-72, and recently Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung*, Berlin, 2002, Strafrecht und Kriminologie Vol. 16, p. 375. On the origins of the Act of State doctrine, see Michael Zander, "The Act of State Doctrine", 53 *American Journal of International Law* (1959) pp. 826-852. For an authoritative account of the Nuremberg trials, see Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, New York, 1992.

6 Nuremberg Judgement, p. 186.

7 The Tokyo Tribunal was established in 1946 by Special Proclamation of the Supreme Commander of the Allied Powers, General MacArthur. See *Charter of the International Criminal Military Tribunal for the Far East, Trial of Japanese War Criminals: Documents*, p. 39, Department of State Publication No. 2613, United States Printing Office, 1946; B.V.A. Röling and C.F. Rüter (eds.), *The Tokyo Judgement*, Amsterdam University Press, 1977, 2 volumes.

8 U.N. General Assembly resolution 95 (I) of 11 December 1946.

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1949 against other Nazi war criminals pursuant to Control Council Law No. 10.[9]

Nevertheless, grappling on a general basis with the principles of criminalization of persons responsible for aggressive war raises a number of intractable questions. It soon proved difficult to agree, prospectively, on what may in the future constitute a case of aggression and an individual aggressor. Together with deciding on how to trigger the initiation of a prosecution, this proved more challenging than to ascertain, in retrospect, the magnitude of the crimes committed by a vanquished enemy after World War II. In clear contrast, the international community swiftly made great strides in providing for definitions of genocide and war crimes, notably through the adoption of the Genocide Convention already in 1948 and the four Geneva Conventions in 1949.

Admittedly, the General Assembly of the United Nations agreed without a vote on a definition of aggression in 1974. However, the declared role of the definition contained in this resolution was to provide guidance to the Security Council in determining the existence of an act of aggression pursuant to article 39 of the UN Charter. It did not define crimes committed by individuals in this context.[10] The following generic definition contained in article 1 is linked to the ban on the use of force in article 2(4) of the Charter of the United Nations:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

Article 2 provides that first use of armed force by a State in contravention of article 2(4) of the Charter is deemed to be *prima facie* evidence of an act of aggression. However, the Security Council may conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances.

Article 3 lists a number of acts identified as "acts of aggression". They include invasion or attack by armed forces against the territory of another State, any ensuing military occupation, or any annexation by the use of force on the territory of another State or part thereof, bombardment or use of weapons against the territory of another State, attacks by armed forces on

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9 Law adopted by the Control Council for Germany on 20 December 1945, see *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1951, vol. III, p. XVIII.

10 Resolution on the Definition of Aggression, General Assembly resolution 3314 (XXIX) of 14 December 1974. Its Preamble recommends that the Security Council should, as appropriate, take account of the definition of aggression "as guidance". See, for instance, Bert V.A. Röling, *The 1974 U.N. Definition of Aggression*, in Antonio Cassese, *op.cit.*, pp. 413-421.

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land, sea or air force, marine and air fleets of another State. They also include the sending by or on behalf of a State of armed groups which carry out acts of armed force against another State "of such gravity as to amount to the acts listed above, or its substantial involvement therein". According to article 4 this listing is declared to be non-exhaustive and "the Security Council may determine that other acts constitute aggression under the provisions of the Charter".

The definition thus contains provisions that leave a large margin of appreciation as to their interpretation and application. With regard to criminalization, the only indication provided is that a "war of aggression is a crime against international peace. Aggression gives rise to international responsibility".[11] This guidance provides only limited assistance on how to define the crime in accordance with the fundamental requirements of clarity and predictability in criminal law, which are encapsulated in the principle of *nullum crimen sine lege*.[12]

Discussions on individual criminal responsibility for the crime of aggression have, however, proved contentious, as most recently confirmed in the negotiations on the International Criminal Court.[13] In light of sharply divided views, a compromise amounting to a postponement combined with a declaration of intent, was adopted in article 5(2) of the Rome Statute on the International Criminal Court in 1998.[14] Through this provision the crime of aggression was in principle included in the catalogue of crimes of the Court. However, the Court's exercise of jurisdiction over this crime must await an amendment of the Statute based on strict requirements. Such an amendment would require adoption through a particularly qualified majority (7/8) at the Assembly of States Parties to the Statute.[15] The first opportunity will be at

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11 *Ibid.*, article 5(2).

12 A principle explicitly referred to in article 22 of the Rome Statute.

13 An account of the negotiations on the crime of aggression at the Rome Diplomatic Conference is given by Herman von Hebel and Darryl Robinson, "Crimes Within the Jurisdiction of the Court", in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, 1999, at pp. 81-85.

14 The Rome Statute for the International Criminal Court was adopted on 17 July 1998 and entered into force on 1 July 2002 after more than 60 States had ratified or acceded to it. For the text of the Statute, see <http://www.un.org/law/icc/statute/romefra.htm>. A comprehensive commentary of the Statute, article by article, is provided in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, 1999.

15 The procedural requirements are contained in articles 121 and 123 of the Statute. The material requirements are set out in article 5(2), which states:

> *The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.*

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the First Review Conference of the Statute to be held seven years after its entry into force, that is, in 2009. Efforts were devoted in this regard in the preparatory work pending entry into force of the Statute and these are being carried forth in the Assembly of States Parties. [16]

2. Is the crime of aggression fundamentally distinguishable from other international crimes and, if so, why?

International criminal justice has made momentous strides with the establishment of the Yugoslavia and Rwanda Tribunals by the UN Security Council and of the treaty-based International Criminal Court. These and other judicial institutions[17] uphold the criminal responsibility of individuals for genocide, crimes against humanity and war crimes. In cases of armed conflict, those crimes will often be referred to as constituting part of *jus in bello*. Literally this could be translated as the "laws within warfare", which are governed by international humanitarian law in a broad sense.[18] The definition of these crimes is built on an extensive and steadily growing international and national jurisprudence. The Rome Statute on the International Criminal Court could in this context to a certain extent be viewed as a codification based on well-established and rock-solid foundations.

Controversies abound, on the other hand, with regard to the rules governing resort to armed conflict, *jus ad bellum*, literally the "laws on going to war".[19] Characteristically, a leading textbook on international law systemati-

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[16] An authoritative overview of the status in those efforts, as of March 2002, is provided in Silvia A. Fernández de Gurmendi, "The Working Group on Aggression at the Preparatory Commission for the International Criminal Court", in 25 *Fordham Int'l L. J.* (2002) pp. 589-605.

[17] Including notably the Special Court for Sierra Leone under establishment in Freetown (Sierra Leone), pursuant to an agreement between Sierra Leone and the United Nations signed in Freetown on 16 January 2002, following resolution 1315 adopted by the U.N. Security Council on 14 August 2000.

[18] It should be added that genocide and crimes against humanity do not normally presuppose a situation of armed conflict, and can therefore also be committed in times of peace. They could therefore aptly be said to form part of a "*jus in bello ac pace*".

[19] For an overview of rules on the use of force (*jus ad bellum*), see Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed., London and New York, 1999, pp. 306-341. For a discussion in the context of the crime of aggression, see for instance Richard L. Griffiths, "International Law, the Crime of Aggression and the Ius ad Bellum", in 2 *Int'l Criminal L. Rev.* (2002) pp. 301-373. On suggestions to revisit difficult legal issues related to anticipatory self-defence, see for example Anthony Clark Arend and Robert Beck in *International Law and the Use of Force: Beyond the UN Charter Paradigm*, Routledge, London, 1993, pp. 71-79; Christopher C. Joyner and Anthony Clark Arend, "Anticipatory Humanitarian Intervention: An Emerging Legal Norm?", in *US Air Force Academy Journal of Legal Studies*, 1999-2000.

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cally deals with the issue of criminal responsibility in the chapter dedicated to *jus in bello*, as opposed to the one devoted to *jus ad bellum*.[20]

There is one distinguishing feature of the crime of aggression that contributes to explaining both legal uncertainties and political disagreements. Attributing responsibility for this crime requires, as a pre-condition, the determination of a breach of international law by a State that qualifies as an act of aggression.[21] This also helps to understand why the crime of aggression would normally not be subject to prosecution by another State, insofar as that would presuppose the determination by the courts of that State of the legality under international law of the conduct of another State.[22] As a result, the crime of aggression, as such, is normally not criminalized in national criminal law nor included in any national rules of universal criminal jurisdiction.

It would be fair to add that this distinguishing feature may risk removing or radically altering an often referred to benefit of prosecuting individuals for the most serious international crimes. International criminal justice can make important contributions to long-term international peace and security in a war-torn area. Objectively identifying the individual guilt of key perpetrators of mass atrocities is quite distinct from stating or implying a "collective guilt" of a nation. Searching for the truth and administering justice in such cases may arguably promote a reconciliation process, together with other measures to restore and maintain peace and security. Prosecuting individuals for conduct the determination of which depends, in large part, on the legal and political characterisation of acts of the State concerned, carries a more direct risk of generating, in the shorter or longer term, political reactions or other consequences. Whether based on an accurate portrayal of the trials, or a deliberate misrepresentation or unintended perceptions thereof, a stamp of "national guilt or shame" may not make the same contributions to reconciliation. The aftermath of World War I and the ensuing peace agreements have commanded numerous historical studies. Several have focused on the real or perceived role certain provisions of the Versailles Peace Treaty may have played in providing pretexts for revanchism. Irrespective of these considerations, there seem to be obvious reasons to consider with the utmost caution and sense of responsibility the issues here involved. At any rate, no

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20 *Ibid.*, p. 342. Chapter 20 is thus entitled "Means of waging war and criminal responsibility: ius in bello".

21 The International Law Commission has, in the context of its work on a Draft Code of Crimes, confirmed that only a State can commit aggression in relation to another State, see Report of the International Law Commission on the Work of its Forty-eighth Session, 6 May - 26 July 1996, UN doc. A/51/10, pp. 9-120, at pp. 83-85.

22 This principle is often referred to as "par in parem imperium non habet" (literally, an equal has no dominion over an equal, see *Black's Law Dictionary*, 6th ed., St. Paul, Minnesota, 1990).

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automaticity based on analogies from the criminalization of other international crimes, including the purposes and consequences thereof, should guide the consideration of these matters.

Particular benefits may be derived from a separate and keen focus on the crime of aggression in light of the concrete jurisprudence based on the Nuremberg law. Moreover, careful study should be made of the collective system for peace and security established by the Charter of the United Nations. The United Nations Secretariat has, in this connection, presented a comprehensive reference document, which goes beyond the normal ambit of UN reports. This document provides an objective, incisive and timely analysis of the existing jurisprudence and practice pertaining to aggression.[23]

An immediate but also enduring perception when analysing this jurisprudence, is linked to particular issues related to high-level political and military leadership of a State. This is not to say that the investigation and prosecution of other crimes will not involve weighing evidence that may stem from the inner workings of a hierarchic State structure or pertain to national security. On the contrary, the case law of the ICTY and ICTR shows that they, in fact, often do. Serious violations of international humanitarian law may include elements that also pertain to State or organisational policy, although this is clearly not a requirement under the Statute.[24] The Rome Statute contains, moreover, particular procedures for dealing with any national security information.[25]

The crime of aggression is, nevertheless, by its very nature a deliberate and essential part of a foreign policy and national security planning.[26] Any investigations and prosecutions would essentially and almost exclusively have to focus on business dealt with in places such as cabinet meeting rooms and the inner chambers of Defence High Command. This carries a number of challenging implications, ranging from where to draw the dividing line of criminal responsibility within a chain of command or authority or within political bodies, and to how to achieve access to and weigh any evidence.

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[23] Historical review of developments related to aggression, prepared by the UN Secretariat for the UN Preparatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, New York, 8-19 April 2002 (UN doc. PCNICC/2002/WGCA/L.1, hereinafter *Historical Review*, as well as Add.1).

[24] The crime of genocide and the crimes against humanity typically involve widespread or systematic attacks against civilians. Reference may also be made to article 8 of the Rome Statute, which states that the jurisdiction of the Court for war crimes should be activated in particular when these are committed as "part of a plan or policy or as part of a large-scale commission of such crimes".

[25] Article 72 of the Statute.

[26] The aggressive designs of the Nazi Government were found to be "a deliberate and essential part of Nazi foreign policy", see Nuremberg Judgement p. 185, see *Historical Review*, pp. 18-19, para. 24.

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Such issues are thoroughly illustrated by the trials pursuant on Control Council Law No. 10, in particular the landmark case of the *United States of America v. Ernst von Weizsäcker et al.* (the *Ministries* case).[27] The Nuremberg law clearly limits individual responsibility for wars of aggression to a few persons on a policy level.[28] Only persons holding high-level positions in various departments of Government were included, while those who had no political influence on planning and execution were excluded. Significantly, when the Tribunal in the above case considered the role of von Weizsäcker, who was State Secretary in the Foreign Office in Berlin from 1938 to 1943, in the context of the aggression against Poland, it stated:

> While his position was one of prominence and he was one of the principal cogs in the machinery which dealt with foreign policy, nevertheless, as a rule, he was an implementor and not an originator. He could oppose and object, but he could not override. Therefore, we seek to ascertain whether he did all that lay in his power to frustrate a policy which outwardly he appeared to support.

Incidentally, von Weizsäcker was ultimately not found criminally responsible for any crimes of aggression.

At this stage, it might be justifiable to move a few steps back and away from the law. In order to approach the question of what may constitute a criminal conduct on the part of an individual in the case of a war of aggression, it may be interesting to briefly reflect on a few historical developments, which have influenced considerations of the legality of use of force. Arguably, a key tendency has been to prevent and counter the use of aggressive war as an instrument of national policy.

3. Defeating aggressive war as an instrument of national policy

Constant threats against the survival of Italian cities of the Renaissance arguably played a decisive role in shaping the initial formation of modern political thought. According to Niccolò Machiavelli, political thought and advice in this regard was interconnected to considerations of military strategy. Not only could they, but they also should be studied as rational and calculable elements. "That is why all armed prophets have conquered, and unarmed prophets have come to grief".[29] Clausewitz, the father of modern strategy,

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27 Judgement 11-13 April 1949, *Trials of War Criminals Before the Nuernberg Military Tribunals*, United States Government Printing Office, vol. XIV, p. 308, see *Historical Review*, pp. 56-83, paras. 166-259.

28 Ambos, *op.cit.*, p. 366.

29 "Di qui nacque che tutti e' profeti armati vinsono, e li disarmati ruinorono". Niccolò Machiavelli, *Il Principe*, Biblioteca Universale Rizzoli, 2nd ed., 1977, VI.6, p. 106. The English translation is George Bull's in Niccolò Machiavelli, *The Prince*, Penguin Books, reprinted with revisions of 1981, p. 52. A modern Norwegian translation is provided by Jon

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developed this realist approach to political and military thought against the backdrop of Napoleon's wars in Europe.[30] In the analysis of Clausewitz, war is merely the continuation of policy by other means.[31]

While it is commonplace to attribute these foundations of modern realist analysis to European thinkers, the reality is that similar analytical efforts had been carried out long before Machiavelli or Clausewitz in other cultures. About 400 years BC the book *Arthâshastra*, reminiscent of Machiavelli's *The Prince*, expounded what became India's classic theories of foreign policy and military theory. It also analysed whether "any power superior in might to another should launch into war".[32] Moreover, at about the same time, in the Warring States period in the history of China, Sun Tzu wrote his seminal *The Art of War*. He could also be termed as a precursor to Machiavelli and Clausewitz. Moreover, maxims such as "the way to avoid what is strong is to strike what is weak" are attributed to him.[33] Comparisons with Machiavelli's achievements may be drawn in the Islamic, particularly the Persian, tradition of political writing known as "Mirrors for Princes". This tradition is possibly best illustrated by Nizam al-Mulk's *Siyasat-nama*, *The Book of Government*.[34] In a strikingly contemporary light, it should be mentioned that Nizam al-Mulk was ultimately murdered by the sect of Assassins in 1092. Today the latter group might have been described as a transboundary terrorist network which threatened through a culture of unpredictable violence the very foundations of centralised governments in Islamic societies of the day.

Marxists often transposed on revolutionary political parties the advice on statecraft given to princes by the Florentine writer. This was explicitly advocated, for example, by the founder-member and chief ideologist of the

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Bingen in N.M., *Fyrsten*, Aventura, Oslo. The expression "the prophet armed" was later notably used by Isaac Deutscher as the title of one volume in his seminal biography of Trotsky. See also Niccolò Machiavelli, *Arte della Guerra* (1521), translated into English by Neal Wood in N.M., *The Art of War*, Da Capo, Cambridge, 1965.

30 On the influence of Machiavelli on Clausewitz, see Carl von Clausewitz, *Strategie*, ed. Eberhard Kessel, Hamburg, 1937, p. 41, as noted in *Makers of Modern Strategy - from Machiavelli to the Nuclear Age*, ed. Peter Paret, Princeton, 1986, p. 31.

31 Carl von Clausewitz, *Vom Kriege*, see *On War*, 1832, trans. and ed. Michael Howard and Peter Paret, rev. ed., Princeton, 1984, p. 87. See also Erling Bjøl, *Hvorfor krig?*, Copenhagen, 1998.

32 Quoted in Stanley Wolpert, *A New History of India*, 4th ed., Oxford Uni. Press, 1993, pp. 57-62.

33 Sun Tzu, *The Art of War*, ed. James Clavell, New York, Delacorte 1983. Partly translated to Norwegian by Harald Bøckman in Sun Zi, *Kunsten å krige*, Oslo, 1999. On early Chinese political and military theory, see David A. Graff, *Medieval Chinese Warfare 300-900*, Routledge, London, 2002.

34 David Morgan, *Medieval Persia 1040-1797*, Longman, London, 1988, pp. 29-32. The *Siyasat-nama* is translated into English by H. Darke, *The Book of Government*, 2nd ed., London, 1978.

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Italian Communist Party, Gramsci, in his prison notebooks before the Second World War.[35] Such a party's politburo has, in fact, been described as a kind of "collective Prince".[36] Before him, Lenin had famously adopted a number of Clausewitzian concepts, and deliberately considered war as an instrument of policy.

This brings us to a particularly perverted application of some of these concepts in Hitler's book *Mein Kampf*. Force was extolled in it as an instrument of foreign policy. This book formed an integral part of the evidence weighed by the Nuremberg Tribunal when considering the criminal elements of planning aggressive war.[37] This book typifies a concrete backdrop for the consideration of criminalization of individuals in cases of aggressive war.[38]

The Briand-Kellogg Pact had, in fact, declared the renunciation of war as an "instrument of national policy" in 1928.[39] Henry Kissinger has analysed with great irony the background of this agreement named after the French Foreign Minister Aristide Briand and the American Secretary of State Frank Kellogg.[40] He famously attributed this agreement to confused leaders who have a tendency to substitute public relations manoeuvres for a sense of direction. According to Kissinger, Kellogg

> did not quite know how to respond to a document which renounced what no one feared and offered what everyone took for granted. The approach of the election year of 1928 helped to clear Kellogg's mind; "peace" was popular, and Briand's draft had the advantage of not involving any practical consequence.

There may be much to be said not only about the lack of any enforcement possibilities for the Pact, but also about its ambiguities and loopholes. Nevertheless, Kissinger's scathing comments may have overlooked the important practical consequences of the Briand-Kellogg Pact ultimately had for the development of international criminal justice. The Nuremberg Tribunal considered it, in fact, a key source. It proved instrumental when determining whether aggressive war was a crime under international law already before

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35 Antonio Gramsci, *Note sul Machiavelli, sulla politica e sullo Stato moderno*, rev. ed. by the Istituto Gramsci 1977, *Editori Riuniti*, Rome, 2000, pp. 10-13. Gramsci was imprisoned by Mussolini and wrote those notebooks while in jail, where he remained until his death in 1937.

36 Raymond Aron, *Machiavelli e Marx*, Address at the Italian Cultural Institute in Paris on 6 November 1969, reprinted as an introductory essay in *Il Principe*, *op.cit.*, p. 18.

37 Nuremberg Judgement, pp. 176, 187-188, see *Historical Review*, *op. cit.*, p. 19, n. 39.

38 For a prominent political philosopher's classical treatment of the theory of aggression, see Michael Walzer, *Just and Unjust Wars*, New York, 1977, 3rd ed. 2000. On the crime of aggression in particular, see *ibid.*, pp. 287-303. In a Norwegian context, see also Raino Malnes, *National Interests, Morality and International Law*, Oslo, 1994, Scandinavian University Press, pp. 119-134.

39 The General Treaty for the Renunciation of War of 27 August 1928, in force in 1929.

40 Henry Kissinger, *Diplomacy*, London, 1994, pp. 280-281.

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the adoption of the Nuremberg Charter.[41] The Tokyo Tribunal expressed in its judgement in 1948 its complete agreement with the opinion of the Nuremberg Tribunal on these issues.[42] Moreover, in the already referred to landmark *Ministries* case, the U.S. Tribunal established pursuant to Control Council Law No. 10, undertook a thorough re-examination of the question in 1949. The Tribunal noted that Germany had become a voluntary signatory to the Pact. Irrespective of how the terms of the Versailles Peace Treaty had been agreed or imposed, this gave Germany's territorial situation "a status of repose and fixation", at least so far as a resort to an aggressive means of correction was concerned. [43] In so doing, the Tribunal in fact confirmed the normative reach of the principle that agreements are binding (*pacta sunt servanda*).

The Charter of the United Nations could be said to build on a more realistic set of assumptions than did the Briand-Kellogg Pact, in that it does not as such attempt to preclude all use of armed force, but limits it to situations where the "common interest" dictates its use.[44]

The use of force is, in certain cases, permissible under the Charter of the United Nations. The legality of the use of force is to be analysed on the basis of the relevant principles and provisions of the Charter. Briefly put, the Charter introduces a new legal architecture for peace and security. The general prohibition against use of force, or of threat thereof, in article 2(4) of the Charter, constrains the use of force by States. The exceptions are few, notably individual or collective self-defence in accordance with article 51 and authorisations by the Security Council under chapter VII, in the absence of request or consent by the State concerned. While these points of departure are in principle quite clear, different interpretations of the Charter have been rife both in theory and practice, leading all too often to different assessments of the legality or legitimacy of use of force by States in concrete situations.[45]

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41 Nuremberg Judgement, p. 220. See *Historical Review*, p. 27.

42 Judgement of the International Military Tribunal for the Far East, 4-12 November 1948, pp. 25-27, see on this point *Historical Review*, p. 91 para. 288.

43 *United States of America v. Ernst von Weizsäcker et al., Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, vol. XIV, p.324; see on this point *Historical Review*, p. 59, para.173.

44 The preamble of the Charter of the United Nations states:

> We the Peoples of the United Nations Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, (...) to ensure, by the acceptance of principles and the institution of methods, *that armed force shall not be used, save in the common interest* (emphasis added).

45 See for instance, Malanczuk, *loc. cit.* A comprehensive study of various conflicts is provided by A. Mark Weisburd, *Use of Force: The Practice of States since World War II*, The Pennsylvania State University, 1997.

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4. Criminalization requires a clear and predictable definition of acts of aggression

As already indicated, the requirements of the principle of legality speak clearly in favour of prior definitions rather than retrospective legislative measures. Moreover, in a political context, the former do not expose themselves easily to allegations of political bias or expediency.

The first challenge is prospectively agreeing on the definition of an act of aggression committed by a State. Efforts at defining the legal concept of aggression have been frequent and assiduous, also in a Nordic context.[46] The international lawyer Edvard Hambro provided in undisguised terms an illustrative account of the difficulties perceived in this respect during the Cold War. In 1969, while he was Permanent Representative of Norway to the United Nations and before being elected as President of the General Assembly of the United Nations, he described then on-going discussions on the definition of aggression as follows:

> The hunt for definitions may be an interesting intellectual pass-time, but will not contribute anything to constructive statesmanship. Unfortunately, the legal arguments are here adduced as aids in a propaganda fight. The scientific front seems to follow the same lines as the political front.[47]

Aggression is a concept which presupposes, yet is distinct from, illegal use of force. This was also confirmed by the 1974 definition of aggression by the UN General Assembly (*supra*), which deemed the illegal use of force prima facie evidence of an act of aggression by a State, but left it to the Security Council to consider when it would be justified to make a determination in this regard. Illegal use of force is thus a necessary but not sufficient condition for the determination of an act of aggression.

When trying to grasp the scope of "acts of aggression" committed by States, one attempts the arduous move from politics to law. However, the high frequency of use of this expression in political debates in multilateral and other fora has, so far, only been matched by its extremely rare use by the Security Council.[48] The latter is the organ of the United Nations entrusted

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[46] See references in Ove Bring, *FN-stadgans folkrätt*, Stockholm, Norstedts juridik, 1992. It suffices here to mention Hans Blix, *Sovereignty, Aggression and Neutrality*, The Dag Hammarskjöld Foundation, Uppsala, 1970; Bengt Broms, *The Definition of Aggression in the United Nations*, Åbo/Turku 1968; Edvard Hambro, "The Question of the Definition of Aggression before the 22nd Session of the General Assembly", in *Liber Amicorum in honour of Professor Alf Ross*, Copenhagen, 1969, p. 154; Ahmed Rifaat, *International Aggression. A Study of the Legal Concept: Its development and Definition in International Law*, Stockholm, 1979.

[47] Edvard Hambro, *op.cit.*, p. 167.

[48] On the latter issue, see *Historical Review*, *op.cit.*, pp. 115-121.

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with the primary responsibility for the maintenance of international peace and security and which may, according to article 39 of the Charter, make determinations with regard to the existence of any acts of aggression. This has, undoubtedly, a lot to do with political considerations in connection with crisis management, including through long periods of time limitations or even paralysis deriving from the use or threat of use of veto powers. However, it also translates the extremely high threshold attributed to making a determination of an act of aggression. An important element in deciding on a definition will, therefore, be the setting of a sufficiently high threshold of gravity.

Moreover, parts of the underlying legal issues examined in the Nuremberg trials are not necessarily directly relevant today. At first blush, it suffices to refer to the consideration of breaches of laws of neutrality and non-aggression agreements before World War II. The entry into force of the Charter of the United Nations in 1945 signified a watershed in the law of international peace and security. To a considerable extent the system of the Charter prevails over and renders obsolete certain earlier laws on *jus ad bellum*, although the exact extent of the latter phenomenon raises a number of complex issues, which may not be dealt with here.

5. Institutional mechanisms to determine an act of aggression and thereby to trigger the Court's jurisdiction

A key feature of the system of collective security envisaged in the Charter is to foresee a paramount role for particular institutional mechanisms in order to maintain or restore international peace and security. It has been noted that the primary responsibility in this regard is entrusted to the Security Council pursuant to article 24. While the General Assembly has powers to discuss and make recommendations for the maintenance of international peace and security in accordance with articles 10, 11, 12 and 14, no mention is in this context made to acts of aggression. Explicit reference to the latter appears, on the other hand, in the first provision under Chapter VII, which in article 39 states that the Security Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression". In the event of such a determination the Council may "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".

Several States maintain, on this basis, that the Security Council has the exclusive power to determine the existence of an act of aggression by a State.[49] It should be noted that the International Law Commission was also

[49] This view is for instance reflected in the French Ministry of Defence's handbook on the laws of armed conflict, *Manuel de Droit des Conflits Armés*, Ministère de la Défense, Di-

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of the view that the particular responsibilities of the Council required a prior determination by the Council of the commission of aggression by a State before a prosecution could be brought against an individual for a crime of aggression.[50]

Other States who have not considered the Council's powers in this regard to be exclusive have, however, opposed this view. They maintain that article 24 of the Charter speaks of the primary, rather than exclusive, responsibility of the Council in this regard. This would, notably, not exclude a role for the General Assembly of the United Nations, in cases where the Council would be unable to take the required measures.[51] Proposals have also been made to subsidiarily entrust the International Court of Justice with a role in determining whether the conduct of a State amounted to an aggression, particularly on the basis of a request for an advisory opinion, consistently with Article 96 of the Charter.[52]

Legal differences have, however, been compounded by traditional political differences on a range of issues concerning international peace and security, not least with regard to the role of the Security Council, including the veto powers of the Permanent Members.

6. Clarifications are needed with regard to the principles of criminal law applicable to individual responsibility in the context of the definition of the crime, but also the determination by other bodies of an act of aggression

When one attempts to move from an "act of aggression" committed by a State to a "crime of aggression" committed by an individual, the two need to be clearly distinguished. One enters, here, the realm of international criminal law. Regulating the crime of aggression after having grappled with the definition of an act of aggression, could therefore be compared to the proverbial

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rection des Affaires Juridiques, (TTA 925) Paris, 2000, p. 20: "le Conseil de sécurité étant seul compétent pour qualifier une situation d'agression armée".

50 The International Law Commission presented a provision to this effect in its draft Statute for an International Criminal Court in 1994, which constituted the basis for negotiations on the International Criminal Court at the United Nations, see UN doc. A/49/10 (1994), Supp. No. 10, pp. 72 and 84.

51 References have, in this regard, been made to the reasoning underpinning the General Assembly's so-called Uniting for Peace resolution 498 (V), adopted on 1 February 1951, in the context of the Korean question, where the Assembly noted that "the Security Council, because of lack of unanimity of the permanent members, has failed to exercise its primary responsibility for the maintenance of international peace and security in regard to Chinese Communist intervention in Korea" and the Assembly found that China had "engaged in aggression in Korea", see *Historical Review*, *op.cit.*, pp. 123-124, para. 415.

52 A detailed proposal to this effect was submitted in 2001 by Bosnia and Herzegovina, New Zealand and Romania, see UN doc. PCNICC/2001/WGCA/DP.2/Add.1.

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need to steer between the whirlpool Charybdis and the many-headed monster Scilla.[53]

This is an area where particular exigencies of objectivity, clarity, certainty and predictability exist. The focus must be put on practical and fair requirements both with regard to the objective and subjective elements of criminalization of individual conduct, including the unlawful acts (*actus reus*) and the guilty state of mind (*mens rea*).

It may be enlightening to provide a concrete illustration at this point of the kinds of defences that may be claimed by an accused. Consider for a moment the Nuremberg Trial's treatment of the Nazi invasion of Norway. Among various defence arguments, the Tribunal had to consider the claim that the invasion of Norway was an act of self-defence to forestall an Allied occupation, and that Germany's action, therefore, was preventive. The Tribunal rejected this claim on the basis of the criteria for self-defence identified in the *Caroline* case, including the requirement of an instant and overwhelming necessity of self-defence. This example suffices to illustrate the kinds of defence arguments that may be submitted in the context of a crime of aggression.[54] One catches here a glimpse of the possibility of mounting defence strategies, which could call into question the premises for the prior determination of an act of aggression by another body, significantly the Security Council.

The latter consideration may require proper study, so that procedures instigated before the International Criminal Court, or elsewhere, do not infringe upon decisions taken by the competent bodies of the United Nations in conformity with the Charter. This may, in fact, appear to be a requirement deriving from the Rome Statute itself, since article 5(2) also clearly states that a future provision on the crime of aggression "shall be consistent with the relevant provisions of the Charter of the United Nations".

7. Essential underpinnings of the International Criminal Court

Is there guidance that can be drawn from other parts of the Rome Statute, its basic approaches and underlying principles, and which may inspire our considerations? It may be useful, although commonplace, to retrace a few salient features.

The Statute confirms and operationalises individual responsibility for certain crimes directly under international law, seen against the background

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[53] According to Homeric and other classic mythology those two dangers haunted ships passing through the Strait of Messina, dividing Sicily from the Italian mainland.

[54] Nuremberg Judgement, pp. 207-209, see *Historical Review*, pp. 22-24, paras. 36-43. For the *Caroline* case, see *Moore's Digest of International Law*, vol. II, p. 412. The defence claims presented were re-examined more thoroughly in the trials pursuant to Control Council Law No. 10, see *Historical Review*, p. 63, paras. 184-186.

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of their irrefutable seriousness. By the same token, this seriousness equips them with a particular international dimension. The Statute thus operates with the concept of "international crimes" (preambular paragraph 6). In the context of the Statute they are the most serious crimes of concern to the international community as a whole.[55]

The broad basis of support to the Statute can also be explained by its concentration on a narrow list of crimes and their precise definitions, which were prone to consensus. Other crimes may be reconsidered at a later review of the Statute if conditions so allow or demand (article 123). This provided a focus on crimes whose criminalization not only is universally accepted but also to a considerable extent already obligatory. This was a central premise for promoting a consensual approach in the negotiations on the Court project. It is no understatement to note that this premise remains yet to be ascertained in the case of the crime of aggression.

With regard to international peace and security, but also the interests of national security, the Statute puts a significant emphasis on the need for harmony, symbiosis and a mutually reinforcing interaction with existing international and national institutions. The Security Council is thus given a key role in the triggering of Court action, through the powers envisaged in the Statute (article 13 (b)) with regard to referral of situations under Chapter VII of the Charter of the United Nations. Moreover, the Council may pursuant to article 16 defer investigations or prosecutions of the Court for periods of 12 months, as was done in the context of peace operations for personnel from non States parties to the Statute through resolution 1422 of the Security Council in July 2002.

Finally, a key for understanding the broad basis of support of the Statute is the principle of "complementarity" between the Court and national criminal jurisdictions. The Statute recalls in preambular paragraph 6 that it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". Moreover, its preambular paragraph 4 affirms that "their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation". Accordingly, it emphasises in preambular paragraph 10 that the Court "shall be complementary to national criminal jurisdictions". The principle of complementarity is expounded in article 17, with procedural rules laid down in articles 18 and 19. The essential point is, however, that cases will only be admissible where the State concerned is unwilling or unable genuinely to investigate or prosecute.

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[55] See preambular paragraphs 4 and 9 as well as articles 1 and 5 of the Statute.

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8. Applying the principle of complementarity to the crime of aggression

Which scenarios may the Court have to face in the context of aggression? One may consider a number, including situations of regime transition or continuity, unstable security environments and difficulties in ensuring a regular functioning of State institutions. When considering the crime of aggression, the adequacy of the complementarity rules of the Statute has therefore also been called into question.

The application of the principle of complementarity to a crime of aggression may raise several conceptual, legal and practical questions. This crime would typically be perceived as a deliberate and essential part of a State's foreign policy, and would seldom, as such, be criminalized in national laws. National controls of what amounts to the legality of foreign and security policy decisions, where such controls exist, would in many cases, if not most, not be ensured by judicial institutions. Even in democratic States where constitutional laws allow for a review of government acts, this would typically belong to the domain of political checks and balances. Moreover, foreign policy or national security exceptions from judicial scrutiny abound.

In some domestic systems such issues may be covered by "executive privilege" or "domaine réservé" clauses. A preference may be given to parliamentary or other particular political supervision or scrutiny, in order to enhance effective democratic controls. Should the constitutionality of the acts concerned not be in issue, it is not unlikely that one may encounter a preference for judicial restraint. In several systems the advisability of allowing judges to "second-guess" the discretion of political bodies subjected to democratic controls, in an area such as national security, would be a key question of constitutional law – pertaining to the very division of powers within a system of government. It may be commonplace to recall, in this context, the approach taken by the US Supreme Court, when it declined jurisdiction over cases raising the question of the legality of the war in Vietnam. According to Currie, this was done in the conviction that the issue was too politically explosive to be settled by judicial decision.[56] A number of other examples of limitations on jurisdiction or admissibility, or of various forms of judicial restraint by the national criminal jurisdictions may be found in other national systems.[57]

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[56] See for example David P. Currie, *The Constitution of the United States, A Primer for the People*, The University of Chicago, 1988, pp. 38-40.

[57] See, for instance, the discussion in relation to measures of enforcement on the high seas during the Algerian war, Laurent Lucchini, *Actes de contrainte exercés par la France en haute mer au cours des opérations en Algérie*, XII A.F.D.I., Paris, 1966, pp. 805-821.

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Holding executive authority paramount in relation to the U.S. Alien Enemy Act, Justice Felix Frankfurter went so far as to express the following general view:

> Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined.[58]

Arguably, it is also difficult to see how the Statute's concrete procedures to decide whether a State has genuinely carried out investigative or other steps could be effectively applied in a case of aggression. To mention a particular example, the rules on preservation of evidence pending completion of certain national steps, do not necessarily appear to be fitting in the types of cases considered here.

All the above considerations should be present in mind when considering what kinds of cases might usefully be dealt with by an international judicial body, and the requirements of clarity and predictability that ought as a minimum to be satisfied in this regard. They may also be relevant when considering whether there are institutional mechanisms that would have clear comparative advantages in dealing with these issues. In this context, it may be asked whether the powers of the Security Council of the United Nations under Chapter VII are not uniquely suited to provide the legitimacy and effectiveness necessary in order to deal with such situations.

9. In guise of concluding observations

Cleavages revealed in negotiations show the depth of pitfalls as well as the high levels of ambitions and of stakes involved. They may be an indication that the level of maturity of the development of international law in this field leaves a lot to be desired. The importance of the outstanding issues requires that negotiators exert the utmost good faith and recognise legitimate interests of other States. The qualified majority requirements for adopting any amendments to the Statute in this regard imply, at any rate, the need for a consensual solution.

Without advocating postponements, it may, in this context, be useful to recall the essential role played by "timing" and its correlative, *i.e.*, patience, when it comes to the role played by surrounding political conditions as a decisive element in making important developments in international law possible.

In the history of international law, one may find thought provoking and possibly encouraging the fate of the Fisheries Jurisdiction cases.[59] The Inter-

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[58] *Ludecke v. Watkins*, 335 U.S. 160 (1948); quoted in Philip B. Kurland, *Mr. Justice Frankfurter and the Constitution*, The University of Chicago, 1971, p. 59.

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national Court of Justice held in 1974 that the establishment of a fishing zone of fifty miles in breadth was not valid. However, views on coastal State jurisdiction were rapidly evolving within the framework of the Third United Nations Conference on the Law of the Sea (1973-1982). It is a paradox that 200-mile zones were recognised only two years later, and that a general acceptance of a two hundred miles Exclusive Economic Zone was achieved already in 1979.[60]

From the commonplace condemnation of aggression in all its forms, to agreeing on delegating authority to an international judicial body, which may oversee national controls in such an area of national security and foreign policy, there would, however, be a huge distance to cover.

This is compounded by the fact that the "hard cases" of use of armed force almost typically give rise to hotly debated issues of international law. When underlying assessments of international legality of use of armed force are still all too often politicised or perceived as such, establishing institutional mechanisms for attributing individual criminal responsibility in such cases is not obvious.

The question as to whether judicial procedures are likely to be a useful way to resolve situations involving the use of force was hotly debated in connection with the *Nicaragua* case before the International Court of Justice.[61] The debate was revived notably after the end of the Cold War and unity and effectiveness had been demonstrated by the United Nations Security Council in response to Iraq's invasion of Kuwait in 1990.[62] The answers to these questions will to a large extent depend on the definition of the crime of aggression, including a sufficient threshold of gravity. Clearly, no one would doubt, for example, that the Iraqi invasion and occupation of Kuwait 1990-91 would qualify. However, according to many observers the mechanism for triggering the jurisdiction of the Court would be decisive. Whereas many could agree on such a role being given to the Security Council, there is no agreement on an exclusive screening function for the latter.

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59 *United Kingdom v. Iceland*, and *Federal Republic of Germany v. Iceland*, I.C.J. Reports (1974) pp. 3 and 175.

60 Ultimately reflected in article 57 of the United Nations Convention on the Law of the Sea of 10 December 1982.

61 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Reports 1984 p. 392 (Judgement of 26 November 1984 on Jurisdiction and Admissibility), I.C.J. Reports 1986 p. 14 (Judgement of 27 June 1986 on Merits). See Oscar Schachter, "Disputes Involving the Use of Force", in Lori Fisler Damrosch (ed.), *The International Court of Justice at a Crossroads*, 1987, p. 223.

62 On a general discussion of advantages and disadvantages of using international judicial procedures in cases of use of force, see Richard B. Bilder, "Judicial Procedures Relating to the Use of Force", in Lori Fisler Damrosch and David Scheffer (ed.), *Law and Force in the New International Order*, 1991, p. 269.

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One would be amiss if one did not also mention the current challenges represented by unforeseen security threats of international terrorist networks, tragically illustrated by the events of 11 September 2001. They have demonstrated the importance of new so-called asymmetrical threats, represented by non State actors or groups benefiting from failed States or States harbouring or in other ways supporting terrorist groups, and compounded by the availability of new technologies, including weapons of mass destruction. Events after 11 September 2001 have shown that an attack directed from abroad against a State may trigger the exercise of self defence within the meaning of article 51 of the Charter of the United Nations and of article 5 of the North Atlantic Treaty. While the question has not been raised as to whether this should have any consequences for a definition of acts of aggression, there can be no doubt about the already existing legal bases for prosecuting under other charges individuals responsible for the terrorist attacks of 11 September, if need may be also on an international level.

The experience of the Nuremberg trial and judgement and the ensuing tribunals established pursuant to Control Council Law No. 10 provide ample illustrations of the reality in the field of prosecution and adjudication in cases of alleged crimes of aggression. In the landmark *Ministries* case referred to above, it became clear that the evidence included hundreds of captured official documents that were not available at the time of the trial before the Nuremberg Tribunal and were not offered in other trials before United States Military Tribunals.[63]

Limits on the Court's fact-finding capabilities are particularly pronounced when it comes to investigation of use of armed force between States. Unless there has been a regime change, with ensuing willingness to co-operate with the Court, or the State concerned has been militarily defeated, powers of coercion would seem to be needed, rather than co-operation and assistance provisions of the Statute. The powers of coercion which are needed in practice in order to carry forth a prosecution speak in favour of a mandate of the United Nations Security Council, in the absence of approval from the State concerned.

In the analysis of Anthony Giddens, the contemporary world is characterised by a "globalisation of risk". This applies both with regard to the intensification of risk and the extension of risk environments when dealing with these issues.[64] As such, this theory of modernity seems here oddly familiar, since it refers to concerns that would have been easily recognised by the Florentine Machiavelli and the Persian Nizam al-Mulk alike.

According to Giddens, a rigid division between realistic and utopian thought is uncalled for. "Utopian thinking is useless, and possibly extremely

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[63] *Historical Review*, pp. 58-59, para. 171.

[64] Anthony Giddens, *The Consequences of Modernity*, 1990, pp. 125-137.

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dangerous, if applied, say, to the politics of deterrence. Moral conviction pursued without reference to the strategic implications of action may provide the psychological comfort which comes with a sense of worth that radical engagement can confer. But it can lead to perverse outcomes if not tempered by the realisation that, with high-consequence risks, the minimising of danger must be the overriding goal."[65]

Cicero mounted famous defences in several procedures instigated against successful generals who had become political leaders at the height of the Roman Republic, which governed the whole of the Mediterranean area.[66] They created the fame of the leading barrister in Rome. It is notable that they consistently are referred to as "political speeches", irrespective of whether they were held before political bodies such as the Roman Senate or before law courts.

The Court needs to be well integrated in the existing system of peace and security of the international community. This system is certainly imperfect, and legitimate reasons speak in favour of its strengthening. However, it seems a dangerous illusion to believe that it could be revised through international criminal law.

If war has been considered as the conversion of politics into other means, it is important that the discussions of criminalization of crimes against the peace not lead to a continuation of politics in a legal forum.

Inclusion of any new crimes must rest on rock-solid foundations. A new international consensus would seem to be needed in order to surmount the legal difficulties analysed in this article. In the meantime, we should not overlook the need to consolidate and strengthen the momentous achievements of international criminal justice with regard to the well-established international crimes that are already defined and included in the exercise of international criminal jurisdiction.

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[65] Giddens, *op.cit.*, p. 155.

[66] Marcus Tullius Cicero (106-43 B.C.). See Cicero, *Selected Political Speeches*, translated with an introduction by Michael Grant, Penguin Classics, 1969.

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IV

Acts of terrorism and crimes within the jurisdiction of the International Criminal Court

Hanne Sophie Greve*

1. Introduction

In the spring of 1942, Hitler described Norway as "the zone of destiny" for the development in World War II. He feared that the Allied Powers would open a new front in Norway – a second front that would alleviate the German pressure on the Russian front.

In this context, the prosperous fishing village of Telavåg on the Norwegian west coast was selected as a target of terrorism. It was the most massive act of terrorism in occupied Norway during World War II. Goebbels noted in his diary: "If they [the Norwegians] do not learn to love us, they shall at least fear us".

In a grand spectacular ceremony inaugurated by the *Reich* Commissar for Occupied Norway Terboven[1] and attended by senior military and civilian personnel from the occupying power, the total destruction of the fishing village was initiated. Thence all males in the village aged between 18 and 60, who had been arrested the same morning, were deported to German concentration camps where more than 40 per cent succumbed. The rest of the population was forcibly transferred from the village as hostages and imprisoned for more than two years in concentration camps in Norway. Five of the apprehended women were pregnant. The hostages ranged in age from weeks only to 93 years.

Soon after they had been arrested, the entire population – women and men, young and old – were under different circumstances subjected to mock executions. Subsequently, they were told that they would all be exterminated in due course – a threat that was to hover over the hostages throughout their incarceration. For the hostages it seemed as if the extermination of the group

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1 Terboven committed suicide when Germany was about to capitulate in Norway, and thus was never made to stand trial for his crimes.

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at large was in progress while over 40 per cent of the men died in German concentration camps. More than half of the men killed perished around Christmas 1942. Each new death fuelled the trepidation of the other hostages.

After the population had been forcibly displaced, the village was entirely looted by Germans. Pillaged were all the means of production linked to the rich fisheries, each private home and every single building. The Germans razed the village completely to the ground.

After some three months of detention in Norway, mothers with children under the age of six were forcibly separated by SS officials from their older children and sent to a separate camp where also the elderly people in the community were kept. The remaining children and women were, it was said, to be deported to Germany as slave labourers. Two women became instantaneously psychotic in the course of the separation. Still, after almost sixty years, many victims of this forcible separation are in continued need of medical assistance to be able to cope with the impact of the separation. Following an outbreak of diphtheria among the older children, German fears that the disease would spread eventually resulted in all the Telavåg hostages in Norway being confined in the same camp.

For the hostages imprisoned in Norway the inhumane *in limbo* situation was terminated after more than two years. In May/June 1944 they were released. They did, however, remain obliged to work for overall German needs. At the time the Germans were enlisting sizeable new groups for forced labour.

Terrorism is a crime with intended repercussions on three levels: First, the immediate target group for the violence – the Telavåg population. Second, those for whom the message "You have to fear us" is intended – the Norwegian population at large, but in particular the Norwegian coastal population. The third target group – those with whom the Germans wanted to "negotiate", or whose thinking they wanted to influence – was probably the Allied Powers who were believed to contemplate the opening of a second front in Europe to alleviate the German pressure on the Russian battlefields.

The Telavåg-tragedy was a measure of terrorism to subdue the will of the Norwegian people – the coastal population in particular – to resist the illegal German occupation with its inherent crimes, abuses and exploitation. The outrages against Telavåg and its population were in their entirety an act of premeditated terror; they were not spontaneous. According to *Reich* Commissar Terboven the decision to unleash the terror was made by Hitler himself.

The Indictment in Nuremberg "Count Three–War Crimes" subsection (G) "Wanton destruction of cities, towns, and villages and devastation not justified by military necessity" opens with alleged crimes committed in

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Western Countries. The second item on the list reads as follows: "In April 1942, the town of Telerag [Telavåg] in Norway was destroyed".

This article will address some aspects of the jurisdiction of the International Criminal Court (ICC) in relation to acts of terrorism. Two main issues will be focused on: (i) whether acts of terrorism are among the crimes covered by the mandate of the ICC; and (ii) whether the ICC constitutes a convenient forum for adjudicating acts of terrorism. The themes are frequently blended into one overall question of whether terrorism comes within the jurisdiction of the ICC. That is, whether the ICC will have the right and the power to administer justice and apply the laws of its mandate in relation to acts of terrorism.

The first matter of contention – whether acts of terrorism are among the crimes covered by the mandate of the ICC – is to a large degree a technical question of classical legal interpretation. The second question – whether the ICC constitutes a convenient forum for adjudicating acts of terrorism – has clear political dimensions. Moreover, the issue of the *character of the crime* is *different and distinct from* the issue of *forum*. For these reasons it seems desirable to consider the issues separately. But, by addressing them within the same context I believe it possible to achieve better understanding of how the questions relate to one another. The arguments sustaining the view that acts of terrorism are not as such excluded from the mandate of the ICC, ought moreover, to support a political decision in favour of the ICC as being a forum of convenience in such cases.

In consideration of the history of the ICC, I find it useful first to refresh the memory of how the International Military Tribunal for the Trial of German Major War Criminals (IMT) approached acts of terrorism in relation to its mandate. Hereunder I will bring to mind the preparatory work done when the IMT was established, and the report of Justice Jackson to the President of the United States of America after the IMT had completed its work.

Then I shall present the main arguments put forward to reject the ICC as a convenient forum for adjudicating acts of terrorism. This will be followed by brief visits to the concept of war, the characteristics of terrorism and the ancient distinction between *ius ad bellum* and *ius in bello*. Subsequently the focus will be on the Statute of the ICC (the ICC Statute); this will include observation on how it compares to the Charter of the IMT (the IMT Charter) and the mandate of the International Tribunal for the former Yugoslavia (ICTY). The closing point at issue will be terrorism as compared to "military necessity" in war; this will be combined with some concluding remarks.

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2. Terrorism and the mandate of the IMT

The German Nazi *Reich* was – it seems fair to epitomise – founded on terrorism. The Nazis built and maintained their power at home and abroad by a reign of terror.

The "Yalta Memorandum"[2] concerning "Trial and Punishment of Nazi War Criminals" reads, *inter alia*:

> III Scope and Dimensions of the War Crimes Problem
>
> The crimes to be punished. The criminality of the German leaders and their associates does not consist solely of individual outrages, but represents the result of a systematic and planned reign of *terror* [emphasis added] within Germany, in the satellite Axis countries, and in the occupied countries of Europe. This conduct goes back at least as far as 1933, when Hitler was first appointed Chancellor of the *Reich*. It has been marked by mass murders, imprisonments, expulsions and deportations of populations; the starvation, torture and inhuman treatment of civilians; the wholesale looting of public and private property on a scale unparalleled in history; and, after initiation of "total" war, its prosecution with utter and ruthless disregard for the laws and customs of war.
>
> We are satisfied that these atrocities were perpetrated in pursuance of a premeditated criminal plan or enterprise which either contemplated or necessarily involved their commission.
>
> The criminals to be punished. The outstanding offenders are, of course, those leaders of the Nazi Party and German *Reich* who since January 30, 1933, have been in control of formulating and executing Nazi policies.
>
> In addition, the Nazi leaders created and utilised a numerous organisation for carrying out the acts of oppression and *terrorism* [emphasis added] which their program involved. Chief among the instrumentalities used by them are the SS [*Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei*], from the personnel of which the Gestapo [the Secret State Police] is constituted, and the SA [*Die Sturmabteilung der Nationalsozialistischen Deutschen Arbeiterpartei*]. These organisations consist of exactingly screened volunteers who are pledged to absolute obedience. The members of these organisations are also the personnel primarily relied upon to carry on post-war guerrilla and underground operations.

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[2] Memorandum, dated 22 January 1945, to President Roosevelt from Secretary of War Henry L. Stimson, Secretary of State Edward R. Stettinius Jr., and Attorney General Francis Biddle. The Memorandum was prepared to guide President Roosevelt at the Yalta Conference. The Memorandum reflected the position taken by the Government, and was the basis for later drafts submitted by the United States of America for the IMT Charter.

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The American Memorandum "of proposals for the prosecution and punishment of certain war criminals and other offenders" presented on 30 April 1945 to the Foreign Ministers meeting at San Francisco contains the following passages:

> II Summary of Proposals.
>
> This memorandum proposes that the following policy be adopted by the Governments of the United States, the Soviet Union, and the United Kingdom, and the Provisional Government of France for the trial of
>
> a. the major Nazi leaders and their principal accomplices in the broad program of war crimes and atrocities which have characterised the Nazi regime since 1933 and
>
> b. the principal Nazi organisations and their members, through whom the most bestial of the Nazi cruelties have been put into effect.
>
> Considerations Taken Into Account in Framing the Proposals
>
> The proposals now advanced give recognition to the following facts:
>
> a. that the criminality of the German leaders and their associates does not consist solely of individual outrages, but represents the result of a systematic and planned *reign of terror* [emphasis added] within Germany and within the areas occupied by German military forces, in connection with which the crimes and atrocities referred to were committed;
>
> b. that these crimes and atrocities were perpetrated pursuant to a premeditated criminal plan;
>
> c. that for the carrying out of the acts of oppression and *terrorism* [emphasis added] which their program involved, the Nazi leaders and their associates created and utilised a numerous organisation, chief among which are the S.S., and the Gestapo, and
>
> d. that there is necessity for establishing practical measures for bringing these criminals, their principal organisations, and their active leaders and members to justice on a basis which takes adequate account not only (1) of those offences committed within and outside Germany, during the war or against the citizens of the United Nations, but also (2) of those atrocities, both before and after 1939, committed against members of Axis minorities.

The Minutes of the Session of 29 June 1945 of the International Conference on Military Trials held in London, sheds light on the basic thinking as well. Among other statements the following has been recorded:

> Sir David Maxwell Fyfe: ...
>
> ... This is the declaration of legal principles and the United States draft can be summarised as (a) violation of international law; (b) violation of municipal law and domestic law; (c) invasion or threat of invasion, or initiation of war against other countries in breach of treaties,

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agreements, or assurances between nations or otherwise in violation of international law, et cetera. Now we suggest first of all that violations of the laws, rules, and customs of war and such acts shall include, but shall not be limited to, mass murder and ill-treatment of prisoners of war and civilian populations and the plunder of such populations. Then "launching a war of aggression" may involve a discussion of different schools of thought as to whether that is an existing offence against international law, and there is the further question whether we are breaking new ground. That we think ought to be discussed and is one of the matters which this Conference should consider. Then we come to (c) invasion or threat of invasion of, or initiation of war against, other countries in breach of treaties, agreements, or assurances between nations or otherwise in violation of international law. Then we introduce (d) – the common plan or enterprise aimed at aggression against or domination over other relations and calculated to involve the unlawful means of violation of international law. We think that it is important that that should be made clear in the declaration of legal principles because we think it is the gist of the offence which is believed by most of the people in the world.

Then (e) deals with atrocities and persecutions in pursuance of the plan and whether they are in violation of the domestic law of the country where perpetrated; that is, it would include atrocities and persecutions in Germany if they were legal by German law. I think you will find that that is set out in the note, and, if you will look about two thirds of the way down in the note, you will find we say, "The chief crime of which it is alleged that the leaders in Germany are guilty is the common plan or conspiracy to dominate Europe and it is therefore most desirable to include this crime specifically in the statutes of the Court. Moreover, the protocol will become a public document of the first importance and for this reason it is essential that the main charge to be made against the major criminals should appear in it. The lay public will not understand its omission." I think really that this last bit that I have read gives the gist of the argument I put forth.

...

Mr Justice Jackson: We would take it that (b) covers launching a war of aggression. If there were conviction on that, (e) and (d) might become somewhat superfluous. But (e) is launching a war of aggression in violation of treaties, et cetera, and (d) is launching it by a combination of *terrorism* [emphasis added] and means which they have used, et cetera, so that those three are read together to make a complete picture.

In the revised draft "Executive Agreement Relating to The Prosecution of European Axis War Criminals"[3] the following declaration was made:

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[3] A revised draft submitted on 30 June 1945 by the American Delegation to the International Conference on Military Trials in London.

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> We have not envisaged this case as a trial of isolated criminal acts. We envisaged it as a trial of the master planners in which the criminality consists of making and executing the master plan to attack the international peace. We are, of course, interested in proving the many manifestations of that plan in local offences and *terrorisms* [emphasis added], but in this main case we are interested in establishing them as proof of the design. We are of course interested in bringing all these individual criminals to justice in other appropriate proceeding.

A proposed revision of the definition of "Crimes" (Article 6 of the IMT Charter) submitted on 20 July 1945 by the British Delegation to the International Conference on Military Trials in London recommended that:

> [t]he Tribunal shall have power to try, convict and sentence any person who has, in any capacity whatever directed or participated in the planning, furtherance, or conduct of any or all of the following acts, designs, or attempts namely:
>
> 1. Domination over other nations or aggression against them in the manner condemned or foresworn in *inter alia* the following Pacts or Declarations ...
>
> 2. Systematic atrocities against or systematic *terrorism* [emphasis added] or ill-treatment or murder of civilians
>
> 3. Launching or waging war in a manner contrary to the laws, usages and customs of warfare and who is hereby declared therefore to be personally answerable for the violations of international law, of the laws of humanity, and of the dictates of the public conscience, committed in the course of carrying out the said acts, designs or attempts by the forces and authorities whether armed, civilian or otherwise, in the service of any of the European Axis Powers.

The subsequent Indictment before the IMT in Nuremberg included numerous acts of terrorism which were specifically listed as such. See, for example, "Count One: The Common Plan or Conspiracy (Charter, Article 6, especially 6 (a)), IV. Particulars of the Nature and Development of the Common Plan or Conspiracy":

> (D) The acquiring of totalitarian control of Germany: Political
>
> 1. First steps in acquisition of control of State machinery.
>
> In order to accomplish their aims and purposes, the Nazi conspirators prepared to seize totalitarian control over Germany to assure that no effective resistance against them could arise within Germany itself. After the failure of the Munich Putsch of 1923 aimed at the overthrow of the Weimar Republic by direct action, the Nazi conspirators set out through the Nazi Party to undermine and overthrow the German Government by "legal" forms supported by *terrorism* [emphasis added]. They created and utilised, as a Party formation, *Die Sturmabteilungen* (SA), a semi-military, voluntary organisation of young men trained for

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> and committed to the use of violence; whose mission was to make the Party the master of the streets.

See also "Count Three: War Crimes (Charter, Article 6, especially 6 (b)), VIII. Statement of the Offence, (A) Murder or ill-treatment of civilian populations of or in occupied territory and on the high seas":

> ...
> In the course of a premeditated campaign of *terrorism* [emphasis added], initiated in Denmark by the Germans in the latter part of 1943, 600 Danish subjects were murdered and, in addition, throughout the German occupation of Denmark, large numbers of Danish subjects were subjected to torture and ill-treatment of all sorts. In addition, approximately 500 Danish subjects were murdered, by torture and otherwise, in German prisons and concentration camps.

Three of the defendants in Nuremberg were found guilty of terrorism and convicted of this.

> On 12th May 1941, five weeks before the invasion of the Soviet Union the OKW [the High Command of the German Armed Forces] urged upon Hitler a directive of the OKH [the High Command of the German Army] that political commissars be liquidated by the Army. Keitel admitted the directive was passed on to field commanders. And on 13th May Keitel signed an order that civilians suspected of offences against troops should be shot without trial, and that prosecution of German soldiers for offences against civilians was unnecessary. On 27th July all copies of this directive were ordered destroyed without affecting its validity. Four days previously he signed another order that legal punishment was inadequate and troops should use *terrorism* [emphasis added].[4]
>
> It is undoubtedly true that most of the criminal programme charged against Frank was put into effect through the police, that Frank had jurisdictional difficulties with Himmler over the control of the police, and that Hitler resolved many of these disputes in favour of Himmler. It therefore may well be true that some of the crimes committed in the General Government were committed without the knowledge of Frank, and even occasionally despite his opposition. It may also be true that some of the criminal policies put into effect in the General Government did not originate with Frank but were carried out pursuant to orders from Germany. But it is also true that Frank was a willing and knowing participant in the use of *terrorism* [emphasis added] in Poland; in the economic exploitation of Poland in a way which led to the death by starvation of a large number of people; in the deportation to Germany

[4] The Judgement of the International Military Tribunal for the Trial of German Major War Criminals (*The Nuremberg Judgement*) in the case of Keitel.

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> as slave labourers of over a million Poles; and in a programme involving the murder of at least three million Jews.[5]
>
> As *Reichs* Commissioner for Occupied Netherlands, Seyss-Inquart was ruthless in applying *terrorism* [emphasis added] to suppress all opposition to the German occupation, a programme which he described as "annihilating" his opponents. In collaboration with the local Hitler SS and Police Leaders he was involved in the shooting of hostages for offences against the occupation authorities and sending to concentration camps all suspected opponents of occupation policies including priests and educators. Many of the Dutch police were forced to participate in these programmes by threats of reprisal against their families. Dutch courts were also forced to participate in his programme, but when they indicated their reluctance to give sentences of imprisonment because so many prisoners were in fact killed, a greater emphasis was placed on the use of summary police courts.[6]

In hindsight, and in his Report to the President of the United States of America, dated 7 October 1946, Justice Jackson wrote:

> III. 6. It has been well said that this trial is the world's first *post mortem* examination of a totalitarian regime. In this trial, the Nazis themselves with Machiavellian shamelessness exposed their methods of subverting people's liberties and establishing their dictatorship. The record is a merciless expose of the cruel and sordid methods by which a militant minority seized power, suppressed opposition, set up secret political police and concentration camps. They resorted to legal devices such as "protective custody" which Goering frankly said meant the arrest of people not because they had committed any crime but because of acts it was suspected they might commit if left at liberty. They destroyed all judicial remedies for the citizen and all protections against *terrorism* [emphasis added]. The record discloses the early symptoms of dictatorship and shows that it is only in its incipient stages that it can be brought under control. And the testimony records the German example that the destruction of opposition produces eventual deterioration in the government that does it. By progressive intolerance a dictatorship by its very nature becomes so arbitrary that it cannot tolerate opposition, even when it consists merely of the correction of misinformation or the communication to its highest officers of unwelcome intelligence. It was really the recoil of the Nazi blows at liberty that destroyed the Nazi regime. They struck down freedom of speech and press and other freedoms which pass as ordinary civil rights with us, so thoroughly that not even its highest officers dared to warn the people or the *Führer* [Hitler] that they were taking the road to destruction. The Nuremberg trial has put that handwriting on the wall for the oppressor as well as the oppressed to read.

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5 *The Nuremberg Judgement* in the case of Frank.

6 *The Nuremberg Judgement* in the case of Seyss-Inquart.

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There can, in short, be no question that at first the Allied Powers and later the IMT saw terror and terrorism as intimately related to many of the major crimes committed during World War II – terror and terrorism was perceived as the very essence of many such crimes.

3. Forum and venue – the convenience of the ICC

"Forum" as a legal concept relates to whether a court has competence, that is, legal authority to adjudicate in a case. In contradistinction to forum, the legal understanding of "venue" relates to the *locus*, the place where a court does actually sit. Both concepts are of relevance in relation to trials concerning acts of terrorism. I shall start with the main controversial issue of whether the ICC is a convenient forum for hearing cases concerning terrorism. This will be supplemented with some observations concerning venue.

Seen in context the issue of the convenience of the ICC as a forum is one aspect of the broader discussion concerning the jurisdiction of the ICC within the framework of its existing Statute. The main topics concerning jurisdiction are resolved in the ICC Statute itself, wherein the kinds of crimes coming under the mandate of the Court and the admissibility of cases are regulated. This however, does not settle the issue of whether the ICC also appears as a convenient forum, a question to which each answer has more than only legal implications. It is appreciated that both States and individuals that question the competence of the ICC – in general and in cases involving terrorist crimes – more often than not argue their case as one concerning the convenience of the forum rather than as a case where they want to draw the fine lines between what is within and what is outside of the mandate of the ICC according to its Statute. The arguments against convenience are voiced by a variety of different entities ranging from the Government of the United States of America to respected legal scholars, concerned individuals and recognised publishers.[7] The main reasoning merits attention.

Debates concerning the convenience of a legal forum are in general limited to civil cases, and occur only when more than one Court may have the authority to hear an actual case. National legislation – the laws on civil procedure and private international law provisions – is intended to resolve the forum questions. Forum shopping is frequently considered to be of interest. The Court sought as a forum in a civil case, may decide that it finds itself to be *forum non conveniens*, if the Court considers that it represents a less suitable forum than another forum available to the parties. Before reaching this

[7] As for the latter, see, for example, the editorial "Whose Law? Why Asia should support the United States' refusal to submit to the International Criminal Court's jurisdiction", *Far Eastern Economic Review*, 18 July 2002.

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conclusion, the Court will consider, in particular, if it is convenient for the taking of evidence and the hearing of witnesses.

For the adjudication of criminal cases there is normally no more than one – but a minimum of one – forum available in each case. Actual prosecution presupposes that the relevant State does not face a total or substantial collapse or unavailability of its national judicial system. Save for the ICC there exists no court on a supranational level empowered to adjudicate criminal cases as such – not even when the crimes are of the most serious kind such as genocide, crimes against humanity and war crimes. The initiative to establish the ICC thus, not surprisingly, dates back to the time when the United Nations General Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide on 9 December 1948. Throughout the violent last century a major odious scourge to humankind was the impunity that more often than not followed even large-scale egregious crimes leaving millions of people dead, mutilated and bereaved.

As for the ICC its function is recognised as auxiliary to the administration of justice by national courts. The ICC "shall be complementary to national criminal jurisdictions" (*cf.* the ICC Statute Preamble paragraph 10 and Article 1). Only where "a State which has jurisdiction" of a case is "unwilling or unable genuinely to carry out the investigation or prosecution" or the handling of the case shows that the national court wants to shield the alleged perpetrator from criminal responsibility, will the ICC be authorised to declare a case admissible (*cf.* the ICC Statute Article 17). The ICC represents a fall-back position. It does not erode a State's sovereign right to make its own laws and implement them; and it shall not supersede national courts save in the above-mentioned circumstances.

International law has two main sources – international customary law and treaty. The ICC is established by treaty. International criminal law has however, customary law provisions banning genocide, crimes against humanity and serious war crimes. These are crimes *erga omnes* – crimes that threaten the maintenance of international peace and security and which for this reason are of international concern. For these crimes there already exists some kind of universal jurisdiction. The international community can oblige States to conform to their international legal obligations not because the States have ceded sovereignty, but because national and international law are complementary and there are some basic rules by which all national legislation has to abide. The latter tallies with the thinking behind the United Nations Security Council's ability to act under the United Nations Charter (the UN Charter) Chapters VI and VII. The ICC may pre-empt the need for the Security Council to act, but the powers of the Security Council are not otherwise limited by the powers of the ICC. International law recognises that the crimes under the jurisdiction of the ICC are so grave that they threaten

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the peace, security and well-being of the world (*cf.* the ICC Statute Preamble paragraph 3); consequently, these crimes as such elicit the legitimate concern of the Security Council and entitle it to use its powers.

The latter may serve as an entry to understanding part of the opposition to the ICC voiced by the Government of the United States of America. US spokespersons have emphasised that their Government give inordinate importance to the question of the forum in which terrorists should be tried. To follow up on this it has been argued that the best approach would be to add to the jurisdiction of the existing ICTY crimes associated with terror wars no matter where or by whom they are committed. This, it is said, could be accomplished through a United Nations Security Council resolution citing the authority of Chapter VII of the UN Charter, "Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression". It is not left unmentioned that this approach could have the advantage of displacing the ICC.

Part of the reasoning in favour of a transformed ICTY is that it would be beneficial because after some eight years of operation the ICTY has an established set of rules of procedure and evidence and has a rational jurisprudence. This tribunal is, the argument continues, perceived as fair and capable, with a competent Prosecutor and a solid complement of trial and appellate judges, including a number of Islamic judges. The tribunal was originally created in response to atrocities and war crimes committed against Muslims because of their religious identity, it is added. The tribunal should thus have a heightened degree of credibility among those who might otherwise be sceptical of an international tribunal. Moreover, it is suggested that – and this appears to be the core of the argument – the ICTY as an institution with ample independence, yet created by and supported by the United Nations Security Council and subjected to its continuing review, is under the ultimate control of the Security Council.

Taking into consideration the veto power of the permanent members of the Security Council it is not surprising that it is being argued that a transformed ICTY may pose a far lesser threat to the interests of the United States of America than could the ICC. It is reasoned that the transformed Yugoslavia tribunal would also avoid many of the political and practical afflictions of the ICC. The political threats are said to emerge from the record of States in the General Assembly with regard to the values the United States of America espouses on human, political and economic rights. The Assembly of States Parties, made up of the States Parties to the ICC Statute, will be empowered with a two-thirds vote to add international crimes (the crime of "aggression" included) to the Court's mandate and to employ and dismiss the Prosecutor.

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The ICC could have an appropriate share in the expertise and wisdom accumulated by the ICTY, without the ICC being replaced with a transformed ICTY. This would require no more than prudent efforts to enlist the competence of people having worked well for the ICTY in the ICC – that could be part of the recruitment policy of the ICC. Secondly, the threat of a politicised ICC may well be a challenge, but it is most probably not an insurmountable problem, especially not if it is clearly identified as a potential danger. Many States may moreover, consider this to be a lesser predicament than the one entailed in leaving all the most significant decision-making in international criminal law to the United Nations Security Council. This aspect of the forum debate is *de facto* a struggle for power.[8]

Finally, opponents of the convenience of the ICC as a forum in cases concerning acts of terrorism ascertain that they think that courts, in whatever form, play only a small role in the fight against terror. Whether large or small or somewhere in-between, most nations will agree that courts have a significant role to play also in the fight against terrorism. If the criminal law response to a terror war, contributed to the vulnerability of the United States of America on 11 September 2001, let the laws be improved. If the criminal law approach to combat serious crime is abandoned, the risk is that it will be replaced by arbitrariness; and unpredictable use of State powers ignites resentment and violence.

Also the choice of venue is of importance to the perpetrators and the victims of crimes and to the States affected. Addressing the criminal conflict in the country from where the main problems originated or where the main crimes took place, has an advantage of bringing justice home and not underestimating or simplifying the context in which a crime was committed. This last argument does not support the view that everything is relative and considering the stakes at issue all means are agreeable or at least absolving from criminal responsibility. The point is that a full understanding of the context is necessary to appreciate the character, the magnitude and the gravity of a crime. There were good reasons for choosing Nuremberg as the venue for the IMT. Important as it was to bring twenty-two top Nazi leaders to justice, it was even more important to identify the crimes, the culprits and the entire system of which this was part and parcel. An extensive examination of the totalitarian regime as such with all its egregious crimes was required, par-

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[8] United Nations Security Council Resolution 1422, dated 12 July 2002, on United Nations peacekeeping missions is informative in this context. The Security Council acting under the UN Charter Chapter VII and consistent with the ICC Statute Article 16, requested the ICC for a period of twelve months from date not to commence or proceed with an investigation or prosecution of any case involving "current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a [United Nations] established or authorised operation". Intention was expressed to renew the request for further twelve-month periods "for as long as may be necessary".

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ticularly for those involved in or affected by the crimes to understand and to live on with their scars, and to give humankind at large a chance to learn a lesson and thereby reduce the chance of the same mistakes being repeated. In the above-quoted words of Justice Jackson: "The Nuremberg trial has put that handwriting on the wall for the oppressor as well as the oppressed to read".

Furthermore, venue is important to issues such as language and circumstantial information relating to geography, history and culture. In a distant venue it is easy to make unsupported allegations that may pass simply because the venue is that remote that the Court is not necessarily in a position to understand when it is being if not fooled so as a minimum misguided or left ignorant on significant issues. Flawed and insufficient information has a significant potential for impairing the quality of a judgement. Moreover, when using a venue in the "home country", it will normally be feasible to conduct the trial not only in one of the Court's official languages, but in a language used by the defendants and victims or many of them as well. This would make the Court more accessible for the latter groups; and for the Court's decision-making it would most probably contribute to secure optimal quality.

The main venue of the ICC will be at The Hague in the Netherlands, but the Court may sit elsewhere when it considers that desirable (*cf.* ICC Statute Article 3, paragraphs 1 and 3).

The crimes covered by the mandate of the ICC are all of such severity and magnitude that they are of relevance to the international community at large. Even when the crimes are committed within the confines of one country during an armed conflict that does not meet the definition of an international armed conflict, such crimes will have repercussions beyond the borders of the one State and are acknowledged in international law as being a matter of international concern. The intimate knowledge of a country that may result from adjudicating such crimes may not without reason be perceived as potentially exposing a State and a people to vulnerability in terms of future exploitation. Not in the least is this so if say a former colonial power or a country perceived as having its own agenda in the State is strongly represented in the criminal procedures. A flexibility in terms of venue, and even the possibility of affected States to influence the choice of judges and members of the Prosecutor's team in an actual case, would reduce such unwarranted side effects of international justice; side effects that may cause objections to supranational criminal justice as such.

Also in this context it is much to be regretted that Cambodia has not reached an agreement with the United Nations through which perpetrators of Khmer Rouge atrocities can be brought to justice with international participation in the process. It would certainly be possible to adapt a criminal jus-

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tice system accommodating the legitimate concerns of the Cambodian people and the international community respectively for these cases. Such an arrangement would have the potential of being edifying for the future work of the ICC as well.

4. On war

After the terrorist attacks on 11 September 2001, a spokesperson of the US Government summarised the core of the tragic event accurately, in my opinion, when saying that it can be described as "unconventional warfare conducted by underprivileged combatants with the assistance of criminal co-conspirators designed primarily to terrorise and kill civilians".

In this context it may be beneficial to briefly revisit the concept of war as it has been understood over the centuries. It may facilitate a better appreciation of the interrelation, overlaps and differences between the concepts of war, crime and terrorism.

In the words of Hugo Grotius:

> In things of a moral nature, those means which conduce to a certain end do assume the very nature of that end. Therefore we are supposed to be authorised to employ those things which are necessary to the obtaining our just rights. If I cannot otherwise save my life, I may by any force whatever repel him who attempts it, though perhaps he who does so is not in any way to blame. This right does not properly arise from the other's crime, but from the prerogative with which nature has invested me of defending myself. ...
>
> ... If not for justice, yet for pity, we must not attempt anything which may prove the destruction of innocents, unless for extraordinary reasons and for the safety of many. ...
>
> ... Sallust records of the ancient Romans, "Our ancestors, the most religious of mankind, took nothing from the vanquished but the power to hurt." It is a reflection worthy of a Christian; and another of his remarks is to a like effect: "Wise men make war for the sake of peace, and undergo labour in hopes of rest." Agreeably to this, our Christian divines teach us that the end of war is to remove those things which disturb peace.[9]

Later, in the early nineteenth century, General Carl von Clausewitz – considered the father of the theory of war – formulated basics of war relevant to all armed conflicts, be they of a national or international character:

> War is a mere continuation of policy by other means.
>
> ... War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same

[9] Hugo Grotius, *The Rights of War and Peace*, "Of fraud against the enemy".

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> by other means. All beyond this which is strictly peculiar to War relates merely to the peculiar nature of the means which it uses. ... the political view is the object, War is the means, and the means must always include the object in our conception.[10]
>
> War ... is an act of violence intended to compel our opponent to fulfil our will. Violence arms itself with the inventions of Art and Science in order to contend against violence. ... Violence, that is to say, physical force (...), is therefore the *means*; the compulsory submission of the enemy to our will is the ultimate object.[11]
>
> War in its literal meaning is fighting, for fighting alone is the efficient principle in the manifold activity which in a wide sense is called War. But fighting is a trial of strength of the moral and physical forces by means of the latter.[12]
>
> War is part of the intercourse of the human race.
>
> We say therefore War belongs not to the province of Arts and Sciences, but to the province of social life. It is a conflict of great interests which is settled by bloodshed, and only in that is it different from others. It would be better, instead of comparing it with any Art, to liken it to business competition, which is also a conflict of human interests and activities; and it is still more like State policy, which again, on its part, may be looked upon as a kind of business competition on a great scale. Besides, State policy is the womb in which War is developed, in which its outlines lie hidden in a rudimentary state, like the qualities of living creatures in their germs.[13]

Clausewitz, moreover, expressed such basics that war is never an isolated act; war does not consist of a single instantaneous blow; and the result of war is never absolute. In line with this he emphasised that protection of the country is the primary object for which the military forces exists.

These basics have not fundamentally changed in the phase of the significant developments in the law of war and international humanitarian law at large.

The rationale for people living in States is the search for a balancing of interests and some norms and regulations in order to end the primordial state of affairs with *bellum omnium contra omnes* – the war of everyone against everyone. The aim is to advance from the primitive stage where might is right. What is humane and what is justified as morally right is not a matter of physical strength. This truth of ethics has an equally profound relevance on

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10 Carl von Clausewitz, *On War*, Book I "On the nature of War" Chapter I "What is War?" 24. "War is a mere continuation of policy by other means".

11 Carl von Clausewitz, *op. cit.*, Book I "On the nature of War" Chapter I "What is War?" 2. "Definition".

12 Carl von Clausewitz, *op. cit.*, Book II "On the theory of War" Chapter I "Branches of the Art of War".

13 Carl von Clausewitz, *op. cit.*, Book II "On the theory of War" Chapter III "Art or Science of War" 3. "War is part of the intercourse of the human race".

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an international level and in the relationship between States regardless of their military or militant strength. Hitler's Germany, for example, was not by any standard entitled to attack and subjugate militarily weaker States – on a State by State basis most probably all of Europe at the time. David was able to fight Goliath, but many States today could have their populations eradicated by one single bomb, or rather several countries could be so destroyed by one single bomb. The people of North-Korea are like people in any other State entitled to defend themselves, but that is not what makes geographical neighbours fearful of the North-Korean military arsenal. At the cost of the well-being of the North-Korean people, the country's resources are for the main part deviated from primary social needs and into the seemingly boundless military budget. An authoritarian leadership that ignores the needs of its own people, can hardly ever be trusted by other peoples. No entity is ever more capable of terrorism than the militant State conjuring up all its resources for that very purpose after having abandoned the basics of civilisation.

The ostentatious and utterly difficult question is *when* there is a just course for war or military or otherwise violent intervention of any kind. The question is not made easier by the far from fair distribution of world resources where many States – however benign to their own people – are deprived even from harvesting the benefits of their natural resources and the labour of their own populations. That many wars are still fought with the covert agenda of maintaining the imbalance or enhancing the strength of the upper hand, does not improve the situation. One added problem is that violence is the only "language" fully understood internationally, whereas the search for common ground and proper references on other levels have been utterly volatile at best.

Moreover, when you have cast, you seek play. Unseasoned soldiers and untested weapons do not appear as ideal to any armed forces. Training and tests are one thing, the real thing is something else. Ideally you want an almost safe "testing range" away from home under circumstances where you may not have to calculate with any casualties. Peacekeeping operations and humanitarian interventions may prove such possibilities. But again, it becomes difficult if there is no agreed common frame of reference.

According to the St. Petersburg Declaration of 1868 – Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles – "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy" and "for this purpose it is sufficient to disable the greatest possible number of men".[14] But, what about a situation where, as now, many States have no force to battle? They may

[14] Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles of 29 November [11 December] 1868, Preamble.

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well be able to recruit manpower, but that is to no avail if the enemy can wipe entire armies off the face of the earth by air strikes that they can neither prevent nor match. Almost no State today can launch a conventional war with any prospect of winning it; and, more significant, almost no country can defend itself if subjected to aggression.

Under these circumstances even the major achievements of Additional Protocol I to the Geneva Conventions for the protection of victims of war, adopted on 8 June 1977 – the rules it established on the conduct of hostilities – while still relevant are often circumvented or overtaken by the format of the most recent wars. When a State has no fighting forces seeking confrontation in battle, the principles of distinction between civilians and combatants and the prohibition of indiscriminate attacks take on new dimensions.

Furthermore, wars are more often than not no longer declared, but rather replaced by ultimatums of conditions to be met. This helps to blur even further the distinction between war, armed conflict and crimes with the use of armed force.

The single most difficult challenge is that war and crime are emerging in new and unprecedented blends on an international level. At present, many international crimes are committed with warlike means. Violent crime has always been a problem, and many wars throughout history have been fought for graft and greed. In the modern world with transnational organised crime, illicit drugs, money-laundering, illegal arms-trafficking, trafficking in people, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, these problems are not less complex or threatening. The present quandary is the size and armament of warlord entities where the violence is used exclusively for personal benefits of the few and where entire populations are held hostages to these war games. Crimes are committed with the means of war. Soldiers are replaced by para-military fighters with loyalty to no one but self and the paymaster; fighters who have no ethical codex and no ideals for which they fight. Entire nations are enslaved by leaderships that have betrayed the common interests and who run the States as private fiefdoms. States not properly functioning are exploited as *terra operandi* – staging areas and safe havens – for outrageous crimes and terrorism.

5. The characteristics of terrorism

As for terrorism as a legal concept there is no general agreement under international law as to its exact content – although several aspects have received almost general recognition internationally after the 11 September 2001 attacks in the United States of America. There are however, some recognised characteristic traits of terrorism as a phenomenon. In this respect the descrip-

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tion provided by Alex Schmid in 1983 seems to have captured the core elements. Schmid explains:

> Terrorism is a method of combat in which random or symbolic victims serve as instrumental *targets of violence*. These instrumental victims share group or class characteristics which form the basis for their selection for victimisation. Through previous use of violence or the credible threat of violence other members of that group or class are put in a *state of chronic fear (terror)*. This group or class, whose members' sense of security is purposely undermined, is the *target of terror*. The victimisation of the target of violence is considered extranormal by most observers from the witnessing audience on the basis of its atrocity; the time (*e.g.*, peacetime) or place (not a battlefield) of victimisation or the disregard for rules of combat accepted in conventional warfare. The norm violation creates an attentive audience beyond the target of terror; sectors of this audience might in turn form the main object of manipulation. The purpose of this indirect method of combat is either to immobilise the target of terror in order to produce disorientation and/or compliance, or to mobilise secondary *targets of demands* (*e.g.*, a government) or *targets of attention* (*e.g.*, public opinion) to changes of attitudes or behaviour favouring the short or long-term interests of the users of this method of combat.[15]

These three categories of victims and target groups are not entirely different from those affected by war crimes and crimes against humanity. They do however, stand out in contradistinction to the victims of ordinary crimes. Terrorism is used especially to influence political decision-making.

The German crimes in Telavåg and against the Telavåg population during World War II illustrate the different target groups of what was terrorism and war crimes at the same time:

i. The inhabitants in Telavåg were the *targets of violence*.
ii. The Norwegian population – the coastal population in particular – was the *target of terror*.
iii. The main *targets of demands* or *targets of attention* may however, well have been the upper echelons in the most influential Allied Powers who would have the final say as to whether or not a second front would be opened in Norway.

Terrorism may be subdivided into three different kinds: State terrorism; individual terrorism; and State-sponsored terrorism.

State terrorism, such as that found in Telavåg during World War II, is conducted by State agents at the behest or with the approval of the State leadership. Terrorism of this kind may amount to crimes against humanity or

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[15] Definition by Alex Schmid in a 1983 study where he compiled 109 definitions of terrorism; as quoted in Joseph J. Lambert, *Terrorism and Hostages in International Law*, pp. 17-18.

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war crimes; the *actus reus* may be, for example, mass-killings, torture, enslavement, mass arrests, deportations or forcible transfers. Like in Nazi Germany, the immediate target groups may be the State's own population such as political opposition and minority groups – the mentally retarded and seriously ill, the Gypsies and the Jews. The German *Reich* also gives, unfortunately, a plethora of examples of the other main target group of State terrorism, that is the population at large or segments of the population in an occupied country. Finally, State terrorism may also target a population in an alien country that is unoccupied. The Khmer Rouge raids across the frontiers into neighbouring Thailand and Vietnam respectively, left scores of innocent villagers mutilated if not dead. Missiles fired against an alien country could be another example. The purpose of State terrorism is to enforce the authority and power of the acting State-entity. As long as it is the State acting, it does not change the character of State terrorism that the agents of the State operate clandestinely or under cover or using special groups under their guidance and control. The crimes committed in pre-independent East Timor by Indonesian agents illustrate a range of such stratagems.

Individual terrorism is different from the above mentioned in that it is carried out by entities that do not represent a State. Conversely, individual terrorism is normally directing its terrorist attacks against the State, it is anti-State and subversive. The *Bader Meinhof group* and the *Brigate Rosse*, are examples of such terrorist entities. Individual terrorism does not mean that the terrorists are acting as individuals, it signifies only that they do not represent a State; many however aspire – more or less legitimately – to take over the State leadership or to create a new State, for example in one part of an existing State or on the territories of some current States.

State-sponsored terrorism covers a wide range of activities and non-activities where terrorism against or in one State is sponsored by another State. Every State has the duty to refrain from organising, instigating, assisting or participating in terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts.[16] The support may range from active to passive – from providing any of the means for terrorist attacks (weapons, financing, education, staging areas, etc.), to shielding the perpetrators by providing a safe haven for those who finance, plan, support or commit terrorist acts. In addition, to facilitate impunity for perpetrators is support for their crimes. All States are obliged not to render any such support to persons or entities involved in terrorist acts. Every State is moreover, required to prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those

[16] This principle is recognised and reaffirmed, *inter alia*, in United Nations Security Council Resolution 1373 of 28 September 2001, which focuses primarily on the need to prevent and suppress the financing of terrorism.

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purposes against other States or their citizens. Hereunder the States shall, for example (to use the financing of terrorism as an illustration of the broad requirements for States to prevent terrorism), prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.

To speak of State-sponsored terrorism it takes a minimum of conscientious participation by the actual sponsor even if that would be limited to turning a blind eye to such activities. The fact that a State is not functioning properly or even hardly functioning at all does not make it a sponsor of terrorism. The sad reality is that the malfunctioning States are many, and whether they like it or not they foster both international crime as such and terrorism. State-sponsored terrorism may relate to and sponsor not only individual terrorism but also State-terrorism.

The above sub-division into three groups is in part artificial as the distinction between the groups is not always as obvious *de facto* as it may appear in theory. Since military force always has been a main implement to build and shape States, terror as committed by States and by subversive elements may have an equally long history, as may the multitude of allegiances that come to play in these power games and the myriad of overt and covert means of support for the adversaries.

All the above mentioned goes to support the view that it does not seem helpful to see the three categories of terrorism as different phenomena. They are in my opinion best viewed as one and the same phenomenon although with some different aspects. It is as a minimum helpful to consider them as one phenomenon in relation to the issue reflected upon in this article.

The core of Schmid's epitomised definition of terrorism, as quoted above, relates to the *mens rea* (the subjective conditions for culpability), and not to the *actus reus* (the objective conditions for culpability). That is, it is the motivation that sets terrorism apart from the other crimes with a similar *actus reus*. This is particularly important to accentuate as so many of the main international debates concerning terrorism are centred on the *actus reus* of the terrorist crimes.

As for the characteristic core of the terrorist crime that relates to the *mens rea* aspect of the crime, it is illustrating how this is emphasised in the Hostage Convention Article 1 paragraph 1. The provision reads:

> Any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person ... *in order to* [emphasis added] compel a third party, namely, a State, an international intergovernmental

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> organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ... within the meaning of this Convention.

This focus on the *mens rea* element is not new. Already the fist two treaties dealing with the subject – the League of Nations Convention for the Prevention and Punishment of Terrorism and the Convention on an International Criminal Court[17] – were based on a similar understanding of the significance of the *mens rea*. Article 1 paragraph 2 of the Convention for the Prevention and Punishment of Terrorism read:

> In the present Convention, the expression "acts of terrorism" means criminal acts directed against a State and *intended or calculated to create* [emphasis added] a state of terror in the minds of particular persons, or a group of persons or the general public.

The focus on the *mens rea* has later been upheld. One example is United Nations General Assembly Resolution 51/210 from 1999 concerning Measures to eliminate international terrorism. Here the United Nations

> 1. *Strongly condemns* all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed;
>
> 2. *Reiterates* that criminal acts *intended or calculated to provoke* a state of terror in the general public, a group of persons or particular persons *for political purposes* [emphasises added] are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.

In other words, terrorism is an anxiety-inspiring method applied for political, criminal or idiosyncratic reasons. The "targets of violence" are not the main targets. The immediate human victims of violence are not selected blindly but the criteria for selecting them are different from what is the case in relation to other criminal acts. The victims may be carefully selected or chosen randomly but in both cases they are taken from a target population as representative of or symbolic for this population for the message to be conveyed to this larger group – the *target of terror* – and to the main *targets of demands* or *targets of attention*.

There are twelve major multilateral conventions and protocols relating to the responsibilities of States for combating terrorism where States have been able to agree on the *actus reus*. Instead of dealing with the issue of terrorism as such, the international community has taken an enumerative ap-

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[17] Both Conventions were opened for signature on 16 November 1937, but never entered into force. The attention paid to the Conventions was soon overshadowed by the terrorism and outrages of World War II.

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proach legislating in respect of distinct offences that are to be suppressed and punished mainly without regard to the cause or motive of the offender. These treaties are: Convention on Offences and Certain Other Acts Committed On Board Aircraft (1963); Convention for the Suppression of Unlawful Seizure of Aircraft (1970); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1988); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (1973); International Convention Against the Taking of Hostages (1979); Convention on the Physical Protection of Nuclear Material (1980); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988); Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991); International Convention for the Suppression of Terrorist Bombing (1998); and International Convention for the Suppression of the Financing of Terrorism (1999).

Most of the conventions and protocols provide that State Parties must establish criminal jurisdiction over offenders, for example, the State where the offence takes place, or in some cases the State of nationality of the perpetrator or victim. The International Convention for the Suppression of Terrorist Bombing creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of such public places.

In United Nations Security Council Resolution 1373 of 28 September 2001, which focuses primarily on the need to prevent and suppress the financing of terrorism, the Security Council goes further as it acts under Chapter VII of the UN Charter and "decides that all States shall", *inter alia*:

> 1 (b) "*Criminalise* [emphasis added] the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;" and
>
> 2 (e) "Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts *is brought to justice* [emphasis added] and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts".

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The Security Council places strong emphasis on the need to use the criminal law systems to ensure compliance with the general prohibition of terrorism. Even a "war on terrorism" would be a futile exercise if it was not supplemented and to a large extent replaced by a criminal law approach. If existing laws are insufficient, so let them be amended to meet the needs, but do not replace them by methods outside of a legal framework. Terrorism is total rejection of law and order and any authority beyond violence. War is violence for a purpose that includes respect for law and order. It comes across as unconvincing when means used for a purpose do not reflect the wanted final results. More important, the use of military armed force when it is not needed – used beyond military necessity – is a war crime.

Moreover, in the Resolution the Security Council calls upon *all* States to:

> (c) Co-operate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts.

Article 12 of the Hostage Convention is focused on the potential overlap between terrorism and war crimes as committed by combatants:

> In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Due to the overall difficulties in reaching an international agreement on the definition of terrorism Schmid suggested in 1992 in a report for the then United Nations Crime Branch that the international community might consider to take the existing consensus on what constitutes a "war crime" as a point of departure. If the core of war crimes – deliberate attacks on civilians, hostage taking and the killing of prisoners – is extended to peacetime, acts of terrorism could be defined as "peacetime equivalents of war crimes", Schmid reasoned.

Compound offences and crimes committed in sequence are more serious than their individual components. In general such crimes are subsumed un-

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der the criminal law provision that most fully considers all the aspects of the act. If the relevant criminal law provisions are aimed at different aspects of the punishable act, they will all come into play to give recognition to the act's increased culpability as compared with a breach of only one of the provisions. It makes no difference if the criminal law provisions have a common ground. The terrorism against the population in Telavåg was more serious than the one element as covered by the Nuremberg Indictment "Count Three – War Crimes" indicates. War crimes may not be compound offences, but genocide and crimes against humanity are. Terrorism is a compound offence as well. As a minimum it has the following two components: the violent act and the intent to terrorise by the use of this very act. The general principle of *ne bis in idem* ought to encourage prosecution under the criminal law provision which most fully considers all the aspects of the act as the first option – that is, when this is sufficiently supported by evidence.

As the motive is to cause terror, terrorist crimes may be committed by almost any weapon or device turned into an implement of terror. Suicide missions and ordinary items such as commercial aircraft and large trucks used to transport gasoline are only some examples. On the other hand, terrorists may well use traditional and even conventional weapons, as the records of Nazi Germany make abundantly clear.

Terrorism rejects as such the dignity and the worth of the human being in that very capacity, and constitutes a threat to international peace and security. Terrorism is thus contrary to the very purposes and principles of the United Nations.

6. Ius ad bellum and ius in bello

For centuries the learned world did not pay much attention to the methods and means of warfare. The focus was almost exclusively on what could be considered just war. It was the *ius ad bellum* – the right to use war as a means – that preoccupied scholars. When was the cause just and when could the horrors of war thus be defended even from a moral point of view? The central theme was the justifications that could exist for using war as a remedy.

Only over the last two centuries has the focus shifted to the issue of *ius in bello* – the rules that ought to regulate the conduct of the parties to the actual war or armed conflict. Whether the war is fully just as sheer self-defence against aggression, somehow justifiable, or pure aggression, there are basics rules concerning the means and methods of the fighting. The principles for the conduct of war, the *ius in bello*, have developed over time starting with some limitations to protect combatants, wounded and captivated combatants and eventually also civilians not taking any part in the hos-

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tilities. Strange enough, one may say in hindsight, the most difficult issue has been to achieve agreement on the protection of the latter group although they are the innocents mainly trapped in a theatre of war where they have no direct role to play.

The overwhelming need to protect the civilian populations from violent attacks have again been brought brutally to the fore by the horrendous suffering engendered by the magnitude and the number of the terrorist attacks opening this new millennium.

The international debate concerning terrorism was for decades – especially in the second half of the twentieth century when many nations struggled for self-determination and independence from colonial rule – mired in the lack of consensus on whether certain underlying root causes could or could not legitimise the use of terrorism as a method of fighting. The discussions were centred along exactly the same lines of reasoning as have the debates concerning the law of war. Eventually, the international community has so far ended up, as outlined above, with an enumerative approach to terrorism whereby certain characteristic terrorist acts have been outlawed. Considering that terrorism may be viewed as "unconventional warfare conducted by underprivileged combatants with [or without] the assistance of criminal co-conspirators designed primarily to terrorise and kill civilians", the approach seems helpful in terms of protecting innocent civilians. Like in conventional warfare the international community has proceeded from the premise that regardless of the cause espoused by the perpetrators *certain types of violence* are always impermissible.

In my opinion, whatever the reference to underlying causes that may justify both resentment and anger, even rebellion – the right to rebel is not outmoded or outlawed – there is an urgent humanitarian need in this context as in all other contexts of armed fighting to underscore that certain means of fighting are as such and always prohibited. The legitimate expectations that root causes (not in the least social injustices) be addressed and eliminated cannot justify delays in the international co-operation on the implementation of preventative measures until the underlying causes are eliminated. Terrorism, in war as in any conflict where one or more parties take recourse to conventional or unconventional arms, can only generate vicious circles of violence where the underlying problems are necessarily given limited attention if any. Armed conflict is also in this respect a miserable means of conflict resolution.

The main argument by less privileged nations in favour of terrorism as sometimes being justified has been that peoples that are poorer than their oppressors and unable to match the armed force of the latter should be entitled to avail themselves of the kind of force within their reach. There is strong resentment voiced against privileged nations that are seen to tie up the

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hands of those legitimately trying to defend their right to human dignity, without at the same time securing the bare basics of that very dignity by other and non-violent means. It can however, only lead towards more violence if the banning of certain means and methods of warfare and violence are made conditional on a solution to underlying problems first being found. Even when a war is absolutely just the law of war limits the kind of means and methods for conducting that very war. Even the most noble of causes – a struggle for the most sacred of values – cannot be fought without any restrictions as to means and methods. That some means and methods are rejected and outlawed, does not entail a moral or legal judgement concerning the aims fought for.

The latter may seem paradoxical and unfair, in consideration of the underlying root causes. It may however, not be less favourable to the weaker party than to the stronger one. The weaker party is, in general, no less served by restraints on the use of force than the stronger one. The means and the methods that one side is entitled to use, the other side will also have access to – the risk of reciprocity is more dangerous for the weak than for the strong. The *ius in bello* advance represents achievements and not an impasse. It does however, not resolve the issues traditionally addressed as the *ius ad bellum*.

Today the latter debate is rephrased as a question of what constitutes "aggression". The IMT Charter Article 6(a) contained the following provision:

> *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

Count One of the Nuremberg Indictment charged the Nazi defendants with conspiring or having a common plan to commit crimes against peace. Count Two charged the defendants with committing specific crimes against peace by planning, preparing, initiating, and waging wars of aggression against a number of other States. In *The Nuremberg Judgement* it is stated that,

> [t]he charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.
>
> To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from

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> other war crimes in that it contains within itself the accumulated evil of the whole.[18]

The German *Reich* unleashed a war of aggression against numerous other States. The more subtle characteristics of aggression do however, still remain contested. When the ICC Statute was being prepared, this was one reason why the crime of aggression was formally included in the Statute, but the implementation of jurisdiction in respect of this crime was suspended until such a date as "a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime". Such a provision shall moreover, "be consistent with the relevant provisions of the Charter of the United Nations" (*cf.* ICC Statute Article 5 paragraph 1(d) and paragraph 2).

The views that aggression is one of the most serious crimes of concern to the entire international community, and that impunity for such crimes are particularly detrimental, are shared in most quarters. The lack of a generally accepted definition of the crime in particular for the purpose of determining individual criminal responsibility for it, made some hesitant to see jurisdiction for the crime of aggression established for the time being. Others were reluctant as they argued that there was no precedent for individual criminal responsibility for acts of aggression as opposed to wars of aggression. The latter argument is erroneous.

In Nuremberg, one of the crimes addressed was the "invasion of Austria". About this compound offence *The Nuremberg Judgement* states, *inter alia*: "The invasion of Austria was a pre-meditated aggressive step in furthering the plan to wage aggressive wars against other countries". As to the elements of this overall crime of an aggressive step, some of the information provided in the affidavit of George S. Messersmith[19] is illustrative. It reads:

> From the very beginnings of the Nazi Government, I was told by both high and secondary government officials in Germany that incorporation of Austria into Germany was a political and economic necessity and that this incorporation was going to be accomplished "by whatever means were necessary."[20]
>
> The outrages were an almost constant occurrence, but there were three distinct periods during which they rose to a peak. During the first two of these periods, in mid-1933 and in early 1934, I was still in Berlin. However, during that period I was told by high Nazi officials in

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18 *The Nuremberg Judgement*, "The Nazi Regime in Germany", "The Common Plan or Conspiracy and Aggressive War".

19 George S. Messersmith had been Consul General of the United States of America in Berlin from 1930 to late spring of 1934. He was then made American Minister in Vienna where he stayed until 1937.

20 International Military Tribunal "Blue Series" Vol. 2 p. 352.

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> conversation with them, that these waves of terror were being instigated and directed by them. I found no concealment in my conversations with high Nazi officials of the fact that they were responsible for these activities in Austria. These admissions were entirely consistent with the Nazi thesis that terror is necessary and must be used to impose the will of the Party not only in Germany but in other countries. I recall specifically that General Milch was one of those who spoke frankly that these outrages in Austria were being directed by the Nazi Party, and expressed his concern with respect thereto and his disagreement with this definite policy of the Party.
>
> During the wave of terrorist acts in May and June 1934, I had already assumed my duties as American Minister in Vienna. The bomb outrages during this period were directed primarily at railways, tourist centres, and the Catholic Church, which latter, in the eyes of the Nazis, was one of the strongest organisations opposing them. I recall, however, that these outrages diminished markedly for a few days during the meeting of Hitler and Mussolini in Venice in mid-June 1934. At that time Mussolini was strongly supporting the Austrian Government and was strongly and deeply interested in maintaining Austrian independence and sovereignty, and in keeping down Nazi influence and activity in Austria. At that time also Hitler could not afford an open break with Mussolini and undoubtedly agreed to the short cessation of these bomb outrages on the insistence of Mussolini because he, Hitler, wished to achieve as favourable an atmosphere for the meeting between him and Mussolini as possible. The cessation of the bomb outrages during the Hitler-Mussolini conversations was considered by me and by the Austrian authorities and by all observers at that time as an open admission on the part of Hitler and the German Government that the outrages were systematically and completely instigated and controlled from Germany.[21]

The most significant argument against immediate inclusion of jurisdiction for the crime of aggression was that considerations of acts of aggression fall within the competence of the Security Council according to the UN Charter, and that some kind of clarifications concerning the powers of the Security Council and the ICC respectively would be necessary in respect of such acts. It is this concern that is attempted accommodated by the inclusion of the reference to a future provision having to "be consistent with the relevant provisions of the Charter of the United Nations". Many have voiced concern as to the role of the Security Council, as they are afraid that the use of the veto power may stay any needed initiative not only in the United Nations at large, but that it could as well impede prosecution by the Court of persons responsible for acts of aggression.

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[21] International Military Tribunal "Blue Series" Vol. 2 p. 354.

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7. The Statute of the ICC

When it comes to the question whether acts of terrorism are crimes within the jurisdiction of the ICC, there are two distinct and disparate issues. That is whether acts of terrorism (i) are included as a separate category of crimes; and (ii) can be subsumed under the other categories of crimes.

The answer to the first question is a clear no. The Statute of the ICC does not contain any separate provision for the specific crime of terrorism. At the Preparatory Committee stage there was, some argue, no agreement regarding the inclusion in the draft statute of the crime of terrorism. The reason is likely to be more complex. At that stage, prior to the terrorist attacks on the United States of America on 11 September 2001, the international community as such had no common definition of the crime of terrorism. In international law terrorist crimes had been approached under the enumerative approach where certain offences – as defined by the objective conditions for culpability, the *actus reus* – are always prohibited regardless of their motivation. The *mens rea*, the subjective conditions for culpability – the motivation that sets terrorism apart from the other crimes with a similar *actus reus* – is not part of the enumerative approach; it is more or less entirely ignored under this approach. Under these circumstances it made sense not to make the ICC *the Court* for enforcing the above-mentioned twelve conventions and protocols relating to terrorism as adopted under the enumerative approach to fight terrorism. Many offences in these legal instruments are not of a severity and magnitude that merit intervention by the ICC.

This does not mean that the second question above ought to be answered in the negative as well. *A contrario*, the international agreement on the characteristic *mens rea* of a terrorist crime should make it even more urgent and compelling that terrorist crimes that fit the *actus reus* description of the specific crimes within the jurisdiction of the ICC, remain within the Court's jurisdiction also when the crimes are committed under such aggravating circumstances as a motive of terrorism. I shall argue in favour of this interpretation of the ICC Statute. Support for reaching this conclusion is found, as I see it, in (i) the wording of the "other" provisions; (ii) the context; (iii) the purpose and intentions; and (iv) the general rules of interpretation.

General rules for the interpretation of treaties are provided in the Vienna Convention on the Law of Treaties (the Vienna Convention).[22] The ICC Statute is a treaty within the meaning of the Vienna Convention (*cf.* Article 2 paragraph 1 (a) and Article 5 paragraph 2). Article 31 provides the general rule of interpretation. As far as relevant this provision reads:

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[22] The Vienna Convention on the Law of Treaties was signed at Vienna on 23 May 1969 and entered into force on 27 January 1980.

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> 1. 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.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: ...
> 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; ...

As for supplementary means of interpretation Article 32 prescribes:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

The States Parties to the Vienna Convention have affirmed in its Preamble "that the rules of customary international law will continue to govern questions not regulated by the provisions of the ... Convention".

An interpretation to the effect that terrorist crimes that fit the *actus reus* description of the specific crimes within the jurisdiction of the ICC, remain within the jurisdiction of the ICC also when the crimes are committed under such aggravating circumstances as a terrorist motive, is in line with and supported by all these principles of interpretation.

Crimes against humanity and war crimes as defined in the ICC Statute Articles 7 and 8 more or less all have such objective conditions for culpability (*actus reus*) as could easily be combined with the subjective conditions for culpability (*mens rea*) characteristic of terrorist crimes. It is the motivation that sets terrorism apart from criminal offences of the same kind but committed for other motives. The wording of Articles 7 and 8 neither demand nor exclude terrorist motivation in any of its definitions.

Insofar as a terrorist motive may generally be considered an aggravating circumstance, it could reasonably be expected that the States Parties to the ICC Statute would have explicitly mentioned it if they intended a terrorist motivation to exclude any crime against humanity or any war crime committed with a terrorist *mens rea* from the jurisdiction of the ICC. This is particularly so because such exemptions could potentially erode the protection intended under Articles 7 and 8. There is no information to this effect in the ICC Statute; *a contrario*, the Statute read as a whole gives the impression that the Court is set up to handle *all* crimes that qualify as genocide, crimes against humanity and war crimes with no exception for the most serious of such crimes.

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In addition, one of the classic terrorist crimes is expressly mentioned as a war crime in Article 8 paragraph 2 (viii) – the taking of hostages. This indicates that the States Parties to the ICC Statute do not consider there to be any reason to distinguish, as far as the jurisdiction of the ICC is concerned, between war crimes and/or crimes against humanity committed with or without a motive of terrorism. The above-quoted Article 12 of the Hostage Convention does not suggest a different view.

Moreover, the later adopted "Elements of Crimes"[23] concerning this war crime of taking hostages explicitly links, that is, defines this crime as one with both a motive of terrorism and an international armed conflict. The relevant provisions read:

> 3. The perpetrator *intended to compel* [emphasis added] a State, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
>
> 6. The conduct took place in the context of and was associated with an international armed conflict.

A combination of the intent characteristic of genocide (*cf.* the ICC Statute Article 6) and the intent characterising terrorism is less practical, if at all, but should – if that weird combination were to occur – not be treated in any other way than suggested above for acts of terrorism that meet with the definitions of crimes against humanity and/or war crimes. That is, the crime of genocide should always be within the jurisdiction of the ICC whatever added motives for the crime that may exist.

The context and the purpose and intentions of the States Parties to the ICC Statute also sustain the interpretation. The States Parties openly lamented the fact that they had not been able to agree upon a generally acceptable definition of the crime of terrorism for the inclusion of these crimes within the jurisdiction of the Court. The concern and regrets expressed are illustrative and read:

> The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,
>
> *Having adopted* the Statute of the International Criminal Court,
>
> *Recognising* that terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community,
>
> ...
>
> *Deeply alarmed* at the persistence of these scourges, which pose serious threats to international peace and security,

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[23] *Cf.* ICC Statute Article 9 and "Report of the Preparatory Commission for the International Criminal Court", "Addendum", "Finalised draft text of the Elements of Crimes", UN doc. PCNICC/2000/INF/3/Add.2.

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> *Regretting* that no generally acceptable definition of the crimes of terrorism and ... could be agreed upon for the inclusion, within the jurisdiction of the Court,
>
> *Affirming* that the Statute of the International Criminal Court provides for a review mechanism, which allows for an expansion in future of the jurisdiction of the Court,
>
> *Recommends* that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and ... with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.[24]

The ICC Statute does not have *travaux préparatoires* in terms of official records from the deliberations in the drafting committees.

The definition of crimes against humanity in the ICC Statute is to a large extent based on the IMT Charter (as this has also been furthered in the statutes of the tribunals for the former Yugoslavia and for Rwanda respectively). As documented above there is no doubt that the IMT Charter not only did not exclude acts of terrorism from the jurisdiction of the IMT, but was designed chiefly to punish the Nazi reign of terror.

The history of World War II and the international community's inability to stop subsequent violent outrages on humankind despite the utterly painful knowledge acquired on an almost global scale through that War, is in my opinion the most cogent reason why terrorist crimes must fall within the jurisdiction of the ICC when these crimes meet the objective conditions for culpability under the mandate of the ICC. The whole idea of the ICC emanated from the horrors of World War II and a desire to prevent such abysmal conditions from ever resurfacing. On 9 December 1948, when the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly, the same body asked its Sub-Committee to start working on the establishment of an international criminal court.

Finally, what would be the alternative if criminal acts that as such fall within the mandate of the ICC were excluded from the jurisdiction of the Court because they are motivated by terror? Terrorism is not inherent in the criminal act as such. Terrorism is an added dimension. It does not make the criminal act as such less serious. If acts of terrorism are excluded from the mandate of the ICC, there is no other international court to which anyone will have recourse. Shall impunity – where there is no national jurisdiction willing and able to prosecute – depend on the perpetrator's intention, and

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[24] UN doc. A/CONF.183/10, Annex I "Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court" E.

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only be avoided if the perpetrator does not act with the aggravating intention of causing terror? It would not be prudent to exclude acts of terrorism from the mandate of the ICC just because these crimes are more serious and more damaging than the "ordinary" grave crimes within the Court's jurisdiction.

8. Some concluding remarks

Terrorist acts are committed for political, criminal or idiosyncratic reasons. The latter reasons are the less prevalent and most difficult to counteract as they are almost unpredictable and beyond reason. The fight against terrorism will primarily have to be focused on terrorism for political and/or criminal reasons. Fighting crime is no different in relation to terrorism than in relation to other crimes of the most serious nature. Fighting politically motivated terrorism does however, as I see it, deserve some reflections in the context of the theme of this article.

The Martens Clause (first included in the Hague Conventions of 1899) affirms the applicability of "principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience" in cases not directly covered by other rules of international law. Despite the ambiguity of the Clause and its real value being disputed by many legal scholars, it brings to mind that legal interpretation can never be considered as a solely intellectual activity. Its fruits will always impact the lives of people.

The quest for justice is human and common to all members of the human family regardless of differences as to what we see as just. If nothing else we know what we do not want to happen to ourselves. In this respect there are basics that people in general can agree on. It is possible for human beings to find common ground based on a minimum of humanity and dictates of the public conscience. Without this the international community would never have been able to develop the law of war, nor to unite to fight at least some aspects of terrorism. On a similar basis it should be possible to proceed to advance at least the bare minimum of social justice for all human beings.

The United Nations have important and impressive principles such as the principles of equal rights and self-determination of peoples, of sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of prohibition of the threat or use of force, and of universal respect for, and observance of, human rights and fundamental freedoms for all. But for many people these principles have yet to be translated into human dignity as the foundation of their everyday life.

This is the context in which the international community is adamant to fight terrorist acts. The fight can succeed only if it takes into account the

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characteristics of the "battlefield". The dire consequences of poverty and deprivation are such that many people have neither the ability nor the will to engage themselves in the running of the communities to which they belong. Trapped in private battles for subsistence that many are left to fight alone, they become easy prey for abuse by self-proclaimed leaders promoting their own causes.

Helping underprivileged people to get on with their lives under circumstances where their human dignity is respected, is the single most efficient approach to turn them away from crime and give them a vested interest in achieving peace. Strengthening the human resources in the different States is the only way to build States as responsible entities not enslaved by leaders running them as their private fiefdoms. The existence of an underprivileged group can be abused by terrorists as a pretext for terrorism for political and/or criminal motives. Strategies of development erode and undermine the existence of such pretexts.

Furthermore, there are dimensions of social justice favouring that terrorist acts should be within the jurisdiction of the ICC as argued for in this article. Because terrorism sometimes is "unconventional warfare conducted by underprivileged combatants" it seems significant to appreciate that there are many people – especially among the underprivileged – who have great difficulties distinguishing between conventional warfare and "unconventional warfare" (that is, terrorism) on a practical level.

The law of war bans certain means and methods of warfare. In addition, the concept of "military necessity" forms a general restraint with respect to the conduct of war. Every legitimate target must qualify as a military target and the use of force shall be limited to what is necessary under the circumstances. But, when these conditions are met, civilian casualties are to a certain degree accepted. In war it may be said that "military necessity" sometimes constitutes the fine and often subtle line between what is permissible and what is an act of terror. A successful fight against terrorism under these circumstances will therefore in my opinion require a restrictive interpretation of its opposite, "military necessity".

To the legal mind the concepts of "military necessity" and terrorism are clearly distinguishable. The differences may not be equally evident for those who suffer under the consequences of the one or the other. For the affected individuals a military attack may appear as no less of a carnage, than if they had been targeted in a terrorist attack. This is *de facto* so regardless of the important but often subtle theoretical and moral distinctions between an accepted side-effect of permissible violence in war and sheer violence as a means of terror. When, for example, it comes to punitive air strikes, it can hardly be expected that ordinary people will be able to distinguish between when they may be legitimately targeted and when not.

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Terrorism debases human beings – the victims – to the maximum, using them as tools only and for a purpose beyond themselves. But, in such wars where the casualties are harvested by underprivileged people who *de facto* have no say in the running of their own countries, they may feel equally much that they are but objects for others to toss about and discard of at will.

Injustice kindles resentment on every level. The dream of basic human dignity is common to every human being and cannot be monopolised by a few without causing conflict. When people are provided with a chance to address their basic needs in a non-violent forum where they will be heard, they can realistically be expected to give up violence as a means of conflict resolution. This is a core element in every legal system: *Si in ius vocat, ito.*[25] When you are party to a dispute, you are required to appear in court when asked to, and at the same time your adversaries are obliged to abstain from violence to settle the dispute. The international community badly needs general legal means of conflict resolution. International tribunals have long existed for the settlement of disputes between States. But the international community does also need to put in place alternative mechanisms to settle significant problems that may not be pure State against State issues, such as armed conflicts of a national character.

It can only weaken the fight against terrorism if acts of terrorism are excluded from adjudication before the ICC and perhaps from other courts as well. Criminal procedures prevent impunity, but do at the same time "rescue" the alleged perpetrators from on the spot justice of the streets or battlefields. Proper criminal procedures should benefit not only the privileged and powerful able to fight the conventional war, but also the "underprivileged combatants". If not, the vicious circles of injustice may be perceived as taking an added turn to the disadvantage of the underprivileged.

In general international humanitarian law has shown resilience and adaptability. The international community should use this flexibility to avoid increased social tension that may arise if acts of terrorism are excluded from the mandate of the ICC.

The international community has enlisted in the fight against terrorism with the intention to protect people from becoming victims of this egregious crime. This goal deserves a wholehearted effort. One marked step in the right direction will be to accept that genocide, crimes against humanity and war crimes fall within the jurisdiction of the ICC also when the crime has been committed under the aggravating circumstances of a motive of terrorism. This will be in line with the main historical precedent, *The Nuremberg Judgement*, and it will not jeopardise any good cause. The power of the Security Council will at all events remain unrestrained where a situation threatens international peace and security.

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[25] The opening phrase from the Roman Law of the Twelve Tables.

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V

Contemporary universal jurisdiction

Christopher Keith Hall*

Much of Asbjørn Eide's writing has been devoted to making the rights recognized in the Universal Declaration of Human Rights truly universal, both in recognition and implementation.[1] Universal jurisdiction is one way of making the right recognized in Article 8 of the Universal Declaration to an effective remedy in national courts for acts violating fundamental rights a truly universal right, universally recognized and universally enforced around the globe.[2] In fact, universal jurisdiction involves an even broader concept of the right to a remedy than envisaged by some of the drafters of that article and some commentators by permitting victims to obtain justice, not only in their own national courts and for violations of their own national law, but also, in principle, in national courts anywhere in the world for any crime under international law.[3]

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1 See, for example, Asbjørn Eide *et al.* (eds.), *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press 1992); Asbjørn Eide, "The Historical Significance of the Universal Declaration", 50 *Int'l Soc. Sci. J.* 475 (1998); Gudmundur Alfredsson and Asbjørn Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague/Boston/London: Martinus Nijhoff Publishers 1999).

2 Universal Declaration of Human Rights, G.A. Res. 217 (III), 10 December 1948, Art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").

3 According to some of the leading commentaries on the Universal Declaration, Article 8 was intended to apply to fundamental rights recognised in national constitutions and national law. *See, for example,* Erik Møse, *Article 8*, in Alfredsson and Eide, *supra*, note 1, 204; Göran Melander, *Article 8*, *in* Eide *et al.*, *supra*, note 1, 144. However, the wording is susceptible of a broader, more natural reading covering fundamental rights recognised in law, including international law, an approach which is consistent with the meaning of the word "law" in other international instruments. For example, in Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the term "lawful sanctions" has been interpreted as meaning lawful under international, as well as national, law. Moreover, it appears that at least some of the drafters intended Article 8 to be a bulwark against national laws that themselves were used to violate fundamental rights, as in Nazi Germany, where "[t]he government of a state could fall into the hands of a small group which could exploit and oppress the rest of the population". Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting*

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In the half century since drafting of the Universal Declaration began at the end of the Second World War, courts on five continents in more than a dozen countries as far apart as Australia, Canada, Israel, Mexico, Norway, Paraguay and Senegal have wrestled with the question. Approximately two-thirds of all countries – located in every region and in every legal system – have legislation permitting their courts to exercise universal jurisdiction over one or more crimes. However, safe havens continue to exist.

This chapter looks at the current status of universal jurisdiction in the world today. There are many misconceptions about universal jurisdiction, including about its definition, its antiquity, the crimes subject to such jurisdiction and the number of countries that can exercise such jurisdiction. In addition, despite the well-known cases of Eichmann, Pinochet and Habré, universal jurisdiction has fallen far short of its potential, and persons suspected of the worst possible crimes still travel the world relatively freely. Indeed, there have been a number of setbacks in recent years in attempts to exercise universal jurisdiction. However, there are a variety of steps that can and are being taken to respond to these setbacks and to address other weaknesses in the current system of universal jurisdiction to ensure that such jurisdiction can be an effective tool to combat impunity throughout the globe for crimes under international law.

1. Definition

It would be useful at the outset to define universal jurisdiction and distinguish it from the other four types of geographic jurisdiction that national criminal justice systems can exercise. *Universal jurisdiction* is the ability of states to investigate and prosecute conduct abroad that is not linked to the forum state by the nationality of the suspect or of the victim or by harm to the forum state's own interests.[4]

The most common other form of geographic jurisdiction is *territorial jurisdiction*, that is, jurisdiction of a court over the territory of the state (forum state) in which it sits. This has been interpreted to extend to include jurisdiction over ships carrying the national flag and aircraft registered in the state, although this is not strictly speaking territorial jurisdiction. It also includes jurisdiction over conduct commenced outside the forum state with effects inside that state (objective territorial jurisdiction) and conduct that

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and Intent 49 (Philadelphia: University of Pennsylvania Press 1999) (quoting Alberto F. Canas, the Costa Rican representative on the Third Committee of the General Assembly).

4 This chapter does not address the use of civil lawsuits to obtain damages for human rights violations abroad, a technique still largely limited to the United States. *See, for example, Filartiga v. Peña-Irala,* 630 F.2d 876 (2d Cir. 1980).

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occurred in the forum state with effects abroad (subjective territorial jurisdiction).

The second most common form of geographic jurisdiction is *active personality* jurisdiction or jurisdiction over crimes committed abroad by nationals of the forum state. Although it has been claimed that active personality jurisdiction includes jurisdiction over alien residents at the time of the crime and aliens who become residents or citizens after the crime, such jurisdiction is not, strictly speaking, active personality jurisdiction and, particularly in the context of crimes under international law, it is better seen as universal jurisdiction. A third, less widely accepted form of geographic jurisdiction is *passive personality* jurisdiction or jurisdiction over crimes committed abroad against a state's own nationals. A fourth form is *protective jurisdiction* over crimes committed against the forum state's particular interests, such as harming its national security or counterfeiting its currency. Each of these forms of jurisdiction has some link to the state whose criminal justice system is seeking to investigate and prosecute conduct committed abroad.

The label "universal jurisdiction" is not that helpful when discussing jurisdiction over conduct which is a crime under international law, but is defined as a crime under national law, since the national court is really acting as an agent of the international community enforcing international, rather than its own, law. This is not simply a question of labels; since the national court is enforcing international, rather than national, law, none of the restrictions which might be appropriate for crimes under national law, such as dual criminality, statutes of limitations or official immunities, are appropriate. The exercise of such jurisdiction is sometimes described as the decentralized prosecution of crimes under international law, but for the purposes of this chapter, the more common term is used.[5]

There are two other aspects of the definition of universal jurisdiction which should be mentioned before discussing the principle in more detail. First, the concept encompasses both the broad principle of jurisdiction to investigate when the suspect – prior to a trial – is absent (occasionally called "pure" universal jurisdiction) incorporated in the Geneva Conventions of 1949 more than half a century ago, and the more narrow one when the suspect must be present in the forum state before an investigation can be opened or an extradition request made (based on the principle of *aut dedere aut judicare* – extradite or try). Of course, fundamental fairness requires the presence of an accused at trial, but this is an independent matter from jurisdiction. Second, it is important to distinguish carefully between *mandatory* universal jurisdiction – under which customary or conventional international law or national law *requires* the state to exercise such jurisdiction or assist

[5] For the origin of this term, see Rüdiger Wolfrum, "The Decentralized Prosecution of International Offences through National Courts", 24 *Israel Y.B. Int'l L.* 183-189 (1994).

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another court to exercise jurisdiction – and *permissive* universal jurisdiction – under which the state is not required by law to exercise jurisdiction, but where such jurisdiction *should* be exercised under general principles of law, logic or morality.

2. A long-established principle

The concept of universal jurisdiction is not new. It has a long history and has been traced back at least to the sixth century Code of Justinian. It has been recognized as a general principle of law applicable to crimes under international law, and even ordinary crimes under national law, in the work of many international scholars since the Middle Ages, including Grotius. However, this chapter focuses on state practice, rather than doctrine. A brief review of the origins of the practice of universal jurisdiction is useful, not only since it demonstrates that the law is well established, but also since many of the same rationales for the principle apply to contemporary practice.[6]

During the Middle Ages, northern Italian city states exercised jurisdiction over brigands who were suspected of committing crimes outside the borders of the city state, based on the ground that there was no effective state control in the area where they committed their crimes and that if the city state did not exercise jurisdiction, the brigands would have complete impunity. These precedents appear to have shaped the thinking of those who drafted the Nuremberg Charter and Allied Control Council Law No. 10. Universal jurisdiction over war crimes appears to date to at least the 14th century, when the *jus militaire* (law of arms governing professional soldiers) became recognized as part of the *jus gentium* (international law). Trials of persons suspected of violations of the law of arms could be conducted by any country for violation of a universal code, both because of the gravity of the crime and because of the lack of an adequate judicial system where the crimes took place. States began to exercise universal jurisdiction over piracy on the high seas as early as the 16th century. Among the justifications ad-

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[6] This section is a brief summary of a more extensive discussion of the history of universal jurisdiction in Chapter Two of the September 2001 Amnesty International memorandum, *infra*, note 16, which is based on a number of sources, including, in particular, M. Cherif Bassiouni, *Crimes against Humanity in International Law* 227-242 (The Hague/London/Boston: Kluwer Law International 2nd edition 1999); Willard Cowles, "Universality of Jurisdiction over War Crimes", 33 *Cal. L. Rev.* 177 (1945); Henri Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (Paris: Libraire du Recueil Sirey 1928); G.I.A.D. Draper, "The Modern Pattern of War Criminality", 6 *Israel Y.B. Hum. Rts* 9 (1976); Marc Henzelin, *Le Principe de l'Universalité en Droit Pénal International:Droit et Obligation pour les Etats de Poursuivre et Juge Selon le Principe de l'Universalité* (Bâle/Genève/Munich: Helbing & Lichtenhahn et Bruxelles: Bruylant 2000); Thomas H. Sponsler, "The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen", 15 *Loy. L. Rev.* 43 (1968-1969).

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vanced for such jurisdiction were that the pirate was an outlaw who was an enemy of all mankind (*hostis humani*) whom any state could punish in the interest of all, that the crime was one of extreme gravity, that the crime took place on the high seas outside the jurisdiction of any state and that in the absence of universal jurisdiction the crime would go unpunished and that since the pirate attacked international commerce, the attack was on the international community and the international legal order. Similarly, states began to exercise extraterritorial jurisdiction in the middle of the 19th century over slave traders and later over slave owners. Like piracy, the slave trade took place largely on the high seas outside the jurisdiction of any state and the crimes were seen as particularly atrocious, deserving of international condemnation.

This state practice was supplemented in the last two centuries by international law associations before the Second World War, which called upon states to provide for universal jurisdiction over a number of crimes under international law, other crimes of international concern and even ordinary crimes under national law.[7] Indeed, nearly two centuries ago, beginning with Austria in 1803, states started to provide their courts with universal jurisdiction over ordinary crimes under national law. By the eve of the Second World War, at least 26 states (approximately half of all states at the time) either had enacted legislation providing for universal jurisdiction over ordinary crimes or had considered proposals that subsequently became law.[8]

Although the jurisdiction of the Nuremberg Tribunal over crimes that had no particular geographic location has usually been justified on principles other than universal jurisdiction, the Tribunal implicitly recognized the existence of universal jurisdiction over crimes against peace, war crimes and

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7 Resolutions were adopted at a number of meetings of such associations, including: the Institute of International Law at Munich in 1883; International Law Association (Japanese Branch) (1926); the Conference for the Unification of Penal Law, Warsaw, 5 November 1927; the Institute of International Law at Cambridge, 31 July 1931; the International Congress of Comparative Law, The Hague, 2-6 August 1932; and the Third International Conference of Penal Law, Palermo, 1933. In addition, after a major research project reviewed contemporary state practice, it proposed a draft treaty providing for universal jurisdiction over ordinary crimes under national law, subject to a number of conditions. Research in International Law (Harvard Research), Draft Convention with Respect to Crime, 29 *Am. J. Int'l L.* 439, 573 (Supp. 1935), Arts. 9 and 10.

8 In addition to Austria, states that had enacted such legislation before 1939 included: San Marino (1868); Hungary (1878), Argentina (1885), Greece (1887), Italy (1889), Germany (1895), Bulgaria (1896), Norway (1902), Russia (1903), Siam (1908), Panama (1916), Costa Rica (1924), Turkey (1926), Venezuela (1926), Albania (1927), Spain (1928), Yugoslavia (1929), Mexico (1931), Belgium (1932) and Poland (1932). Six other states had considered proposals by that date to provide courts with such jurisdiction that were subsequently adopted in essentially the same or expanded form, including: Switzerland (1913), Sweden (1923), Cuba (1926), Czechoslovakia (1926), Germany (1927) and Rumania (1928).

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crimes against humanity by stating that, in addition to the ground that the parties to the London Agreement could legislate for Germany as occupying powers, in setting up the Tribunal they had "done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law".[9] Some of the thousands of trials by Allied military courts and commissions at the end of the War of other persons who had served the Axis Powers for war crimes and crimes against humanity were based on universal jurisdiction or expressly recognized the doctrine as applicable to these crimes.[10]

However, apart from the trial of Adolf Eichmann by Israel in 1961,[11] there appear to have been no other trials for war crimes or crimes against humanity based on universal jurisdiction until the establishment of the International Criminal Tribunals for the former Yugoslavia (Yugoslavia Tribunal) in 1993 and for Rwanda (Rwanda Tribunal) in 1994 acted as a catalyst for national prosecutors and investigating judges to investigate and prosecute persons suspected of war crimes, crimes against humanity and genocide in these two regions. Since 1993, there have been investigations and prosecutions based on universal jurisdiction for such crimes in former Yugoslavia and Rwanda and neighbouring countries by prosecutors and investigating judges in Austria, Belgium, Denmark, France, Germany, the Netherlands and Switzerland.

Two important developments in 1998 led to a renewed interest in the use of universal jurisdiction as a practical tool in the broader struggle to end impunity for crimes under international law. On 17 July 1998, a diplomatic conference in Rome adopted the Rome Statute of the International Criminal Court, more than a century after it was first proposed in 1872 by Gustave Moynier, one of the founders of the International Committee of the Red Cross. Despite widespread support at the diplomatic conference for giving

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9 Judgment of the International Military Tribunal for the Trial of German Major War Criminals (With the dissenting opinion of the Soviet Member), Nuremberg, 30th September and 1st October, 1946, 38 (London: H.M.S.O. Cmd. 6964 1946).

10 See, for example, In re List (Hostages case), Judgment, Case No. 47, U.S. Mil. Trib. Nuremberg, 19 February 1948, 8 Law Reports of Trials of War Criminals 35, 54 (London: H.M.S.O. 1949); Trial of Wilhelm von Leeb and Thirteen Others (German High Command case), Judgment, U.S. Mil. Trib. Nuremberg, 28 October 1948, 12 Law Reports of Trials of War Criminals, *supra*, 61; In re Eisentrager, Judgement, Case No. 84, U.S. Mil. Comm'n, Shanghai 1947, 14 Law Reports of Trials of Major War Criminals, *supra*, 8, 15; The Hadamar Trial, Judgment, Case No. 4, U.S. Mil. Comm'n, Weisbaden, 8-15 October 1945, 9 Law Reports of Trials of War Criminals, *supra*, 46, 53; The Almelo Trial, Judgment, Case No. 3, Brit. Mil. Ct., Almelo, 24-26 November 1945, 1 Law Reports of Trials of War Criminals, *supra*, 35, 42; The Zyklon B Case, Judgment, Case No. 9, Brit. Mil. Ct., Hamburg, 1946, 1 Law Reports of Trials of War Criminals, *supra*, 93, 103.

11 *Attorney General of Israel v. Eichmann,* 36 *Int'l L. Rep.* 18 (Israel Dist. Ct. Jerusalem 1961), *aff'd,* 36 *Int'l L. Rep.* 277 (Sup. Ct. Israel 1962).

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the International Criminal Court universal jurisdiction, as part of a political compromise designed to make the Court more acceptable to the United States, the Rome Statute did not provide the Court with such jurisdiction or expressly require states parties to exercise such jurisdiction. However, in the Preamble, states parties affirm that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation", determine "to put an end to impunity for the perpetrators of these crimes", and recall that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[12]

The arrest of the former President of Chile, Augusto Pinochet Ugarte, on 16 October 1998 in London in response to a extradition request seeking his trial in Spain based on universal jurisdiction for genocide, torture, murder and hostage-taking in Chile, Spain and other countries, marked a significant shift in the use of universal jurisdiction. For the first time an investigation was based on universal jurisdiction for crimes committed since the Second World War in a country that was not already within the jurisdiction of an existing international court. The final decision by the House of the Lords in *Pinochet* was limited to permitting the extradition of a former head of state to another country to face trial on charges of torture and conspiracy to torture, based largely on interpretation of the United Kingdom's obligations under its legislation implementing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture),[13] and each of the six judges in the majority wrote different opinions.[14] Moreover, the Home Secretary, after a series of judicial challenges, subsequently permitted the suspect to leave on the disputed ground that he was mentally unfit to stand trial. However, the decision continues to have great significance to the practice of universal jurisdiction and to efforts to end impunity in territorial states.

3. The broad range of crimes subject to universal jurisdiction around the world

As part of its work in preparing for its third-party interventions in the House of Lords in the *Pinochet* case, Amnesty International discovered that there

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12 Rome Statute of the International Criminal Court, Preamble, paras. 4-6.

13 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted by* U.N.G.A. Res. 39/46, 39 U.N. G.A.O.R. Supp. (No. 51) at 197, UN doc. A/39/51 (1984).

14 R. v. Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (Amnesty International and Others Intervening) (No. 3), [1998] 2 All Eng. Rep. 897, 24 March 1999.

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was little recent information about national law concerning universal jurisdiction and that most scholarly writing was based on only a handful of examples of national legislation and jurisprudence, calling into question much of this work. Indeed, the last global study of state practice concerning extraterritorial jurisdiction was published in 1935, more than six decades before the former President of Chile had been arrested.[15] After the Home Secretary permitted the former President to return to Chile, Amnesty International undertook a study of state practice and *opinio juris* at the national and international level in more than 125 countries. The results of that study, published in a memorandum in September 2001, were somewhat surprising, both in the scope of the crimes subject to universal jurisdiction and in the number of countries that had legislation permitting their courts to exercise such jurisdiction. That memorandum demonstrates that customary international law permits – and, in some cases, requires – states to exercise universal jurisdiction over crimes in three categories: (1) crimes under international law, such as war crimes, crimes against humanity and genocide, as well as torture, extrajudicial executions and "disappearances"; (2) crimes under national law of international concern, such as hijacking or damaging aircraft, hostage-taking and attacks on diplomats; and, what may surprise some, (3) ordinary crimes under national law, such as murder, abduction, assault and rape.[16] These three types of crimes by individuals who are subject to universal jurisdiction should be distinguished from a now out-of-date fourth category, crimes by states (international crimes).[17]

Space does not permit an examination here of all forms of state practice examined in the Amnesty International memorandum. Instead, this section briefly summarizes such practice at the international and national levels in the form of ratification and signature of treaties providing for universal jurisdiction and national legislation providing for universal jurisdiction, as well as indicating states that have exercised such jurisdiction over crimes under international law. Some of the recent examples of states that have investigated, prosecuted or tried such crimes on the basis of universal jurisdic-

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15 Harvard Research, *supra*, note 7.

16 Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation,* AI Index: IOR 53/002 - 018/2001, September 2001 (obtainable from <http://www.amnesty.org> or as a CD-ROM from: <ijp@amnesty.org>).

17 Whether crimes under national law that are not common to most legal systems, such as criminal anti-trust laws or criminal prohibitions for violating restrictions on trade with certain countries, are subject to universal jurisdiction is controversial and falls outside the scope of this chapter. Of course, international law does not authorize national courts to exercise universal jurisdiction to prosecute persons for crimes under national law when the provisions of the penal code prohibit conduct that is protected by international law itself, such as the peaceful exercise of the right to freedom of expression, association and assembly.

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tion or responded favourably to requests for extradition to states seeking to exercise universal jurisdiction are discussed in the following section.

Types of legislation. National legislative and constitutional provisions generally fit within one of five models: (1) express authorization to exercise universal jurisdiction over specific crimes under international law;[18] (2) authorization to exercise universal jurisdiction over ordinary crimes under national law;[19] (3) authorization to exercise universal jurisdiction over crimes defined or listed in treaties;[20] (4) authorization to exercise universal jurisdiction over crimes under customary international law or general principles of law;[21] and (5) direct incorporation of international law into national law.[22]

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[18] The most common examples are the Geneva Conventions Acts found in Commonwealth countries, based on the original United Kingdom Geneva Conventions Act 1957. The Seychelles Geneva Conventions Act, 1985, Act 20 of 1985, § 3 (1) is typical. It states:

> Any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the Conventions as is referred to in the following articles respectively of those Conventions – [list of grave breaches provisions in the Geneva Conventions omitted] is guilty of an offence ...

[19] Section 12 (4) of the General Civil Penal Code of Norway (English translation by Norwegian Ministry of Foreign Affairs) states:

> § 12. Unless it is otherwise specially provided or accepted in an agreement with a foreign State, Norwegian criminal law shall be applicable to acts committed:
>
> ...
>
> 4. abroad, by a foreigner when the act either
>
> a) is one of those dealt with in sections 83, 88, 89, 90, 91, 91 a, 93, 94, 98 to 104 a, 110 to 132, 148, 149, 150, 151 a, 152 first *cf.* second paragraph, 152 a, 152 b, 153 first to fourth paragraphs, 154, 159, 160, 161, 169, 174 to 178, 182 to 185, 187, 189, 190, 192 to195, 217, 220, 221, 222 to 225, 227 to 229, 231 to 235, 238, 239, 243, 244, 256, 258, 266 to 269, 271, 276, 291, 292, 324, 325, 328, 415 or 423 of this code or sections 1, 2, 3 or 5 of the Act relating to defence secrets,
>
> b) is a felony also punishable according to the law of the country in which it is committed, and the offender is resident in the realm or is staying therein, ...
>
> In cases in which the criminality of an act depends on or is influenced by any actual or intended effect, the act shall be regarded as committed also where such effect has occurred or is intended to be produced.

[20] One such example is Article 10 of the Penal Code of Panama, which provides:

> Regardless of the legal requirements in force in the place where the punishable act is committed and regardless of the nationality of the accused, Panamanian criminal law shall be applicable to those who commit punishable acts covered under international treaties which have been ratified by the Republic of Panama.
>
> In order for the offences in the preceding paragraph to be prosecuted and punished in Panama, it is necessary for the accused to be present on national territory.

[21] Article 17 of the Ethiopian Penal Code of 1957 provides in part that

> [a]ny person who has committed in a foreign country:
>
> (a) an offence against international law or an international offence specified in Ethiopian legislation, or an international treaty or a convention to which Ethiopia has adhered;

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However, there are a number of variations within each model and some states have more than one type of provision. The ability of states to exercise universal jurisdiction over ordinary crimes under their own national law is of immense importance since many states have failed to define crimes under international law as crimes under their national law or have done so inadequately. However, as explained below, this alternative is often not satisfactory since national law may be subject to restrictions that would be inappropriate with respect to crimes under international law, such as statutes of limitation. It is important to note that almost none of the states with universal jurisdiction legislation have provisions in that legislation expressly preventing the police or prosecutors from opening an investigation at a time when the suspect is outside the country, even if the suspect has never been in the country.

War crimes. The prohibition of war crimes under national law still suffers from the classical distinction in international law between violations of international humanitarian law in international armed conflict and violations in non-international armed conflict. Although this distinction has been eroded in the past decade by the jurisprudence of the Yugoslavia and Rwanda Tribunals and by the Rome Statute, as well as in some recent national legislation implementing that Statute, it remains a serious deficiency in the global framework of law. The unfortunate effects of this distinction are particularly marked in the case of universal jurisdiction.

Almost every state is a party to the Geneva Conventions of 1949, which require states parties to search for, arrest and bring to justice persons suspected of grave breaches of those Conventions (which are classified as war crimes) in their own courts, to extradite suspects to any state requesting extradition or to surrender them to an international criminal court. The common jurisdictional article provides:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions

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...

Shall be liable to trial in Ethiopia in accordance with the provisions of this Code and subject to the general conditions mentioned hereinafter (Art. 19 and 20 (2)) unless he has been prosecuted in the foreign country.

(2) Nothing in this article shall affect the provisions of articles 14 and 15 (2).

[22] United States military general courts-martial can try members of enemy forces for violations of the laws of war. Article 18 of the Uniform Military Code of Justice, 10 U.S.C.§ 818, provides:

> General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.

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> of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided that such High Contracting Party has made out a *prima facie* case.[23]

This common provision makes clear that in addition to the expressly stated duties, states parties may also request other states parties to extradite suspects without any requirement that the suspects have ever been in their territories or to have any connection whatsoever with the requesting state. What was envisaged more than half a century ago was a shared responsibility among all states parties to repress grave breaches, and for other states to step in when states where the suspects are located are unable or unwilling to fulfil their responsibilities. Sadly, until recently, this aspect of the provision has not been implemented.

Grave breaches include the following acts if committed in connection with an *international armed conflict* against persons or property protected by the relevant Geneva Convention: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a protected person to serve in the forces of the hostile power; wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed by the Third Geneva Convention or a protected person of such rights prescribed in the Fourth Geneva Convention; unlawful deportation or transfer or unlawful confinement of a protected person; and taking of hostages. The 1977 Protocol I to these Conventions expands the scope of application of these grave breaches and contains an extensive list of additional grave breaches, also subject to universal jurisdiction. There are also a wide range of prohibitions under customary and conventional international humanitarian law applicable to international armed conflict which are considered to be war crimes and, therefore, subject to universal jurisdiction.

Regrettably, neither the drafters of the Geneva Conventions nor of the 1977 Protocol II to those Conventions expressly provided for international criminal responsibility for violations of international humanitarian law in *non-international armed conflict.* However, there has been substantial state practice over the past decade, including legislation and prosecutions, demonstrating not only that there is international criminal responsibility for violations of common Article 3 to the Conventions and of Protocol II and certain other conduct prohibited in non-international armed conflict, as recognized in the Rome Statute, but also that national courts may exercise universal ju-

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[23] First Geneva Convention, Art. 49; Second Geneva Convention, Art. 50, Third Geneva Convention, Art. 129; Fourth Geneva Convention, Art. 146.

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risdiction over persons responsible for such violations. It is also increasingly accepted that if states do not do so, then they should extradite the suspects to a state able and willing to do so or surrender them to an international criminal court with jurisdiction over the crimes and suspects.

As of 31 July 2002, 189 states were parties to the Geneva Conventions of 1949 and 159 states were parties to Protocol I.[24] As of the same date, 152 states were parties to Protocol II.[25] Despite the nearly universal ratification

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[24] All but two of the 189 UN Members (the only exceptions being the Marshall Islands and Nauru) and both UN Observer states, the Holy See and Switzerland (at the time of writing), were parties to the Geneva Conventions of 1949 as of 31 July 2002. East Timor, which is expected to become a member of the UN in 2002, has indicated that it intends to ratify the Geneva Conventions and Protocol I. The following states were parties to Protocol I as of the same date: Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Democratic People's Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Republic of Korea, Monaco, Mongolia, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Palau, Panama, Paraguay, Peru, Poland, Portugal, Qatar, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, SaoTome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Suriname, Swaziland, Sweden Switzerland, Syrian Arab Republic, Tajikistan, The former Yugoslav Republic of Macedonia, United Republic of Tanzania, Togo, Tunisia, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Yemen, Yugoslavia (Federal Republic of), Zambia and Zimbabwe.

[25] As of 31 July 2002, the following 152 states were parties to Protocol II: Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Micronesia (Federated States of), Republic of Korea, Monaco, Mongolia, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Palau, Pa-

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of the Geneva Conventions and the widespread ratification of the Protocols, what is particularly striking is that only about two-thirds of all states have legislation permitting their courts to exercise universal jurisdiction over war crimes, and, in many cases, this legislation is applicable only to certain conduct prohibited by national law, such as murder, that would amount to a war crime if committed in international armed conflict or, in some cases, non-international armed conflict.[26] The courts of almost a dozen states since the end of the Second World War have exercised universal jurisdiction over war crimes, including Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, Switzerland, the United Kingdom and the United States.

Crimes against humanity. The most widely accepted contemporary definition of crimes against humanity is found in Article 7 of the Rome Statute, although there are a number of similar definitions in other recent international instruments that differ in some respects.[27] These crimes are defined

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nama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, SaoTome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Suriname, Swaziland, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, United Republic of Tanzania, Togo, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, Uruguay, Uzbekistan, Vanuatu, Venezuela, Yemen, Yugoslavia (Federal Republic of), Zambia and Zimbabwe. East Timor, which is expected to become a member of the UN in 2002, has indicated that it intends to ratify Protocol II.

[26] States with such legislation – widely differing degrees of effectiveness – include: Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Barbados, Belarus, Belgium, Belize, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominica, Dominican Republic, East Timor, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Fiji, Finland, France, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guyana, Honduras, Hungary, India, Iran, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia (the former Yugoslav Republic of), Malawi, Malaysia, Malta, Mauritius, Mexico, Moldova, Monaco, Mongolia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Seychelles, Sierra Leone, Singapore, Slovak Republic, Slovenia, Solomon Islands, Spain, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tadjikistan, Tanzania (United Republic of), Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Kingdom, United States, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Yemen, Yugoslavia and Zimbabwe. Equatorial Guinea recognizes the principle of universal jurisdiction, but it is not clear if this has any practical effect. South Africa will include universal jurisdiction in its implementing legislation for the Rome Statute.

[27] *See, for example,* Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 5; Statute of the International Criminal Tribunal for Rwanda, Art. 2; Statute of the Special Court of Sierra Leone, Art. 2.

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in Article 7 of the Rome Statute to include the following acts, when committed as part of a widespread or systematic pattern of such acts, pursuant to a state or organizational policy: murder, extermination, enslavement, deportation or forced displacement of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape and other crimes of sexual violence, persecution, "disappearances", the crime of apartheid and other inhumane acts. As of the 31 December 2000 deadline for signature, 139 states had signed the Rome Statute and 76 states had ratified it as of 31 July 2002. In addition, two treaties expressly recognize universal jurisdiction over two specific crimes against humanity, one on the crime of *apartheid* and the other on torture.[28] It is now

[28] As of 31 July 2002, the following 101 states were parties to the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by U.N.G.A. Res. 3068 (XXVIII) of 30 November 1973, 28 U.N. G.A.O.R. Supp. (No. 30) at 75, UN doc. A/9030 (1973): Afghanistan, Algeria, Antigua and Barbuda, Argentina, Armenia, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Benin, Bolivia, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Czech Republic, Democratic Republic of the Congo, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guyana, Haiti, Hungary, India, Iran (Islamic Republic of), Iraq, Jamaica, Jordan, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lesotho, Liberia, Libyan Arab Jamahiriya, Macedonia (The Former Yugoslav Republic of), Madagascar, Maldives, Mali, Mauritania, Mexico, Mongolia, Mozambique, Namibia, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Panama, Peru, Philippines, Poland, Qatar, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, Sao Tome and Principe, Senegal, Seychelles, Slovakia, Slovenia, Somalia, Sri Lanka, Sudan, Suriname, Syrian Arab Republic, Tanzania (United Republic of), Togo, Trinidad and Tobago, Tunisia, Uganda, Ukraine, United Arab Emirates, Venezuela, Viet Nam, Yemen, Yugoslavia (Federal Republic of), Zambia and Zimbabwe. As of this date, one state, Kenya, had signed, but not yet ratified the *Apartheid* Convention.

As of 31 July 2002, the following 130 states were parties the Convention against Torture: Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, the Federal Republic of Yugoslavia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Holy See, Honduras, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Macedonia (The former Yugoslav Republic of), Malawi, Mali, Malta, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, Uzbekistan, Venezuela, Yemen and Zambia. The following eight states had

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generally accepted that every state is permitted to exercise universal jurisdiction over crimes against humanity. It is also increasingly accepted that no state may harbour a person suspected of such crimes, but must exercise jurisdiction, extradite the person to a state able and willing to do so or surrender the suspect to an international court. As of 1 September 2001, almost 100 states were known to have legislation that would permit their courts to exercise universal jurisdiction over at least some conduct that could amount to crimes against humanity in time of peace.[29] The number of states is lower than for war crimes because many of the states with Geneva Conventions Acts do not have legislation providing for universal jurisdiction over other crimes under international law or over ordinary crimes that would include some conduct amounting to crimes against humanity. Prosecutors have opened investigations or commenced prosecutions in a dozen of these states since the Second World War based on universal jurisdiction over conduct amounting to crimes against humanity, or have arrested persons at the request of states seeking to exercise such jurisdiction, including: Austria, Belgium, Canada, Germany, Israel, Mexico, Netherlands, Paraguay, Senegal, Spain, the United Kingdom and the United States, although the effort in Senegal ultimately failed and the case in Mexico was still pending review in the Supreme Court on 31 July 2002.

Genocide. Genocide, as defined in Article II of the Genocide Convention and Article 6 of the Rome Statute, involves certain prohibited acts, such as killing members of a national, ethnical, racial or religious group, committed with intent to destroy, in whole or in part, that group, as such. It is now beyond doubt that every state, whether party to the Genocide Convention or not, is *permitted* to exercise universal jurisdiction over persons suspected of genocide. In addition, there is support for the view that states are also *re-*

Venezuela, Yemen and Zambia. The following eight states had signed, but not yet ratified, the Convention as of the above date: Comoros, Dominican Republic, Gambia, Guinea-Bissau, India, Nicaragua, Sao Tome and Principe and Sudan.

29 States with such legislation – widely differing degrees of effectiveness – include: Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominican Republic, East Timor, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Honduras, Hungary, Iran, Iraq, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia (the former Yugoslav Republic of), Malta, Mexico, Moldova, Monaco, Mongolia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tadjikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, United States, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam and Yugoslavia. South Africa will include universal jurisdiction over crimes against humanity in its implementing legislation for the Rome Statute.

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quired to exercise such jurisdiction over persons suspected of genocide found in territory under their control, to extradite the person to a state able and willing to do so or surrender the suspects to an international criminal court. As of 31 July 2002, 133 states had ratified the Genocide Convention.[30] Approximately 70 states have legislation that would permit their courts to exercise jurisdiction over at least some of the acts constituting genocide. A number of national courts have exercised universal jurisdiction over persons suspected of genocide or authorized their extradition to other states able and willing to do so, including: Germany, Israel, Mexico and Spain.[31]

Torture. Although torture is a war crime when committed during armed conflict and a crime against humanity when committed as part of a widespread or systematic pattern of crimes against humanity, it is also a crime under international law when committed in other circumstances. Articles 5 and 7 of the Convention against Torture require states parties to exercise

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30 As of 31 July 2002, 133 states had ratified the Genocide Convention (Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Federal Republic of Yugoslavia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Honduras, Hungary, Iceland, India, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Malaysia, Maldives, Mali, Mexico, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Macedonia (the former Yugoslav Republic of), Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Togo, Tonga, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United Republic of Tanzania, United States, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen and Zimbabwe) and three states had signed, but not yet acceded to it (Bolivia, Dominican Republic and Paraguay).

31 States with such legislation – widely differing degrees of effectiveness – include: Argentina, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Canada, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Denmark, East Timor, Ecuador, El Salvador, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Honduras, Hungary, Israel, Italy, Kazakhstan, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lithuania, Luxembourg, Macedonia (the former Yugoslav Republic of), Mexico, Monaco, Mongolia, Netherlands, New Zealand, Nicaragua, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Tadjikistan, Turkey, Turkmenistan, United States, Venezuela and Yugoslavia. Equatorial Guinea recognizes the principle of universal jurisdiction, but it is not clear if this has any practical effect. South Africa will include universal jurisdiction in its implementing legislation for the Rome Statute.

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universal jurisdiction over persons found in their territory who are suspected of torture or to extradite them to a state able and willing to do so.[32] "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 [concerning extradition] to any of the States mentioned in paragraph 1 of this article." As of 31 July 2002, 130 states had accepted these binding legal obligations.[33] Approximately 84 states have legislation that would permit their courts to exercise universal jurisdiction over individual cases of torture not amounting to war crimes or crimes against humanity.[34]

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[32] Article 5 of the Convention against Torture reads:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
> (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
> (b) When the alleged offender is a national of that State;
> (c) When the victim is a national of that State if that State considers it appropriate.
> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 12, para. 1 of the Inter-American Convention on Torture contains a similar jurisdictional provision:

> Every State Party shall take the necessary measures to establish its jurisdiction over the crime described in this Convention in the following cases:
> a. When torture has been committed within its jurisdiction;
> b. When the alleged criminal is a national of that State; or
> c. When the victim is a national of that State and it so deems appropriate.

Article 7 (1) of the Convention against Torture provides:

> 1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

[33] For the 130 states that were parties to the Convention against Torture and the eight states had signed, but not yet acceded to it, as of 31 July 2002, see note 28 above.

[34] States with such legislation – widely differing degrees of effectiveness – include: Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, East Timor, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Finland, France, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Iraq, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kyrgyzstan, Lebanon, Liechtenstein, Luxembourg, Macedonia (the former Yugoslav Republic of), Malta, Mexico, Monaco, Mongolia, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Sri Lanka, Sweden,

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Enforced disappearances and extrajudicial executions. "Disappearances" are crimes against humanity when committed as part of a widespread or systematic pattern of crimes against humanity pursuant to a state or organizational policy. However, it is beginning to be recognized that even when committed in other circumstances they are violations of international law. The UN General Assembly has declared that all states have a duty to bring to justice those responsible for "disappearances" no matter where they occurred. Article 14 of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance (UN Declaration against Disappearances) provides:

> Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be in their jurisdiction or under their control.[35]

The Inter-American Convention on Forced Disappearance of Persons recognizes that enforced disappearances were subject to universal jurisdiction.[36] Similarly, Article 6(1) of the draft International Convention on the Protection of All Persons from Forced Disappearance requires every state party to take the necessary measures to provide its courts with universal jurisdiction over enforced disappearances.[37] In addition, states, such as Colombia, El Salvador, Ethiopia, Guatemala, Paraguay, Peru and Venezuela, are starting to make such acts crimes under national law, in some cases, subject to universal jurisdiction.

Some extrajudicial executions could amount to the grave breach of wilful killing if committed during international armed conflict or serious violations of common Article 3 or Protocol II if committed in non-international armed conflict. Extrajudicial executions are crimes against humanity when committed as part of a widespread or systematic pattern of crimes against

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Switzerland, Syrian Arab Republic, Tadjikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, United States, Uruguay, Uzbekistan, Venezuela, and Yugoslavia.

35 UN Declaration on the Protection of All Persons from Enforced Disappearance, U.N.G.A. Res. 47/133, 18 December 1992, Art. 14.

36 As of 1 September 2001 eight of the 18 members of the OAS had ratified the Convention, without any reservations, and eight others had signed it.

37 Report of the sessional working group on the administration of justice, UN doc. E/CN.4/Sub. 2/1998/19, Annex: Draft international convention on the protection of all persons from forced disappearances, Art. 6 (1).

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humanity pursuant to a state or organizational policy. When extrajudicial executions are committed with the requisite intent, they can constitute the genocidal act of murder. However, it is beginning to be recognized that even when committed in other circumstances they are violations of international law. For example, Principle 18 of the 1989 UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides:

> Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.[38]

Further support for such an obligation is found in the resolution adopted by the Inter-American Commission on Human Rights on 20 October 2000 recommending to the Member States of the OAS that they "refrain from granting asylum to any person alleged to be the material or intellectual author of international crimes", including summary executions.[39] The UN Commission on Human Rights has reiterated "the obligation of all Governments to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, to grant adequate compensation to the victims or their families and to adopt all necessary measures to prevent the recurrence of such executions", without limiting that obligation to bring to justice those responsible to those suspects in its jurisdiction who were alleged to have committed such executions in its territory.[40] Moreover, states, such as the United States and Guatemala, are starting to make such acts crimes under national law, in some cases, subject to universal jurisdiction.

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[38] UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the UN Economic and Social Council (ECOSOC) in its Resolution 1989/65 of 24 May 1989, Principle 18. The Principles were welcomed by the UN General Assembly in its Resolution 44/159 of 15 December 1989.

[39] Inter-American Commission on Human Rights, *Asylum and International Crimes*, 20 October 2000, obtainable from: http://www.cidh.oas.org/asylum.htm.

[40] UN Commission on Human Rights, Res. 2000/31 of 20 April 2000, para. 4.

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4. Setbacks and victories since the *Pinochet* case

There have been a number of successful prosecutions based on universal jurisdiction since 16 October 1998.[41] There have been several convictions in Germany for genocide in Bosnia and Herzegovina, continuing a series of cases that began in 1994 with the arrest of Duško Tadić, who was subsequently transferred to the International Criminal Tribunal for the Former Yugoslavia.[42] A Belgian court in June 2001 convicted four Rwandans arrested in Belgium (Vincent Ntezimana, Alphonse Higanirio, Sister Gertrude Mukangango and Sister Julienne Kizito) for war crimes committed in 1994 in non-international armed conflict in Rwanda and the convictions of the three who appealed were affirmed.[43] In the first case in the South, a Senegalese court on 3 February 2000 held that it had jurisdiction over the former President of Chad, Hissein Habré on charges of torture.[44] On 24 August 2000, a former Argentine naval officer, Miguel Angel Cavallo, whose extradition is being sought by Spain and France, was arrested in Mexico. On 12 January 2001, a Mexican court held that he could be extradited to face charges of genocide and "terrorism" in Spain, and on 2 February 2001, the Minister of Foreign Affairs said that he could also be extradited on charges of torture, despite expiration of the Mexican statute of limitations for this crime.[45]

Nevertheless, attempts to exercise universal jurisdiction since *Pinochet I* have run into a disturbing number of obstacles at the national and interna-

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41 Elements of this section and the following section have appeared in a somewhat different form in a short article in volume 14 of the Interights *Bulletin*.

42 These post-*Pinochet I* cases include: *Public Prosecutor v. Jorgić,* Judgment, Federal Supreme Court, 30 April 1999 [*Bundesgerichtshof, Urteil vom 30. April 1999* – 3 StR 215/98], *aff'd, Jorgić* case, Judgment, Constitutional Court, 12 December 2000 [*Bundesverfassungsgericht* (BVerfG), 2 BvR 1290/99 *vom* 12.12.2000, Absatz Nr. (1-49) (obtainable from <http://www.bverfg.de>)]; *Sokolović* case, Judgment, Federal Supreme Court, 21 February 2001 [*Bundesgerichtshof, Urteil vom 21. Februar 2001 – 3 StR 372/00*]; *Kjuradj Kusljić* case, Judgment, Federal Supreme Court, 21 February 2001 [BGH 3 StR 244/00 – Beschluss v. 21. Februar 2001].

43 *Cour d'assise de l'arrondissement administratif de Bruxelles-Capitale* (obtainable from <http://www.asf.be/AssisesRwanda2/fr/fr_VERDICT_verdict.htm>). For press reports covering each day of the trial and summarizing the judgment on appeal, see *La Libre, Le génocide rwandais aux assises* (obtainable from <http://www.lalibre.be>).

44 Procès-verbale d'interrogatoire de première comparution, Tribunal Régional Hors Classe de Dakar, Cour d'appel de Dakar, Cabinet de M. Demba Kandji, Juge d'instruction, No. du Parquet: 482, No. de l'instruction: 13 2000 (obtainable from: <http://www.hrw.org/french/themes/habre-inculpation.html>).

45 *Expediente de extradición 5/2000 Juez Sexto de distrito de Procesos Penales en el Distrito Federal, 11 enero 2001.* The press statement by the Minister of Foreign Affairs is obtainable from <http://www.sre.gob.mx/communicados/prensa/dgcs/2001/feb/B-021.htm> (see below for later developments).

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tional level. The first of a series of setbacks occurred in the House of Lords when, after the first decision was vacated, the Appellate Committee in *Pinochet III* upheld the exercise of universal jurisdiction, but on much narrower, statutory grounds, rather than on the basis of international law, as in *Pinochet I*, and over a seriously reduced number of crimes.[46] The following examples illustrate the range of problems encountered.

Following intervention by the United States Department of State, a former Peruvian army officer, Tomás Ricardo Anderson Kohatsu, was permitted to leave the United States on 10 March 2000 after he had been detained by the Federal Bureau of Investigation for questioning in a Texas airport concerning allegations of torture.[47] On 4 July 2000, five months after the decision mentioned above by the Senegalese court in the *Habré* case to indict the former President of Chad for crimes in that country, an appellate court held that Senegalese law did not implement the universal jurisdiction provisions of the Convention against Torture.[48] On 13 December 2000, the *Audencia Nacional* in Spain, while accepting that national courts could exercise universal jurisdiction over former Presidents of Guatemala, Efrain Rios Montt, Fernando Romeo Lucas Garcia and Oscar Humberto Mejia Vitores, and other former high officials on charges of genocide, determined that since there were no legal obstacles to prosecuting the accused in Guatemala and since the victims had not demonstrated that such proceedings could not take place in that country, Spanish courts should not exercise such jurisdiction. It left open the possibility that they could exercise such jurisdiction in the future if the victims could demonstrate that it would not be possible to obtain justice in Guatemala, but it did not consider the serious implications for victims if they had to meet this burden.[49] In the *Cavallo* case, cited previously, a court in March 2002 overturned the decision by the Mexican Minister of

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46 R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3), [1999] 2 All ER 97.

47 See Sean D. Murphy (ed.), "Immunity Provided Peruvian Charged with Torture, Contemporary Practice of the United States Relating to International Law", 94 *Am. J. Int'l L.* 535, 536 (2000). See also Karen DeYoung & Lorraine Adams, "U.S. Frees Accused Torturer", *Washington Post*, 11 March 2000; "State Dept. Helped Peruvian Accused of Torture Avoid Arrest", *New York Times*, 11 March 2000.

48 Habré, Arrêt n° 135 du 04-07-2000, la Chambre d'accusation; Arrêt, n° 14 du 20-3-2001 Pénal, La Cour de cassation, Première chambre statuant en matière pénale (both decisions are obtainable from <http://www.hrw.org/french/themes>).

49 Decision of the National Court, Criminal Chamber, Plenary Session, Appeal Record No. 115/2000, Preliminary Proceedings 331/99, Central Court of Instruction No. 1, Madrid, 13 December 2000 (obtainable from <http://www.pangea.org/impunitat/> or <http://www.derechos.org/nizkor/guatemala/doc/espana.html>).

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Foreign Affairs to permit extradition on the charges of torture.[50] An appeal to the Supreme Court was pending on 31 July 2002.

In September 2001, the Netherlands Supreme Court in the *Bouterse* case reversed a decision by the Amsterdam Court of Appeal ordering the Prosecutor to open an investigation of the former Head of State of Surinam for torture in 1982 on the grounds that the alleged torture took place before the Netherlands had ratified the Convention against Torture and that Dutch law did not provide for universal jurisdiction over torture when it was alleged to have occurred.[51]

These setbacks at the national level in the exercise of universal jurisdiction were echoed at the international level on 14 February 2002, in the Judgment of the International Court of Justice in the *Democratic Republic of the Congo v. Belgium* case. In that decision, the Court declared, without citing any evidence of state practice and *opinio juris*, that customary international law prevented an investigating judge in Belgium from issuing an arrest warrant for an acting foreign minister of another country for alleged war crimes and crimes against humanity committed abroad before the acting foreign minister, Abdulaye Yerodia Ndombasi, took office. It held that he had immunity for such crimes while in office, and it ordered Belgium to annul the arrest warrant it had issued.[52] The Court did not directly rule on the question whether the Belgian court could exercise universal jurisdiction by issuing an arrest warrant for a foreign suspect when the suspect was not present in the country because the Democratic Republic of the Congo withdrew its jurisdictional challenge after Belgium informed the Court that the applicant had provided for universal jurisdiction since 1960 over ordinary crimes in its Penal Code carrying a sentence of two month's imprisonment. Nevertheless, it is disturbing that a number of judges in separate opinions suggested that international law prohibited a state acting on behalf of the entire international community from seeking the extradition based on universal jurisdiction of a person accused of war crimes and crimes against humanity. They reached this conclusion despite state practice suggesting that only a handful of the approximately 125 states with universal jurisdiction legislation expressly prevent the opening of a criminal investigation or the request for ex-

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50 Jesus Aranda and Carolina Gomez, "Caso Cavallo: Ordena a la SRE que emita nuevo acuerdo sobre la extradición", *La Jornada*, 27 March 2002.

51 Associated Press Newswires, Supreme Court dismisses case against Suriname dictator for crimes against humanity, 9 September 2001.

52 Democratic Republic of the Congo v. Belgium, Judgment, ICJ, 14 February 2002. The flaws in the legal reasoning of the judgment are detailed in Amnesty International, Universal Jurisdiction: Belgian court has jurisdiction in Sharon case to investigate 1982 Sabra and Shatila killings (AI Index: IOR 53/001/2002).

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tradition of a suspect when the suspect is outside the forum state.[53] These judges also disregarded the universal jurisdiction provisions of the four Geneva Conventions mentioned above that expressly authorize states parties to seek the extradition of persons suspected of grave breaches without any requirement that the suspects had ever been in territory subject to their jurisdiction. It is also a matter of concern that three judges suggested that international law imposed certain conditions on the exercise of such universal jurisdiction that could seriously limit its effectiveness.[54]

It would have been reasonable to expect that the Belgian court considering the criminal charges against Abdulaye Yerodia Ndombasi would simply have cancelled and reissued the warrant since he was no longer foreign minister. However, to considerable surprise, two months later, on 16 April 2002, a chamber of the Brussels Court of Appeal decided in the *Yerodia* case, despite evidence to the contrary, that the Parliament had intended that national courts could not even open a criminal investigation based on universal jurisdiction if the suspect was outside the country.[55]

Equally surprising and disappointing was that another chamber of the same Belgian court reached an identical conclusion about an investigation of the alleged role of Ariel Sharon in the 1982 killings of at least 900 Palestinian men, women and children in the Sabra and Chatila refugee camps on the outskirts of Beirut, Lebanon.[56] The complaint alleged that Ariel Sharon, then Israeli Minister of Defence and currently Prime Minister, and Amos Yaron, then Brigadier General commanding Israeli armed forces (as well as other – unnamed – Israeli military officials and members of the Phalange, that is, Lebanese Christian militia) were responsible for war crimes, crimes against humanity and genocide.

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53 Separate opinions of Guillaume, Ranjeva, Rezek and the Democratic Republic of the Congo *ad hoc* Judge, Bula-Bula.

54 Separate opinion of Higgins, Kooijmans and Buergenthal. They claimed – without citing any evidence – that a state seeking to exercise universal jurisdiction "must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned", para. 59. This alleged requirement ignores the very reason for universal jurisdiction – the widespread failure of states of the nationality of the accused or of the place where the crimes occurred to conduct prompt, thorough, independent and impartial investigations or trials, with protection for victims and witnesses, and would encourage impunity by requiring the forum state to extradite the accused even if the requesting state intended to conduct sham proceedings.

55 Cour d'appel de Bruxelles, Communiqué de Press, Affaire Yerodia et Texte informatif sur le contenu de l'arrêt Yerodia du 16 avril 2002; Kabila et consorts, Arrêt de la Cour d'appel de Bruxelles, Chambre des mises en accusation, 16 avril 2002 (obtainable from <guy.delvoie@just_fgov.be>).

56 Sharon, Arrêt de la Cour d'appel de Bruxelles, Chambre des mises en accusation, 26 avril 2002 (obtainable from <ijp@amnesty.org>) see also Gareth Smyth, "Belgian court drops Sharon human rights case", *Financial Times*, 26 June 2002; Robert Fisk, "Court rules Sharon cannot be indicted for slaughter", *The Independent*, 27 June 2002.

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The results in these cases were all the more unexpected since criminal complaints had been lodged over the preceding decade with Belgian courts against a number of leaders and prominent members of past and present administrations of some 20 foreign states, without the slightest suggestion by members of the parliament that there was a presence requirement in order to open an investigation. This decision met with widespread criticism in Belgium and abroad and a bill was introduced in Parliament on 18 July 2002 to overturn these decisions, both of which were still on appeal as of 31 July 2002.[57]

Attempts in other countries since the International Court of Justice decision have also met with reverses. On 22 April 2002, the United Kingdom Home Office refused to implement requests by French and Spanish judges to question former United States Secretary of State, Henry Kissinger, as a witness concerning crimes committed in Chile.[58] Two days later, an English magistrate refused a request to order the arrest of that former official in connection with allegations he was responsible for grave breaches of the Geneva Conventions of 1949 in the bombing of Cambodia in the 1970s, on the ground that the Director of Public Prosecutions had decided not to institute proceedings for a prosecution; the magistrate also noted that the application had failed to present sufficient evidence to frame a charge.[59] The reluctance to act in these two instances is consistent with reluctance of United Kingdom authorities in other cases, including the abandonment of a prosecution in a Scottish court of a Sudanese doctor for torture on the eve of trial, the failure to open a criminal investigation of a former military officer for crimes in Rwanda in 1994 (subsequently transferred to the Rwanda Tribunal) and the repeated refusal of the Attorney General to open a criminal investigation of the former President of Chile during his involuntary stay in the United Kingdom from 1999 to 2000.

5. Overcoming the obstacles to universal jurisdiction

There are a number of reasons, examined in greater detail in the Amnesty International memorandum, why universal jurisdiction has been so little used in the past few years and why it has been successfully invoked in some cases, but not others.

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57 Proposition de loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, introduced on 19 July 2002 (obtainable from <http://www.senate.be>).

58 La Respuesta del Home Office a la Comision Rogatoria en Relacion con Henry Kissinger Tramitada por el Juez Garzon, 22 April 2002 (obtainable from <http://www.derechos.org/nizkor>).

59 Application concerning Henry Kissinger, Judgment, Bow Street Magistrates Court, London, 24 April 2002 (Nicholas Evans, J.) (obtainable from <http://www.petertatchell.net>).

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Lack of legislation or adequate legislation. Probably the most important reason why there have been such a limited number of investigations and prosecutions based on universal jurisdiction is that only two-thirds of all states are known to have universal jurisdiction legislation over conduct that could amount to war crimes, crimes against humanity, genocide or torture and most of that legislation is flawed in certain respects. For example, the legislation may have the following defects: omission of certain crimes under international law, definitions that are inconsistent with international law, incorporation of national rather than international principles of criminal responsibility, inclusion of defences such as superior orders that are not consistent with customary international law, provision for statutes of limitation, acceptance of official immunities and recognition of foreign amnesties or similar measures of impunity.

Reluctance of prosecutors and investigating judges. Most prosecutors and investigating judges in the approximately 125 states that permit them to exercise universal jurisdiction over certain crimes appear to be unaware of these provisions. Even when made aware of these provisions, they often interpret them in the light of outmoded concepts of state sovereignty, suggest there is little to be gained in expending limited resources to investigate crimes abroad, and exaggerate the practical and legal obstacles.[60]

Lack of political will by political officials or obstruction by political officials. In some countries, political officials decide whether to prosecute universal jurisdiction cases and in most, they decide whether to extradite. In the United Kingdom, the Attorney General, a member of the Cabinet, refused several times to permit a criminal investigation of the former President of Chile despite five extensive submissions of carefully documented allegations by victims, and the Home Secretary refused to extradite him. In France, government officials reportedly colluded to help Khaled Nezzar, the former Algerian defence minister and a member of the High Committee of State, to leave the country a few hours after a prosecutor opened a preliminary investigation on 25 April 2001.

Inadequate safeguards to prevent flight. One of the best-known examples is the flight of Ely Ould Dah, a Mauritanian army lieutenant participating in a training course in France with the French army, who fled the country on 5 April 2000 after being released on conditional liberty during a criminal investigation in France of alleged torture. Another notorious example was the failure to detain or ensure the presence in Austria of Izzat Ibrahim al-

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[60] The most recent example is the decision of a Norwegian prosecutor not to open a criminal investigation of killings by Israeli forces in the Occupied Territories. AFP, *Norwegian prosecutor rejects human rights case against Sharon,* 24 July 2002. *See also* <http://www.dagbladet.no/nyheter/2002/07/24/344111.html> for an explanation by the Director General for Public Prosecutions of this decision.

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Duri, the Deputy Commander-in-Chief of the Armed Forces of Iraq and Vice-Chairman of the Revolutionary Command Council, after the Vienna prosecutor had opened a criminal investigation of allegations of torture. Most recently, a Tunisian vice-consul in Strasbourg, Khaled Ben Said, fled France after an investigating judge on 16 January 2002 opened an investigation of alleged torture.

Refusal of courts in the state where the crime occurred to extradite or try. For example, Argentina has refused extradition requests by France, Italy, Spain and Sweden, Brazil has refused requests by Paraguay, Japan has refused requests by Peru, and the United Kingdom has refused requests by Belgium, France, Spain and Switzerland. All of these countries have also declined to investigate or try the suspects, in violation of their legal obligations under the Convention against Torture.

Practical and legal problems in obtaining evidence. Problems include absence of special investigation or prosecution units to deal with universal jurisdiction cases, the absence of or inadequacy of mutual legal assistance treaties and agreements, difficulties in conducting foreign on-site investigations, lack of cooperation by some foreign authorities, problems in ensuring presence and security of witnesses, difficulties in obtaining documentary and physical evidence.

Choice of targets who arguably had immunity. Although, as stated above, under customary international law government officials do not have immunity from prosecution, courts or executive officials have blocked prosecutions of such officials in universal jurisdiction cases in the Democratic Republic of the Congo, Denmark and Spain.

Each of these obstacles can be overcome. Effective legislation can be enacted and inadequate legislation amended. Prosecutors and investigating judges are slowly beginning to see war crimes, crimes against humanity, genocide and torture as crimes, rather than political events, to be investigated and prosecuted, just like murder, abduction, assault and rape. Governments are being shamed when they interfere with the independence of the judiciary. Practical problems in obtaining evidence have been overcome in each of the prosecutions so far and the solutions that governments are developing to improve cooperation in the repression of "terrorist" offences can serve in some cases as a useful model for crimes under international law. Non-governmental organizations are starting to choose cases more strategically and to work together more efficiently as part of the effort envisaged by Asbjørn Eide "to make the rule of law more effective for the international framework ... to contain the pretensions of the powerful – whether they be states or multinational corporations – and to bolster the rights of the weak".[61]

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[61] Eide, *The Historical Significance of the Universal Declaration*, *supra*, note 1.

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Perhaps the most promising recent development is that effective universal jurisdiction provisions are being incorporated into legislation implementing the Rome Statute of the International Criminal Court. Argentina, Australia, Canada, Germany, New Zealand, South Africa and Switzerland are among the states parties that have included universal jurisdiction in implementing legislation or draft implementing legislation for all crimes under the Rome Statute.[62] International conferences repeatedly call for implementing legislation to provide for universal jurisdiction over crimes under international law. Nevertheless, as the above account suggests, those who hope to use universal jurisdiction as an effective tool of international justice to end impunity for the worst possible crimes in the world when states where they occur are unable or unwilling to do so and when the International Criminal Court is not a realistic alternative because of its limited resources and jurisdiction, have major challenges ahead.

[62] The texts of such legislation and draft legislation are obtainable by links from: <http://www.amnesty.org> and <http://www.iccnow.org>.

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VI

The first ever international trial on genocide: notes on *Akayesu*

Frederik Harhoff*

The two judgements by the Trial Chamber (1998) and the Appeals Chamber (2001) of the International Criminal Tribunal for Rwanda (hereinafter the ICTR) in the case against *Jean-Paul Akayesu* raised a number of captivating issues that certainly call for further elaboration. The present article does not, however, intend to bring yet another general comment on the judgements or to offer one more analysis of all the criminal legal elements of the crimes falling within the jurisdiction of the ICTR; these are amply treated elsewhere.[1] The aim here is rather to focus on the judgements' most significant innovations of international humanitarian law, the *ratio decidendi* of this case, for which it will be remembered in the future. The present article, thus, will seek to answer the following question: *What did the Akayesu judgements bring or clarify which was not already evident?*

We shall first have a look at the Trial Chamber's legal findings on each of the three crimes in the ICTR Statute: *genocide*, *crimes against humanity* and *serious violations of common Article 3 of the Geneva Conventions* as well as *Additional Protocol II to the Geneva Conventions*. As the Appeals Chamber's judgement in the case added some further adjustments to the Trial Chamber's decision, these will be reviewed next. To provide the necessary background for discussion of these legal issues, however, we shall begin by taking a look at the facts of the case.

1. Brief summary of the case

Jean-Paul Akayesu was born in 1953 in a small commune called Taba in Gitarama prefecture just West of Kigali in Rwanda where he grew up and married. He served first as a teacher and subsequently as inspector of the local primary schools, and then from April 1993 as *bourgmestre* (mayor) of

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1 See, *e.g.*, Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers (1994) and *The International Criminal Tribunal for Rwanda*, Transnational Publishers (1997); and most recently William A. Schabas, *Genocide in International Law*; Cambridge University Press (2000).

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Taba commune. His election as *bourgmestre* followed his political activities in the commune after the introduction of a multiparty system in Rwanda in early 1991. In July of that year, Akayesu was one of the co-founders of a new political party, the MDR (*Mouvement Démocratique Républicain*) which, although still related to Hutu-Government policies, sought to challenge the MDR-Parmehutu party and the former State-party MRND (*Mouvement Révolutionaire National pour le Développement*) on domestic issues such as delays in providing public health, transportation, schools, etc. He was considered a man of high integrity and intelligence and enjoyed widespread trust and respect throughout Taba commune, notably due to his good leadership and his fight against corruption and incompetence by the previous administration. As most other *bourgmestres* in the country he played a leading role in his community and held extensive *de jure* and *de facto* executive powers over its inhabitants and the communal police, subject to the authority of the prefect. According to his identity card, he was Hutu by ethnicity.

After the shootdown of Rwandan President Habyarimana's airplane on the night of 6 April 1994 and the ensuing mass killings of both Tutsi and moderate Hutu in Kigali, Akayesu tried at first to prevent the spread of violence into his commune and successfully ordered people to resist – even with force – the attempted incursions of the *Interahamwe* into Taba.[2] He arranged for care and accommodation in the communal buildings to the rapidly increasing number of displaced persons arriving from Kigali, and he intervened when they were shot at or intimidated by the *Interahamwe*.

At a meeting with the new Government, prefects and *bourgmestres* on 18 April 1996 in nearby Murambi, he raised a number of security concerns regarding the protection of refugees. To this end, he requested directly from the new Prime Minister assignment of three *gendarmes* to Taba to help him and his 10 policemen maintain order and security and stop the killing of Tutsi in his commune. The Prime Minister, however, did not respond to his demand but threatened Akayesu and other *bourgmestres* who had also complained about security with dismissal.

After this meeting, Akayesu's conduct changed and he began to cooperate with the *Interahamwe* in chasing down Tutsi within his commune. According to his own testimony, he was coerced under the threat of death to collaborate with the *Interahamwe* and to provide logistical support to the FAR (*Forces Armées Rwandaises*, the Government Hutu army) which had

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2 *Interahamwe* means "Those who work together" in the Kinyarwandan language. The *Interahamwe* was the youth wing of the MRND-party; an organisation of mostly young Hutu men and boys trained briefly in a militia-like manner to serve as perpetrators of the search and killing of Tutsi and the destruction of their property. They mostly raided in gangs armed with clubs and machetes, often wearing palm leave skirts, red armbands and blowing whistles to scare their victims during search.

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also arrived in Taba. Indeed, he now turned away people who had come to him for rescue and witnessed, supervised and even ordered himself the arrest, beating and subsequent killing of Tutsi. He failed to intervene when Tutsi women – with his knowledge – were beaten, humiliated and raped in one of the communal buildings and he took no initiative to arrest any of the perpetrators of crimes committed against Tutsi in his commune. In a few instances after 18 April, however, the accused still managed to issue *laissez-passer* documents to certain Tutsi enabling them to pass road-blocks and escape, and he himself was never known to have killed anyone by his own hand. It was estimated that approximately 2000 Tutsi were killed in Taba commune during the period in which Akayesu served as *bourgmestre*.

It is important to recall that the conflict in Rwanda took two different but closely interrelated shapes. One aspect of the conflict was the regular internal *armed conflict* between the RPF (*Rwandan Patriotic Front*, the Tutsi army) and the FAR fighting for control of the country; in this conflict, "war crimes" and crimes against humanity were reportedly committed on both sides.[3] The other aspect of the conflict materialized as *violent attacks* carried out by Hutu civilians or militias against (mostly) Tutsi civilians and *destruction of Tutsi property* with the purpose of destroying the Tutsi group; this conflict included genocide and crimes against humanity. FAR soldiers *did* take part in the assaults on Tutsi – also in Taba – but generally speaking, the FAR combatants in the conflict were mainly engaged in the war efforts. The conflict ended in August 1994 when the RPF finally seized control over the country.

Some time in June 1994, Akayesu fled the commune and finally settled in Zambia where he was arrested on 10 October 1995 by the Zambian authorities at the Rwandan Government's request. On 22 November 1995, the Prosecutor of the ICTR requested the continued detention of Akayesu in Zambia as a provisional measure under Rule 40 of the ICTR Rules of Procedure and Evidence, awaiting completion of the Tribunal's ongoing investigation. The indictment against Jean-Paul Akayesu – charging him with genocide (including complicity in and incitement to genocide), crimes against humanity and serious violations of common Article 3 of the Geneva Conventions (but not violations of Additional Protocol II) – was confirmed by the ICTR on 16 February 1996 along with a warrant for his arrest and an order for surrender. He was finally transferred to the ICTR Headquarters in Arusha, Tanzania, on 26 May 1996 and had his initial appearance before Trial Chamber I on 30 May 1996 in the presence of his counsel, pleading *not guilty* to all 12 counts against him in the original indictment. By this time,

[3] "War crimes" here being understood as serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II to the Geneva Conventions – applicable to internal armed conflicts.

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Akayesu had been detained under the Tribunal's authority for more than six months.

As the accused had been found to be indigent, a defence counsel (from Belgium) was assigned to him at the Tribunal's expense and – as it were – of his own choosing. The opening date of the trial was then set for 31 October 1996. By October 1996, however, the accused wanted to change his counsel (for loss of confidence) and filed a motion to this effect, which was granted by the Trial Chamber on 31 October 1996. The new defence counsel (from the USA) – chosen again by the accused – needed more time to study the files and the trial was therefore postponed until 9 January 1997. After less than a month, however, the accused wanted again to change his counsel. His request was granted, but this time the Registrar chose two counsels (from Cameroon and Centrafrique) and all further motions for change of counsel were hence dismissed.

The trial of the Accused on the merits was opened on 9 January 1997 with the opening statements of the Prosecution and the Defence, respectively. Then followed the testimonies of 22 Prosecution witnesses, including 5 expert witnesses, which took place over 26 trial days until 24 May 1997.

In their testimonies, several witnesses had reported incidents of rape committed in May and June 1994 by Hutu militia in the communal buildings in Taba, allegedly with the accused's knowledge. For this reason, the Prosecutor sought leave to amend the indictment in order to include three additional counts of rape, inhumane acts and outrages on personal dignity, charged as crimes against humanity and serious violations of Article 3 common to the Geneva Conventions *and* of Additional Protocol II to these Conventions. The Prosecutor's request was granted on 17 June 1997 and the trial was then resumed on 23 October 1997 with the initial appearance of the accused for the three new counts, to which he also pleaded *not guilty*. The Prosecutor then advanced 6 new witnesses in 5 trial days to substantiate these counts.

The Defence presented its case from 4 November 1997 to 13 March 1998, during which time it called 13 witnesses over 12 trial days, including the accused and the former UN Force Commander of UNAMIR, whose immunity against testifying as a witness was partially lifted by the UN Secretary General. In addition, the Defence wanted to call two persons also accused by the Prosecutor to appear as *ordinary* witnesses and yet a third accused person to appear as an *expert* witness before the Tribunal. For all these three Defence witnesses, the Chamber found that their fundamental rights as accused under Article 20(4)(g) of the Statute might be violated by having to testify under a solemn declaration and that their security could be at risk after their testimony; for the expert witness, furthermore, the Chamber pointed out that the impartiality of the testimony by a person accused of crimes re-

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lated to those for which Akayesu also stood accused could not be assured and that this witness, consequently, did not meet the criteria for being called as an expert witness. For these reasons, the Chamber dismissed the Defence counsels' motions for all three witnesses. The Chamber also dismissed a Defence motion for a site visit in Taba and a forensic analysis of the remains of certain alleged victims, arguing that neither a visit nor an analysis would be instrumental to the discovery of the truth.

The parties presented their closing arguments over three days between 19 and 26 March 1998, at which point the trial was adjourned for deliberation. By this time, the trial on the merits had gone on for 46 trial days, during which a total of 41 witnesses and the accused had testified and 155 exhibits had been submitted.

The verdict was rendered on 2 September 1998, by which the accused was found guilty as charged in 9 out of 15 counts (acquitted in one count of complicity in genocide and in all 5 counts of serious violations of Common Article 3 and Additional Protocol II) and subsequently on 2 October 1998 sentenced to life imprisonment. At that point, the trial had lasted almost 1 year and 9 months (since 9 January 1997) while the accused had been detained at the Tribunal's order for more than 3 years and 11 months (since 22 November 1995).

On 1 and 2 October 1998, Akayesu appealed the verdict to the Appeals Chamber in The Hague on a number of grounds, including that he had been deprived of his right to be defended by a competent counsel of his own choice, that the Tribunal was biased and lacked independence and that the Trial Chamber had erred in its findings on law and fact. On 2 November 1998, he then appealed the sentencing judgement on the ground that it was unreasonable and unwarranted. During the appeal, Akayesu was defended by new counsels of his own choice.

The Prosecutor, too, filed an appeal on 2 October 1998 against some of the findings in the Trial Chamber's judgement, seeking to correct some legal errors in the verdict.

The Appeals Chamber rendered its judgement in Arusha on 1 June 2001, by which it dismissed all of the accused's grounds of appeal but partly upheld the Prosecution's grounds on three important points, to which we shall return. The Trial Chamber's verdict of guilty on the counts on which he was convicted and the sentence, however, were affirmed by the Appeals Chamber. Akayesu was finally transferred to Mali on 9 December 2001 to serve his term of life imprisonment.

Thus ended the first ever international trial on genocide. A little more than 5½ years had gone by since Akayesu was first detained in Zambia at the Prosecutor's request in November 1995 until the Appeals Chamber rendered the final judgement in the case in June 2001.

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2. The significance of the Trial Chamber's judgement

Of course, the fact that the Trial Chamber's judgement was the first *international* judgement ever rendered on *genocide* proper is in itself an important asset of the judgement and provides an equally important contribution to the jurisprudence on genocide. Indeed, some of the judgement's most valuable legal innovations lie within the elements of the crime of genocide. These elements will be discussed below under part 2.1.

But the Chamber's findings on the law of *crimes against humanity* also brought valuable news, notably on the issues of genocide and rape. These will be illuminated under part 2.1 and 2.2 below. Finally, the Trial Chamber's interpretation of "command responsibility" under *common Article 3 of the Geneva Conventions* – a notion of the laws of war – triggered some surprise and partly formed the reason for the Prosecution's appeal. This will be dealt with under part 2.3.

2.1. The Trial Chamber's findings on genocide

The toughest challenge brought by the accused against the charges of genocide was the question of whether at all the Tutsi would come under the list of groups protected by the provision on genocide in Article 2 of the ICTR Statute, *i.e.*, *national, ethnic racial or religious* groups.[4]

The Tutsi, to be sure, are not a national group in Rwanda as they have no affiliation to any other country or nation. Nor are they an ethnic group as they speak the same language (Kinyarwanda) and share the same culture as the country's Hutu and Twa population. The Tutsi, furthermore, are not distinguishable by any hereditary physical traits which might justify their categorization as a racial group, and they adhere to the same religion and denomination as most others in the country – thus neither a religious group. To qualify the Tutsi as any such group, consequently, did not seem a ready option.

Every Rwandan citizen, on the other hand, was required to carry an identity card that included an entry for "*ethnicity*" as either "Hutu", "Tutsi" or "Twa". Article 57 of the Rwandan Civil Code of 1988 provided that every person was to be identified by "sex, *ethnic group*, name, residence and domicile". Likewise, Article 16 of the Rwandan Constitution of 10 June 1991 establishes that, "[a]ll citizens are equal before the law, without any distinction, notably, on grounds of race, colour, origin, *ethnicity*, clan, sex, opinion, religion or social position", *ethnicity* here commonly understood as

[4] The list of groups is taken *verbatim* from the Genocide Convention of 9 December 1948.

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referring to Hutu, Tutsi and Twa.[5] The identification of persons as being either Hutu or Tutsi or Twa and as such of belonging to a group, thus, had long since become embedded in the Rwandan culture. If anything, the Tutsi could perhaps be perceived as an "ethnic" group, but the distinctive qualification of *ethnicity* – the sharing of a particular language or culture – clearly did not exist in the case of the Tutsi.

The Trial Chamber, however, resorted to the *travaux préparatoires* of the Genocide Convention and found that the crime of genocide was originally perceived as targeting

> "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected be the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.[6]

By this reference to the preparatory works of the Genocide Convention, the Trial Chamber was able to circumvent the narrow delimitation of the protected groups in Article 2 of the Statute and thereby to establish that the Tutsi, although neither in the strict sense an ethnic group, nor a national or racial or religious group, is indeed a "stable" group covered by the protection against genocide.

In this context, the Trial Chamber also considered the question of how to establish the existence of a "group" within the meaning of the genocide provision.[7] Determination by any *objective* criterion would seem pointless for the simple reason that the criminal intent to destroy a particular group requires, by implication, a *subjective* perception – at least in the minds of the perpetrators – that the group exists as a social phenomenon. The question was raised, in particular, whether for there to be genocide it is also necessary that the members of the group *perceive* themselves as a group. Can a person be found guilty of conspiracy to genocide if he or she plans to exterminate, say, all people with red hair (who themselves are totally unaware of being members of any such red-haired "group")? Given that the target element in genocide is *the group's cohesiveness*, its ability to remain a source of self-identification in the minds of its members, this answer should clearly be an-

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5 See paras. 170-71 of the Trial Chamber's judgement.

6 See para. 511 of the Trial Chamber's judgement. Reference was made to the Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September to 10 December 1948; Official Records of the General Assembly, 1948.

7 See para. 171 of the Trial Chamber's judgement.

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swered in the affirmative. In the end, therefore, the Chamber decided to include *both* perceptions in the determination of a "group".

Genocide, consequently, requires (1) that the members of the group perceive themselves as belonging to a particular group, and (2) that they must also be identified and understood as such by the perpetrators. This finding was sustained in the subsequent jurisprudence of the Tribunal, notably in *Prosecutor v. Rutaganda*.

Turning then to the charge of *complicity in genocide*, the Trial Chamber made some interesting observations that deserve a short comment too. Complicity in genocide is listed in Article 2, para. 3, of the ICTR Statute as a separate crime along with *conspiracy* to commit genocide, direct and public *incitement* to commit genocide and *attempt* to commit genocide. Contrary to the three other crimes in this provision, however, complicity is *not* an inchoate offence that can be punished independently and irrespectively of whether the anticipated genocide was ever committed or not. An accomplice in genocide, in other words, is someone who assisted in the *actual commission* of genocide. The Trial Chamber briefly recalled that once the main crime has been established, the accomplice must act knowingly of the main crime but does not himself have to wish this crime to occur or to share the principal perpetrator's criminal intent and, further, that an accomplice to a crime cannot logically also be the principal perpetrator of that same crime; the two functions, of course, are mutually exclusive.[8] For this reason, Akayesu was acquitted for complicity in genocide in count 2 of the indictment.

But then the Trial Chamber went on to highlight a difference between *complicity* in genocide as laid down in Article 2, para. 3, and participation in the form of *aiding and abetting* in that same crime under Article 6, para. 1, of the Statute on individual criminal responsibility ("aiding or abetting in the planning, preparation or execution of a crime"). While aiding and abetting is roughly akin to complicity, generally speaking, the Chamber held that complicity in genocide in Article 2, para. 3(e), requires the commission of a *positive act*, whereas aiding and abetting under Article 6, para. 1, may entail individual criminal responsibility even for *passive* support such as the *failure to act* or the *deliberate abstention* from taking any action at all.[9] The cases adduced in support of this contention do not seem quite convincing and one might ask just why this distinction is indeed necessary. If, say, an influential citizen is a witness to acts of genocide but fails to intervene – assuming he or she could in fact have interrupted the commission of the crimes – it would seem difficult to explain just why that person cannot be held responsible as an accomplice to genocide under Article 2, para. 3(e). The Trial Chamber's distinction on this point seems to imply that a person who *passively assists*

8 See paras. 530-32 of the Trial Chamber's judgement.
9 See para. 548 of the Trial Chamber's judgement.

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("aids or abets") in the commission of genocide must and can only be held individually responsible *for genocide proper* under Article 2, para. 3(a) in conjunction with Article 6, para. 1, but not as an *accomplice in genocide* under Article 2, para. 3(e). I fail to see the logic in this.

The Appeals Chamber, however, did not pronounce itself any further on these issues. The Trial Chamber's interpretation, therefore, stands unchallenged.

2.2. The Trial Chamber's findings on rape

Another important and far-reaching international criminal legal innovation is the Chamber's definition of *rape* under crimes against humanity as covered by Article 3(g) of the ICTR Statute.[10] No commonly accepted definition existed of this crime in international law at the time, but rape had been defined in many national jurisdictions as *enforced non-consensual intercourse*, involving verifiable acts of penetration or insertion into the body of the victim of objects that may or may not be perceived as intrinsically sexual.

The Chamber could perhaps have adhered to this or any other similar definition of rape, but the Judges encountered a particular problem in this respect. During trial, specifically, it turned out to be extremely difficult to appreciate what the victims really meant when they claimed in their testimonies to have been "raped". This difficulty was rooted, above all, in the *cultural sensitivities* involved in having to account in public for intimate matters and in the inability of the witnesses to disclose and describe anatomical details of the sexual violence they had endured, let alone the ensuing *psychological traumas*. While the Chamber was convinced in the end that the victims in fact had been raped, only a few of them were able to describe in objective terms how they had suffered "non-consensual intercourse" or "penetration in the form of insertion of various objects in their sexual organs"; in this respect, *proper translation and interpretation of the testimonies* was in itself a very substantial difficulty.

Under these circumstances and because the Chamber felt that rape cannot, anyway, "be captured in a mechanical description of objects and body parts", the Chamber chose to define rape as: "*a physical invasion of a sexual nature, committed under circumstances which are coercive*". By so doing, the Chamber wanted to evade (but not necessarily disregard) the narrow confines of the objective element of "penetration" and to emphasize in stead, by use of the broader concept "invasion", the long-lasting psychological elements of fear, annihilation, abhorrence and guilt with the victim by being *forced* to relate sexually and intimately to the perpetrator. For many or most victims of rape, in any case, the latter elements are sensed as being far more

[10] See paras. 596-98 and paras. 687-88 of the Trial Chamber's judgement.

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intimidating and difficult to overcome than the physical penetration itself and the associated pain.

To clarify the distinction between *rape* and *sexual violence*, then, the Chamber went on to consider the latter as: "*any act of a sexual nature which is committed on a person under circumstances which are coercive*". In respect of the latter, the Chamber added that, "sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact".[11]

The significance of this new concept of "invasion" was immediately recognized in many camps and the term was subsequently tabled in New York in the Preparatory Commission of the International Criminal Court (ICC) in the course of drawing up the *Elements of Crimes* falling within the ICC's jurisdiction. Several delegations strongly advocated use of the term "invasion" in the definition of "rape" as a crime against humanity in Article 7(1)(g) of the ICC Statute but in the end, the majority of delegations felt most comfortable by holding on to the traditional concept of "penetration" – mainly because this concept refers to objective elements that are easier to verify and prove in a criminal court. At last, however, a compromise was struck between the opposing views and the *Elements* to rape as a crime against humanity in Article 7(1)(g) of the ICC Statute now read:

> 1. The perpetrator *invaded* the body of a person by conduct resulting in penetration, however slight, or any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
>
> 2. The *invasion* was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
>
> 3. ... (italics added).

It remains to be seen how this new concept will be applied in practice by the ICC; the reference to "penetration – however slight" has kept the "invasion" closely linked to a demonstrable and verifiable act, yet the introduction of the new term "invasion" certainly calls for a renewed and much needed appreciation of the traumatic psychological impacts on the victims as pointed out by the Chamber in *Akayesu*.

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[11] See para. 688 of the Trial Chamber's judgement. As an example, the Chamber referred to the incident described by a witness in which the accused ordered the *Interahamwe* to undress a student and force her to do gymnastics naked in a public courtyard in front of a crowd. This, in the Chamber's view, constituted *sexual violence* even though the victim was never physically touched and no physical force was shown.

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Here too, the Appeals Chamber left the Trial Chamber's findings untouched.

2.3. Trial Chamber findings on serious violations of common Article 3

2.3.1. Criminalization of violations of common Article 3

The first problem that the Chamber faced in dealing with serious violations of common Article 3 and Additional Protocol II was that neither of these instruments includes any direct provision on individual criminal responsibility for the perpetrator. Both instruments, to be sure, contain fundamental guarantees for the protection of victims of internal armed conflicts, but neither establishes that violations of these guarantees entail individual criminal responsibility, as do the relevant provisions in the Geneva Conventions and Additional Protocol I for "grave breaches" committed during *international* armed conflicts.[12] How then can the Tribunal punish someone for violations thereof?

The short answer to this question is that such responsibility is embedded in Article 4 of the ICTR Statute by the UN Security Council. But what if the Council had erred in providing a legal basis for individual criminal responsibility to violations that were *not* deemed criminal under international law? To get around this problem, the Trial Chamber referred to the ICTY Appeals Chamber's decision of 2 October 1995 in *Tadić* on the Defence Motion for Interlocutory Appeal on Jurisdiction. In this decision, the Appeals Chamber asserted that

> customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.[13]

This was subsequently affirmed by the ICTY Trial Chamber in its judgement in *Tadić*. Not surprisingly, the ICTR Trial Chamber took the same line in *Akayesu*, both with respect to serious violations of common Article 3 and of Additional Protocol II.[14] It was clear, in the Chamber's view, that under customary international law, the authors of such egregious violations of these instruments must incur individual criminal responsibility for their deeds. The Appeals Chamber ultimately confirmed this position in its judgement in the present case by holding that

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12 See, for instance, Article 146 of the IVth Convention.

13 See para. 613 of the Trial Chamber's judgement.

14 *Ibid.*, para. 615.

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> the minimum protection provided for victims under Common Article 3 implies necessarily effective punishment for those who violate it.[15]

This contention, however logic, may still seem problematic in view of the scarcity of State practice (the objective element) and the lack of expressions of legal opinion (the subjective element) to support the existence of a *customary international legal norm* by which serious violations of common Article 3 and Additional Protocol II necessarily entail individual criminal responsibility – short of any international legal provision to this effect. It was perhaps for this reason that the Trial Chamber felt obliged to recall that Rwanda had ratified all of the four Geneva Conventions (in 1964) and both Additional Protocols (in 1984) and, furthermore, that all of the offences enumerated under Article 4 of the ICTR Statute indeed constituted crimes under Rwandan national law.[16]

2.3.2. Who can commit "war crimes"?

An even greater challenge faced the Chamber in deciding whether at all the accused could be held responsible for "*war crimes*" under Article 4 of the ICTR Statute during an internal armed conflict. No doubt remained that an *armed conflict* of a non-international character was going on in Rwanda at the time, and that both of the armed parties to this conflict, the FAR and RPF, did meet the criteria for being proper "armed forces" under common Article 3 as well as Additional Protocol II.[17] The *victims*, furthermore, were "persons not taking an active part in the hostilities".

As for the *perpetrators* of crimes prohibited under these instruments, however, they would in most cases be persons who, by virtue of their authority and because they belong to the "parties to the conflict", are engaged in the conduct of hostilities and fulfilment of the war efforts. Such persons, indeed, are normally military commanders, combatants and other members of the armed forces. But the accused held no such position; he was not a member of the armed forces and had no role to play in fulfilling the war efforts. The Defence therefore asserted that, as a civilian, *the law of armed conflict* did not apply to the accused.

As shown in the Nuremberg and Tokyo trials, however, *civilians* too may be held responsible for violations of the laws of war when they have a link or a connection with a party to the conflict; the Trial Chamber recalled in this connection the *Zyklon B Case* from Nuremberg and the trial against

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[15] See para. 443 of the Appeals Chamber's judgement.

[16] *Ibid.*, para. 617.

[17] By these criteria, they were under *responsible command*, they were able to exercise such control over a part of their territory as to enable them to *carry out sustained and concerted military operations*, and they were able to *implement Additional Protocol II.*

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the former Japanese Foreign Minister *Hirota*, both of which brought convictions of civilians for contributing to the war efforts and failing to prevent the commission of war crimes, respectively.

But then again, Akayesu *did not act* for the Government or the FAR in the direct execution of their military objectives, nor was he engaged in the conduct of hostilities, nor were the *Interahamwe* as "armed local militia" under his control. As pointed out above, the conflict in Rwanda had two shapes and the accused was only directly involved in the one that consisted of violent attacks against the Tutsi group. Therefore, the Trial Chamber called upon the Prosecutor to "prove that the Accused was either a member of the armed forces under the military command of the FAR or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts".[18]

As the *bourgmestre* of Taba, Akayesu did indeed hold extensive local powers and he did assist the FAR upon arrival by undertaking a number of tasks, including reconnaissance and mapping of the commune, setting up radio communications and allowing FAR soldiers to use the communal offices. He also controlled the local policemen who, under his authority, assisted in the search for Tutsi in the commune and maybe took some part in the atrocities. In the Chamber's view, however, this was not enough to prove that the accused actually supported the Government's war efforts against the RPF and that he acted in conjunction with the armed conflict as a member of the armed forces or as a public official/agent/person holding public authority relevant to the armed conflict. For these reasons, the Trial Chamber acquitted the accused on all five counts on violations of Article 4 of the ICTR Statute.

The Chamber's findings on this issue were indeed quite narrow and restrictive; if the Chamber had so wanted, it could have reached the opposite result, arguing that the two shapes of the conflict were perhaps not as distinct and separate as they might have appeared at first sight. FAR soldiers, for instance, were known to take part in the atrocities committed against Tutsi civilians and these, in turn, were frequently referred to as "RPF accomplices" – the notion being that Tutsi civilians were suspected of providing secret logistical assistance to the advancing RPF army. In the end, moreover, both conflicts could be perceived as having the same ultimate objective: namely to re-establish, once and for all, Hutu supremacy over the entire country.

Be that as it may, one can only speculate about the reasons why the Trial Chamber chose to apply a relatively high threshold for crimes to fall under Article 4 of the ICTR Statute. One such possible reason could be that

[18] See para. 640 of the Trial Chamber's judgement.

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the Chamber was careful not to expand the application of the law of armed conflicts too far beyond its military origin. Perpetrators of "war crimes" are, by implication, persons who somehow play a role in the planning, management or use of armed force during an armed conflict. It *is* therefore pertinent to distinguish between such persons (typically members of the armed forces and superior political leaders) on the one hand, and persons without any such authority (typically ordinary civilians) on the other. Frivolous confusion of these categories – perhaps only for reasons of mere prosecutorial convenience – might just entail unwarranted consequences.

The Chamber, most likely, wished to respect the limits within which the law of armed conflicts is to be properly applied. For, say, a (civilian) Cabinet member like *Hirota* in Japan, *Albert Speer* in Germany, *Milošević* in the former Yugoslavia, or *Jean Kambanda* in Rwanda, all holding superior national authority in Government policy matters, a sufficient nexus to the armed conflict could perhaps be established by virtue of the "command responsibility" implied in their superior leadership positions, thereby providing the basis for incurring individual criminal liability for the crimes committed on the battlefields. But even then, the Chamber noted, extension of the principle of command responsibility to civilians *remained contentious*. This approach, in any case, was in line with Judge Röling's dissenting opinion in the *Hirota* case, to which the Trial Chamber specifically referred.[19]

But for someone like Akayesu, on the other hand, who only held local powers in purely civil matters and hardly any means to prevent the killings, it would seem to be going too far to claim that he had the requisite nexus to the armed conflict. He was not, in other words, a public agent or Government representative in relation to the armed conflict and was thus outside the class of perpetrators of violations of common Article 3 and Additional Protocol II.

3. What the Appeals Chamber added

On this particular point, the Appeals Chamber had something to add. The Prosecutor had based her appeal against the Trial Chamber's findings on four grounds. The first of these related to the Chamber's application of the "*public agent or Government representative test*" in requiring that the accused must hold such powers as were necessary to enable him to support or fulfil the war efforts. In the Prosecutor's view, first, there was no legal basis in the Statute to apply such a test and secondly, any test of this kind would run contrary to the overall protective and humanitarian purpose of the Geneva Conventions and their Additional Protocols. Should the Appeals Chamber come to the conclusion that such a test was indeed called for, how-

[19] *Ibid.*, para. 490.

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ever, the Prosecutor would argue – as her second and alternate ground of appeal – that the accused did in fact hold such powers.

The Appeals Chamber agreed with the Prosecutor in that individual criminal responsibility for violations of Article 4 of the Statute is *not* restricted to any particular class of perpetrators. What is required in common Article 3 and Additional Protocol II, said the Appeals Chamber, is merely that a link or nexus be established between the *crimes committed* and the *armed conflict*. This, in turn, is an important observation because it implies that the perpetrator's official functions are immaterial to the subsuming of his or her acts under the category of war crimes. Hence, *all persons* who commit one of the crimes listed in Article 4 of the Statute *in conjunction with an armed conflict* may incur criminal responsibility.

To the extent in which the Trial Chamber's acquittal of the accused was based on the ground that he did not meet the (unwarranted) "public agent test", one would have thought that the Appeals Chamber's conclusion on this point might have entailed a review of the Trial Chamber's acquittal of the accused for the counts relating to Article 4 of the Statute. The Prosecutor, however, had not sought conviction of the accused for these counts and the Appeals Chamber therefore merely corrected the Trial Chamber's judgement on this point of law. Consequently, the Prosecutor's second ground of appeal became redundant and fell away.

The Appeals Chamber's next observation is perhaps less dazzling, but nevertheless important. In its judgement, the Trial Chamber had held that someone who commits a crime against humanity must himself have *a discriminatory intent* in that the crime in question must be committed on *national, political, ethnic, racial or religious* grounds.[20] In her third ground of appeal, the Prosecutor argued that the requirement of a discriminatory intent with the perpetrator is inconsistent with the Statute and international customary law. Only the widespread or systematic attack needs to be discriminatory, but not the intent of the perpetrator, held the Prosecutor.

Article 3 of the Statute, to be sure, criminalizes a number of acts ((a) murder, (b) extermination, (c) enslavement … and (h) persecutions on political, racial and religious grounds) committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds". On the face of the wording, it is indeed difficult to see whether it is the *perpetrator's* specific act or the *ongoing widespread/systematic attack* that has to be carried out on these discriminatory grounds. The Prosecutor holds the latter and argues that the specific crime listed under Article 3(h) would otherwise be redundant. What is required for conviction of crimes against humanity, in the Prosecutor's view, is merely that the act be committed by a perpetrator *who knew of the widespread or*

[20] *Ibid.*, para. 590.

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systematic attack against civilians on national, political, ethnic, racial or religious grounds, and knew that his or her act contributed to, or was part of, this attack. The perpetrator, on the other hand, does not have to commit his particular crime on any such ground; he or she is only required to know of the attack and to recognize that it is founded on one or more of the stipulated discriminatory grounds. The *mens rea* does not go any further.

The Appeals Chamber agreed with this submission, conceding that the Security Council's reasons for including the discriminatory element into the Statute was merely to link the Tribunal's jurisdiction as close as possible to the conflict in Rwanda.[21] That conflict was, beyond any doubt, characterized by the discriminatory feature of the attacks against the Tutsi and the Council just endeavoured to emphasize the framework within which the ICTR was to operate. The discriminatory requirement in the Statute is therefore but a *jurisdictional limitation* on this Tribunal and not a substantive element of the perpetrator's intent. In comparison, international customary law does not include any such discriminatory intent in the constituent elements of crimes against humanity; see for example Article 7 of the ICC Statute in which the definition of that main crime is void of any discriminatory requirement – save for the specific crime of persecution under crimes against humanity.

However, there may still be room for the argument that the Security Council's inclusion of the discriminatory element as an attempt to limit the Tribunal's jurisdiction does indeed have repercussions on the perpetrator's intent. It seems, notably, that the distinction to be made between *knowing of the discriminatory attack and accepting the consequence that one's action in fact contributes to this attack* on the one hand, and on the other *sharing the attackers' discriminatory intent and committing a crime to help fulfil the attackers' objective,* is very subtle. If the Prosecutor has to prove in Court that the perpetrator *knew of* the ongoing discriminatory attack and *realized* that his crime would enhance the operation, then it is probably uncontroversial to assume that the perpetrator himself did have a discriminatory motive to his own particular action – and indeed to require evidence thereof. Consider the following example: A person kills his neighbour for purely private reasons, but the neighbour happens to be a member of a political party against whose members there is an ongoing widespread attack, and the perpetrator knew of the discriminatory attack and of the fact that his victim was also a party member. Are we to find the perpetrator liable for crimes against humanity? *Yes* if we disregard his personal motives and merely give attention to the fact that he knew of the attack and realized that after his crime, there would be one less party member alive. *No* if we maintain that for a person to be held responsible for crimes against humanity, he must have in-

[21] See para. 465 of the Appeals Chamber's judgement.

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tended to contribute to the ongoing attack for the same reasons as those underlying the attack.

The disturbing feature in the example, obviously, stems from the fact that the Statute includes a discriminatory qualification of the widespread-systematic attack. Once such qualification is introduced in the elements of the crime, the risk arises that it will almost inevitably have an impact backwards, so to say, on the required *mens rea* and the perpetrator's intent. In the end, considerations on justice and fairness will determine the right course of action in these cases.

The last point on which the Appeals Chamber reviewed the Trial Chamber's judgement was in response to the Prosecutor's fourth ground of appeal regarding the question of whether or not *instigation* under Article 6, para. 1, must be "direct and public" in the same way as *incitement to genocide.* Again, the Appeals Chamber endorsed the Prosecutor's view, which in this respect entailed that instigation has a broader ambit than direct and public incitement. Instigation may but does not have to be direct and public. The issue hardly calls for any further analysis.

Judge Shahabuddeen appended a supporting declaration to the Appeals Chamber's finding that its consideration of the Prosecutor's three grounds of appeal – none of which sought to reverse the Trial Chamber's verdict on guilt and sentence – was fully justified and did not establish an unwarranted legislative or advisory function for the Appeals Chamber.

Judge Nieto-Navia submitted a dissenting opinion on the same point. In the Judge's view, the Prosecutor's grounds of appeal simply fall outside the scope of Article 24 of the ICTR Statute that deals with appeals, and the Appeals Chamber should therefore have dismissed the Prosecutor's appeal.

4. Conclusions on *Akayesu*

For posterity, the following conclusions are offered as the *ratio decidendi* of the Akayesu trial.

First, the trial established that the targeted groups of genocide may include other than the four groups specifically listed in the Genocide Convention of 1948 and subsequently in the Statutes of the two UN Tribunals and the International Criminal Court, namely *national, ethnic, racial or religious groups*. What the prohibition against genocide seeks to protect is the continued existence of *any stable human group*, membership of which is acquired by birth in a continuous and often irremediable manner, unchallengeable by its individual members. Recognition of the group *as such* in relation to genocide, furthermore, is required by the perpetrators as well as by the members of the group, to whom the group serves as a basis for self-identification.

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Secondly, the Trial Chamber suggested a completely new entry to the definition of *rape* as genocide, a crime against humanity and a war crime. In the Trial Chamber's submission, rape should no longer be defined as enforced non-consensual intercourse involving penetration or insertion of body-parts or objects into the victim's body, but rather as "*a physical invasion of a sexual nature committed under circumstances which are coercive*". The purpose of this new definition is to better grasp the psychological elements of fear, annihilation, abhorrence and guilt that the victim experiences by being forced to relate sexually to the perpetrator.

Thirdly, the trial confirmed the earlier conclusion of the ICTY Appeals Chamber that although Article 3 common to the Geneva Conventions and Additional Protocol II to these Conventions do not contain any legal basis for imposing criminal liability on individuals for certain breaches committed during internal armed conflict, such liability may nevertheless be derived from customary international law. The minimum protection provided for victims in these instruments implies necessarily effective punishment for those who violate it.

Fourthly, perpetrators of *grave breaches* of the four Geneva Conventions and of Additional Protocol I committed in international armed conflict, and of *serious violations* of Article 3 common to the Geneva Conventions and of Additional Protocol II to the Conventions committed during internal armed conflicts (in short "war crimes") can be committed by any person irrespective of his or her official functions. What is required for conviction of war crimes is merely that a link or nexus be established between the crimes committed and the armed conflict.

Fifthly, perpetrators of crimes against humanity during the conflict in Rwanda are not required to have committed their particular crimes with any *discriminatory* intent. For conviction under Article 3 of the ICTR Statute, it suffices that the perpetrator knew of the widespread or systematic attack against civilians on national, political, ethnic, racial or religious grounds, and knew that his or her act contributed to or formed part of that attack.

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VII

How do human rights humanize the law of war?

Theodor Meron*

1. Introduction

It is a pleasure to participate in this volume in honour of my friend Asbjørn Eide on the occasion of his 70th birthday. Asbjørn's contributions to human rights and humanitarian law have been enormous and all those who work in this area owe him a deep debt of gratitude.

In this essay, I will discuss the humanizing influence of human rights on the law of war. The law of war – by which I mean the rules and customs governing both how soldiers should conduct themselves in fighting other soldiers and how soldiers may treat non-combatants – has roots that are centuries old, though the first major multilateral treaties were not negotiated until the latter half of the 19th century. As I will explain a little more fully in a moment, this classic law of war, like a number of other areas of international law, was limited in several important respects. First, it was a set of rules governing relations among states, not individuals. This state-centric character of traditional law of war was reflected in the definition both of liability and of remedies. When a soldier violated the rules, the state for whom he fought was liable for the violation, and the offending state was usually liable not to the victims but to the victims' state. The remedies available to the injured state were largely methods of self-help: reprisals, demands for compensation through diplomatic channels, and, after the war, a demand for war reparations. Individuals seldom benefited from such arrangements. Second, the law of war rested on the principle of reciprocity – the notion that states are legally bound only *vis-à-vis* those other states that have themselves agreed to abide by the same rules or conventions. While the principle of reciprocity created an important incentive for compliance, it also dramatically limited the reach of the protections afforded by the law of war. If even one of the belligerents was not a party to the Hague Convention (1907) on the Laws and Customs of War on Land, the convention would not apply to any of the belligerents. Third, in the tension between military necessity and restraint in the interest of reducing human suffering that has always been the

* Judge, the International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber). This article draws on my article published in the *American Journal of International Law* entitled "The Humanization of Humanitarian Law". I appreciate the Journal's consent.

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hallmark of the law of war, the traditional law gave wide latitude to the achievement of military goals.

By the "humanization of the law of war" I mean the intellectual and political process that has transformed this body of international law since the Second World War and particularly in the last three decades. That process has given the law of war a more humane face (and indeed a correspondingly new name, "international humanitarian law"). It has moved the focus of the law of war increasingly from states to individuals. More and more, violations are defined in terms of the rights of individuals, and individuals are increasingly held responsible for their own derelictions. New institutions to enforce this individual responsibility, such as the international criminal tribunal on which I serve, have been established. Reciprocity has given way to the establishment of norms considered to be universally binding. And in the tug-of-war between military effectiveness and reduction of suffering, the balance has shifted toward greater protection of individual dignity and freedom.

This humanization of the law of war has many sources. But in the most basic sense, it reflects the ever-growing force since the Second World War of the movement for human rights. The atrocities of World War II gave birth to that movement – in the recognition of human rights as a fundamental principle in the U.N. Charter, in the insistence on individual criminal responsibility and the establishment of the concept of crimes against humanity in the judgment of the Nuremberg Tribunal, in the promulgation of the Universal Declaration of Human Rights in 1948. During the era of the Cold War, human rights instruments, and both governmental and non-governmental bodies designed to investigate and judge human rights violations proliferated. Many of the larger social changes that have fed the burgeoning human rights consciousness – notably the development of radio and television and the elaboration of their increasingly global networks – have helped move public opinion towards greater intolerance for human suffering in times of war as well as in times of peace. As a result, human rights norms – including guarantees of due process of law and the prohibitions of torture and cruel, inhuman or degrading treatment and punishment, arbitrary arrest and detention, and discrimination on grounds of race, sex, language, or religion – have infiltrated the law of war to a significant degree.

This is the humanization of the law of war I would like to discuss. In order to do so, I would like briefly to describe what I have called the classic law of war. Then I will offer four examples of the humanizing changes that I believe have re-shaped that law in recent decades. Finally, I will return to the question of causes and consequences.

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2. The classic law of war

By describing recent developments as the humanization of the law of war, I do not mean to suggest that the classic law of war was inhumane. On the contrary, efforts to impose legal restraints on the conduct of the murderous violence that is war have always been motivated to some degree by a desire to reduce human suffering. The law of war, for example, has long contained rules based on chivalry, religion, and humanity designed for the protection of non-combatants, and especially of women, children and old men, presumed incapable of bearing arms and committing acts of hostility. It has also long contained rules protecting combatants in matters such as giving quarter, not inflicting unnecessary suffering, and not using perfidious means of killing.[1] When Hugo Grotius penned his *De Iure Belli ac Pacis* in 1625, the work often considered the fount of the modern law of war, he was responding to the savagery of the wars of religion that had racked Europe for centuries and to the ruthless methods of the mercenary armies often employed in Europe at the time. He sought to establish some restraints on the particularly vicious methods of warfare he saw around him.

Calamitous events and atrocities have often driven the development of international humanitarian law. The more offensive or painful the suffering, the greater the pressure for adjustment of the law. This pattern is evident in the two mid-19th century events that laid the groundwork for the elaboration and embodiment in treaties of what I have called the classic law of war. The American Civil War, with its staggering levels of casualties, generated the Lieber Code (1863), a manual for the Union Army commissioned by President Lincoln and prepared by Francis Lieber, a German-American professor at Columbia University in New York. The Lieber Code helped inspire the branch of international humanitarian law commonly known as "the Hague Law", which governs the conduct of hostilities. That set of rules is called the Hague law because it was developed in a pair of international conventions drafted at the Hague – the first in 1899, the second in 1907. The suffering of the thousands of wounded soldiers at the Battle of Solferino during the Italian wars of unification, immortalized in Henri Dunant's *Memory of Solferino* (1862), inspired the creation of the Red Cross Movement and what has come to be known as "the Geneva Law", the other branch of humanitarian law. Starting with the first Geneva Convention of 1864 and developed further in conventions of 1906 and 1929, the Geneva law emphasizes the protection of victims of war – the sick, the wounded, prisoners and civilians. What we think of today as the Geneva Conventions were the four conventions prom-

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

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ulgated in 1949 that built on these earlier efforts, plus two protocols added in 1977.

3. The thresholds of applicability of humanitarian law

The thresholds of applicability of international humanitarian law and the qualification of conflicts are among the most difficult and controversial issues in international humanitarian law. The Geneva Conventions distinguish between international conflicts, and defined in common Article 2, and conflicts not of an international character under common Article 3. Conflicts involving lower intensity violence that do not reach the threshold of an armed conflict are implicitly distinguished from non-international armed conflicts to which the provisions of that Article are applicable. The Additional Protocols distinguish among international armed conflicts as defined in Article 1 of Protocol I, non-international armed conflicts[2] as defined in Article 1 of Protocol II, and "situations of internal disturbances and tensions", which are below the threshold of applicability of the Protocol II. Article 8(2)(f) of the Rome Statute of the International Criminal Court (ICC) has further complicated the problem by declaring that the provisions of Article 8(2)(e) apply to "armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups".

The characterization of the conflict, or the thresholds, determines which, if any, rules of international humanitarian law will be applicable. The first threshold, common Article 3, determines the applicability of international humanitarian law pertaining to non-international armed conflicts in that Article. Since common Article 3 does not provide for a definition of "conflicts not of an international character", it is easy for governments to contest the Articles applicability.[3] Even with a better definition of non-international armed conflicts, however, a government might contend that this Article is not applicable to its territory. Distinguishing between international and non-international conflicts is particularly difficult in contemporary conflict situations, which present aspects of both. These "mixed" or "internationalized" conflicts create special problems, as illustrated by the contradictory decisions initially rendered by the different chambers of the ICTY on the charac-

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

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

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terization of the conflicts in the former Yugoslavia. There is no agreed-upon mechanism available for characterizing situations of violence.

The threshold triggering the application of Additional Protocol II is very high. The Protocol applies to "situations at or near the level of a full-scale civil war"[4] or belligerency. But States involved rarely recognize such situations. In practice, therefore, Protocol II has seldom been formally applied. Even in international armed conflicts, the applicability of the Fourth Geneva Convention has been contested (the West Bank – by Israel; Kuwait – by Iraq; East Timor – by Indonesia). There are situations in which the applicability of the Geneva Conventions as a whole or of common Article 3 has been denied. The principal difficulty regarding the application of international humanitarian law has been, as George Aldrich observed, the refusal by States "to apply the conventions in situations where they should be applied. Attempts to justify such refusals are often based on differences between the conflicts presently encountered and those for which the conventions were supposedly adopted".[5] Richard Baxter concluded that "[t]he first line of defense against international humanitarian law is to deny that it applies at all".[6]

Fortunately, thresholds of applicability have recently been blurred. The ICRC Study on rules of customary law humanitarian law distinguishes only between international and non-international armed conflicts. It does not adopt the three tiered approach of the Geneva Conventions and the Additional Protocols. Moreover, the ICRC study seeks a broader recognition that many rules are applicable both to international and to non-international conflicts. Many military manuals do not make explicitly the distinction between rules applicable in non-international conflicts and rules applicable in international conflicts (although they often indicate the relevant treaty provision). Some armed forces now recognize that the same rules of international humanitarian law should be applicable in all situations involving armed conflict. Thus, an Instruction issued by the Chairman of the US Joint Chiefs of Staff states that "[t]he Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized [...]".[7]

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4 *Id.*, para. 79.

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

6 Baxter, "Some Existing Problems of Humanitarian Law" in *The Concept of International Armed Conflict: Further Outlook* 1, 2 (Proceedings of the Intentional Symposium on Humanitarian Law, Brussels, 1974).

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

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This approach brings about a comprehensive application of international humanitarian law and should be emulated by other countries.

The regulations promulgated by the Secretary-General of the United Nations on the observance of international humanitarian law restate a broad set of protective norms distilled from humanitarian law treaties without making any distinction between international and non-international conflicts, in which U.N. forces are involved.[8]

Limitations or prohibitions in the regulation of weapons and methods of war are increasingly being applied to internal armed conflicts governed by common Article 3. Such is the case with the revised Protocol II (to the 1980 Convention on Certain Conventional Weapons) on Prohibitions or Restrictions on the Use of Mines, Booby-traps and other Devices (1996). Some instruments impose rules for all circumstances, including the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997), the Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (a 1972 arms control treaty) and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction (1993, which concerns both arms control and use).

The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict applies also to non-international armed conflicts.[9] Even more recently, in December 2001, on the proposal of the United States, the scope of the Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, was amended to apply also to common Article 3 situations. The Convention will thus apply in any international or non-international armed conflict to which the Geneva Conventions apply.[10] The amended Article 1(7), however, leaves open the scope of the application of future protocols to the Weapons Convention. Unless otherwise provided, a new protocol would apply to both international and non-international armed conflicts.

The Yugoslavia Tribunal's Appeals Chamber has encouraged the blurring of distinction between international and non-international conflicts. Ac-

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

9 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, reprinted in 38 *International Legal Materials* 769 (1999).

10 David Kaye and Steven A. Solomon, "The Second Review Conference of the 1980 Convention on Certain Conventional Weapons" 96 *American Journal of International Law* 922, 929-30 (2002).

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cording to the Chamber, one of the factors leading to this development has been "the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of Universal Declaration of Human Rights in 1948, [which] has brought about significant changes in international law, notably in the approach to problems besetting the world community". According to the Appeals Chamber,

> [a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State?[11]

Progress in the identification of customary rules and in States' readiness to recognize the extension of rules to non-international armed conflicts has been quite remarkable in recent years. The establishment of two *ad hoc* tribunals and their subsequent jurisprudence, the drafting and the adoption of the Statute of the International Criminal Court, and even the ICRC study of customary rules of international humanitarian law, contributed to this progress.[12] The U.N. Secretary-General concluded that "it might well be that the identification of customary rules obviates some of the problems which exist in the scope of the existing treaty law, and will assist in the identification of fundamental standards of humanity".[13] Finally, the codification in the ICC Statute of the principle that crimes against humanity can be committed in all situations, without regard to thresholds of armed conflicts, and that they can be committed not only by States, but also in furtherance of the policy of non-State entities, is a signal achievement.

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[11] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Tadić*, Case IT-94-AR72, para. 97 (1995).

[12] Minimum Humanitarian Standards, *supra*, note 8, at paras. 86/87.

[13] *Id.*; *see also* Fundamental Standards of Humanity: Report of the Secretary-General Submitted Pursuant to Commission Resolution 1998/29, UN doc. E/CN.4/1999/92, paras. 23/24 (1999).

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

Because of its interstate, reciprocity-based origins, the law of war has traditionally protected enemy persons, but not nationals of a State from their own government. Although this paradigm still prevails in some respects, it is changing by means of a process in which the application of the law of war is being assimilated to human rights, a system which addresses responsibility of governments *vis-à-vis* populations over which they exercise power, authority or jurisdiction, regardless of nationality. Segments of the Geneva Conventions and Protocols now apply to the relations between a State and its citizens, especially to internal conflicts. This change in the definition of "protected person" will serve as my second illustration of the recent humanization of the law of war.

Pursuant to Article 4 of the Fourth Geneva Convention of 1949, which reflects the traditional state-centric, reciprocity-based approach of the law of war, the Convention applies only to protected persons, that is, persons who find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals. In such cases, nationals of a state bound by the Convention are protected. Nationals of a neutral state who find themselves in the territory of a belligerent state and nationals of a co-belligerent state are not protected persons while their state of nationality maintains normal diplomatic representation in the state where they are found.

A literal interpretation of Article 4's requirements led to a denial of protected status to people in Bosnia and Herzegovina during the war that took place in that country in the early 1990s. In its 1995 *Tadić* decision, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) insisted that Bosnian Muslims in the power of Bosnian Serbs were not "persons in the hands of a party to the conflict of which they are not nationals" and thus could not be "protected persons" under Convention IV.[14] Two years later, a trial chamber of the same tribunal similarly held that "the forces of Republika Srpska could not be considered as *de facto* organs or agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)"[15] and hence, the conflict did not constitute an international armed conflict to which the grave breaches provisions of the Geneva Conventions would apply.

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[14] *Prosecutor v. Duško Tadić*, International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber), Case No. IT-94-1-A72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 76.

[15] *Prosecutor v. Duško Tadić*, International Criminal Tribunal for the Former Yugoslavia (Trial Chamber II), Case No. IT-94-1-T, Judgment of 7 May 1997, para. 607.

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These interpretations of Article 4 in the Yugoslav context were, in my view, unacceptably literalist. Of course, in these cases, two interrelated but distinct questions arose, the proper resolution of either of which could have avoided the court's crabbed result. One concerned the definition of protected persons. The other was the qualification of the conflict as international. Given the character and the scope of the Federal Republic of Yugoslavia's involvement in the conflict, the second question could have been answered in the affirmative, that is, the war could have been seen as an international armed conflict.[16] But even when that is not strictly the case, as in many contemporary conflicts where the disintegration of States and the quest to establish new ones make nationality too impractical a concept on which to base the application of international humanitarian law, practical equivalents of formal nationality – as were the ethnic and religious categories Serb and Muslim in Yugoslavia – should be recognized as satisfying Article 4's requirements.

In light of the protective goals of the Geneva Conventions, in conflicts involving the disintegration of a single state, Article 4's requirement of a different nationality should be construed as referring to persons in the hands of an adversary. Indeed, the International Committee of the Red Cross's (ICRC) Commentary to Article 4 states that a country's own nationals were excluded from the definition of protected persons to avoid interfering in a State's relations with its nationals,[17] a concern obviously not relevant to the circumstances of the *Tadić* case, in which each ethnic group considered members of other ethnic groups as foreigners and, often, enemies. The interpretation of international humanitarian law should be directed at serving protective goals and should avoid paralyzing the legal process.

Fortunately, in more recent decisions, the Yugoslavia Tribunal has adopted a more generous understanding of "protected persons". In the 1998 *Čelebići* case, for example, a trial chamber of the Yugoslavia Tribunal moved in this direction. First, it concluded that the conflict was an international one. Second, it recognized that the nationality test in Article 4 has to be applied "in a more flexible manner" and in accord with "the reality of the situation before us". The trial chamber determined that in light of the fact that the purpose of the Conventions was "first and foremost to protect individuals, and not to serve State interests", the "provisions of domestic legislation on citizenship in a situation of violent State succession cannot be determinative of the protected status of persons caught up in conflicts which ensue from such events". The trial chamber even noted that "this interpretation of the Convention is fully in accordance with the development of the human

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16 *See id.*

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

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rights doctrine which has been increasing in force since the middle of this century".[18]

The purpose of the Geneva Conventions and Protocols is to protect all persons on the adverse side who fall "in the hands of a party to a conflict" as prisoners of war, medical personnel or civilians. Article 50 of Additional Protocol I defines a civilian as "any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered a civilian". The ICRC Commentary on the Fourth Geneva Convention takes a similar stance:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no 'intermediate' status; nobody in enemy hands can be outside the law.[19]

In accepting the broader interpretations of the grave breaches provisions, the ICTY in the *Čelebići* case[20] quoted the ICRC Commentary on the Fourth Convention, namely that "the Conventions have been drawn up first to protect individuals, and not to serve State interests".[21]

In a more recent appeals decision in the *Tadić* case, handed down on 15 July, 1999, the ICTY Appeals Chamber gave its imprimatur to the new interpretation of protected persons.[22] First, departing from the Trial Chamber's use of the imputability test established by the International Court of Justice in the *Nicaragua* case, the Appeals Chamber found that at the relevant time and place, there was an international armed conflict because "overall political and military authority over the Republika Srpska was held by the Federal Republic of Yugoslavia (control in this context included participation in the planning and supervision of ongoing military operations)". It followed that even if the victims and the perpetrators were nationals of Bosnia and Herzegovina, the Bosnian Serb forces acted as *de facto* organs of another State, the Federal Republic of Yugoslavia. Since the victims found themselves in the

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18 *Prosecutor v. Delalić* et al., International Criminal Tribunal for the Former Yugoslavia (Trial Chamber), Case IT-96-21-T, Judgment of 16 November 1998, paras. 263-266.

19 Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War at 51.

20 *Prosecutor v. Delalić* et al., *supra*, note 18, paras. 271-273.

21 Commentary of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War at 21.

22 *Prosecutor v. Duško Tadić*, International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber), Case IT-94-1-A, Judgment of 15 July 1999.

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hands of armed forces of a State of which they were not nationals, they were protected persons.

Abandoning the overly literalist approach requiring different nationalities for the definition of protected persons, the Appeals Chamber held that Article 4 of Geneva Convention IV was predicated on conditions of effective diplomatic protection and allegiance. In contrast to a formal bond of nationality, substantial allegiance could be based on ethnicity. Since the victims did not owe allegiance to and did not enjoy diplomatic protection from the authority of the *Srpska* Republic, they could be regarded as possessing different nationalities for Article 4's purposes.[23] It followed, therefore, that even if all the nationals of the Federal Republic of Yugoslavia had the same nationality, as they had before the adoption of a citizenship act by Bosnia and Herzegovina, Article 4 would apply and the victims would still be protected persons. The Appeals Chamber observed that

> [t]his legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the ground for allegiance ... . Allegiance to a party to the conflict and, correspondingly, control by this Party over persons in a given territory may be regarded as a crucial test.[24]

Subsequent jurisprudence has confirmed this approach. In the *Aleksovski* decision, handed down in 2000, the Appeals Chamber agreed that "in certain circumstances, Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors".[25] In the *Čelebići* case, the Appeals Chamber had similarly stated that

> [t]he nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterizations, but rather upon an analysis of substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State.[26]

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

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[23] *Id.*, at para. 169.
[24] *Id.*, at para. 166.
[25] Case IT-95-14/1-A, Judgement of 24 March 2000, para. 151.
[26] Case No. IT-96-21-A, Judgement of 20 February 2001, para. 84.

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5. Repatriation of prisoners of war and personal autonomy

The notion of rights, and the idea that those rights belong to the individual, has increasingly affected the interpretation not only of the Fourth Geneva Convention's category of "protected persons", but also the Third Geneva Convention's language governing the repatriation of prisoners of war at the end of hostilities. The increasing recognition of the right of prisoners of war to exercise considerable freedom of choice in their repatriation marks a third example of the humanization of the law of war.

The Regulations annexed to the Hague Convention on the Laws and Customs of War of 1899 and 1907 provided only that the repatriation of prisoners of war should be carried out as quickly as possible after the conclusion of peace.[27] But as World War I had shown, the conclusion of peace could come considerably later than the actual end of hostilities. The 1929 Convention relative to the Treatment of Prisoners of War attempted therefore, "to expedite repatriation by stipulating that it should, if possible, take place as soon as an armistice had been concluded".[28] World War II further "exposed the inadequacies of both the Hague and the Geneva formulation".[29] No formal armistice or peace treaty was concluded at the end of the war, and only the Paris Peace Treaties of 1947 and the 1955 Austrian State Treaty included clauses concerning the repatriation of prisoners of war.[30]

Article 118 of the Third Geneva Convention provides that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities".[31] Their repatriation is not conditional on the conclusion of an armistice or a peace treaty.[32] If no agreement is concluded, prisoners of war must be released unilaterally.[33] In practice, however, negotiations and some kind of mutuality have proved necessary.

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

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

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

30 *Id.*, at 44.

31 Geneva Convention relative to the Treatment of Prisoners of War, Art. 118. *See generally*, Christiane Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities: A Study of Article 118, Paragraph 1 of the Third Geneva Convention relative to the Treatment of Prisoners of War* (1997).

32 Dinstein, "The Release of Prisoners of War", *supra*, note 29, at 44.

33 *Id.*

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

The most difficult question raised by Article 118 is whether prisoners of war may be repatriated without their consent. Should rights of the state of nationality prevail over personal choice (leaving aside the question of the right to asylum)? At the 1949 Conference, forced repatriations were not condemned.[34] A large majority rejected an Austrian proposal to add to Article 118: "prisoners of war shall be entitled to apply for their transfer to any other country (than their country of origin) which is ready to accept them".[35] The reasons for this rejection were, however, related to the availability of asylum and the fear of abuse by the detaining powers.[36]

The repatriation of North Korean and Chinese prisoners of war was one of the major issues in the armistice negotiations at the end of the hostilities of the Korean War. In October 1952, the question of prisoner of war repatriations had already been under discussion for eight months. The United Nations Unified Command stated that "many prisoners of war were violently opposed to being returned to the Communists" and that the U.N. Command was "willing to return all prisoners excepting those who would violently resist repatriation. The Communists, however, have insisted on the return of all prisoners by force if necessary". The U.N. took the view that it "could not yield without disregard for the fundamental principles of human rights and individual freedom embodied in the Charter".[37]

North Korea, China and the USSR contended that under Article 118 of the Third Geneva Convention, the obligation to repatriate all prisoners of

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[34] Charmatz and Witt, "Repatriation of Prisoners of War and the 1949 Geneva Convention", 62 *Yale Law Journal* 391, 401 (1953).

[35] Commentary on the Geneva Convention (III) relative to the Treatment of Prisoners of War, at 542.

[36] Mayda, "The Korean Repatriation Problem and International Law", 47 *American Journal of International Law* 414, 433 (1953); *also* Charmatz and Witt, *supra*, note 34.

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

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war was absolute and that Article 7 provided that prisoners of war could not waive their rights. The U.N. Command argued that "forcible repatriation was inconsistent with the humanitarian basis and thus the spirit of the Geneva Convention".[38]

As one scholar observed, the interpretation of Article 118 rested on whether the right corresponding to the duty of the State to repatriate prisoners of war, was "a right of the prisoner to be repatriated" or "the right of his state to have him repatriated". The USSR's view was that the duty is owed to the State of origin, and consequently, "they must be repatriated 'irrespective of their wishes'".[39] The other view, based on Article 6 (rights conferred on POW), could lead to the conclusion that,

> the convention must be read in the context of contemporary international law which has established human rights, such as personal freedom and inviolability, as legal rights under the United Nations Charter, and is in the stage of their specification in the Declaration of Human Rights and the *de lege ferenda* Covenant on Human Rights.[40]

The General Assembly supported the Unified Command's position and affirmed that "force shall not be used against prisoners of war to prevent or effect their return to their homelands, and that they shall at all times be treated humanely [...]".[41] The issue was finally resolved in mid-1953 by a special agreement. "[T]he prisoners who [had] not exercised their right to be repatriated"[42] were taken into the custody of a Neutral Nations Repatriation Commission. Representatives of the States of origin were entitled to access prisoners, explain their rights and inform them about "their full freedom to return home". Another scholar has commented that "the point of departure is that every prisoner of war has, by right, a free choice whether or not to return to his mother land [...] The option of repatriation is granted to the prisoner of war individually rather than to one of the two concerned States (the Power of Origin and the Detaining Power)".[43] Although the initial position of the United Nations Unified Command was the principle of "voluntary repatriation", the governing principle was later transformed into the more limited "no forced repatriation", that is, repatriation that was not resisted by force.

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38 *Id.*, at 18-19.

39 Mayda, *supra*, note 36, at 435.

40 *Id.*

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

42 Agreement on Prisoners of War, June 8, 1953, reprinted in 47 *American Journal of International Law*, supp., 180, 182.

43 Dinstein, *supra*, note 29, at 41.

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The question of forced repatriation arose after each of the two Gulf Wars.[44] Both the ICRC and the U.N. investigators found that Iraqi prisoners taken during the Iran-Iraq war were "subjected to ideological and political pressure, contrary to the Convention" and "forced [to participate] in demonstrations decrying the Iraqi Government".[45] Some Iranian prisoners asked U.N. investigators whether at the end of hostilities they would be returned to Iran without their consent.[46] In practice, the ICRC has questioned prisoners as to their wishes. Those wishing to remain in the territory of the detaining State were allowed to do so.[47] Noting that some Iraqi prisoners of war had been released locally without notification to the ICRC or to Iraq, the ICRC considered that "these people retain prisoner-of-war status and must be allowed to decide, in particular when a general repatriation takes place, whether or not they wish to return to their country of origin".[48]

Thus, from a "right not be repatriated by force" in the Korean War, the practice has evolved to a "right of free choice". That latter right was applied after the Second Gulf War, where the ICRC interviewed, without witnesses, Iraqi prisoners of war "to ascertain the willingness of each prisoner to be repatriated".[49] Prisoners who had not been repatriated at the end of the repatriations period and were still in camps came under the protection of the Fourth Geneva Convention as civilians and were granted the status of refugees by Saudi Arabia.[50]

In the Dayton Peace Agreement, the ICRC was similarly entrusted with the task of privately interviewing and determining the "onward destination of each prisoner". The Agreement further provided that "the Parties shall take no reprisals against any prisoner or his/her family in the event that a prisoner refuses to be transferred".[51]

Practice has in fact recast Article 118. Interpretation has drastically modified its categorical language, yielding to an individual autonomy based approach. This adjustment exemplifies the potential of developing the law

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44 *See generally*, Meron, "Prisoners of War, Civilians and Diplomats in the Gulf Crisis", 85 *American Journal of International Law* 104 (1991).

45 Quigley, "Iran and Iraq and the Obligations to Release and Repatriate Prisoners of War After The Close of Hostilities", 5 *American University Journal of International Law and Policy* 73, at 81 (citing ICRC communiques) (1989). Also, Report of the Mission dispatched by the Secretary General on the situation of prisoners of war in the Islamic Republic of Iran and Iraq, UN. Doc. S/20147, Annex, para. 78 (1988).

46 Quigley, *id.*, at 82.

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

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

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

50 *Id.*, at 102.

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

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through interpretation and custom. Of course, respecting the will of the prisoner of war regarding repatriation is predicated both on assurances that the detaining power will not abuse the system by unduly influencing the prisoner's choice and on the readiness, at least of some governments, to allow the prisoners to enter or stay in their countries.

6. Application of humanitarian law by human rights organs

The three examples I have discussed so far illustrate the influence of human rights concepts on the substance of humanitarian law rules. The fact that I have illustrated the first of these examples in part through the case law of an international criminal tribunal reflects one of the most important institutional changes in the realm of humanitarian law: the establishment of international institutions capable of bringing accountability for violations through the imposition of criminal penalties on individuals. For my last example of the humanization of the law of war, I would like to consider another important institutional development: the application of humanitarian law by human rights organs.

Since the 1970s, the United Nations has concerned itself with important aspects of international humanitarian law in human rights contexts, in particular through the activities of the Human Rights Commission and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Thematic rapporteurs have been requested to analyze issues that mainly concern situations of armed conflicts. Such themes as the use of mercenaries, sexual violence during armed conflicts and children in armed conflicts have been the subject of special reports to the Commission and the General Assembly. At times, country rapporteurs have also made extensive reference to humanitarian law norms in their reports.

The Human Rights Commission has condemned violations of human rights and humanitarian law, both in international and non-international conflicts, for example, in resolutions on Kuwait, the former Yugoslavia, and Rwanda.[52] The report by a Special Rapporteur designated at the request of the Commission on Human Rights to report on "human rights violations committed in occupied Kuwait by the invading and occupying forces of Iraq", is of particular importance. In defining his mandate, the Rapporteur noted that the Commission's resolution referred to "the principles embodied in the Charter of the United Nations, the International Covenants on Human

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

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Rights and other relevant legal instruments, including civil and political rights, economic, social and cultural rights, and principles of humanitarian law". He concluded that his mandate "should be understood in a broad sense as to include all violations of all guarantees of international law for the protection of individuals relevant to the situation".[53]

Even in the absence of explicit mandates, human rights rapporteurs have referred to humanitarian law to examine issues that human rights law can address only indirectly, such as the use of certain means or methods of warfare including chemical weapons or land mines. The Special Rapporteur on Iraq thus sought authority in the Land Mines Protocol (II), to the Conventional Weapons Convention (1980) and the Geneva Protocol (1925).[54] Similarly, when non-State entities committed the objectionable conduct, special rapporteurs have looked to humanitarian law. For the Special Rapporteur on Sudan in 1994, common Article 3 served as the basis for the condemnation of indiscriminate attacks, rape, mutilation, looting, the seizing of an ICRC airplane and the detention of the crew and passengers as hostages by the Sudan People's Liberation Army.[55]

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

> in the counter-insurgency campaign, the forces of law and order were failing to comply with certain basic principles of international humanitarian law, such as the principle of not engaging in violence against the civilian populations.[56]

He named such violations as killing of civilians by military units, summary executions and forced displacement. A particular conduct may thus violate both human rights and humanitarian law.[57]

Although most human rights implementation bodies lack an explicit mandate to apply international humanitarian law, violations in the context of armed conflicts have often led them to examine certain abuses in the light of humanitarian law.[58] Reference to international humanitarian law by human rights rapporteurs has not gone unchallenged. The Government of Turkey

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

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

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

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

[57] *Id.*, at 485-486.

[58] *Id.*, at 482.

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questioned the mandate of the Rapporteur on Extrajudicial, Summary or Arbitrary Executions to address aspects of the conflict with the Kurdistan Workers' Party, stating that U.N. human rights mechanisms were not intended to "encroach upon the field of international humanitarian law, unless specifically provided otherwise by that law".[59]

Some U.N. human rights bodies have been given mandates covering both human rights and humanitarian law violations. A case in point is the U.N. Observer Mission in El Salvador.[60] The Parties to the 1991 San Jose Agreement asked the U.N. to start its mission before a cease-fire was concluded. As a result, the Observer Mission's first reports discussed extensively humanitarian law violations by both parties.[61] The Mission endeavored to investigate such violations of international humanitarian law as:

1. Attacks on the civilian population as such and on civilians;
2. Acts or threats of violence whose main purpose is to intimidate the civilian population;
3. Acts involving attacks on material goods essential to the survival of the civilian population or the obstruction of relief operations; and
4. Arbitrary relocation of the civilian population.[62]

The mission also investigated summary executions by the guerrillas and the indiscriminate use of land mines.

The United Nations Verification Mission in Guatemala was established with the mandate to verify implementation of the Comprehensive Agreement on Human Rights, signed by the Government of Guatemala and the rebel alliance in 1994. The Agreement provided that,

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

The parties further agreed that they understand human rights as meaning those rights which are recognized in the Guatemalan legal order, including international treaties, conventions and other instruments on the subject to which Guatemala is a party.[63]

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

60 O'Donnell, *supra*, note 54, at 484. The Mission was established by Security Council Resolution 693 (May 20, 1991).

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

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

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

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In a case brought before the Inter-American Commission on Human Rights arising from military action taken by the U.S. in Panama in December 1989, the U.S. Government contended that the scope of the Commission's jurisdiction did not extend to issues of the law of armed conflict. The U.S. argued that "the OAS Member States did not expressly or implicitly consent to the competence of the Commission through its Statute to adjudicate matters concerning that complex and discrete body of law". In the U.S.'s view, "these legal authorities were extraneous to and fall outside the scope of the Commission's jurisdiction to interpret and apply". The U.S. pointed out that the Fourth Geneva Convention

> provides a wholly separate series of internal procedures and remedies for its enforcement, including the use of protective powers, the activities of the International Red Cross and its national counterparts, and the conducting of inquiries.

The Commission, however, rejected the U.S.'s arguments and found that it was competent. Setting out its view in brief syllogism, the Commission took the position that,

> where it is asserted that a use of military force has resulted in non-combatant deaths, personal injury, and property loss, the human rights of the combatants are implicated. In the context of the present case, the guarantees set forth in the American Declaration are implicated. This case sets forth allegations cognizable within the framework of the declaration. Thus the Commission is authorized to consider the subject matter in this case.[64]

In a case concerning an attack launched by an armed group on military barracks of the Argentine Armed Forces, the Inter-American Commission considered complaints from some of the participants in the attack alleging violations of the American Convention and of rules of international humanitarian law by members of the armed forces. The Commission considered whether it was competent to apply international humanitarian law directly and ultimately determined that it was. It first considered whether the armed confrontation at the base was merely an example of an "internal disturbance or tensions" or whether it constituted a non-international or internal armed conflict within the meaning of Article 3 common to the four Geneva conventions.[65]

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

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[64] *Id.*, 329.

[65] Abella *et al.* v. Argentina, Case No. 11.137, Report No. 55/97, OEA/Ser.L/V.97 Doc. 38 at para. 148.

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

distinguished these events from internal disturbances.[66] One of the criteria commonly applied to characterize a situation as being governed by common Article 3, the duration of the conflict, was not considered a decisive factor.

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

> [c]laims alleging arbitrary deprivations of the right to life attributable to State agents are clearly within the Commission's jurisdiction. But the Commission's ability to resolve claimed violations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone ... because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations.[67]

This reasoning recalls the International Court of Justice's 1996 *Nuclear Weapons Advisory Opinion*, in which the Court concluded that a determination that a particular loss of life in warfare is an arbitrary deprivation, contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

The Commission also relied on 3 provisions of the American Convention on Human Rights: Article 29(b), which provides that a State may not invoke the American Convention to restrict the enjoyment of a right or freedom provided under national law or under another international convention to which the State is Party; Article 25, which provides for an effective remedy before a national court "or protection against acts that violate [the] fundamental rights recognized by the constitution or laws of the State concerned"; and Article 27(1), which states that the measures of derogation in

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[66] *Id.*, paras. 154-156.
[67] *Id.*, para. 161.

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time of emergency may "not be inconsistent with a State's other international obligations".[68]

The American Court of Human Rights did not go as far as the Commission. It held that it was only competent to determine whether the acts of the States were compatible with the American Convention and not with the Geneva Conventions.[69] However, it took the view that it could observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3.[70]

7. Some concluding thoughts

In light of the developments I have outlined, it has become common in some quarters to conflate human rights, on the one hand, and the law of war or international humanitarian law, on the other. Nevertheless, despite the growing convergence in various protective trends, significant differences remain. The law of war, in contrast to human rights law, allows or at least tolerates the killing and wounding of innocent human beings not directly participating in an armed conflict – such as civilian victims of lawful so-called "collateral damage". It also permits certain deprivations of personal freedom without convictions in a court of law. It allows occupying powers to resort to internments and to limit appeal rights of detained persons. It permits limitations of freedom of expression and assembly.

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

Human rights norms, by contrast, protect physical integrity and human dignity in all circumstances. They apply to relationships between unequal parties, protecting the governed from their governments. Under human rights law, no one may be deprived of life except in pursuance of a judgement by a competent court. The two systems, human rights and humanitarian norms, are thus distinct and, in many respects, different.

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

[69] Las Palmeras Case, Preliminary Objections, 4 February 2000, ACHR Reports, Series C, No. 67, para. 33.

[70] Bàmaca Velàsquez Case, Judgement of 25 November 2000, ACHR Reports, Series C, para. 208.

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

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

A realistic assessment of the state of international humanitarian law, though, should not lead to despair. Normative development must continue and become part of public consciousness, and consequently, ensure respect for the norms. Education, training, persuasion and emphasis on values that lie outside the law, such as ethics, honor, mercy and chivalry, must be vigorously pursued. For that, the creation of a culture of values is indispensable. This job cannot be left to lawyers alone.

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VIII

Impact of human rights conventions on the two *ad hoc* Tribunals

Erik Møse*

1. Introduction

Asbjørn Eide's impressive number of books and articles cover a wide range of topics, including human rights law and international humanitarian law. He has been amongst those who have pointed out the similarities between human rights in peace and in armed conflict. One illustration is an article from 1984, in which he stressed that there has been a convergence in the conceptualisation and application of the two systems of law.[1]

About ten years after the publication of that article, the world witnessed the establishment of the first two international criminal *ad hoc* Tribunals. In May 1993, the Security Council decided to set up the International Criminal Tribunal for the Former Yugoslavia (ICTY) and, eighteen months later, the International Criminal Tribunal for Rwanda (ICTR).[2] A subsequent milestone was the adoption of the Statute of the International Criminal Court (1998), which entered into force on 1 July 2002.[3] The Court will become operative in 2003.

The rapid development in the promotion and protection of human rights since 1948 has often been referred to as the "*human rights revolution*". In particular since the 1970s, the world has witnessed an increased focus on such issues, even if there are still many gaps between norms and reality. Even more astonishing has been what could be called the "*criminal court explosion*". Until the establishment of the ICTY and the ICTR there were no

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1 See Eide, "The laws of war and human rights: differences and convergences", in C. Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet* (Martinus Nijhoff, 1984), pp. 665-697, in particular pp. 695-697 (conclusions).

2 See Security Council resolutions 808 of 5 May 1993 and 955 of 8 November 1994, respectively.

3 Rome Statute of the International Criminal Court, adopted on 17 July 1998.

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truly international criminal tribunals.[4] Another significant development was the establishment of tribunals composed of judges appointed by the United Nations and by the authorities of the state concerned. Examples are the Special Panel for East Timor and the Special Court for Sierra Leone.[5] The ten years from 1993 to 2003 represent a giant leap in the field of international criminal law and humanitarian law.

The purpose of the present contribution is to examine the impact of human rights conventions on the two Tribunals in The Hague and Arusha. Are we witnessing a new area of convergence between human rights law and international humanitarian law?

2. General observations

2.1. Background

The ideological and political link between the human rights conventions and international criminal tribunals is visible in many ways. When the General Assembly on 10 December 1948 adopted the Universal Declaration on Human Rights it had, the day before, decided to open the Genocide Convention for signature.[6] Article VI of the Convention provided that persons charged with genocide should be tried by a competent tribunal of the State where the act was committed "or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".[7]

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4 The Nuremberg Tribunal was an example of four states (France, UK, USA and USSR) combining their national jurisdiction pursuant to the London agreement of 8 August 1945, by which that Tribunal was set up. The legal basis for the Tokyo Tribunal was mainly the Tokyo Charter of 26 July 1945, elaborated by General MacArthur on the basis of the Potsdam Declaration, made by the same four states on 26 July 1945.

5 The first "mixed tribunal" was the Special Panel for Serious Crimes, set up by the United Nations Transitional Administration in East Timor (UNTAET). The Panel is composed of two judges appointed by the United Nations and one by the national authorities. The Special Court for Sierra Leone starts its activities in 2003. It was established by an agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000), see also the Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone (doc. S/2002/246). A Trial Chamber is composed of one judge appointed by the Government of Sierra Leone and two by the Secretary General of the United Nations. The Appeals Chamber is composed of two "national" and three "international" judges. Plans for a "mixed" tribunal for Cambodia have so far not led to results.

6 Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948.

7 The drafting of article VI is discussed in Schabas, *Genocide in International Law* (2000), pp. 75, 355-360 and 368-378.

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Both instruments reflected a first step towards the prevention of atrocities of the kind that took place in the 1930s and 1940s. The Declaration was eventually followed up by the adoption of the Covenant on Civil and Political Rights (CCPR) and the Covenant on Economic, Social and Cultural Rights, both adopted for signature by the General Assembly on 16 December 1966. These three instruments formed "The International Bill of Rights" and were followed by many other human rights conventions, not only globally, but also at the regional level, such as the European Convention on Human Rights of 4 November 1950 (ECHR), the American Convention on Human Rights of 22 November 1969 (ACHR) and the African Charter on Human and Peoples' Rights of 26 June 1981 (ACHPR). The conventions established bodies which exercise international supervision of states' national implementation of human rights. Examples are the Human Rights Committee and the European Court of Human Rights, set up under the CCPR and the ECHR, respectively. On the basis of state reports and complaints from individuals and states, such bodies have monitored the extent to which states have complied with their international obligations to respect and ensure human rights.

This model, based on *state responsibility*, can only work efficiently when the state is able and willing to perform its role as a counterpart in the dialogue with the treaty-based body. During internal and international armed conflict, or in situations of large-scale atrocities, the authorities may not be in control, or may be amongst the main perpetrators of human rights violations. In such situations, the principle of *individual criminal responsibility* is an important supplement or alternative to state responsibility. Criminal responsibility may be determined by national courts, either in the state where the violations took place (national jurisdiction) or in other states (universal jurisdiction). But in particular when such national protection is unavailable or insufficient, the need arises for international tribunals (international jurisdiction). The aim is to avoid impunity for gross human rights violations.[8]

This is not the place to give an overview of the normative development in humanitarian law since 1948, including the four Geneva Conventions of 1949 and their Additional Protocols of 1977. It is sufficient to recall that work on an international criminal tribunal, as expressed in the Genocide Convention, started again in 1950, but was later suspended. Only in 1989 was the International Law Commission given a new mandate, and its revised draft of 1994 led to the work in an *ad hoc* Committee, a Preparatory Com-

[8] This is illustrated by the establishment of the two *ad hoc* Tribunals. Pursuant to a request by the Human Rights Committee, Yugoslavia submitted a special report on 30 October 1992. The Committee's possibilities to influence the events in the country were limited. Rwanda was not a party to the CCPR and therefore outside the Committee's scope of supervision.

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mittee and finally at the Diplomatic Conference in Rome in July 1998. The work accelerated as a consequence of the establishment of the Tribunals for the former Yugoslavia and Rwanda.

2.2. Legal basis and structure

The two Tribunals were set up by the Security Council in pursuance of Chapter VII of the UN Charter (threats to international peace and security). It is quite remarkable that there was sufficient political will to establish such international judicial organs by resolutions instead of the traditional and more time-consuming method of drawing up conventions. Therefore, the Security Council could act quickly on the basis of a report from the Secretary General and create legal obligations that were binding on all states.[9]

Each Tribunal has three organs: the Chambers, the Prosecutor and the Registry. The Chambers are composed of 14 independent judges. Nine of them sit in the three Trial Chambers, each consisting of three judges. Seven judges constitute the Appeals Chamber, which deals with appeals from the ICTR and the ICTY. This represents a guarantee of consistency in the case law of the two Tribunals. Five judges sit in each appeal. The Judges are elected by the General Assembly for a term of four years and must be persons of high moral character, impartiality and integrity, who possess the qualifications required in their respective countries to the highest judicial office. The Trial Chambers may draw on a pool of *ad litem* judges in order to expedite their work.[10]

The Prosecutor is common to the ICTR and the ICTY. He or she is responsible for the investigation and prosecution of serious violations of humanitarian law, is required to act independently as a separate organ and not to seek or receive instructions from any government or from any other source. There is a Deputy Prosecutor for each Tribunal.[11] A Registry is responsible for the administration and servicing of each of the Tribunals. Each

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9 On the legislative history of the two Tribunals see Morris and Scharf, *The International Criminal Tribunal for Rwanda* (1998), pp. 75-115 with further references. See also Morris and Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995).

10 See, in particular, ICTR (Statute) art. 10, 11 and 12 and ICTY (Statute) art. 11, 12 and 13. The number of Trial Chambers (TC) was increased from two to three by Resolution 1165 (1999). Security Council Resolution 1329 of 30 November 2000, increased the number of judges in the Appeals Chamber (AC) from five to seven and enabled the ICTY to establish a pool of *ad litem* judges, who started to work in October 2001 following elections earlier that year. The legal basis for the *ad litem* system was inserted into the ICTR Statute by Security Council Resolution 1431 of 14 August 2002. The election of these judges will take place in the first months of 2003.

11 ICTR art. 15 and ICTY art. 16.

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Registrar is appointed by the Secretary General after consultation with the President of the respective Tribunal.[12]

In *Tadić,* the accused unsuccessfully challenged the legal basis of the ICTY before the Appeals Chamber. He argued, *inter alia*, that there was no threat to the peace in terms of Chapter VII of the UN Charter when the Tribunal was set up; that the Council did not have the necessary discretion to take appropriate measures to respond to such a threat; and that the establishment of a Tribunal was not an appropriate measure under Chapter VII.[13] Similar arguments have been advanced in relation to the ICTR, but in vain.[14] To some extent human rights conventions played a part in the argumentation. This will be dealt with below (4.6).

2.3. Sources

The main legal sources of the two Tribunals are the provisions of the Statute, followed by the Rules of Procedure and Evidence ("the Rules"), adopted and updated by the Judges during their plenary sessions.[15] Other important instruments are the Directive on the Assignment of Defence Counsel, the Code of Conduct for Defence Counsel, and the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal.[16]

Judgements and decisions of the Appeals Chamber of the two Tribunals are of particular importance. In *Aleksovski*, the Appeals Chamber concluded that in the interests of certainty and predictability, it should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. In the present context, it is interesting to note that it referred, *inter alia*, to the principle of fair trial in the CCPR, ECHR, ACHR and ACPHR, which includes the right of an accused person to have like cases treated alike, so that in general, the same cases will be treated in the same way and decided possibly by the same reasoning. It also referred to the European Court of Human Rights, which has stated that it will normally fol-

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12 ICTR art. 16 and ICTY art. 17.

13 *The Prosecutor v. Duško Tadić*, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction (AC).

14 See *The Prosecutor v. Joseph Kanyabashi*, Decision of 18 June 1997 on the Defence Motion on Jurisdiction (TC). Similar arguments were advanced in *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, first in the proceedings before the United States courts in *Re The Surrender of Elizaphan Ntakirutimana*, particularly before the District Court for the Southern District of Texas (1998) and subsequently in Arusha, see oral decision of 2 April 2001 (TC, transcripts pp. 126-136).

15 ICTR art. 14 and ICTY art. 15.

16 All these texts can be found in the publication *ICTR Basic Documents* and are available at the Tribunal's website <www.ictr.org>. Similar instruments have been adopted by the ICTY.

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low its previous decisions and only depart from them if there are "cogent reasons" for doing so (*Cossey v. UK*).[17]

In the present contribution the main emphasis is on the jurisprudence of the Appeals Chamber, but some cases from the ICTR and ICTY Trial Chambers are also mentioned. Only judgements and decisions that contain explicit references to human rights are included. Tribunal case law where the parties have invoked such arguments and the Chamber has not addressed them will not be dealt with.

3. Material jurisdiction

The material jurisdiction of the *ad hoc* Tribunals is similar, but not identical. Furthermore, their temporal and geographical jurisdictions are not limited in the same way. The ICTY deals with grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity committed in the territory of the former Yugoslavia after 1 January 1991.[18] The ICTR prosecutes persons responsible for genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II, committed between 1 January and 31 December 1994, in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States.[19] The Statutes provide definitions of these crimes.

Human rights conventions have influenced the interpretation of the statutory crimes of the two Tribunals. A further analysis of this issue would lead to an in-depth consideration of several key concepts in humanitarian law. This falls outside the scope of this contribution. Suffice it to mention three examples.

The first illustration is the definition of *torture*, which is a crime against humanity under the Statutes and also constitutes a grave breach of the Geneva Conventions.[20] Already in *Akayesu*, the ICTR Trial Chamber referred to the definition of torture in the UN Torture Convention in connection with its discussion of that crime.[21] A further discussion followed in *Čelebići*, where the ICTY Trial Chamber referred extensively to several international human rights conventions prohibiting torture and concluded that the prohibition of torture is part of customary law and constitutes a norm of *jus cogens*. It held that the definition of torture in the UN Convention on Torture reflected a consensus that was representative of customary law. During its dis-

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17 *Prosecutor v. Zlatko Aleksovski*, Judgement of 24 March 2000 (AC) paras. 89-111.
18 ICTY arts. 2-5.
19 ICTR arts. 2-4.
20 ICTR art. 3(f); ICTY art. 3(b) and art. 5(f).
21 *The Prosecutor v. Jean-Paul Akayesu*, Judgement of 2 September 1998 (TC) para. 593.

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cussion of the requisite level of severity of pain or suffering, the Chamber referred to views of the Human Rights Committee relating to CCPR article 7 and followed the line of reasoning in several judgements on ECHR article 3 by the European Court of Human Rights (*Ireland v. UK*, *Aksoy v. Turkey* and *Aydin v. Turkey*).[22]

Another example is *rape*, which may amount to torture and be part of genocide, and is as well a crime against humanity.[23] The concept was defined in *Akayesu*. The Trial Chamber in *Čelebići* confirmed this definition and then discussed when rape can be included within the offence of torture. The Chamber agreed with the interpretation adopted in the case law of the Inter-American Commission (*Fernando and Raquel Meija v. Peru*) and the European Court in Strasbourg (*Aydin v. Turkey*).[24]

Subsequent jurisprudence has confirmed the significance of human rights law in relation to torture and rape. It is also worth noting that ICTY case law on *enslavement* as a crime against humanity has included references to the Slavery Convention of 1926, ILO Conventions on Forced and Compulsory Labour, the CCPR, ACHR, ACHPR and ECHR (including *van Droogenbroeck v. Belgium* and *van der Mussele v. Belgium*).[25] Without further discussion it can safely be concluded that human rights conventions and case law from the treaty-based supervisory bodies have shed light on crimes enumerated in the Statutes. There are also examples of influence on Tribunal case law from human rights activities within the charter-based bodies, such as the Special Rapporteur against Torture.

4. CCPR article 14 and the Tribunals

4.1. Introduction

The rights of the accused follow mainly from the Statute and the Rules of Procedure and Evidence. The key statutory provisions are ICTR article 20 and ICTY article 21, entitled "Rights of the Accused". Their wording, which is virtually identical, is inspired by CCPR article 14 on fair trial.[26] Conse-

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22 *The Prosecutor v. Zejnil Delalić* et al., Judgement of 16 November 1998 (TC) paras. 452-474.

23 ICTR art. 3(g); ICTY art. 5(g).

24 *The Prosecutor v. Jean-Paul Akayesu*, Judgement of 2 September 1998 (TC) paras. 596-598; *The Prosecutor v. Zejnil Delalić* et al., Judgement of 16 November 1998 (TC) paras. 480-497.

25 See, for instance, *The Prosecutor v. Furundžija*, Judgement of 10 December 1998 (TC); *The Prosecutor v. Kunarac* et al., Judgement of 22 February 2001 (TC) and Judgement of 12 June 2002 (AC); *The Prosecutor v. Krnojelac*, Judgement of 15 March 2002 (TC).

26 See Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), Doc. S/25704 of 3 May 1993, para. 106 (relating to ICTY Statute art. 21): "It is axiomatic that the International Tribunal must fully respect internationally rec-

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quently, a comparison between article 14 and the provisions governing the activities of the Tribunals provides a convenient point of departure for the purposes of the present contribution. As will be shown below, the fact that CCPR article 14 formed the basis for the Statutes does not exclude that equivalent provisions in regional conventions, for instance ECHR article 6, may influence the interpretation of the Statute and the Rules.

The rights in CCPR article 14 are quite generally formulated and apply to all stages of court proceedings, even if some of them are particularly relevant during trial.[27] ICTR article 20 and ICTY article 21 are applicable to "the determination" of "charges" against the accused. In Strasbourg, many judgements have addressed these concepts and described them as "autonomous", *i.e.*, independent of national definitions. Similarly, the Human Rights Committee has clarified these expressions, even if its case law provides limited guidance.[28] It is noteworthy that the interpretation of these key concepts has not been a major issue before the Tribunals. The main explanation is probably that the ICTR and the ICTY – unlike national courts – only deal with serious criminal cases. The delimitation under ECHR article 6 between criminal charges and other sanctions, such as disciplinary proceedings and petty offences, has not been an issue before the Tribunals.

4.2. Equality before the Tribunals

The introductory sentence in ICTR article 20 and ICTY article 21 provides that all persons shall be equal before the Tribunal. The Human Rights Committee has interpreted the corresponding principle in the CCPR ("All persons shall be equal before the courts and tribunals") as including "equal access to court" without distinction.[29] In human rights law, the principle of "access to court" has played a rather limited role in criminal proceedings, compared to civil cases. It is therefore interesting that in *Čelebići*, the Appeals Chamber applied this statutory provision in relation to an allegation that one of the accused was the subject of a selective prosecution policy, based not on ap-

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ognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights".

27 See generally on CCPR art. 14, Nowak, *CCPR Commentary* (1993), pp. 233-273; and McGoldrick, *The Human Rights Committee* (1994), pp. 395-458. It should be noted that the two Tribunals do not have any provisions equivalent to CCPR art. 14(4) on the protection of juvenile offenders. In practice, all offenders in the ICTR and the ICTY have been adults. See also the exception from public hearings in the interest of juveniles (note 42 below).

28 See General Comment 13 (1984) of the Human Rights Committee, in particular paras. 2 and 8.

29 General Comment 13 para. 3, see also *Nowak*, *op. cit.*, pp. 238-241.

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parent criminal responsibility alone, but on extraneous policy reasons, such as ethnicity, gender, or administrative convenience.

The Appeals Chamber stated that even if the Prosecutor is independent, she must exercise her discretion within the limitations of the Statute, Rules and recognised principles of human rights. The sentence that all persons shall be equal before the Tribunal must be interpreted in light of human rights provisions relating to equality before the law, which is central to the principle of due process of law. The Prosecutor, in exercising her discretion under the Statute in the investigation and indictment of accused before the Tribunal, is subject to the principle of equality before the law and to this requirement of non-discrimination. An accused has the burden of proof to demonstrate that the Prosecutor has improperly exercised her prosecutorial discretion in relation to him. The Appeals Chamber dismissed the allegation of the accused that he was singled out because he was a Bosnian Muslim in order to give an appearance of "even-handedness" to the Prosecutor's policy. It was established that the decision to continue the trial against him was consistent with the general policy to focus on persons responsible for exceptionally brutal or otherwise extremely serious offences.[30]

The principle established in this case is important and may be of significance in other contexts. It is interesting that the Appeals Chamber referred to several human rights instruments concerning the principle of equality, but had to look to national jurisprudence in support for the application of that principle to selective prosecutorial policy. Apparently, human rights case law provided no guidance.

4.3. Fair trial

According to ICTR article 19(1) and ICTY article 20(2) the trial shall be fair and the proceedings conducted in accordance with the Rules, with full respect for the rights of the accused. ICTR article 20(2) and ICTY article 21(2) provide that the accused is entitled to a "fair hearing". CCPR article 14(1) contains the same formulation. Human rights case law has established that several elements are included in the general principle, such as equality of arms, the adversarial principle, prohibition against self-incrimination etc.[31] The Tribunals have adopted the same approach.[32]

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30 *The Prosecutor v. Zejnil Delalić* et al., Judgement of 20 February 2001 (AC) paras. 596-619.

31 The protection against self-incrimination follows explicitly from ICTR art. 20(4)(g) and ICTY art. 21(4)(g) and will be considered under 4.8.7. below. See also 2.3. above about legal precedents (*Aleksovski*).

32 In *Čelebići* (AC, see note 30 above), the Appeals Chamber, in connection with the importance of appearances in the administration of justice, also accepted the approach of the Strasbourg Court that "the misgivings of the individuals before the court, for instance

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4.3.1. Equality of arms

The Appeals Chamber has interpreted the principle of equality of arms in conformity with case law under ECHR article 6 and CCPR article 14. In *Aleksovski*, it applied this concept of a fair trial in favour of both parties, not only in favour of the Defence, because the Prosecution acts on behalf of and in the interests of the community, including the interests of the victims of the offence charged (in cases before the Tribunals the Prosecutor acts on behalf of the international community). In reaching this result it referred to three Strasbourg judgements (*Ekbatani v. Sweden*; *Barbera v. Spain* and *Brandstetter v. Austria*). It recalled that the provisions of ECHR article 6(1) entail equal treatment of the Prosecution and Defence and that the requirement of equality of arms provides a "fair balance" between the parties and implies that each party must be afforded a reasonable opportunity to present its case, including its evidence, under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent.[33]

In *Tadić*, the Appeals Chamber referred to several cases under the CCPR Optional Protocol (*Morael v. France*, *Robinson v. Jamaica* and *Wolf v. Panama*) in support of the view that the right to a fair trial guaranteed by the Statute covers the principle of equality of arms. More generally, it stated that there is no reason to distinguish the notion of fair trial under the Statute from its equivalents in the ECHR and the CCPR.

The main question was the scope of application of this principle, *i.e.*, whether it includes not only procedural equality, but also substantive equality. The Defence argued that the authorities of *Republika Srpska* had failed to co-operate with the Defence and thereby deprived the accused of adequate facilities for the preparation of his defence, thereby prejudicing his enjoyment of equality of arms. The Appeals Chamber referred to Strasbourg judgements (*Dombo Beheer B.V. v. The Netherlands*; *Delcourt v. Belgium*) and found nothing in ECHR case law that suggests that the principle of equality of arms is applicable to conditions, outside the control of a court, that prevented a party from securing the attendance of certain witnesses. It also held that the Human Rights Committee had interpreted the principle to provide guarantees that are procedural in nature (*e.g.*, *B.d.B. v. The Netherlands*).

The Appeals Chamber observed, however, that all these cases related to proceedings before domestic courts that have the capacity, if not directly, at

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with regard to the *fairness* of the proceedings, must in addition be capable of being held to be objectively justified" (italics added). Reference was made to *Kraska v. Switzerland*.

[33] *The Prosecutor v. Zlatko Aleksovski*, Decision of 16 February 1999 on the Prosecutor's appeal on admissibility of evidence (AC, paras. 24-25).

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least through the extensive enforcement powers of the State, to control matters that could materially affect the fairness of a trial. The Tribunals, on the other hand, have to rely on the co-operation of the States without having the power to compel them to co-operate through enforcement measures. Consequently, the principle of equality of arms must be given a more liberal interpretation than is normally upheld with regard to proceedings before domestic courts. A Chamber is required to provide every practicable facility when faced with a request by a party for assistance in presenting its case. After having listed the possible measures at the disposal of a Chamber, the Appeals Chamber did not find that the Trial Chamber had failed to assist the Defence when seized of a request to do so.[34]

This judgement illustrates that even if a principle from human rights law is applied by the Tribunals, its scope may be different because they and national courts are not in comparable situations. The principle of equality of arms has also been invoked in other situations. In *Kayishema and Ruzindana*, the Defence requested an order to the effect that the Prosecution should limit its number of lawyers, consultants, assistants and investigators working on the case. The Trial Chamber held that equality between the parties should not be confused with equality of means and resources and dismissed the motion.[35]

4.3.2. Adversarial proceedings

In *Kayishema and Ruzindana*, the Appeals Chamber agreed with the European Court of Human Rights that the concept of a fair trial includes the fundamental right that proceedings shall be adversarial. This means, in a criminal case, that both the Prosecution and the Defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will be afforded a real opportunity to comment thereon. Reference was made to two judgements under ECHR article 6 (*Brandstetter v. Austria*; *Ruiz-Mateos v. Spain*). According to the Appeals Chamber, the adversarial principle under the Statute and the Rules is to the same effect. It found no evidence to support the accused's allegation that the judgement of the Trial Chamber did not adhere to the adversarial principle.[36]

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34 *The Prosecutor v. Tadić*, Judgement of 15 July 1999 (AC) paras. 29-56.

35 *The Prosecutor v. Clement Kayishema and Obed Ruzindana*, Decision of 5 May 1997 (TC). A similar decision is *The Prosecutor v. Mladen Naletilić* et al. of 31 August 2001.

36 *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgement of 1 June 2001 (AC) paras. 79-80.

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4.3.3. Reasoned opinion

ICTR article 22(2) and ICTY article 23(2) provide that the judgement shall be accompanied by a reasoned opinion in writing. Rule 88(C) contains a similar provision. In *Furundžija*, the Appeals Chamber confirmed the case law under ECHR article 6 to the effect that a reasoned opinion is a component of the fair hearing requirement, but that the extent to which this duty applies may vary according to the nature of the decision and can only be determined in light of the circumstances of the case. It also agreed that a tribunal is not obliged to give a detailed answer to every argument. Reference was made to *Ruiz Torija v. Spain* and *Van de Hurk v. The Netherlands*. Based on the above principles, the Appeals Chamber rejected the accused's allegation that the Trial Chamber failed to provide a reasoned opinion concerning the manner in which it resolved the conflict between the testimonies of two witnesses.[37]

The extent of the obligation to give reasons for the assessment of evidence calls for further comments. In *Musema*, the Appeals Chamber recalled established case law to the effect that it "will not lightly disturb findings of fact by a Trial Chamber". The task of weighing and assessing the evidence lies with the Trial Chamber, which also has to determine whether a witness is credible or not. But the Trial Chamber's discretion is always limited by its duty to provide a reasoned opinion in writing, although it is not required to articulate every step of its reasoning for each particular finding it makes. The question arises as to the extent that a Trial Chamber is obliged to set out its reasons for accepting or rejecting a particular testimony. According to the Appeals Chamber, there is no guiding principle and, to a large extent, testimony must be considered on a case by case basis. But it is interesting to note that, also in this context, the Appeals Chamber recalled the statements of principle inspired by human rights case law in the *Furundžija* Judgement, quoted above.[38]

4.4. Public hearing

In accordance with ICTR article 20(2) and ICTY article 21(2) the accused is entitled to a public hearing. A similar text is found in CCPR article 14(1), but that provision also lists the reasons for excluding the press and the public from all or part of a trial for reasons of morals, public order, national security, prejudice to the private life of the parties and in special circumstances when it is strictly required. The only indication of possible exceptions in the

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37 *The Prosecutor v. Anto Furundžija*, Judgement of 21 July 2000 (AC) paras. 68-73.

38 *The Prosecutor v. Musema*, Judgement of 16 November 2001 (AC) para. 18.

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Statute is the proviso "subject to" the following statutory article, which deals with witness protection.[39]

Again, the Rules supplement the Statute. According to Rule 78, all proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided. Rule 79 enables the Trial Chamber to order that the press and the public be excluded from all or part of the proceedings for reasons of public order or morality; safety, security or non-disclosure of the identity of a victim or witness; and the protection of the interests of justice.

The exceptions in the Rules appear more limited than in the CCPR and are tailor-made to the needs of the Tribunals. Chambers make orders for closed hearings almost exclusively in order to protect witnesses. The main rule is certainly that the hearings are public. Decisions to go into closed session are now very brief and usually made orally. But in the early days of the Tribunals such decisions could be lengthy and involve questions of principle. Human rights case law played an important part. In *Tadić*, the Trial Chamber referred to *Sutter v. Switzerland*, *Axen v. Germany* and *Le Compte, Van Leuven and De Meyere v. Belgium*. It noted that, in general, the European Court considers whether one of the exceptions from the principle of public hearings prevails before accepting that a given hearing *in camera* proceedings has not been conducted in violation of that article.[40]

According to CCPR article 14(1), third sentence, judgement shall be made public except where the interest of juveniles otherwise requires (the other exception on matrimonial disputes is, of course, irrelevant here). ICTR article 22 and ICTY article 23 provide without exception that the judgement shall be rendered by the Trial Chamber in public.[41] In practice, the different wording has had no significance. No juveniles have been tried by the ICTR or the ICTY.[42]

4.5. Impartial tribunal

CCPR article 14 requires that courts and tribunals are "impartial". ICTR article 20 and ICTY article 21 do not mention this explicitly. But according to ICTR article 12(1) and ICTY article 13(1), judges shall be persons of high moral character, "impartiality" and integrity, and this also follows from the

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39 ICTR art. 21 and ICTY art. 22.

40 *The Prosecutor v. Duško Tadić*, Decision of 10 August 1995 on the Prosecutor's motion requesting protective measures for victims and witnesses (TC). See also *The Prosecutor v. Zejnil Delalić* et al., Decision of 28 April 1997 on the motions by the Prosecution for protective measures for the Prosecution witnesses pseudonymed "B" through to "M" (TC) with reference to *Pretto v. Italy* (para. 34).

41 See also Rule 88(A).

42 See also note 27 above.

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principle of fair trial. It is clear, therefore, that impartiality is a requirement under the Statute. Moreover, Rule 15 on "Disqualification of Judges" provides that a judge may not sit at a trial or an appeal in which he has "a personal interest or concerning which he has or has had any association which might affect his impartiality". In any such circumstance the judge shall withdraw from the case. The parties may apply to the presiding judge of a Chamber for the disqualification of a judge. If necessary, the Bureau of the Tribunal shall decide the matter. There are several decisions on Rule 15 by presiding judges or the Bureau.

The Appeals Chamber dealt with the interpretation of the concept of impartiality for the first time in *Furundžija.* The Defence argued that a judge was disqualified because of her former involvement in the United Nations Commission on the Status of Women. The Appeals Chamber referred to the distinction developed under ECHR article 6 between the subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. It also observed that the Strasbourg Court has repeatedly declared that the personal impartiality of a judge must be presumed until there is proof to the contrary, and that, in relation to the objective test, a tribunal must be not only genuinely impartial, but also appear to be impartial. What is decisive is whether a fear that a particular judge lacks impartiality can be held objectively justified. The Appeals Chamber based its observations on nine Strasbourg judgements (from *Piersack v. Belgium* to *Incal v. Turkey*). It then analysed the situation in several common law and civil law systems, and concluded that there is a general rule that a judge should be not only subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. Finally, the Appeals Chamber formulated the principles that should direct it in interpreting and applying the impartiality requirement of the Statute and stated that Rule 15(A) falls to be interpreted in accordance with these principles.[43]

In this instance, it is striking how both human rights case law and national jurisprudence contributed to the interpretation of the concepts of "impartiality" and "disqualification". Some of the principles formulated by the Chamber were directly inspired by national decisions. As for their concrete application in the case at hand, the Appeals Chamber held that the judge concerned was not a party to the cause nor did she have a disqualifying interest therein. Moreover, her previous membership in the Commission would not lead a reasonable and informed observer to apprehend bias.[44]

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[43] *The Prosecutor v. Furundžija*, Judgement of 21 July 2000 (AC) paras. 164-191.

[44] *Ibid.*, paras. 192-215.

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The issue of impartiality was also considered in *Čelebići* in relation to a judge who had accepted the position as Vice-President of Costa Rica. She had not been re-elected as a judge, but her mandate had been prolonged in order to finish an on-going case. The Defence argued that she was not impartial, but to no avail. The Appeals Chamber based its decision on an interpretation of ICTY article 13. It also referred briefly to principles of judicial independence and impartiality as expressed in human rights instruments.[45]

Experience shows that some allegations of bias are similar to those advanced at the national level. For instance, the fact that a judge has rendered a previous judgement that raised similar issues as the case at hand, will normally not in itself be seen as lack of impartiality.[46] But there have also been requests for recusal due to specific circumstances at the Tribunals. For instance, the fact that judges travelled to Kigali (Rwanda), met with high ranking officials and paid a visit to a memorial did not lead to their disqualification.[47]

4.6. Other requirements in CCPR article 14(1)

In contrast to CCPR article 14(1), the ICTR and ICTY Statutes do not contain any explicit requirements to the effect that the Tribunals shall be "competent, independent and ... established by law". These principles are, however, applicable to the two Tribunals. In *Tadić*, the Appeals Chamber discussed extensively whether the ICTY was "established by law". Adopting the interpretation by the Human Rights Committee, it found that what is important is that a tribunal has been set up by a competent organ in keeping with the relevant legal procedures, and that it observes the requirements of fairness. The ICTY fulfilled these requirements, as the Security Council was competent to establish the Tribunal. The fair trial guarantees in the CCPR had been adopted almost verbatim in ICTY article 21, and other fair trial guarantees appear in the Statute and the Rules of Procedure.[48]

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45 *The Prosecutor v. Delalić* et al., Judgement of 20 February 2001 (AC) paras. 651-693, in particular para. 689.

46 See, for instance, Decision of the ICTR Bureau on 6 June 2000 in the case of *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Ntahobali* (whether a judge was disqualified because he had previously handed down the *Akayesu* judgement) and Trial Chamber Decision of 19 September 2000 in *The Prosecutor v. Ferdinand Nahimana* (whether two judges were biased because they had rendered the *Ruggiu* Judgement).

47 Decisions of the ICTR Bureau of 25 September 2000 in *The Prosecutor v. Joseph Nzirorera* and Decision of two judges on 11 September 2000 in *The Prosecutor v. Jean-Bosco Barayagwiza*.

48 *The Prosecutor v. Dusko Tadić*, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction (AC) paras. 9-48. The Appeals Chamber referred to General Comment 13 (1984) of the Human Rights Committee and *Cariboni v. Urugay*

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It is interesting to note that the Appeals Chamber did not follow the interpretation under ECHR article 6, according to which a tribunal can only be established by the legislature and cannot depend on the discretion of the executive. It held that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the United Nations, where there is no legislature.

4.7. Presumption of innocence

The presumption of innocence in CCPR article 14(2) is reflected in ICTR article 20(3) and ICTY article 21(3). This principle, which is known in all national jurisdictions, is frequently invoked before the Tribunals. So far, there has been limited need to refer to human rights instruments in order to clarify its substance.

4.8. Minimum rights

The minimum rights listed in ICTR article 20(4)(a)-(g) and ICTY article 21 (4)(a)-(g) are specific expressions of the general principle of fair trial and identical to CCPR article 14(3)(a)-(g).[49] They are supplemented by specific provisions in the Rules. Available case law suggests that in relation to several of these paragraphs focus has been on the statutory provisions and the Rules, whereas human rights case law has played a limited role (see below).

4.8.1. Information on the charge

According to para. 4(a), the accused has the right to be informed promptly and in detail of the nature and cause of the charge against him. Related provisions are ICTR article 17(4) and ICTY article 18(4), according to which the Prosecutor, when a *prima facie* case is established, shall prepare an indictment containing "a concise statement of the facts and the crime or crimes" with which the accused is charged under the Statute.[50] The Statutes then provide that, when an accused has been taken into custody pursuant to an arrest warrant issued by the Tribunal, he shall "immediately be informed of the charges against him" and transferred to Arusha or The Hague. Moreover, during the initial appearance, which usually takes place a few days after the transfer, the Trial Chamber shall read the indictment, satisfy itself that

(para. 45). See also the Separate Opinion of Judge Sidhwa para. 65 *et seq*. Similar issues were raised in *The Prosecutor v. Slobodan Milošević*, Decision of 8 November 2001 (TC).

49 Unlike the CCPR, the statutory provisions are gender neutral.

50 See also Rule 47(C).

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the rights of the accused are respected and "confirm that the accused understands the indictment". The accused is then requested to enter a plea. These provisions are found in ICTR article 19(2) and (3) and ICTY article 20(2) and (3), respectively. In practice, the initial appearance takes place before a single judge.[51]

The information shall be given in a language that the accused understands. In practice, the indictments are available in the working languages of the Tribunals, English and French.[52] At the ICTR, almost all the accused are fluent in French. There has usually not been any need to translate the indictment into Kinyarwanda.

4.8.2. Preparation of defence

Under para. 4(b), the accused has the right to have adequate time and facilities for the preparation of his defence. The accused is therefore entitled to know the case against him. A key provision is Rule 66(A) concerning disclosure of materials. The Prosecutor shall disclose to the Defence within 30 days of the initial appearance copies of the supporting material that accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused. The Prosecutor shall also, not later than 60 days before the date set for trial, disclose copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial. According to Rule 66(B), the Prosecutor shall permit the Defence to inspect any books, documents, photographs etc. in its custody that are material to the preparation of the defence or are intended for use by the Prosecutor as evidence at trial. Exceptions from these rights to disclosure and inspection are found in Rule 66(C) and Rule 70, relating to on-going investigations and internal working documents etc. Moreover, under Rule 68 the Prosecutor shall, as soon as practicable, disclose exculpatory evidence to the Defence.

The indictment and the disclosure of materials, in particular witness statements, will normally give the accused a fairly good picture of the case against him. In addition, it is now established practice that the Trial Chamber, at the pre-trial conference under ICTR Rule 73*bis* and ICTY Rule 65*ter*, orders the Prosecution to file a pre-trial brief addressing the factual and legal issues, and a list of witnesses the Prosecution intends to call with, *inter alia*, a summary of the facts on which each witness will testify.

These provisions do not exclude that the Defence may argue that there was not sufficient time and facilities for the defence. Evidence may appear

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[51] This follows from Rule 62, which contains detailed provisions on the procedure to be followed.

[52] ICTR art. 31 and ICTY art. 32. See also Rule 3.

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late at the pre-trial stage or even during trial. But because of the specific provisions in the Rules, human rights conventions and the case law under them will normally provide limited assistance.[53]

Under para. 4(b) the accused has the right to communicate freely with counsel. This basic principle is reflected, *inter alia*, in Rule 97 ("Lawyer-Client Privilege") and Rule 65 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal.[54]

4.8.3. Trial without undue delay

It follows from para. 4(c) that the accused has the right to be tried "without undue delay". ICTR article 19 and ICTY article 20 state that the Trial Chambers shall ensure that a trial is fair and "expeditious". There is extensive human rights case law relating to the expressions "without undue delay" in CCPR article 14(4)(c) and "within reasonable time" in ECHR article 6(1). These provisions apply to any accused, whether he is detained or not. Similar rules for detained persons are found in CCPR article 9(3) and ECHR article 5(3), which have no explicit equivalent in the Statutes (see 5.3 below).

Many accused at the Tribunals have spent considerable time in pre-trial detention before their trial starts, some of them several years. Factors influencing the pre-trial period include the preparation required by the Prosecution and the Defence, the frequency of pre-trial motions, disclosure, translation of voluminous case files, the limited number of Trial Chambers, etc. The time required for trial depends on the complexity of the case, the number of accused and witnesses in the case, the need for interpretation of testimony, postponements because the parties have to prepare during trial, the number of trials heard in parallel ("twin-tracking" or "triple-tracking"), etc.

This is not the place to discuss the reasons for delays and the measures taken to improve the situation.[55] Suffice it to recall that human rights case law, in particular concerning ECHR article 6 (and article 5), has developed criteria to establish whether a trial is conducted within reasonable time. They include the complexity of the case, the conduct of the authorities and the conduct of the individual. These criteria have also been invoked in cases be-

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53 An example is *The Prosecutor v. Zoran Kupreskić* et al., Judgement of 23 October 2001, where the Appeals Chamber did not refer to human rights instruments in its discussion of convictions based on material facts not pleaded in the indictment (para. 79 *et seq.*).

54 Rule 65 of these provisions at the ICTR reads as follows: "Each detainee shall be entitled to communicate fully and without restraint with his Defence Counsel, with the assistance of an interpreter where necessary".

55 See Erik Møse and Cecile Aptel, "Trial Without Undue Delay Before The International Criminal Tribunals" in *Man's Inhumanity to Man – Essays in Honour of Antonio Cassese* (2003).

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fore the Tribunal, for instance in motions by the Defence for provisional release under Rule 65. Only in very few cases have such motions been granted and then because the accused has been in a particular situation.[56] Moreover, the Appeals Chamber has applied para. 4(3) in light of human rights law in other situations.[57]

4.8.4. Legal assistance

The right to legal assistance for suspects that are questioned during investigation follows from ICTR article 17(3) and ICTY article 18(3). According to Rule 42, a suspect shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands, of the right to be assisted by counsel of his choice or to have legal assistance assigned to him if he does not have sufficient means to pay for it. The questioning shall not proceed without counsel unless the suspect has voluntarily waived his right to counsel.[58]

In accordance with para. 4(d), the accused is entitled to be present at trial and to defend himself in person or through legal assistance of his own choosing, and to be informed of this right to legal assistance. Virtually all accused have been defended by counsel.[59] Para. 4(d) also provides that legal assistance shall be assigned to the accused "if the interests of justice so require" and without payment if he does not have sufficient means to pay for it. Based on the information available, all accused at the ICTR have been considered indigent and counsel have been assigned to them. Rules 44 to 46 contain detailed provisions about appointment and qualifications of counsel, duty counsel, assignment, availability and misconduct of counsel. In particular, Rule 45 provides that a list of counsel who speak one or both of the working languages of the Tribunal and fulfil the requirements for appoint-

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[56] ICTR Rule 65 allows for provisional release "only in exceptional circumstances". This is no longer a requirement in the equivalent ICTY Rule, but practice in The Hague is still restrictive.

[57] See *The Prosecutor v. Milan Kovačević*, Decision of 2 July 1998 (Trial Chamber's denial of a request for amendments of indictment in order to avoid a delay), and *The Prosecutor v. Miroslav Kvočka* et al., Decision of 25 May 2001 (Trial Chamber's decision to stay proceedings until the International Court of Justice had made a final determination in the Case concerning the Application of the Genocide Convention).

[58] See also Rule 63, according to which counsel shall be present when the accused is questioned by the Prosecution after the initial appearance.

[59] At the ICTR, one accused decided not to appear in court and not to be represented by counsel. In order to ensure a fair trial and safeguard the rights and interests of the accused, the Trial Chamber directed the Registrar to appoint immediately counsel to provide legal assistance to the accused in conformity with ICTR art. 20(4)(d), see *The Prosecutor v. Jean-Bosco Barayagwiza* (TC), oral decision of 6 February 2001. At the ICTY, Mr. Milošević decided to defend himself in person, but the Trial Chamber invited the Registrar to designate counsel to appear before it as *amicus curiae* in order to ensure a fair trial, see written Decisions of 30 August 2001 and 11 January 2002.

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ment shall be kept by the Registrar. The Directive on the Assignment of Defence Counsel also contains numerous provisions.[60]

Human rights case law has influenced decisions in this area. In *Kambanda*, the ICTR Appeals Chamber agreed with the Human Rights Committee that a party will not be allowed, unless special circumstances can be shown, to raise issues on appeal that had not previously been raised by counsel in the course of the trial.[61] It then interpreted the right of the accused to legal assistance "of his own choosing" in light of the Statute and the Rules, read in conjunction with relevant decisions of the human rights supervisory bodies. The Human Rights Committee had held that CCPR article 14(3)(d) does not entitle the accused to choose counsel provided to him free of charge (*Osbourne Wright and Eric Harvey v. Jamaica)*. Moreover, under ECHR article 6(3)(c) the right to legal assistance of one's own choosing is not absolute (*e.g.*, *X v. UK*, *Croissant v. France*), and in particular does not apply when legal assistance is free. According to the European Commission of Human Rights, that provision does not guarantee the right to choose the counsel who will be assigned by the court, nor does it guarantee the right to be consulted on the choice of the counsel to be assigned. The Appeals Chamber held that the Registrar of the ICTR had no other obligation than to assign counsel whose name appears on the list of counsel who may be assigned. He was not bound by the wishes of an indigent accused.[62]

Finally, the Appeals Chamber did not find incompetence on the part of counsel substantiated. But it also agreed with the European Commission that it is up to the authorities responsible for providing free legal assistance and assigning defence counsel to make sure that the assigned counsel can defend the accused effectively.[63]

In *Akayesu*, the ICTR Appeals Chamber confirmed its interpretation in *Kambanda* concerning the right to legal assistance of one's own choosing. It also reiterated that the right to competent assigned counsel is guaranteed by human rights instruments, such as the CCPR, ECHR and ACHR. Reference was made to statements by the Human Rights Committee (*Hezekiah Price v. Jamaica*) and decisions of the European Commission.[64]

4.8.5. Examination of witnesses

According to para. (4)(e), the accused has the right to examine and have examined witnesses against him and to obtain the attendance and examination

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60 ICTR Directive No. 1/96.

61 *Jean Kambanda v. The Prosecutor*, Judgement of 19 October 2000 (AC) para. 27 (with reference to *Albert Berry v. Jamaica* and *Glenford Campbell v. Jamaica*).

62 *Ibid.*, para. 33.

63 *Ibid.*, para. 34.

64 *The Prosecutor v. Jean-Paul Akayesu*, Judgement of 1 June 2001 (AC) paras. 76-84.

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of witnesses on his behalf under the same conditions as witnesses against him. This provision, which corresponds to CCPR article 14(3)(e) and ECHR article 6(3)(d), is supplemented by Rule 85(B), which provides that examination-in-chief, cross-examination and re-examination shall be allowed in each case. Also Rule 90(G) is relevant in this context. It provides that cross-examination shall be limited to points raised in the examination-in-chief or matters affecting the credibility of the witness. The Trial Chamber may, if it deems it advisable, permit inquiry into additional matters, as if on direct examination.

Case law has established that the right to obtain the attendance and examination of witnesses is subject to certain conditions, including a requirement that the evidence should be called at the proper time.[65] Moreover, in conformity with human rights case law the Tribunals have held that para. 4(e) does not give an unlimited right to call witnesses, for instance if their testimony is irrelevant, repetitive or is unlikely to ascertain the truth.[66] The *Tadić* judgement and the *Aleksovski* decision, mentioned above in connection with equality of arms, are also relevant in relation to the attendance of witnesses.

Case law under the equivalent provision in ECHR article 6(3)(d) has clarified the extent to which an accused can be convicted on the basis of previous written statements given to the police when he has not had the opportunity to cross-examine those witnesses. Similar questions have arisen before the Tribunals. In *Kordić and Čerkez*, the Appeals Chamber directed the Trial Chamber to exclude a statement of a deceased witness, which had not been given under oath, not subjected to cross-examination, and not corroborated. The Appeals Chamber did not refer explicitly to the Strasbourg judgements invoked by the accused.[67] The Tribunals have also had to address the issue of examination of anonymous witnesses against the accused, which was first addressed by the Strasbourg Court in *Kostovski v. The Netherlands*. In *Tadić*, the Trial Chamber drew up guidelines for such situations based on that judgement and material from national case law.[68] At the ICTR, the accused have been aware of the identity of all witnesses heard so far.

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65 *The Prosecutor v. Anto Furundžija*, Judgement of 21 July 2000 (AC) para. 75.

66 *The Prosecutor v. Zejnil Delalić* et al., Decision of 12 June 1998 on the motion of the joint request of the accused persons regarding the presentation of evidence (TC). Reference was made to decisions by the European Commission of Human Rights (paras. 34-35).

67 *The Prosecutor v. Dario Kordić and Mario Čerkez*, Decision of 21 July 2002 (AC).

68 *The Prosecutor v. Duško Tadić*, Decision of 10 August 1995 on the Prosecutor's motion requesting protective measures for victims and witnesses (TC). See also *The Prosecutor v. Zejnil Delalić* et al., Decision of 28 April 1997 on the motions by the Prosecution for protective measures for the Prosecution witnesses pseudonymed "B" through to "M" (TC,

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4.8.6. Interpretation

According to para. (4)(f), the accused has the right to have the free assistance of an interpreter if he cannot understand or speak the language used in the Tribunal. This has not caused major legal problems. Under Rule 3(E) it is incumbent on the Registry to make the necessary arrangements for interpretation of the working languages. The accused has the right to use his own language. At the ICTR, interpretation into and from Kinyarwanda is always available and required in connection with the testimonies of most of the witnesses.[69]

A related issue is the translation of documents, which is also a Registry responsibility under Rule 3(E). The complex and voluminous nature of the cases before the two *ad hoc* Tribunals requires the translation of a vast number of documents. This may, in some instances, cause delays. As mentioned above, most accused at the ICTR speak French, which is one of the two official languages. But the question has arisen whether an accused who only understands Kinyarwanda has the right to receive all documents in that language. In *Muhimana*, the Trial Chamber held that para. 4(f), read in conjunction with the right to a fair trial and the right to information on charges under para. 4(a), covers not only oral proceedings, but also, to an extent to be determined subsequently for the purposes of the case at bench, some documents relating to his case. Reference was made to the similar wide interpretation of the equivalent provision in ECHR case law on article 6(3)(e), in particular *Luedicke, Belkacem and Koc v. Germany* and *Kamasinski v. Austria*. In those judgements, the Strasbourg Court stated that the right does not go as far as to require a written translation of all items of written evidence or official documents in the procedure. On the basis of these principles and case law in the ICTY, the Trial Chamber considered the need to translate the various documents at issue. Translation was required of all evidentiary material which related to the determination by the Trial Chamber of the charges against him, namely those submitted by either party at trial, all material accompanying the indictment pursuant to the disclosure provision in Rule 66(A), as well as prior witness statements, provided that the Prosecutor intended to call these witnesses at trial.[70]

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paras. 54-55), with reference to *Kostovski v. The Netherlands* and *Unterpertinger v. Austria*.

[69] See also Rule 42(A)(ii) on the right of the suspect to have an interpreter if he cannot understand or speak the language that is used for questioning during investigation, and Rule 101.

[70] *The Prosecutor v. Mika Muhimana*, Decision of 6 November 2001 on the Defence motion for the translation of documents into Kinyarwanda.

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4.8.7. Self-incrimination

Para. (4)(g) provides that the accused has the right not to be compelled to testify against himself or to confess guilt. Aspects of this principle are reflected in the Rules. Under investigation, Rule 42(A)(iii) provides that a suspect has the right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence. At trial, the accused may, "if he so desires", appear as a witness in his own defence.[71]

In *Čelebići*, the Defence argued that the Trial Chamber had erred in taking into account as an aggravating circumstance that one of the accused failed to give oral testimony. The Appeals Chamber observed that between national jurisdictions, there is no consensus as to an absolute right for the accused to remain silent at trial at no risk of adverse inferences being drawn. It recalled that the Strasbourg Court had found that the right to a fair trial implies that an accused has the right to remain silent and not to contribute to incriminating himself, but that the right is not absolute, and that the drawing of adverse inference from an accused's silence regulated by law is not contrary to article 6 as long as there are other safeguards in place. Reference was made to *Funke v. France*, *Murray v. UK* and *Condron v. UK*. In the view of the Appeals Chamber, an absolute prohibition against consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules, reflecting what is now expressly stated in the Rome Statute article 67(1)(g). The Trial Chamber had erred since its remark left open the real possibility that the accused's failure to testify had been considered as an aggravating circumstance.[72]

It is noteworthy that in this Judgement the Appeals Chamber, inspired by the Rome Statute, afforded to the accused a wider protection against self-incrimination than case law under ECHR article 6.

4.9. Review by higher tribunal

According to CCPR article 14(5), everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. A similar right is not explicitly stated in ICTR article 20 and ICTY article 21, but the principle of review in CCPR and other human rights instruments led to the establishment of an Appeals Chamber for each

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71 Incrimination of witnesses during examination in court is dealt with in Rule 90(E).

72 *The Prosecutor v. Zejnil Delalić* et al., Judgement of 20 February 2001 (AC) paras. 778-785. The *Funke* and *Murray* Judgements also formed part of the Trial Chamber's reasons in its Decision of 19 January 1998 to deny the Prosecutor's request to issue an order compelling one of the accused to provide a sample of his handwriting (paras. 38-61).

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of the two Tribunals.[73] The relevant provisions are ICTR article 11 and ICTY article 12 ("Composition of the Chambers") as well as ICTR article 24 and ICTY article 25 ("Appellate proceedings"). Rules 107-119 contain detailed provisions concerning the appellate proceedings.

In *Tadić*, the Appeals Chamber stated that an individual's right to appeal a judgement of a Trial Chamber resulting in conviction must be accorded substantial weight, as it reflects the position of the general corpus of international law. Reference was made to CCPR article 14(5), ECHR Protocol No. 7 article 2 and ACHR article 8(h). In light of the fundamental importance of this right, a Trial Chamber should not impose undue encumbrances that could deter a convicted person from pursuing an appeal. Generally, fairness requires that an accused or a convicted person not be punished for the exercise of a procedural right. Consequently, the Trial Chamber had erred in ordering that the ten years minimum sentence should begin to run from the date of the sentencing judgement "or of the final determination of any appeal", whichever was the later. The latter alternative could suggest to prospective appellants that the exercise of the right to appeal could result in enhanced penalties and lead to discouragement of appeals.[74]

In *Kambanda*, the Appeals Chamber agreed with the Human Rights Committee that a party will not be allowed, unless special circumstances could be shown, to raise issues on appeal that had not previously been raised by counsel in the course of the trial.[75] The Appeals Chamber referred to *Albert Berry v. Jamaica* and *Glenford Campbell v. Jamaica*. The decision is another illustration that human rights case law may, in some instances, be an argument to the detriment of the accused.

Different from appellate proceedings is *review*. ICTR article 25 and ICTY article 26 ("Review proceedings") give the convicted person or the Prosecutor the possibility to apply for review when a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber, provided that it could have been a decisive factor in reaching the decision. More detailed provisions are given in Rules 120 to 123. Review is not an individual right, but a remedy that may be granted to both parties by the Chamber concerned. This possibility is found in many national systems, but is not obligatory according to human

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73 *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* of 3 May 1993, S25704 para. 116: "The Secretary-General is of the view that the right of appeal should be provided for under the Statute. Such a right is a fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary-General has proposed that there should be an Appeals Chamber".

74 *The Prosecutor v. Duško Tadić*, Judgement of 26 January 2000 in Sentencing Appeals (AC) paras. 24-33.

75 *Jean Kambanda v. The Prosecutor*, Judgement of 19 October 2000 (AC) para. 27.

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rights instruments, which rather provide for compensation in the event of miscarriage of justice (see below). In the two Tribunals, there are few examples of successful applications for review.[76]

4.10. Compensation for miscarriage of justice

According to CCPR article 14(6), a person who has been finally convicted and whose conviction has subsequently been reversed as a result of miscarriage of justice shall be compensated, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.[77]

There is no such provision in the ICTR and ICTY Statutes. It may be argued, however, that acts of the Tribunals, as subsidiary organs of the Security Council, are imputable to the United Nations. Consequently, since the organisation considers itself bound by generally accepted norms of human rights law, such as CCPR article 14(6), the United Nations would be under an obligation to ensure that compensation is paid to a person whose conviction by an *ad hoc* Tribunal has later been reversed. In practice, such a situation has not occurred.

In letters to the Security Council, the Presidents of the ICTR and the ICTY have asked the Council to consider conferring upon the Tribunals the competence to deal with cases of compensation, including to persons wrongly convicted.[78] If the Security Counsel accepts the proposal, this is yet another example that human rights instruments have had legislative impact on the Tribunals.

4.11. *Non bis in idem*

CCPR article 14(7) provides that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.[79] In the context of the two Tribunals, the principle of *non bis in idem* is formulated in a different way. ICTR article 9 and ICTY article 10 stipulate that no person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the Statutes, for which he or she has already been tried by the Tribunal. By contrast, a person who has

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[76] One example is *The Prosecutor v. Jean-Bosco Barayagwiza*, Decisions of 3 November 1999 (AC) and 31 March 2000 (AC), respectively.

[77] Similar provisions are found in ECHR Protocol No. 7 art. 3, ACHR art. 10 and the Rome Statute art. 85(2).

[78] See, for instance, letter of 22 September 2000 from Judge Navanethem Pillay, President of the ICTR, to the Secretary-General of the United Nations.

[79] ECHR Protocol No. 7 art. 4 and ACHR art. 8(4) contain similar rules.

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been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the Tribunal, but only when the act was characterized as an ordinary crime, or the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.[80]

Consequently, the principle of *non bis in idem* in human rights conventions has had an impact on the two Statutes, but its scope is different than in relation to states. No need has been felt to state explicitly that a person cannot be tried twice within a Tribunal. The focus is on the division of functions between international and national criminal justice.

5. Other rights

Other human rights provisions than those mentioned above may have an impact on the activities of the Tribunal. Only four areas will be mentioned below.

5.1. Right to life

It follows from ICTR article 23 and ICTY article 24 that the penalty imposed by a Chamber shall be limited to imprisonment. The Statutes do not allow for capital punishment. CCPR article 6 on the right to life does not rule out the death penalty, but according to the Second Additional Protocol to CCPR of 15 December 1989 the death penalty shall be abolished. By following the CCPR Protocol, the Statute sends an important message to the world community: not even the gravest crimes shall be a sufficient reason to impose the death penalty.

5.2. Humane treatment

Both during pre-trial and subsequent detention, it is obvious that the detainees shall be treated with humanity and with respect for their inherent dignity, as required by CCPR article 10. Inhuman or degrading treatment or punishment is forbidden (see, *e.g.*, CCPR article 7 and ECHR article 3). The International Committee of the Red Cross regularly visits the detention facilities of the Tribunals and has found little to criticize. These provisions must also be observed during the enforcement of sentences.[81]

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[80] See also Rule 13.

[81] Relevant provisions are ICTR art. 26 and ICTY art. 27 ("Enforcement of sentences"), Rule 103 ("Place of Imprisonment"), Rule 104 ("Supervision of Imprisonment"), and the Rules governing the detention of persons (see 2.3. above).

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5.3. Deprivation of liberty

CCPR article 9 affords guarantees against arbitrary arrest or detention.[82] There is no corresponding article in the Statutes, but similar principles apply. According to CCPR article 9(1), no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. At the pre-trial stage, the relevant statutory provisions are ICTR article 18 and ICTY article 19, according to which a judge may, after having reviewed the indictment, issue such warrants of arrest, detention, surrender and transfer to the Tribunal as may be required for the conduct of the trial. Rule 40 ("Provisional Measures") and Rule 40*bis* ("Transfer and Provisional Detention of Suspects") contain detailed provisions.[83] Article 9(2) concerning information on the reasons for the arrest and any charges against the accused is linked to ICTR article 20(4)(a) and ICTY article 21(4)(a), see 4.8.1 above.

CCPR article 9(3) contains two distinct rules. According to the first, anyone arrested shall be brought "promptly" before a judge. The relevant provision is Rule 62 on initial appearance. The second rule provides that the detained person shall be entitled to trial "within reasonable time". This provision corresponds to ICTR article 20(4)(c) and ICTY article 21(4)(c), see 4.8.3 above. Furthermore, CCPR article 9(4) entitles an accused to judicial control over deprivation of liberty, and release if the detention is unlawful.

This is not the place to provide a detailed comparison between CCPR article 9 and the Statutes and Rules of the Tribunal. Suffice it to say that in *Barayagwiza*, the Appeals Chamber applied CCPR article 9(2) and referred to the jurisprudence of the Human Rights Committee with respect to the permissible length of time that a suspect may be detained without being charged. It considered whether the accused had been promptly informed about the charges against him and whether he had been brought promptly before a judge. It was also troubled by the fact that the accused had not been given a hearing on his writ of *habeas corpus*. Human rights case law played an important part in the Appeals Chamber's considerations.[84]

According to CCPR article 9(5) and ECHR article 5(5), anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. The Statutes contain no such provision. It may be ar-

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[82] ECHR art. 5, ACHR art. 7 and ACHPR art. 6 are also important.

[83] Rule 64 ("Detention on Remand") is applicable: "Upon his transfer to the Tribunal, the accused shall be detained in facilities provided by the host country…".

[84] *The Prosecutor v. Jean-Bosco Barayagwiza*, Decision of 3 November 1999 (AC), subsequently revised on the basis of new facts (see note 76 above). CCPR art. 9 was also discussed in *The Prosecutor v. Slobodan Milošević*, Decision of 8 November 2001 (TC) para. 35 *et seq.*

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gued, however, that the United Nations is under a legal obligation to ensure that a victim of such a violation is compensated. The Presidents of the Tribunals have requested the Security Council to consider whether there is a need for a statutory amendment (see 4.10).[85]

5.4. Freedom of expression

Trials at the Tribunals may raise issues relating to the right to freedom of expression. One example is *Brđanin and Talić*, where a Trial Chamber dismissed a motion from a retired journalist, who sought to set aside a Subpoena directing him to appear before the ICTY to give evidence concerning his earlier interview with one of the accused. He appealed to the Appeals Chamber, joined by 34 press companies and associations of journalists as *amici curiae*. The Appeals Chamber noted that the case concerned war correspondents, not journalists in general. It agreed with the Trial Chamber that the public has a clear interest in the work of such correspondents, who play a vital role in bringing to the attention of the international community the horrors and reality of conflict. Reference was made to the provisions on freedom of expression in international human rights instruments and to the case law of the Strasbourg Court.[86] The Appeals Chamber further held that compelling war correspondents to testify before the Tribunal on a routine basis may have a significant impact on their ability to obtain information and thus their ability to inform the public on issues of general concern. It then laid down the test to be applied in order to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court. As the Trial Chamber had not applied this test the Subpoena was set aside.[87]

6. Concluding observations

Human rights conventions have influenced the ICTR and the ICTY in various ways. At the *ideological* or *political* level, both human rights law and the development of international criminal justice can be seen as separate, but related methods to achieve the same aim – the reduction and possibly elimination of grave human rights violations. Whereas global human rights con-

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[85] See also note 78 above.

[86] It recalled the Court's case law that journalists play a "vital public watchdog role" and that in certain circumstances, compelling journalists to testify may hinder the ability of the press to provide accurate and reliable information, as stated in *Goodwin v. UK*. The Appeals Chamber also referred to *Fresso and Roire v. France*; *Erdogdu and Ince v. Turkey*, and *Sener v. Turkey*.

[87] *The Prosecutor v. Radoslav Brđanin and Momir Talić*, decision of 7 June 2002 (TC) and 11 December 2002 (AC).

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ventions were adopted from the middle of the 1960s and onwards, the United Nations was only able to establish international criminal tribunals about thirty years later, from the mid-90s. The adoptions of the Statutes of the *ad hoc* Tribunals under Chapter VII of the United Nations Charter were landmark events also in the development of international law.

The *legal* impact of human rights conventions on the two Tribunals is evident. Most obvious is the *legislative* influence. Some of their statutory provisions are directly inspired by human rights conventions. In particular, the wording of ICTR article 20 and ICTY article 21 ("Rights of the Accused") as well as their *travaux préparatoires* show the direct influence of the CCPR during the drafting process. These statutory provisions reproduce almost verbatim CCPR article 14(1)-(3) and (5). This is not surprising. It was axiomatic that an international tribunal established by the United Nations had to be in full compliance with the fair trial requirements laid down in the CCPR, one of the three instruments constituting the "The International Bill of Rights". This basic view has also motivated recent proposals to amend the Statutes in line with that convention.

The *judicial* impact of the human rights conventions depends on the substance. Case law of the two Tribunals provides examples of how human rights instruments and jurisprudence have influenced the interpretation of their material jurisdiction. Illustrations are the crimes of torture, rape and enslavement. This represents a substantive convergence between the two bodies of law and contributes to the prevention of human rights abuses.

The main impact of human rights law so far has been in relation to the statutory provisions concerning fair trial. In connection with its application of ICTR article 20 and ICTY article 21, the Appeals Chamber has frequently referred to provisions from the CCPR, ECHR, ACHR and ACHPR as well as to jurisprudence from the Human Rights Committee and the Strasbourg Court. In particular, the Appeals Chamber has followed the Court's approach in interpreting the principle of "fair trial" as including elements such as equality of arms, adversarial proceedings and reasoned opinions.

Human rights law has not only influenced the notion of fair trial within the Tribunals. Noteworthy examples of other concepts subjected to such influence are independence and impartiality, trial without undue delay and deprivation of liberty. The most frequently invoked human rights instruments have been the CCPR, followed by the ECHR and the ACHR.

Even if the impact of human rights conventions is important, other treaties are also significant. For instance, the Appeals Chamber has referred to the Rome Statute, even before it entered into force. National law and jurisprudence have also influenced the interpretation of the Statutes and the Rules. More importantly, in most cases there is no need to have resort to human rights instruments. The Statutes are supplemented by specific provi-

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sions in the Rules and other basic texts adopted by the ICTR and the ICTY. These texts form a body of law specifically adapted to the needs of the Tribunals and provide to some extent, depending on their level of precision, sufficient guidance to solve most of the legal issues with which the Tribunals are confronted. It is noteworthy, therefore, that some provisions that originally were inspired by the CCPR and other human rights instruments now generally live a life of their own in the specific context of the Tribunals.

The purpose of human rights instruments is to protect the individual, but they do not afford unlimited guarantees. The survey above illustrates that human rights case law has been applied both to the advantage and to the detriment of the accused. It is also interesting that the ICTR and the ICTY have adapted human rights case law to the specific circumstances of the Tribunals and even deviated from it, for instance because international tribunals are in a different situation than national courts.

In spite of such variations, the overall conclusion is that human rights conventions and case law have had a significant impact on the *ad hoc* Tribunals. This is one aspect of the convergence between human rights law and humanitarian law, which was predicted by Asbjørn Eide almost twenty years ago. There is reason to believe that this development will continue.

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Part Two:

Economic, Social and Cultural Rights

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IX

Development, capabilities, rights: what is new about the right to development and a rights approach to development?

Bård Anders Andreassen*

1. Introduction

This article addresses interpretations of the right to development and the related "rights approach" to development. It explores whether these concepts reflect new directions of development thinking and practices – or rather are alternative buzzwords of the "aid business". Does the right to development as a *human right* make sense? What are the contributions of a rights approach to development? What is the "value added" by defining development in human rights terms for people in need of a better life? How *operational* is a rights approach to development?

The relationship between rights, freedoms and development has been part of the international human rights discourse for more than fifty years. During the drafting of the Universal Declaration of Human Rights in the late 1940s, Eleanor Roosevelt, the chair of the Human Rights Commission, stated that, "we are writing a bill of rights for the world ... one of the most important rights is the opportunity for development" (Johnson, 1987: 1). Roosevelt was a strong advocate of putting an equal emphasis on economic and social rights on the one hand and civil and political rights on the other.

An interrelationship between rights and development had been made in the UN Charter, which states in Article 55 that a link between human rights and social and economic development exists. The nature of the "link", however, has remained relatively unexplored, although article 28 of the Universal Declaration of Human Rights refers to the right of anyone to a social and international order that may fulfil the rights and freedoms of the Declaration. The subject arose again in the 1990s, triggered by debates on the right to development, in particular the high-tempered debate at the UN World Conference on Human Rights in Vienna in 1993.

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In other words, from the 1940s through the 1990s, human rights and development co-existed in an unclear and ambiguous relationship. Important in this respect was that the equal emphasis on all rights sectors (civil, political, social, economic and cultural rights), established by the UN Commission while drafting the Universal Declaration from 1946-48, was broken in the 1950s by the Cold War. Consequently, the transformation of the rights of the Universal Declaration into international human rights law led to the adoption of two separate covenants, covering civil and political, and economic, social and cultural rights respectively. This distinction contributed to cementing a development ideology, which tended to exclude human rights as a development issue. Talk about human rights (or democracy and governance issues) represented unacceptable interferences in internal affairs, in conflict with the principle of state sovereignty. Arguments focused invariably on the possible trade-offs between democratic rights and economic growth, on the "danger" of democratic overload in developing countries with weak political institutions and authority, on the need for achieving growth before equity, or on how economic dependency of countries marginalized in the world economy had perverse effects on political stability and performance.

The adoption of the Declaration on the Right to Development by the UN General Assembly in Resolution 41/128 of 4 December 1986, accentuated a new interest in the interrelationship of rights sectors and dimensions of development, although the work to have this declaration adopted was controversial, and, in fact marginal to mainstream human rights work until the mid-1990s. Issues in the first decade after the adoption of the Declaration revolved around the "intrinsic nature" of development as a right. This interpretative work is still going on. Central among the many critical questions that were posed during the drafting process in the 1980s, and in the aftermath of its adoption, was whether a new right to development would enhance the compliance of countries with established international human rights law, or rather serve to excuse the failure of states to comply with basic human rights. What did it mean to say that the right to development is more than a sum set of rights covered by other human rights instruments? If development is about processes of change in social relations and living conditions of people, how does it help national and international development interventions if development is defined as a human right? Not least, as development implies change over time, what does it mean to have a right to a *process*? Who is the right-holder, and whose obligation is it to comply?

These issues have still not been resolved. Yet, this article argues that the right to development is part of debates about the notion of development, and has made valuable contributions to changes in development thinking. It has denoted a process towards a more comprehensive notion of development, putting the freedom and welfare of people at the centre. Still, however, the

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UN Declaration on the Right to Development has little practical influence on international relations and development work. And the international legal community sees it very much as aspirations and at best, as soft law without sufficiently clear legal substance.

Others, however, see the right to development discourse as gradually inspiring new models and mechanisms of national and international development interventions (including development aid) that is perceptive of the interrelated nature of human rights sectors. Proponents of this position assume that the right to development (as defined by the Declaration) may strengthen the international human rights regime at national level as well as in international relations. Underlying these models, it is argued, should be a normative foundation that regulates contractual-like relations between agents of international development, in the form of development compacts, and in making international commercial interests more accountable to human rights standards. Development compacts, it is further argued, should be designed in ways that award results in development, including mutually agreed human rights conditions.

The purpose of this article is to make a modest contribution to this debate. The first section addresses the notion of development, traces changes in development thinking over the last decades and reviews shifting interpretations of development. It argues that there is a convergence of development thinking and international human rights.

The second section examines the concept of *human development*, and how it relates to theories of human rights. In this section the contributions of Asbjørn Eide and Amartya Sen are of particular interest. It also addresses the concept of a rights-based approach to development.

The third and fourth sections discuss attempts to operationalise the right to development in international development interventions, and exploring how a rights approach to development differs from conventional approaches. Of particular interest are some of the outcomes of the work of the UN Independent Expert on the right to development, appointed by the UN Human Rights Commission in 1998.

2. Development from growth to human agency, capabilities and rights

"Development" has been seen in different ways during the last fifty years. The concept has gone through changes in interpretation and practical application. It has been a concept in flux that has changed through cycles corresponding roughly with four decades from the 1950s' theories of growth until the present stress on human development and sustainable growth. Throughout this period, there has been a lively debate about development, and the practical means to be employed in trying to achieve stated development

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goals. A number of narrower views have invariably identified development with growth of gross national product, with the rise of personal incomes, social modernisation, industrialisation, or just rise in personal incomes.

In general terms, development models have differed along two dimensions: the objectives they pursue, and the means they apply. As concerns objectives, positions have mainly varied between favouring growth and emphasising redistribution of resources, that is, growth versus equity. On the means dimension, a main difference has been between model building on a central role of the state and a predominance of governmental intervention on the one hand, and a strong focus on the involvement of people and social forces in development processes on the other. The various options are presented in *Fig. 1*.

Taking these options as a classification scheme, we can distinguish between five time periods in development thinking/practices over the last fifty years.[1]

1. The first period was the time of the *modernisation perspective* from the mid-1950s until the mid-1960s. In this period W.W. Rostow published his classic *Growth Through Stages*. Theories of growth had a guiding influence on development aid, and assumed that developing countries did not "take off" in their economic development because of shortcomings in capital and infrastructure.

These deficiencies had to be filled by international aid agencies that provided resources for infrastructure ("gap filling") in developing economies in order to achieve sustainable economic growth, which was the ultimate goal of development. The approach was fundamentally statist and "top-down". International institutions, particularly the UN, initiated technical and financial assistance.[2] This was a period when "growth through stages"-theories were influential in development theory (*cf.* the north-west quadrant in *Fig. 1*).

2. In the second period, covering roughly the decade between 1965 and 1975, the "innocence" of the initial period gradually gave way to political realism and a radical development platform. In spite of large sums of capital being transferred to developing economies, development did not "trickle down" to the poorer segments of the population as expected. The existing

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1 This section refers, in particular to Hyden, 1994. Hyden suggested, in his article, four periods of development thinking. In view of developments in the 1990s and to the present, however, I suggest an additional period that is crosscutting of Hyden's "analytical time periods" in *Fig. 1*. This represents the diagonal line on the right side of the figure, suggesting that current development thinking is crosscutting previous periods with an emphasis on equity, participation and growth.

2 Technical assistance as an objective of the UN was proposed, for the first time by Lebanon in the General Assembly in 1946, urging the creation of "advisory boards" charged with providing "expert advice" on request from developing countries.

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schemes of development were totally inadequate for coping with the immense problems of "the new nations". A radical critique claimed that social and economic change in developing countries could only be understood if placed in a global context. The capitalist structures of the North undermined developments in the "dependent South". Some concluded that the only way out of this "trap of underdevelopment" for the South was to de-link itself from the North. The *dependency* school of development sociology achieved wide influence, and advocated self-reliance strategies. Others concluded that trade was a better strategy than aid, but declining export prices from developing countries and increasing imports led to a worsening balance of payment deficit.

Within development institutions, the macro-economic "trickle-down" approach was replaced by an emphasis on basic needs, redistribution and integrated development programmes. Equity and social justice replaced growth as the most important goals of development. The donor community was preoccupied with supporting countries that pursued the "right" policies, but insisted rhetorically to leave as much responsibility as possible to the recipient government on how to spend the support. In this period the idea of "recipient responsibility" emerged. Budgetary support was a favoured way of granting aid (similar, in fact, to current trends in bilateral aid). It was widely held that strong state institutions were needed, in order to provide resources to the people, develop industries, and mobilise national resources. High import tariffs were introduced to support a nascent domestic industrial sector.

3. From the mid- or late 1970s to the mid-1980s, however, the role of the state in promoting development became increasingly questioned. The focus of attention shifted towards "the local", and respect for local traditions, modes of production and customs became new catchwords, reflecting the entry of social anthropology into development work. Social anthropologists brought in a focus on culture, cultural sensitivity, and questioned the nationalist elites real agenda of pursuing a Western model of nation building. Assisting and "empowering" people at the local levels became new slogans, and development had to incorporate local mobilisation and entrepeneurship. New social groups (*e.g.*, women) and sectors (*e.g.*, small-scale industries and communal self-help initiatives) became favoured mechanisms of development. In instrumental terms this led to a focus on *popular participation*, and "participatory development strategies" (demonstrated in the south-east quadrant of *Fig. 1*).

4. The fourth period, stretching from the mid-1980s to the mid-1990s saw new directions in development thinking (*cf.* the north-west quadrant of *Fig. 1*). First, the foundational goal of development was defined in terms of *human development,* and *enabling environments*. Second, this instrumental

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re-orientation of development thinking focused on political institutions and governance structures, although it was argued that the participatory approach lacked an understanding of the institutional conditions for popular influence. In the 1980s, the human rights movement criticised development actors for not taking seriously the need for institutional safeguards of democratic rights, and the rule of law. These areas of political organisation, it was argued, were critical for development in social and economic areas. Institutional protection of rights was seen as essential for enabling individuals and groups to take part in the development process.

During this period, the increasing use of political conditionality of aid witnessed a growing dissatisfaction with authoritarian regimes, and arguments in favour of tying aid and governance in donor countries. The ending of the Cold War, and the collapse of Soviet communism, ushered in a wave of democratic expansions in former non-democratic societies throughout the world, reinforcing the trend towards a rights approach to development. International organisations (*e.g.*, the World Bank) started to use the term "governance" in order to address the weaknesses of the capacities of public institutions in formulating and conducting effective and efficient development policies.

5. The last period begins sometime in the early 1990s, and reflects the new emphasis on capabilities, choice and rights. It represents an expansion and elaboration of the human development approach, but draws more explicitly on the role of rights and freedoms in enhancing capabilities of individuals and groups in becoming the active subjects of development. This rights-based approach, as it has been referred to, should not, however, analytically (and in practical terms) ignore the *structural and institutional obstacles* to development that deprive people of their freedoms and rights.

3. Human development and the relationship to human rights

This trend in development thinking moved the concept of *human* development to the centre stage of the debate in the early 1990s. The work of the United Nations Development Programme (UNDP) was no doubt significant for this reorientation of development thinking. In 1991 the UNDP published the first *Human Development Report* and tried to establish new parameters of development. The report defined human development as *a process of increasing people's choices*. To achieve this key goal of development, it suggested focusing on strengthening human capabilities "through investing in people", and on the use of those capabilities for growth of employment and income (UNDP, 1991: 14). According to this approach participation was an integral part of development. What mattered was development *by* people as

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well as *for* people. Economic growth was important only if it was translated into well-being of the people.

In order to measure and monitor human development, a Human Development Index (HDI) was created, combining national income with two social indicators – adult literacy and life expectancy – to give a composite measure of human progress at aggregate national levels. This way of defining and measuring human development represented a significant step forward in specifying a normative and measurable concept of development that moved beyond a traditional measurement of national and per capita income. By building a matrix that combined economic and social measures for development, the human development index could, for instance, conclude in 1991 that 26 countries had HDI ranks that were 20 or more places lower than their per capita rating, thus showing that they had considerable potential to improve their human development levels "by spending their incomes better and planning their investment priorities more wisely" (*ibid.*, 15).[3]

In the 1991 *Human Development Report* a human *freedom* index was proposed in order to emphasise the importance of human freedoms and rights. Human development was seen as "incomplete" without rights and freedoms. The HDI of the 1991 human development report, however, had not included human rights and freedoms because "freedom is easier to talk about than to measure" (UNDP, 1991: 18). Attempting to establish an index on human freedom, the 1991 report relied on the *World Human Rights Guide* published annually by Charles Humana using 40 rights indicators to measure human freedom. The rights and freedoms included in the index were taken from the UN Covenant on Civil and Political Rights, and excluded, in other words, economic, social and cultural rights. The analysis concluded that there seems to be a high correlation between human freedom and human development. However, the index was strongly criticised for its exclusive reliance on political and civil rights, and for failing to develop an appropriate and realistic rating system (Tomasevski, 1992). It was also politically sensitive, and much more so than the human development index, because it was conceived as a "shame and blame"-list of governments throughout the world. The 1992 and subsequent reports did not include human freedom indexes.

The concept of human development represented a major step forward in defining development in normative terms. The major merit of the approach was to combine a normative constituent component (life expectancy) with instrumental factors (income and education). The growing success of the human development index and the related human poverty index (in terms of application) was due not least to its effort to attract public attention and in-

[3] One serious problem with the index that – to my knowledge – has not been corrected is that the index, as a national average rating, overlooks important differences of regional, local and household nature in terms of equity and distribution.

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terest as an alternative to the narrow measure of per capita or gross national income previously employed by statistical and economic analysis. HDI was broader, although narrow enough to offer an easily eligible measurement of development. Here, in the simple structure of aggregate analysis was its partial success, but also its weakness. As any constructed aggregate it may be less interesting for policy analysis than substantive analyses of diverse local and national performances (Sen, 1999).

Perhaps as a consequence of the failure to construct a reliable human freedom index, rights and freedoms remained to some extent detached from the human development approach. Although the index of rating freedom was justly criticised, one should expect that the "choice dimension" of human development would be more explicit in identifying rights and liberties as essential factors of the choice and opportunity structures of citizens. Hence, in defining development as the process of increasing people's choices, a model explicating rights and freedoms as prerequisites for making effective choices was not elaborated. In understanding causes of poverty, and in proposing remedies for poverty alleviation, this is a critical point. For instance, in situations of rural poverty, poor peasants who lack autonomous capacity to assure their basic needs for food, shelter and health typically have to seek dependencies on better off households for whatever necessities for production or consumption. This "clientilist" dependency renders them potentially vulnerable to coercion by better off household (patrons), undermining the foundation of their basic political and civil rights and freedoms. Assuring people a "minimum choice" among significant alternatives by providing basic infrastructure and capability in economic terms, thus, could be instrumental for securing civil and political freedoms.[4]

The perspective of minimum choice turned attention to the importance of self-provision in the implementation of economic and social rights. Focusing on self-provision in securing economic and social rights has been central in Asbjørn Eide's important work on economic and social rights since the mid-1980s. Eide has proposed to focus on *obligations* in implementing economic and social human rights. As rights generally require correlative duties a focus on obligations implies addressing measures and means of implementing rights.[5]

Under international human rights law obligations are primarily those of States. In his writings since the mid-1980s, Eide has summarised human rights obligations in three categories (subsequently developed to four); the state's obligation to respect, protect, and fulfil (see, *e.g.*, Eide, 1984). The

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[4] This point has been made by Smith, 1986, and by Andreassen, Smith and Stokke, 1992: 258f.

[5] Although obligations are not spelled out in great detail in international human rights instruments, they have been gradually clarified through monitoring bodies and case law.

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obligation to fulfil includes further an obligation of the state to *facilitate* and an obligation to *provide*. A common interpretation of this rights-obligation linkage has been that all economic and social rights must be provided by the state. Eide argues, however, that this view represents a narrow interpretation of these rights and their corresponding obligations. Alternatively it can be argued that most of the time the individual is the active subject of rights provision, in social and economic terms. Hence, "the individual is expected, whenever possible through his or her own efforts and by use of own resources, to find ways to ensure the satisfaction of his or her own needs, individually or in association with others" (Eide, 1995: 36f).

The use of one's own resources requires that the state respects the individual's freedom to take the necessary actions, and use the necessary resources to satisfy one's needs (*ibid.*). In rural settings this typically takes place in the context of a household. This means that the rights-holder must have the capacity and capability to use *other* rights and freedoms needed in order to be able to fulfil economic rights, say to adequate food, by self-provision (*cf.* article 11 ICESCR). For instance, the right to seek information, or to have access to adequate health facilities may be instrumental in securing the right to food for a peasant household. There are, in other words, empirical as well as normative-legal inter-linkages between international human rights and freedoms that, taken together, can make the individual able to be *a self-provider* of basic needs and values. This makes Eide conclude that development is the combined realisation of all basic human rights defined by international human rights law.

To stress the role of self-provision does not, by any means, diminish the role of the state in respecting, protecting or fulfilling rights. But it emphasises that the individual (in households, or other association) is the key subject of law, and of development. Here, a link between the human development approach and the role of rights and freedoms in facilitating development exists, and has been examined in detail by Eide.

Basic elements of this approach are also reflected in Amartya Sen's seminal work on development (most recently in Sen, 1999). Sen suggests that development can be seen as a process of expanding the real freedom that people enjoy. Development advances freedom as an overarching objective, and expanding freedom means to remove the sources of un-freedom, such as poverty and social deprivation, tyranny, neglect of public facilities, as well as intolerance and activity of repressive states. There are mainly two reasons for defining development in terms of expanding freedom: The first is an evaluative reason that implies assessing progress in terms of the enhancement of peoples' freedoms. The second reason concerns effectiveness, implying that promoting development as expansion of freedom is inherently dependent on the people's free agency: the free agency of the individual

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(and, at the aggregate level, people) is instrumental for *production*, and hence, development output. Free agency is what Sen refers to as "the engine" of freedom, or its "constitutive component" (p. 4).

The emphasis on agency is not new in human rights theory. In *Human Rights, Essays on Justification and Applications* (1982), Gewirth asserted that human rights are central to all other moral considerations "because they are rights of every human being to the *necessary conditions* of human action, i.e., those conditions that must be fulfilled if human action is to be possible either at all or with general chances of success in achieving the purposes for which humans act" (*ibid.* 3, emphasis here). To be able to exercise autonomous and purposeful action is the moral basis of human dignity.[6]

Sen applies a similar justification of rights and freedoms, but he develops the framework further to show that rights and freedoms are inherently related to development (*ibid.*, p. 148). This perspective implies first that political and civil rights have direct importance in enhancing basic capabilities, including political and social participation. Second, political and civil rights have instrumental roles in enabling people to express their demands, grievances and preferences, including claims of economic needs. Third, political and civil rights and freedoms have constructive roles in conceptualising (and interpreting) peoples' needs in proper social contexts. All of these *functions* of rights and liberties are critical for people to enjoy freedom, or phrased differently, to exercise *capabilities* to choose a life one has reason to value. This "capability approach" emphasises that human development is integrally connected with enhancing certain capabilities, that is, the range of things a person can do and be in leading a life (UNDP, 2000: 19).

Sen's work has, indeed, been central in moving attention towards freedoms and capabilities in defining development (or human development as it is generically termed). But what specifically do human rights add to human development? What is a coherent human rights approach to development? On the basis of Sen, and the contributions made to this field by others, including not least Eide, I suggest that a human rights approach to development has two main dimensions: a legal dimension and a process dimension.

On the one hand, a rights based approach to development represents a framework for human development that is normatively and legally based on international human rights standards, and aims to protect and promote human rights through all types of development interventions. Human rights

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[6] This relationship between purposeful agency and human rights (as necessary conditions) makes sense, but it is at the same time problematic. If the scope of human dignity is limited (as an underlying justification of human rights) to instrumental agency, what can we say about the dignity of mentally retarded persons, or the baby child. The centrality of agency is reasonable in justifying the instrumental nature of rights. But human rights as claim-rights for or institutional protection of basic human dignity and integrity are goods and entitlements of intrinsic value to human existence.

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norms, therefore, have to be *mainstreamed* into plans, policies and processes of development, which refuses a charity or "welfarist" view of development. Development is a matter of rights, with corresponding obligations. Education, for instance, is not a matter of policy goals alone, but a right that the individual has, and can claim in legal terms. It explicitly applies references to international human rights treaties and jurisprudence in order to determine its legal content and orientation. It expressly gives attention to non-discrimination, the principle of equality and measures to protect vulnerable groups identified by positive international human rights law.

On the other hand, it does not offer precise prescriptions about economic and social policies. It offers basic legal obligations that need to be upheld, but has less to say about the institutional implementation, including the use of markets and state. Accordingly, the basic provisions of the UN Covenant on Economic, Social and Cultural Rights (*cf.* articles 2 and 11) were drafted more in the form of obligations of result than obligations of conduct (Eide, 1995: 13). This presupposes, however, the responsibility of the state in respecting and protecting rights, and to fulfil human rights actively if these are not assured through other, non-state mechanisms and measures.

The second dimension of a human rights approach to development is the *process aspect* that addresses the opportunities of people to take advantage of the freedoms and liberties that they are entitled to. This is where the capability approach to development addresses elementary capabilities that people need in order to secure their most important interests, preferences and values. There are a number of capabilities that people require to secure their most valued goods and to be able to make real choices according to their own interests. As noted above, capabilities give freedom to make choices, that is, to be a *purposeful agent* in Gewirth's terminology. Perhaps one of the most basic capabilities – often alluded to by Amartya Sen – is to be capable of knowing, requiring a free information base. The free flow of information, institutionally guaranteed by a right to free access to information and to share information with fellow citizens, often has a significant effect on other capabilities that people need to have in order to live a life they value, and to live in dignity in material as well as immaterial terms. Below I return to the concept of the right to development as a process.

4. The right to development and development compacts

Considering the changes in the development discourse over the past ten years towards an emphasis on rights and freedoms, surprisingly little attention has been paid to the UN *Declaration on the Right to Development* adopted by the General Assembly in December 1986. Why has the right to

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development remained in the background? Rightly, the attention and controversy around the right to development issue at the World Conference on Human Rights in Vienna in 1993 incited some interest in the subject, but still the right is characterised by scant operationalisation and little practical use. And the right to development continues to attract a good deal of controversy.

In parts of the international human rights community the right to development has had a lukewarm reception. At the Vienna Conference, for instance, efforts of representatives in third world countries to refer to development as a human right provoked passionate debates and long-lasting negotiations before it was approved.

Responding to this scepticism, the UN Commission on Human Rights appointed an Independent Expert by Resolution 72/1998 on the right to development. The appointed Expert was the Indian Professor of economics, Arjun Sengupta. The Independent Expert has tried to move the debate towards a more precise interpretation of the Declaration, and to make the right to development a practical tool in the international development practice. Since 1999, four reports have been issued. The discussions below focus on some critical dimensions of this work, mainly efforts to resolve key obstacles to a broader acceptance of the right to development as a human right. In the final section I put forward the question whether the right to development debate may contribute to build new and better models of international development interventions. In other words, what is the value added?

The idea of a right to development was first proposed in 1966 in the General Assembly by the Foreign Minister of Senegal. In 1972 it was taken up and elaborated by the then President of the Supreme Court of Senegal, Keba M'Baye in a lecture and subsequently followed up in several statements that he made as head of the Senegalese delegation to the Human Rights Commission. Developing and socialist countries and a few Western governments supported the idea. The term soon became a chief catchword of the UN and was referred to in a number of resolutions in the 1970s. Accordingly, the demand for a right to development preceded the call for a New International Economic Order (NIEO) that arose in the mid-1970s, although the justification of these two sets of ideas became mutually reinforcing.[7]

In the 1970s and -80s a number of different motivations were proposed as justification for an affirmation of a "right to development". First of all, it was a way of formulating the demand of developing countries for a restructuring of the world economic order, and to define this in the terms of international law. Defining claims for international justice, and support for poor

[7] In May 1974, the General Assembly adopted by consensus, in the face of considerable reservation on the part of Western countries led by the US, one resolution containing a Declaration on the Establishment of NIEO (Res. 3201-S.VI) and another containing a Program of Action on the Establishment of NIEO (Res. 3281-XXIX).

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countries in legal terms, it was assumed, would make the claim stronger because it would require a definition of corresponding obligations and duty-holders. The latter, it was assumed, would primarily be the industrial world (the North), which would have a responsibility to transfer resources, in particular financial support to developing countries, and to restructure the international economic order. The application of the human rights doctrine was germane because it sought to catch the momentum of human rights as an important principle of international relations, which became increasingly important for Western countries. Note that this was about the time when Jimmy Carter tried (unsuccessfully) to make human rights a touchstone of US foreign policy, and shortly after the Helsinki process had been launched.[8]

For some developing countries and members of the Socialist bloc of the UN, focussing on the right to development served as a useful tool in the ideological and political struggle. The anticipation of Western governments was that the right to development argument was used (or misused) to divert international, including UN, attention to gross human rights violations in developing countries. Accordingly, they assumed that this focus served to weaken the international human rights regime. This was the "excuses and trade-offs" difference (Thiis, 1995). According to this difference, developing countries would argue that emphasis could neither be paid to civil and political rights, nor to economic, social and cultural rights as long as these countries' basic right to development was not assured: without a right to development, developing countries had to rely on fragile institutions and structures, which could not possibly assure basic civil and political human rights, nor meet the "resourceful demands" of economic, social and economic rights.

Opponents of the right to development at the time of its adoption argued, at the same time, that despite the fact that the demand for a right to development reflected a serious and justified preoccupation about international injustices, these concerns could not be translated into human rights terms. This represented a mistake, they argued, either as *de lege lata* or as *de lege ferenda* laws, because the right to development could not be conceived of and transformed into positive law ("operationalised") as a right of individuals (Cassese, 1986: 369). Main challenges would be to define corresponding obligations, to identify whose responsibility was the fulfilment of a right to development, and to define the term: What *kind* of development was envisaged, what should its substance or material content be?

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According to Donnelly (1985) the right to development was part of a worrying tendency to subordinate civil and political rights to social and economic rights, and national dimensions of human rights violations to interna-

[8] *Cf.* Egeland, 1988 for a discussion of the failures of the Carter administration to make human rights a main objective of its foreign policy.

tional dimensions. It would potentially absolve governments of developing countries of their responsibility for human rights violations due to miserable economic situations. There was a strong fear that a right to development as a *human* right would potentially undermine the notion of human rights as rights of the individual. Was it a collective right of peoples? How to define "the people" as a collective entity, and whose prerogative was it to make the definition (granted that most people are heterogeneous with internal differences)?

The UN drafting and adoption process of the Declaration on the Right to Development reflected a concern for many of these controversies and trade-offs, in particular the definition of the subject of the right – the individual, a people, or both? And who is responsible for fulfilling the right to development, when, as it were, the right was defined as a right to a *process*?

A content analysis of the Declaration on the Right to Development shows that some of these concerns were justified, while others were resolved through the final negotiations. First, the Declaration in Article 1 states that the subject of the right to development is the individual, saying in Article 2, paragraph 1 that "the human person is the central subject of development" in the sense of being the "active participant and beneficiary of the right to development". The right, however, extends to "peoples" in the sense that "every person" and "all peoples" are entitled to the right to development. This implies that "peoples" cannot be interpreted in a way that ignores or neglects the individual. Article 1 of the Declaration thus states that

> [t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

Hence, every human person and all peoples are entitled to "participate in, contribute to and enjoy" processes of development.

This represents a difficulty of the Declaration. The meaning of a right to a "process of development" is not at all explicated. Above, I have discussed the shifting notions of development over the last forty years or so. Although these shifts in development theory and practice to some extent reflect a cumulation of experiences, they also demonstrate that the notion and interpretation of what development is about is in flux. To have a right to an object (development) that is in constant flux, however, causes some problems of conceptual and legal interpretation.

Here I suggest that the right to development as a process relates to this notion of development (as an expansion of freedoms and capabilities) in the sense that a process is constructed of *successive situations* of social, political, economic and cultural exchange and interrelationships. Taking this as a

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premise, a *process* approach to development as a right invokes three suggestions.

First, any situation or socio-political context should be assessed according to the human rights standard. Here, human rights compliance would require that human rights assessments be made on the basis of international human rights treaties. In this sense, the right to development adds little new. It represents, as stated in article 1 of the Declaration, a process where all human rights and freedoms can be fully realised. Rightly, in this interpretation, the right to development stresses a concern about *change over time* (directions of change), or *trend analysis* of human rights performance of states. Trend analysis, moreover, may be of interest in order to determine the types of international interventions that should be made (if any) and to make estimations about their likely effects. But we do not really need a right to development to stress this point.

Second, processes imply different and alternative modes of change in political, economic and social fields caused by social forces, planning and policy interventions, in short, by human activity. Here, the right to development emphasises that the citizen (or any inhabitant in a society) should be the beneficiary of development results, though it should also be an active and capable *participant* in making a contribution to change. In article 2 paragraph 3, the Declaration says that

> States have the right and duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Considering this article together with article 1, the Declaration presupposes that development processes shall be conducted in ways that ensure the protection and "full realisation" of "all human rights and fundamental freedoms". According to the preamble, these rights and freedoms are enshrined in positive human rights law (reference is made to the UN Charter and the two UN Covenants), and are viewed as capability factors that enable the active participation of people in development processes. In terminology it is human-centred, and presupposes democratic participation and involvement.

In this sense, the right to development adds *prescriptive modalities* of national and international development. It implies, for instance, that decisions are made by democratic governance, at national as well as international levels. The right to development, therefore, also concerns international processes of change, including decision-making structures and procedures that are subsumed under the concept of global governance.

Third, and more challenging than the two other observations, the right to development triggers a re-thinking of the relationship between rights and

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obligations. As noted, perhaps the most contentious issue in the drafting process on the Declaration was the issue of obligations: whose responsibility is the fulfilment of a right to development? The conventional legal response is that rights are entitlements that require corresponding duties. Human rights regulate the relationship between the state and individuals within its jurisdiction. According to the human rights doctrine, any individual has a legitimate claim to the material benefits, immunities, freedoms etc. that are defined by human rights treaties. The state is the ultimate provider.

We discussed above, however, how the modes of state obligations are of different types, balancing types of state intervention and a respect for the individual's use of one's own resources and capability for rights self-provision. The weakest demand on the state is to respect a right, basically by not interfering in the lives of the citizen (respecting civil and political rights), or not infringing on the individual's or a group's self-provision. Respecting, of course, requires state action by legislation. A more active role of the state in terms of legislation and *law-enforcement* institutions shall protect and enforce the rights enshrined in law, including human rights provisions. And at a third level of state obligations an active state as a *provider* of the substance of a right is required.

All of these obligations are, ultimately, *perfect obligations* in the terminology of Immanuel Kant. According to Amartya Sen (1999: 230), perfect obligations would be acceptable only if they can be implemented, requiring that they have a corresponding duty-holding party. In human rights law the ultimate duty-holding party is conventionally the state.

In the real world, however, there are many situations where rights exist, although there is no immediate possibility to have them *fully* realised (Sen, *ibid.*). Economic and social human rights are partly rights of this nature, recognised by the International Covenant on Economic, Social and Cultural Rights (ICESCR) that says that the full realisation of the rights of the Covenant should be achieved *progressively*, and to the maximum of available (national and international) resources (*cf.* article 2.1). In the Kantian tradition, the obligations derived from this text can be described as *imperfect obligations*, where no person or agency (including the state) is charged with securing the *full and immediate* obligation to ensure a specific right.

Imperfect obligations capture situations where a right exists as a freedom, or immunity, or power that people *should have* such as human rights, while there is no "specific duty of any given individual to make sure that the person has her rights fulfilled" fully (Sen, *ibid.*). This interpretation of obligations, however, should not conclude that states that ratify the ICESCR have *no* obligations. On the contrary, every state should indeed take *immediate* steps (*e.g.*, by enacting legislation), as well as long-terms steps (by developing public policies, looking for international co-operation and assis-

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tance, etc.), and do whatever it can within the resources available, including obtaining international assistance and co-operation. In real life, most states could do much to accommodate these obligations if the ruling elites had a political will and made priorities consistent with human development goals. It is worth noting, that according to international human rights treaties (*cf.* for instance article 2 of the ICESCR), imperfect obligations are not just the responsibility of the domestic State. The claim to have the right fulfilled can be made to anyone who are in a position to help, for instance by international co-operation and support.

Obligations to fulfil the right to development can be viewed in the same way despite the fact that, from the point of view of international law, the Declaration is a non-binding instrument in legal terms. If the right to development makes sense as benefits that everyone should have (which we argue that it does from a human rights point of view), the claim for fulfilling the right should be addressed to any agency in a position to help, including affluent states, corporations and other private or public agents. This interpretation of imperfect obligations was implicit in the Vienna Declaration , which espouses that

> States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realisation of the right to development and the elimination of obstacles to development.

Immediate obligations are, in this way, constituent of an ethics of international assistance and co-operation.

Thus, imperfect obligations are implicitly part of international human rights law, as inherent in the ICESCR. It may be argued that they are preconditioning any sensible talk of obligations under the Declaration on the Right to Development. Imperfect obligations, however, are not legally enforceable, but they rely on political pressure, democratic persuasion, and moral commitment.

5. A rights approach to development – value added?

Perhaps the main contribution of a rights approach to development is its *substantive coherence* and its *legal and normative foundation* in international law with broad-based international support. A rights-based approach to development aims at *human* development as the goal of development. It presupposes that human rights are institutional requirements for achieving this goal and hence, there are express linkages to rights defined by international treaties. This implies that the various components of human development can be monitored in terms of rights assessment and "expansion of freedoms"

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in Sen's terminology. Main "outcomes" of a rights-based development are accountable governments and democratic institutions, empowerment and active participation and involvement of people in development processes. It also implies non-discrimination among groups and particular attention to vulnerable groups. The moral ethos of development is clearer and more articulate than in previous conceptions of development.

This shift of emphasis towards a legal foundation of development goals implies that development output (for instance basic education, health, personal security or other valued goods in human life) are not matters of charity or "welfareism". They are matters of *legal* entitlements and claims. In this sense, development goals – if denied – can be pursued by litigation. In real life situations, to make legal entitlements effective relies on the support of collective action by social movements that pursue development goals effectively as legal claims and political priority. Social movements, in fact, are major human rights mechanisms for people to have their rights fulfilled. For instance, the role of teacher unions can be instrumental in demanding educational facilities needed in order to implement the right to education.

In more operational terms, the rights approach to development also helps to broaden the conception of development to include governance issues (and the demand for accountable and transparent governing), the rule of law and security of the person, as well as minority issues. Although development is multi-dimensional, a rights approach provides coherence in values and moral underpinning. For instance, in many cases the right to organise is an institutional requirement for people's assurance of rights to adequate food and nutrition by self-provision, because the organisational factor may determine whether a local community can make effective demands for infrastructure (to be able to trade their produce) or forcefully demand a reallocation of land.

In other words, an advantage of a rights-based approach is its cohesion and comprehensiveness. International human rights cover the main areas of human agency and social life. Again, the potential for operationalising the goals of development by using rights categories gives guidance to practical development initiatives and interventions. The current attention to rights-based development by international development agencies, however, has made scant use of these categories in mainstream aid programmes.

A rights approach to development also adds substantive requirements for developmental goals. Again, taking the right to education as an illustration, international human rights law (*cf.* the ICESCR, and the UN Convention on the Rights of the Child) makes prescriptions about the *substance* of the right (its material content), and hence, what the right to education as a development objective means in practical terms. This approach also requires that development interventions be made in ways that do not violate other

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rights. Freedom from want, in other words, cannot be implemented by the state in ways that are inconsistent with the right to organise, the right to seek information, or the right of a citizen to be an active participant in decision-making.

In his fourth report to the Human Rights Commission, the UN Independent Expert suggests a programme aimed at the eradication of poverty. He proposes to remove three "major aspects" of "capability poverty", namely hunger, absence of primary health care, and lack of basic education by the universal fulfilment of the right to food, the right to primary education, and the right to health. This may prove a useful model for expanding understanding of the ways that rights can be used as standards and guidelines for basic development goals. A rights-based approach to these categories of rights would demand, however, that other rights categories that are instrumental for fulfilling the right to food were integrated into the model, such as freedom of information, freedom of association, and the right to participation etc. There is, therefore, a danger that the step-by-step approach suggested by the Independent Expert may tend to compartmentalise the development process, rather than directing attention to realistic and comprehensive approaches.

Attempts to operationalise the right to development has revitalised the idea to experiment with development compacts as observed by the Independent Expert in his fourth report (*cf.* E/CN.4/2002/WG.18/2). The then Norwegian Minister of Foreign Affairs, Thorvald Stoltenberg, put forward the idea of *development* compacts in 1989. He talked about such contracts as comprehensive, long-term commitments by industrial countries for development assistance to implement long-term plans of the third world countries (*cf.* Report 1 of the Independent Expert, E/CN.4/1999/WG.18/2). Development compacts may be one way of implementing imperfect obligations in the field of development. So far, however, they have not been operationalised further. In order to contribute new models of development assistance that ensure the most effective use of the resources provided, such models should include a focus on incentive structures of both the donor and the recipient for being part of the compact. This would potentially be compatible with the development compact idea and a view of development as expansion of capabilities and freedoms.

6. Concluding remarks

Human rights as well as democracy and good governance have become central concerns in contemporary development discourses. Slowly, the idea that a human rights approach to development may add value and direction to development processes seems to be gaining some international recognition.

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This practical and theoretical reorientation of the development discourse sees development as a normative conception of *desired* change: It concerns basic values and norms in human existence and social life that can facilitate human worth and dignity. In this regard development is not just a matter of economic growth, and models for achieving growth. More basically, development is about processes that expand human freedom and welfare, and create human capabilities that enable people to be "purposeful" agents in society with others. In this article I have argued that a rights approach to development helps turning our attention to the role that international human rights play in structuring such processes of human development.

Although it cumulatively builds on previous conceptions, development as an expansion of freedoms and rights represents a new direction in development thinking. It reiterates the old insight that law enforcement is a basic quality of change. Yet, the notion of development discussed here qualifies this insight by pointing at *human rights law* as the basic source of guidance for development, including international development interventions.

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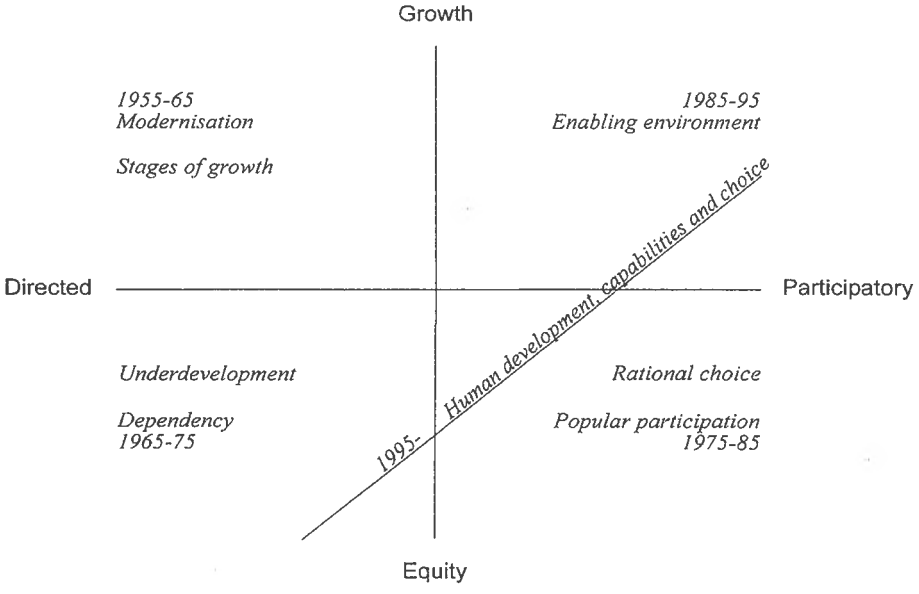
Figure 1:



Source: Developed on basis of Hyden, 1994.

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Genetic resources for food and agriculture: International Treaty on Plant Genetic Resources for Food and Agriculture and other international agreements negotiated through the FAO Commission on Genetic Resources for Food and Agriculture

José T. Esquinas-Alcázar*

"Significant achievements in the reduction of hunger cannot be obtained in the globalizing world unless states and the organized community recognize their obligation to adopt and implement appropriate international regulations."

Asbjørn Eide, in an address to the Second World Conference on Bioethics, Gijón, Spain, 4 October 2002.

1. Introduction

Agricultural biological diversity, or more specifically, genetic resources for food and agriculture, is the storehouse that provides humanity with food, clothes and medicines. It is essential in the development of sustainable agriculture and food security.

Matters related to the conservation and sustainable use of genetic resources and the management of related biotechnologies may appear to be technical, but they have strong socio-economic, political, cultural, legal and ethical implications, in that problems in these fields could put at risk the future of humanity.

According to present estimates, food production in developing countries will have to increase more than 60% in the next 25 years just to keep pace with population growth. The possibilities for expanding the areas used for terrestrial and aquatic farming are relatively limited and most of the world's wild fish stocks are already overexploited. Production must therefore be intensified, productivity increased and productive natural systems must be optimally managed, all in a sustainable manner. This will require the combined application of new and old biotechnologies, including innovative approaches

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to plant and animal breeding and to farming practices. Success in this endeavour will depend on the sustainable utilization of a broader range of species, and of the genetic material within each species, including genes from the wild relatives of domesticated species.

In spite of its vital importance for human survival, agricultural biodiversity is being lost at an alarmingly increased rate. It is estimated that some ten thousand species have been used for human food and agriculture. Currently no more than 120 cultivated species provide 90% of human food supplied by plants, and 12 plant species and 5 animal species alone provide more than 70% of all human food. A mere 4 plant species (potatoes, rice, maize and wheat) and 3 animal species (cattle, swine and chicken) provide more than half. Within the so-called "main food species", a tremendous loss of genetic diversity has occurred in the present century. Hundreds of thousands of farmers' heterogeneous plant varieties and landraces that existed, for generations, in farmers' fields until the beginning of the twentieth century, have been substituted by a small number of modern and highly uniform commercial varieties. In the USA alone, more than 90% of fruit trees and vegetables that were grown in farmers' fields at the beginning of the century can no more be found and only a few of them are maintained in gene banks. Similar alarming figures can be given for the genetic erosion of domestic animal breeds and varieties. The picture is much the same throughout the world. The loss of agricultural biological diversity has drastically reduced the capability of present and future generations to face unpredictable environmental changes and human needs.

The rapid process of globalization and economic integration is creating an increasing number of situations where nations and regions are interdependent. This can raise important ethical questions. One of the oldest forms of interdependence, going right back to the spread of crops from their centers of origins since the Neolithic, is in relation to agrobiodiversity.

In general, we can say that no country on the planet is today self-sufficient with respect to the genetic resources for food and agriculture they are using, and the average degree of interdependence among countries with regard to the most important crops is 70%. Paradoxically, the countries which are poorest from the economic point of view, and which are in general located in tropical or sub-tropical zones, are also richest in terms of genetic diversity needed to ensure human survival. International co-operation should lead to a more fair and equitable sharing of the benefits derived from the use of genetic resources, providing an essential incentive to ensure that countries continue developing, conserving and making available to humanity their genetic diversity.

There is also interdependence between generations. Agricultural biodiversity is a precious inheritance from previous generations, which we have

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the moral obligation to pass on intact to coming generations and allow them to face unforeseen needs and problems. However, up until now, the interests of future generations, who neither vote nor consume, have not been adequately taken into account by our political and economic systems.

Interdependence also exists between genetic resources and biotechnology. In general, genetic resources provide the raw material for biotechnologies. New and more powerful biotechnologies drastically increase the potential of using genetic resources, but, in some instances, they can also raise new risks for the environment, and socio-economic concerns, if the only purpose of the users is immediate profit without ethical considerations. Regulatory mechanisms need to be developed to maximize the potentials and minimize the risks. It is important to ensure that both the new and traditional biotechnologies contribute together to the sustainable and efficient utilization of biological diversity, and to the fair and equitable distribution of the benefits derived from their use. The industrialized world has developed legal-economic mechanisms, such as intellectual property rights (*e.g.*, patents and plant breeders' rights) to provide incentives for the development of new biotechnologies and to compensate their inventors. However, there are no economic or legal mechanisms to compensate or provide incentives for the developers of the raw material, the genetic resources themselves. An important step in this direction has been the unanimous recognition by FAO Member Countries of Farmers' Rights, whereby farmers are recognized as donors of genetic resources, as a counterweight to plant breeders' rights (rights of the donors of technology). Unlike plant breeders' rights, however, Farmers' Rights are not yet operative.

It is the inescapable responsibility of our generation to develop ethical solutions to problems and implications mentioned above, within an overall political framework to allow an equitable sharing of benefits for all countries, and ensure food and agriculture for future generations. For this task, the United Nations, as a universal inter-governmental forum, has a fundamental role to play in the facilitation of the necessary inter-governmental negotiations.

In the 1970s, world-wide systematic actions began within the Food and Agriculture Organization of the United Nations (FAO) resulting in the establishment, in 1983, of the first permanent inter-governmental forum on this subject: the Commission on Genetic Resources for Food and Agriculture (CGRFA), which is currently composed of 164 Member Countries and the European Community. This forum has made possible in the 1980s the negotiation and development of an International Undertaking on Plant Genetic Resources, which recognized Farmers' Rights as being complementary to plant breeders' rights. Farmers' Rights were adopted by the FAO Commission in 1989 as "rights arising from the past, present and future contributions

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of farmers in conserving, improving, and making available plant genetic resources, particularly those in the centers of origin/diversity", with the aim of allowing "farmers, their communities, and countries in all regions, to participate fully in the benefits derived, at present and in the future, from the improved use of plant genetic resources". The members of the Commission then negotiated a revision of the International Undertaking in harmony with the Convention on Biological Diversity (CBD), which allows the regulation of access to genetic resources for food and agriculture, the fair and equitable sharing of the benefits derived from their use and the realization of Farmers' Rights. This international agreement, which is binding, was adopted by consensus by the FAO Member Countries on 3 November 2001, with the name of International Treaty on Plant Genetic Resources for Food and Agriculture.

The FAO/CGRFA has also negotiated various other international instruments. In 1993, it adopted the International Code of Conduct for Plant Germplasm Collecting and Transfer; and it is currently discussing a Code of Conduct on Biotechnology as it relates to genetic resources for food and agriculture, the objective of which is to enhance the positive effects of the new biotechnologies and to mitigate the negative effects and possible risks. This document provides information on this negotiating process and its results.

2. The International Treaty on Plant Genetic Resources for Food and Agriculture

2.1. Background: the uniqueness of plant genetic resources for food and agriculture

In the long negotiating process to develop and agree on the International Treaty on Plant Genetic Resources for Food and Agriculture, countries took into consideration the fact that plant genetic resources for food and agriculture differ substantially from other plant genetic resources, and therefore that specific solutions – which are not necessarily similar to those required for other kinds of biodiversity – were needed for their conservation and development, as well as for their availability, and the fair and equitable sharing of the benefits derived from their use. Among these differences are the following:

(i) They are essentially *man-made*, that is, biological diversity developed and consciously selected by farmers since the origins of agriculture, who have guided the evolution and development of these plants for over 10,000 years. In recent times, scientific plant breeders have built upon this rich inheritance. Much of the genetic diversity of cultivated plants can only survive through continued human conservation and maintenance.

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(ii) They are not randomly distributed over the world, but rather concentrated in the so-called "centres of origin and diversity" of cultivated plants and their wild relatives, which are largely located in the tropical and sub-tropical areas (see Appendix 1).

(iii) Because of the diffusion of agriculture all over the world, over the last 10,000 years, and because of the association of major crops with the spread of civilizations, many crop genes, genotypes and populations have spread, and continue to develop, all over the planet. Moreover, plant genetic resources for food and agriculture have been systematically and freely collected and exchanged for over two hundred years, and a large proportion have been incorporated in *ex situ* collections.[1]

(iv) There is much greater inter-dependence among countries for plant genetic resources for food and agriculture than for any other kind of biodiversity (see Appendixes 1 and 2).[2] Continued agricultural progress implies the need for continued access to the global stock of plant genetic resources for food and agriculture. No region can afford to be isolated, or isolate itself, from the germplasm of other parts of the world.

For such reasons, the second session of the Conference of the Parties to the Convention of Biological Diversity, in 1995, adopted decision II/15, "recognizing the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions". The Conference of the Parties also supported the negotiations for the International Treaty on Plant Genetic Resources for Food and Agriculture, in order to provide such solutions.

2.2. Economic, technical and legal issues involved in a multilateral system to regulate the conservation and sustainable use of plant genetic resources for food and agriculture

During the negotiations for the International Treaty on Plant Genetic Resources for Food and Agriculture, a number of complex economic, technical and legal issues needed to be examined and understood in order to develop, negotiate and reach consensus on innovative concepts and provisions, based on an interdisciplinary approach. To facilitate this negotiation, the secretariat of the negotiating body, the Commission on Genetic Resources for Food and

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1 These collections were made before the entry into force of, and hence outside the Convention on Biological Diversity, as Resolution 3 of the Nairobi Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity recognized.

2 More information on countries' dependence for its major crops on genetic resources that originated abroad is given on a country-by-country basis in Flores, X., 1997.

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Agriculture commissioned a number of technical papers, as part of its series "Background Study Papers" (available on the internet at <http://www.fao.org/ag/cgrfa/docs>). Many of the concepts discussed in this section were presented and developed in such papers.

2.2.1. Economic issues

Wild and weedy crop-relatives and landraces provide the foundation breeding materials for crop improvement and sustainable agriculture. They allow value to be added or provide a "value of use" in breeding and farming activities. This value is realized through the use of germplasm from *in situ* conditions, or of material in *ex situ* collections.

Besides the current use-value of plant genetic resources, there are a variety of expected marginal values for plant genetic resources. The *portfolio value* is the value of retaining a relatively wide range of assets within biological production systems, to smooth yield fluctuations. The *option value* is the value of retaining a wide range of known agro-biodiversity across time, as a source of currently unknown potential usefulness. The *exploration value* is the value retaining unexplored biodiversity, for the same reasons. Another way of grouping those values is to see them as *insurance values* (diversity acts as an insurance against crop yield fluctuations) and *information values*,[3] (specific information coded in the germplasm may later prove to be of concrete value).

Partial quantitative estimations exist of the importance of plant genetic resources for food and agriculture, that is, their current use-values, and how they add value in crop production. For example, a detailed study on the value of rice landraces for Indian agriculture showed that they contribute between US$ 100 and 200 million per annum to the value of rice production in South Asia.

It is clear that the conservation of plant genetic resources for food and agriculture generates a use-value. A further question is how an exchange-value may arise, that is, how is it possible to obtain a price, or other economic compensation, for the exchange of these resources? An understanding of this matter is necessary in attempting to identify effective incentives for the conservation and sustainable use of plant genetic resources for food and agriculture.

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[3] Swanson *et al.*, 1994 (supplemented by personal communication with Swanson), consider that there are two parts to the information value of biodiversity: one part is unappropriable under all known mechanisms, while one part (*exploration value*) is appropriable under current conditions. They believe that the returns earned by plant breeders and seed companies, when they market a new variety over which they have any form of exclusive marketing right, include this value.

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Traditional farmers, their communities and countries maintain agro-diversity *in situ*, and thereby conserve and further develop the diversity contained in their landraces and related material. A problem arises, however, in that they often have an economic incentive to replace their variable landraces by homogeneous modern varieties, as these frequently offer higher yields and productivity, and thus, higher incomes. While this process of conversion (the replacement of landraces by modern varieties) may be a rational decision on the part of an individual farmer, in global terms, increasing conversion means a continuous and irreversible loss of diversity, which is not in the global interest.[4]

The question of the realization of an exchange-value for plant genetic resources for food and agriculture is complex, because the farmers and communities developing and cultivating landraces, and other related genetic resources, in their farming systems, are, in fact, creating a global economic value, much of which they are unable to appropriate. In other words, they have no mechanism for obtaining a price, or other form of compensation, for the valuable germplasm they generate and conserve. It is the germplasm which they have developed within their farming systems that is the world's main source of plant genetic resources for food and agriculture (whether it is still maintained in the fields, or in *ex situ* collections). This germplasm is, however, mostly available at no cost.

Traditional farmers thereby generate externalities, as providers of a "public good" (that is, a good that cannot be appropriated by its producers, and which may be used by many without exhausting it, and without adding cost). To the extent that traditional farmers, their communities and countries, are not able to appropriate the values that they generate, they lack economic incentives to continue developing and conserving the diverse plant genetic

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[4] An example may be given of how fast the conversion process is. Tarwi (*Lupinus mutabilis*) is one of the Andean crops that have formed the staple diet of the area for thousands of years, as a protein source. These landraces were selected by farmers over many generations for the quantity (as much as 40%) and quality of their proteins. Although of lesser interest to the farmer, tarwi also has a high fat content (as much as 26%). There is, however, a negative correlation between productivity and the oil content of tarwi seeds. In 1977, in a foreign assistance project to industrialize the crop, an experimental factory for the extraction of tarwi oil, was established south of Lima. The commercial production of new varieties of this crop, which had been selected to offer better characteristics for oil extraction, was encouraged, and farmers replaced their very heterogeneous and protein-rich landraces with the new, uniform, oil-rich but protein-poor varieties. The experiment failed, and the factory was closed in 1979. Farmers found themselves without seeds of their old, more nutritious, landraces, the useful genes of which would have been lost for ever, had not some samples previously been collected and kept viable through storage. In situations like this, a few years of the substitution of landraces by modern varieties are often enough to cause the permanent loss of germplasm that has been selected in traditional farming systems over thousands of years. (Esquinas-Alcázar, J.T., 1983.)

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resources for food and agriculture, on which agricultural development will continue to depend. That is, they lack economic incentives to maintain this biodiversity, rather than converting to improved varieties.

In more general terms, where public goods are created, the investments for producing or preserving them necessarily tend to be sub-optimal, because their producers are unable to fully benefit from the rents such goods may generate. This is a typical market failure, and is also often found in areas such as the funding of basic science.

The public nature of the good generated by traditional farming does not mean, however, that other agents do not benefit from, and eventually appropriate these values, at a later point of the development and production process. Plant breeders and seed companies do, for example, capture at least part of the rents generated by the farmers' germplasm which they have incorporated in their varieties, especially when these are protected by plant breeders' rights, or other forms of intellectual property right. But this value is not appropriated at the correct point in the production cycle.

If it is in the global interest to maintain landraces and other diverse plant genetic resources for food and agriculture, it is necessary that farmers and communities, who develop and conserve diversity, and their countries, either appropriate the values of diversity directly, or are compensated for the costs of conserving diversity, or for the potential benefits that they forego by not converting to modern varieties. For global values that are easy to estimate, but difficult to appropriate, a compensation strategy might be indicated. For global values that are very uncertain, appropriation mechanisms might be preferable. A major difficulty arises with agro-biodiversity, where values are both difficult to estimate and to appropriate. In fact, an essential part of these values specifically those of global nature, cannot be appropriated.

Whichever approach prevails, economic analysis suggests that, for an agreement to be economically effective, it should be forward-looking and include structural incentives to favour and reward conservation in a clear, transparent manner. These incentives must be greater than the benefits foregone by renouncing conversion to specialized agriculture. If necessary, they could be linked to conservation for precise periods of time. The implementation of such incentives would require international arrangements, within the framework of an overarching multilateral agreement.

This analysis suggests that future losses of plant biodiversity, especially that developed and maintained in *in situ* conditions, could be avoided or minimized through an international agreement that provides for clear financial incentives to farmers, and their communities and host states, to compensate them for their conservation efforts, and the potential profits foregone in not converting to modern varieties, and thus, to allow them effectively to appropriate a greater part of the values of their rich and diverse resources.

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Such a system might, in principle, be based on market mechanisms (for example using intellectual property rights or contracts), on non-market mechanisms (such as an international fund), or on a mixture or combination of mechanisms (such as a system of payments from countries on the basis of the commercial benefits derived from the use of foreign plant genetic resources for food and agriculture to an international fund, and utilized to pay countries and farming communities maintaining diverse plant genetic resources for food and agriculture, for making specific commitments). These mechanisms in turn raise a number of technical and legal questions, which may condition their feasibility and enforceability. These three possible mechanisms – especially the latter two – provide ways in which Farmers' Rights and benefit sharing could be implemented.

A further approach, which avoids the burden of many separate bilateral agreements and the need to trace material in use with all the technical difficulties involved, is the development of a multilateral system shaped to the needs of agriculture, and which would not compensate individual farmers but facilitate access generally and, as benefits, mobilize finance for projects, programmes and activities for internationally agreed priorities, which promote conservation and sustainable use of plant genetic resources for food and agriculture, and, in particular, support small farmers holding biological diversity in their farming systems.

In order to identify needs and priorities, national and regional plans of actions were developed from 1993 to 1996 in a country-driven process that culminated with the negotiation and adoption by 150 countries of the Global Plan of Action for the Conservation and Sustainable Utilization of Plant Genetic Resources for Food and Agriculture, at the Fourth FAO International Technical Conference on Plant Genetic Resources for Food and Agriculture in Leipzig (Germany) in 1996.[5] The Global Plan of Action identified twenty priority activities on plant genetic resources for food and agriculture and estimated the funds necessary for their implementation.

2.2.2. Technical issues

For the design and implementation of mechanisms for the appropriation of, or compensation for, plant genetic resources for food and agriculture (or a combination of both), the identity and origin of material must be identifiable, at least when bilateral instruments are concerned. A major question is how far this is possible, that is, whether it is possible to identify and track plant genetic resources in use, over time. A document commissioned by FAO reviews the capabilities and limitations of genetic fingerprinting, and related

[5] It is available on the Internet at <ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/GS/gpaE.pdf>.

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modern techniques, in identifying plant genetic resources for food and agriculture, and establishing their geographical origin.[6]

In this analysis, a distinction is made between an original accession, the population from which that accession was sampled, a single genotype from that accession, and a particular gene from an accession. While any individual organism appears as a phenotype,[7] genetic fingerprinting and related techniques help to analyse the genotype and the particular combination of genes and gene variants (that is, alleles) it contains, independently of the environment in which it may be expressed. Diverse populations can be described in terms of genotype and allele frequencies.

It must also be noted that there are important differences in the genetic structure, as well as the genetic variability contained in landraces, when compared with the modern varieties that are the subject of plant breeders' rights. Current plant breeders' rights legislation applies only to propagating materials that are distinct, uniform and stable, and can therefore easily be identified; that is, to modern varieties. These contain much less variation than is usually present in a landrace. A landrace is the product, at a particular moment of time, of continuous, changing evolutionary processes, that result in great variability in the gene pool, but which also provide the capacity to adapt to changing human needs (expressed through selection by farmers) and environmental conditions (expressed through evolutionary pressure). It is these characteristics that give landraces their high value as sources of plant germplasm. However, these same dynamics mean that the identification of a landrace is much more difficult than the identification of a modern variety.

Genetically inherited traits, such as flower colour, growth habits, and disease resistance, can be used to identify plant genetic resources for food and agriculture. More precise identification can also be obtained at the level of biochemical and molecular composition, especially through proteins and DNA-sequences.

The examples given in the document show that, in specific instances, a number of techniques have been used to distinguish varieties and accessions. However, it is unlikely that such techniques can be routinely used to prove the identity of specific genotypes, or gene sequences, and even less the origin of unknown genetic material. There are several reasons for this:

(i) the high costs of some of the techniques, particularly sequencing and restriction fragment length polymorphisms (RFLPs);
(ii) the same, or similar, genetic material may exist, and be detected, in more than one place, especially in neighbouring countries;
(iii) different methods of analysis may give different genetic estimates for the same accessions, which may lead to disputes; and

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6 Hardon, J.J., *et al.*, 1994.

7 The expression of a particular genotype in a particular environment.

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(iv) the complex pedigrees of most improved varieties resulting from a plant breeding programme complicate attempts to trace specific genes, and to infer their possible relative values.

In addition, it must be borne in mind that, on the rare occasions when the ultimate geographical origin can be identified, it may not necessarily benefit the country or region of origin, since this might not be the provider of the accession, which, in line with the Convention on Biological Diversity, will usually be the subject of any rights.[8]

All these were strong arguments in favour of multilateralism as the preferred option to deal with plant genetic resources for food and agriculture.

2.2.3. Legal issues

There is a need to establish a clear distinction between sovereign rights and property rights, as well as between physical and intangible property. The recognition of sovereign rights over plant genetic resources for food and agriculture is not equivalent to the attribution, or existence, of property rights over such resources: sovereignty only means that the State may, within the limits imposed by the nature of such resources, determine what type and modalities of property rights, if any, are recognized.

The real value of plant genetic resources for food and agriculture lies in the genetic information contained in their germplasm. It is from this point of view that intellectual property rights become relevant. Intellectual property rights cover the intangible content of processes or goods: in the case of living forms, for instance, they may govern knowledge of the information contained in genes, or other sub-cellular components, in cells, propagating materials or plants. However, the existence of intellectual property rights over such information is not equivalent to property rights over the individual organism that carries such information, but is the right to exclude third parties from producing or selling such organisms without prior agreement. Intellectual property rights (in particular, patents and breeders' rights) cannot currently apply to crop landraces and farmers' varieties. It may be questioned whether it is technically sound, and legally feasible, to extend such rights, possibly in a modified, *sui generis*, form, to cover such heterogeneous populations, and whether this would create adequate incentives for the conservation of landraces.

A number of complex legal problems appeared. These include the definition of the subject matter of such rights, requirements for protection, who may become titleholders, the territorial validity and administration of the system, and the actual enforceability of rights. A proposal to extend intellec-

[8] Article 2 of the Convention on Biological Diversity.

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tual property rights to landraces, if feasible, would also have to consider the transaction costs involved in the establishment and operation of the system.

In certain cases, the value of plant genetic resources may also be appropriated by contractual arrangements, whereby the suppliers of germplasm are remunerated, or otherwise ensured an equitable sharing in the benefits of their exploitation. Most contracts concluded until now relate to genetic resources of specific pharmaceutical or industrial value, rather than plant genetic resources for food and agriculture, where multilateral approaches are likely to be efficient.

Under either a multilateral or a bilateral approach, "material transfer agreements" (a form of contract) may be of value in regulating the transfer of material. Material transfer agreements typically regulate the use of the materials by the receiver, issues relating to intellectual property rights, and economic compensation to the supplying source.

Another important legal issue relates to sharing benefits with, or compensating, traditional farmers, their communities and countries, for the value of plant genetic resources for food and agriculture made available. Under the 1983 International Undertaking, an international fund was to be entrusted with the responsibility of implementing Farmers' Rights. This approach could overcome a number of difficulties that arise from the frequent lack of knowledge of the origin of specific germplasm contributions; the difficulty of attributing value; the fact that the same diversity may be found in *in situ* conditions in a number of countries; and the probably onerous transaction costs, and administrative complexities, that are likely to be involved in devising new systems of intellectual property. A number of issues need definition or clarification with regard to the implementation of Farmers' Rights, notably the nature of these rights, the resources needed, and the basis for contributions and allocations.

Many of these economic, technical and legal issues have been overcome during the negotiating process of the International Treaty on Plant Genetic Resources for Food and Agriculture by innovative provisions in the context of its multilateral system, where Farmers' Rights are the responsibility of national governments, and separate from the concept of the sharing of the monetary and other benefits of commercialization, which will contribute to the implementation of a rolling Global Plan of Action periodically agreed by the Governing Body of the International Treaty.

2.3. Adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture

On 3 November 2001, the Thirty-first Session of the Conference of the FAO adopted, by consensus and as a binding international agreement, the Interna-

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tional Treaty on Plant Genetic Resources for Food and Agriculture. The Treaty is in harmony with the Convention on Biological Diversity (CBD). The Treaty is available on the Internet at <http://www.fao.org/ag/cgrfa>.

The Treaty is the outcome of many years of intense negotiations in the FAO's inter-governmental Commission on Genetic Resources for Food and Agriculture, to revise the voluntary International Undertaking on Plant Genetic Resources for Food and Agriculture. As the thirtieth session of the Conference of the FAO noted, in 1999 these negotiations were at the meeting point between agriculture, the environment and commerce. The Conference agreed that there should be consistency and synergy in the agreements being developed in these different sectors.

The Treaty will enter into force upon ratification by forty countries, and, in the meantime, the FAO Commission on Genetic Resources for Food and Agriculture will act as the Interim Committee. In adopting the Treaty, by Resolution 3/2001, the Conference of the FAO identified elements of a programme of work for the Commission acting as Interim Committee for the Treaty. Article 1 provides that the Treaty's *objectives* are "the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security". Article 3 establishes that its *scope* "relates to plant genetic resources for food and agriculture".

Article 9, for the first time in a binding international agreement, makes provision for *Farmers' Rights*, in recognition of the collective innovation on which agriculture is based, as follows:

> 9.1 The Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.
>
> 9.2 The Contracting Parties agree that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including:
>
> (a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
>
> (b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and
>
> (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

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> 9.3 Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/ propagating material, subject to national law and as appropriate.

A further important and innovative part of the Treaty is contained in Articles 10 to 13 (Part IV), which establish a *Multilateral System of Access and Benefit-sharing*, which applies to a list of crops in Annex I to the Treaty, established according to criteria of food security and interdependence. The crops in question cover about 80% of the world's food calorie intake from plants. In accordance with Article 11.2, Contacting Parties will bring into the Multilateral System all such resources that are under their management and control and in the public domain, and will, in accordance with Article 11.3, encourage natural and legal persons within their jurisdiction to include the resources they hold in the Multilateral System. Article 11.5 provides that the plant genetic resources for food and agriculture listed in Annex I and held in the *ex situ* collections of the International Agricultural Research Centres of the Consultative Group on International Agricultural Research (CGIAR) will also be brought into the Multilateral System, by agreements which they are invited to sign with the Treaty's Governing Body, in accordance with Article 15.

Article 12.3a provides that "[a]ccess shall be provided solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture, provided that such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses". Article 12.3 b provides that "[a]ccess shall be accorded expeditiously, without the need to track individual accessions and free of charge, or, when a fee is charged, it shall not exceed the minimal cost involved". Further clauses of Article 12 provide that:

> (d) Recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System;
>
> (e) Access to plant genetic resources for food and agriculture under development, including material being developed by farmers, shall be at the discretion of its developer, during the period of its development;
>
> (f) Access to plant genetic resources for food and agriculture protected by intellectual and other property rights shall be consistent with relevant international agreements, and with relevant national laws;
>
> (g) Plant genetic resources for food and agriculture accessed under the Multilateral System and conserved shall continue to be made available to the Multilateral System by the recipients of those plant genetic resources for food and agriculture, under the terms of this Treaty ...

Article 12.4 provides for access to be provided

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> pursuant to a standard material transfer agreement (MTA), which shall be adopted by the Governing Body and contain the provisions of Articles 12.3a, d and g, as well as the benefit-sharing provisions set forth in Article 13.2d(ii) and other relevant provisions of this Treaty, and the provision that the recipient of the plant genetic resources for food and agriculture shall require that the conditions of the MTA shall apply to the transfer of plant genetic resources for food and agriculture to another person or entity, as well as to any subsequent transfers of those plant genetic resources for food and agriculture, will be contained in a standard Material Transfer Agreement to be agreed by the governing body. Its conditions shall apply to the transfer of the resources to subsequent persons.

By Article 12.5:

> Contracting Parties shall ensure that an opportunity to seek recourse is available, consistent with applicable jurisdictional requirements, under their legal systems, in case of contractual disputes arising under such MTAs, recognizing that obligations arising under such MTAs rest exclusively with the parties to those MTAs.

Article 13 deals with benefit-sharing in the Multilateral System. By Article 13.1:

> The Contracting Parties recognize that facilitated access to plant genetic resources for food and agriculture which are included in the Multilateral System constitutes itself a major benefit of the Multilateral System and agree that benefits accruing therefrom shall be shared fairly and equitably ...

Article 13.2 states that,

> The Contracting Parties agree that benefits arising from the use, including commercial, of plant genetic resources for food and agriculture under the Multilateral System shall be shared fairly and equitably through the following mechanisms: the exchange of information, access to and transfer of technology, capacity-building, and the sharing of the benefits arising from commercialization, taking into account the priority activity areas in the rolling Global Plan of Action, under the guidance of the Governing Body.

Article 13.2d deals with the sharing of monetary and other benefits of commercialization. In particular, Article 13.2d (ii) provides that,

> the standard Material Transfer Agreement referred to in Article 12.4 shall include a requirement that a recipient who commercializes a product that is a plant genetic resource for food and agriculture and that incorporates material accessed from the Multilateral System, shall

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> pay to the mechanism referred to in Article 19.3f,[9] an equitable share of the benefits arising from the commercialization of that product, except whenever such a product is available without restriction to others for further research and breeding, in which case the recipient who commercializes shall be encouraged to make such payment.
>
> The Governing Body shall, at its first meeting, determine the level, form and manner of the payment, in line with commercial practice. The Governing Body may decide to establish different levels of payment for various categories of recipients who commercialize such products; it may also decide on the need to exempt from such payments small farmers in developing countries and in countries with economies in transition. The Governing Body may, from time to time, review the levels of payment with a view to achieving fair and equitable sharing of benefits, and it may also assess, within a period of five years from the entry into force of this Treaty, whether the mandatory payment requirement in the MTA shall apply also in cases where such commercialized products are available without restriction to others for further research and breeding.

Article 13.3 provides that,

> benefits arising from the use of plant genetic resources for food and agriculture that are shared under the Multilateral System should flow primarily, directly and indirectly, to farmers in all countries, especially in developing countries, and countries with economies in transition, who conserve and sustainably utilize plant genetic resources for food and agriculture.

These mandatory payments foreseen in Part IV of the Treaty form part of the Treaty's *funding strategy* – which is detailed in Article 18 – whereby the Governing Body periodically sets a funding target, within which to mobilize funds from a wide variety of sources for agreed projects and programmes aimed particularly at farmers in all countries, especially in developing countries, and countries with economies in transition, who conserve and sustainably utilize plant genetic resources for food and agriculture.

The Treaty (Article 15) deals with *ex situ collections of plant genetic resources for food and agriculture* held by the International Agricultural Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR) and other international institutions. Article 15.1 recognizes the importance to the Treaty of the *ex situ* collections of plant genetic resources for food and agriculture held in trust by the IARCs of the CGIAR, and calls upon the IARCs to sign agreements with the Governing Body with regard to such *ex situ* collections. In doing so, the IARCs under-

[9] Article 19.3f provides that a function of the Treaty's Governing Body is to "establish, as needed, an appropriate mechanism, such as a Trust Account, for receiving and utilizing financial resources that will accrue to it for purposes of implementing this Treaty".

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take to make their plant genetic resources for food and agriculture of the crops listed in Annex I of the Treaty available in accordance with the provisions of the Multilateral System. Their other plant genetic resources for food and agriculture collected before the entry into force of the Treaty "shall be made available in accordance with the provisions of the MTA currently in use pursuant to agreements between the IARCs and the FAO.[10] This MTA shall be amended by the Governing Body no later than its second regular session, in consultation with the IARCs, in accordance with the relevant provisions of this Treaty...". The IARCs will recognize the authority of the Governing Body to provide policy guidance relating to *ex situ* collections held by them and subject to the provisions of the Treaty. Article 15.5 provides that "the Governing Body will also seek to establish agreements for the purposes stated in this Article with other relevant international institutions".

These innovative provisions of the Treaty provide for facilitated access to plant genetic resources for food and agriculture and an agreed way of benefit-sharing, without deriving these benefits from individual negotiations, on a case-by-case basis, between the provider and the user of these resources. They provide for both access and benefit-sharing to be through multilateral arrangements. This avoids the high transaction costs that such bilateral contracts involve, which are hard to justify in the context of plant breeding, which has for thousands of years been characterized by repetitive exchange, crossing, selection and local adaptation of the intra-specific genetic resources of crops, within and between countries and regions. This ensures that plant breeders, in both the public and private sectors, can have access to the widest possible range of the resources crucial for world food security. This will benefit consumers, by providing a stream of improved and varied agricultural products. And it will benefit the seed and biotechnology industries, by providing an agreed international framework, within which to plan their investments. It also provides a firm international framework for IARCs of the CGIAR and other international organizations, whereby they hold plant genetic resources for food and agriculture in trust, under the Treaty.

The Treaty will come into force ninety days after forty governments have ratified it. An up-to-date listing of governments that have signed or ratified the Treaty is available on the Internet at <http://www.fao.org/ag/cgrfa/ITsign.htm>.

[10] These agreements are available on the Internet at <http://www.fao.org/ag/cgrfa/exsitu.htm>. They were signed in October 1994.

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3. Other international instruments developed or being developed by the FAO Commission on Genetic Resources for Food and Agriculture

The International Code of Conduct for Plant Germplasm Collecting and Transfer was negotiated by the Commission on Genetic Resources for Food and Agriculture and adopted by the FAO Conference at its twenty-seventh session, in November 1993. A Code of Conduct on Biotechnology as it relates to Genetic Resources for Food and Agriculture, is currently under development.

3.1. The International Code of Conduct for Plant Germplasm Collecting and Transfer[11]

This Code of Conduct aims to promote the rational collection and sustainable use of genetic resources, to prevent genetic erosion, and to protect the interests of both donors and collectors of germplasm. The Code, a voluntary one, has been developed by FAO and negotiated by its Member Nations through the FAO Commission on Genetic Resources for Food and Agriculture.[12]

The Code proposes procedures to request and to issue licenses for collecting missions, provides guidelines for collectors themselves, and extends responsibilities and obligations to the sponsors of missions, the curators of gene banks, and the users of genetic material. It calls for the participation of farmers and local institutions in collecting missions and proposes that users of germplasm share the benefits derived from the use of plant genetic resources with the host country and its farmers.

The primary function of the Code is to serve as a point of reference until such time as individual countries establish their own codes of regulations for germplasm exploration and collection, conservation, exchange and utilization.

3.2. Towards a Code of Conduct on Biotechnology as it relates to genetic resources for food and agriculture[13]

Following the proposal of the Commission on Genetic Resources for Food and Agriculture in the 1990s, a survey of more than 400 international experts in plant genetics identified four major areas that should be covered in the Code of Conduct: biosafety, intellectual property rights, the substitution of

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11 FAO, 1994.

12 At that stage, still the Commission on Plant Genetic Resources.

13 FAO, 1993.

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traditional agricultural products and the development of biotechnologies appropriate for developing countries.

Biosafety: Public interest groups were concerned over the possible environmental and health risks resulting from biotechnology, especially from the field testing and release of genetically engineered organisms and plants in the area of food and agriculture. They considered that there is lack of scientific data to evaluate such risks and only the rudiments of a valid risk assessment procedure. In the absence of international agreement, countries that neglect to adopt adequate regulatory policies may become attractive as test sites for genetically modified organisms and plants in ways forbidden in other countries. Once released, however, organisms modified by biotechnology will not be limited by political boundaries. It is critical that means of regulation be developed at the international level. It was therefore suggested that the Code could set international standards for testing and release of such organisms.

Intellectual property rights: Some developed countries have extended legislation on intellectual property rights to cover biotechnology processes and products, in order to stimulate and protect research. But often such measures tend to restrict the exchange of germplasm, scientific information and technologies. It was suggested that the Code lay the foundations of an international system of co-operation, through a set of agreed principles which, while being in harmony with existing international agreements, would promote research and transfer of technologies, and prevent the appropriation of existing genetic resources, traditional knowledge and local technologies.

Substitution of traditional agricultural products: Biotechnology offers future possibilities for developing substitutes for existing crops, such as laboratory-produced vanilline flavour substituting for vanilla, which provides the livelihood of 70,000 farmers in Madagascar alone. Cocoa and sugar are two other crops threatened by substitutes. Current international economic equilibrium could dramatically shift if biotechnologies displace workers and markets in developing countries. It was proposed that the Code of Conduct offer options to minimize such effects, resulting in less drastic economic change.

Development of appropriate biotechnologies to fit the needs of developing countries: Biotechnology research is expensive, and thus tends to concentrate on cash crops and commodities of major economic interest. Unless suitable provisions are taken, crops of local and social importance in developing countries could be neglected. It was proposed that the Code promote economic incentives and suitable institutional arrangements needed to stimulate research for developing biotechnologies more appropriate for the needs of developing countries.

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A first draft Code of Conduct, with four modules corresponding to the above-mentioned issues, was discussed by the FAO inter-governmental Commission on Genetic Resources for Food and Agriculture in 1993. The draft Code is aimed at biotechnologies in so far as they "affect the conservation and utilization of plant genetic resources". It recognizes that the new biotechnologies have tremendous possibilities both for improving the conservation of plant genetic resources and for stimulating throughout the world the creation of improvement programmes. It further recognizes the risks inherent in these technologies, as well as how their application could have a negative effect, in particular in developing countries. The purpose of the Code is to enhance the positive effects of these new biotechnologies, and mitigate the negative effects foreseen. More information on this issue and the draft Code itself can be found on the Internet at <http://www.fao.org/ag/cgrfa/biocode.htm>.

Subsequently, and taking into account that the CBD was developing a Biosafety protocol, the Commission recommended that the module on biosafety in relation to plant genetic resources for food and agriculture be sent to the Executive Secretary of the Convention as FAO's contribution to the development of the protocol. In 1995, the Commission examined a report on recent international developments of interest to the draft Code of Conduct, and recommended that its further development and the negotiation of the draft Code be postponed until the negotiations for the revision of the International Undertaking on Plant Genetic Resources had been completed. Following the adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture by the FAO Conference in 2001, the future of the Code of Conduct will be discussed by the Commission on Genetic Resources for Food and Agriculture in October 2002.

4. Final remarks

The adoption of the International Treaty marks a milestone in international co-operation. It will enter into force ninety days after forty governments have ratified it. Governments that have ratified it will make up its Governing Body. At its first meeting, this Governing Body will address important questions such as the level, form and manner of monetary payments on commercialization, a standard Material Transfer Agreement for plant genetic resources, mechanisms to promote compliance with the Treaty, and the funding strategy. Countries may therefore consider it important to be among the first to ratify, so as to ensure that their national interests can be taken into account at the Governing Body's first meeting.

The Treaty will also need to be enforced at national level. The development of national legislation for implementation of its provisions will be es-

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sential in deterring genetic erosion, protecting indigenous germplasm and Farmers' Rights, facilitating access to plant genetic resources for food and agriculture, and ensuring benefit-sharing. A diagram showing the relationship between access to genetic resources and to biotechnologies for food and agriculture, and between the plant breeder's rights and Farmers' Rights, as well as the possible role of *sui generis* systems in ensuring synergy and co-operation among the various intergovernmental organizations involved, is attached as Appendix 3.

Political and economic support for this can be stimulated, if the public is informed about the importance of genetic diversity and the dangers of its depletion, and encouraged to act to stop genetic erosion.

In any event, it should not be forgotten that genetic erosion is but one consequence of man's abusive exploitation of the planet's natural resources, which has broken the balance of many ecosystems and brought about an increasing degradation of the biosphere. Safeguarding genetic resources by protecting them *ex situ* or *in situ* is crucial, if the process that has been unleashed is to be reversed, or controlled, at all. The fundamental problem remains man's lack of respect for the rest of nature, and any lasting solution will have to involve establishing a new relationship with our small planet, in full understanding and recognition of its limitations and fragility. If humanity is to have a future, it is imperative that children learn this in primary schools, and that adults make it part of their life.

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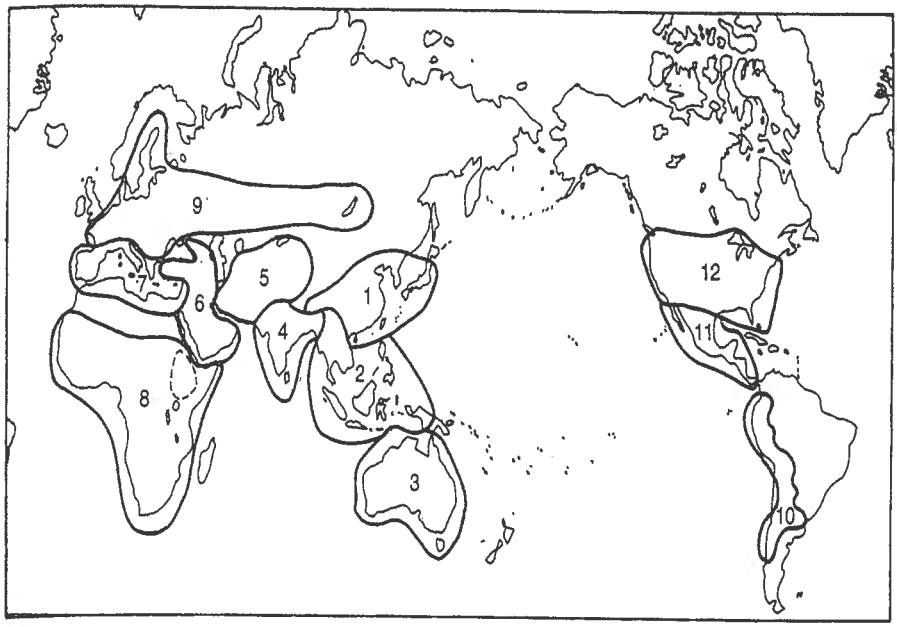
Appendix 1: Cultivated plants and their regions of diversity[14]



1. Chinese-Japanese Region:
   - Prosomillet, Fox tail millet, Naked oat
   - Soybean, Adzuki bean
   - Leafy mustard
   - Orange/*Citrus*, Peach, Apricot, Litchi
   - Bamboo, Ramie, Tung oil tree, Tea

2. Indochinese-Indonesian Region:
   - Rice
   - Rice bean, Winged bean
   - Cucurbits/Ash gourd
   - Mango, Banana, Rambutan, Durian, Bread fruit, *Citrus*/Lime, Grapefruit
   - Bamboos, Nutmeg, Clove, Sago-palm, Ginger, Taros and Yams, Betel nut, Coconut

3. Australian Region:
   - *Eucalyptus, Acacia, Macadamia* nut

[14] Esquinas-Alcázar, J.T., 1993. (Based on Zeven and Zhukovsky (1975) and Zeven and de Wet (1982)).

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4. Hindustani Region:
   - Rice, Little millet
   - Black gram, Green gram, Moth bean, Rice bean, *Dolichos* bean, Pigeonpea, Cowpea, Chickpea, Horse gram, Jute
   - Eggplant, Okra, Cucumber, Leafy mustard, Rat's tail radish, Taros and Yams
   - *Citrus*, Banana, Mango, Sunnhemp, Tree cotton
   - Sesame, Ginger, Turmeric, Cardamom, Arecanut, Sugarcane, Black pepper, Indigo

5. Central Asian Region:
   - Wheat (Bread/Club/Shot), Rye
   - *Allium*/Onion, Garlic, Spinach, Peas, Beetroot, Faba bean
   - Lentil, Chickpea
   - Apricot, Plum, Pear, Apple, Walnut, Almond, Pistachio, Melon, Grape, Carrot, Radish
   - Hemp/Cannabis, Sesame, Flax, Safflower

6. Near Eastern Region:
   - Wheat (Einkorn, Durum, Poulard, Bread), Barley, Rye/*Secale*
   - Faba bean, chickpea, French bean, Lentil, Pea
   - *Brassica oleracea, Allium*, Melon, Grape, Plum, Pear, Apple, Apricot, Pistachio, Fig, Pomegranate, Almond
   - Safflower, Sesame, Flax
   - Lupins, Medics

7. Mediterranean Region:
   - Wheat (Durum, Turgidum), Oats
   - *Brassica oleracea*, Lettuce, Beetroot, Colza
   - Faba bean, Radish
   - Olive, *Trifolium*/Berseem, Lupins, *Crocus*, Grape, Fennel, Cumin, Celery, Linseed

8. African Region:
   - Wheat, (Durum, Emmer, Poulard, Bread)
   - African rice, Sorghum, Pearl millet, Finger millet, Teff
   - Cowpea, Bottle gourd, Okra, Yams, Cucumber
   - Castor bean, Sesame, Niger, Oil palm, Safflower, Flax
   - Cotton, Kenaf, Coffee
   - Kola, Bambara groundnut, Date palm, Ensete, Melons

9. European-Siberian Region:
   - Peach, Pear, Plum, Apricot, Apple, Almond, Walnut, Pistachio, Cherry
   - Cannabis, Mustard (black), Chicory, Hops, Lettuce

10. South American Region:

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- Potato, Sweet potato, *Xanthosoma*
- Lima bean, Amaranth, *Chenopodium, Cucurbita*, Tomato, Tobacco, Lupin
- Papaya, Pineapple
- Groundnut, Sea island cotton
- Cassava, Cacao, Rubber tree, Passion fruit

11. Central American and Mexican Region:
    - Maize, French bean, Potato, *Cucurbita*, Pepper/Chilli, Amaranth, *Chenopodium,* Tobacco, Sisal hemp, Upland cotton

12. North American Region:
    - Jerusalem artichoke, Sunflower, Plum, Raspberry, Strawberry

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Appendix 2: Percentages of regional food crop production[15] accounted for by crops associated with different regions of diversity

Regions of diversity

Regions of Production	**Chino-Japanese**	**Indo-Chinese**	**Australian**	**Hindustanean**	**West Central Asiatic**	**Mediterranean**	**African**	**Euro-Siberian**	**Latin American**	**North American**	**Total Dependence**
Chino-Japanese	37.2	0.0	0.0	0.0	16.4	2.3	3.1	0.3	40.7	0.0	62.8
Indochinese	0.9	66.8	0.0	0.0	0.0	0.0	0.2	0.0	31.9	0.0	62.8
Australian	1.7	0.9	0.0	0.5	82.1	0.3	2.9	7.0	4.6	0.0	100.0
Hindustanean	0.8	4.5	0.0	51.4	18.6	0.2	12.8	0.0	11.5	0.0	48.6
West Central Asiatic	4.9	3.2	0.0	3.0	69.2	0.7	1.2	0.8	17.0	0.0	30.8
Mediterranean	8.5	1.4	0.0	0.9	46.4	1.8	0.7	1.2	39.0	0.0	98.2
African	2.4	22.3	0.0	1.5	4.9	0.3	12.3	0.1	56.3	0.0	87.7
Euro-Siberian	0.4	0.1	0.0	0.1	51.7	2.6	0.4	9.2	35.5	0.0	90.8
Latin American	18.7	12.5	0.0	2.3	13.3	0.4	7.8	0.5	44.4	0.0	55.6
North American	15.8	0.4	0.0	0.4	36.1	0.5	3.6	2.8	40.3	0.0	100.0
World	**12.9**	**7.5**	**0.0**	**5.7**	**30.0**	**1.4**	**4.0**	**2.9**	**35.6**	**0.0**	

Reading horizontally, the figures can be interpreted as measures of the extent (in percentages) to which a given region of production depends upon each of the regions of diversity. The column labelled "total dependence" shows the percentage of a given region's production that is accounted for by crops associated with non-indigenous regions of diversity. (This is the total of the figures in the row, except for the percentage of auto-dependence.) Due to rounding, the figures in each row do not always sum exactly to 100.

[15] Extracted from Kloppenburg, J.R. Jnr., and Kleinman, D.L., 1988. The figures are based on the twenty food crops of current economic importance that lead global production in tonnage. These are: wheat, maize, rice, potato, barley, cassava, sweet potato, soybean, grape, sorghum, tomato, oats, banana, orange, apple, cabbage, coconut, rye, millet and yam.

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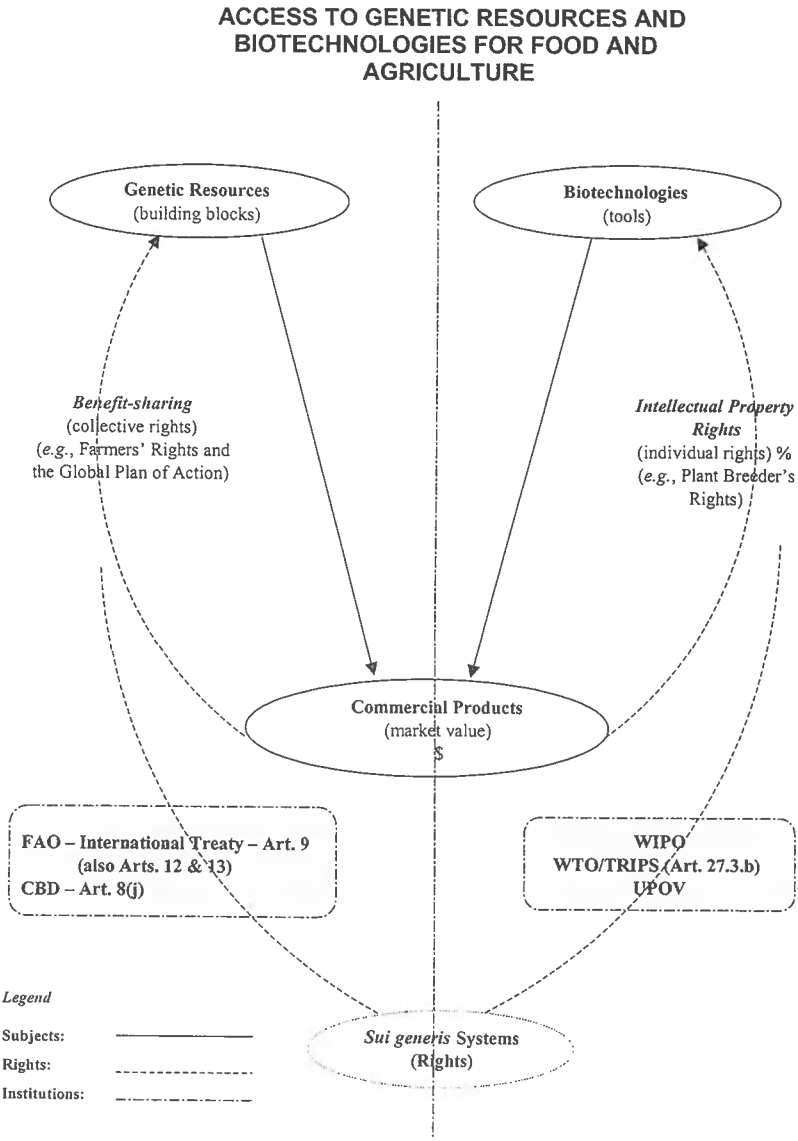
Appendix 3:



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XI

Human rights and humanitarian action: the right to food in armed conflict

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1. Humanitarianism at the crossroads?

The classical model of humanitarian action, based on the humanitarian principles famously initiated by Henri Dunant some 140 years ago, is under scrutiny. The multifaceted changes in the global political environment, in the nature of war and civil strife and the international humanitarian assistance regime as well as the increasingly recognised role of human rights in all aspects of life, have renewed an intense debate on the humanitarian response and the role of international law, notably human rights and humanitarian law.

Key humanitarian principles are codified in international humanitarian law (IHL), in particular the 1949 Geneva Conventions and their Protocols. IHL has been the international community's main legal frame of reference in dealing with armed conflict situations. International human rights law (HRL), in contrast, has long taken a "back stage" position, partly due to the widespread notion among humanitarians that HRL can be "derogated", *i.e.*, temporarily suspended, in times of conflict – a provision whose applicability is in fact limited to a narrow range of rights and situations.

There is now a growing "awakening" among humanitarian actors to the fact that human rights essentially apply in both peace and war and that HRL should be extended, in practice, to humanitarian situations. The motto "rights – not charity" so often heard from activists in the fight against poverty is now increasingly echoed by humanitarians. A logical consequence of current advocacy of human rights-based approaches to development in peaceful conditions would be human rights-based humanitarian action in war and other emergency situations. However, this move "has been a slow and pain-

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ful one for most humanitarian agencies".[1] And it is this "logical extension" of human rights into humanitarian situations – as well as the broader tendency of merging humanitarianism with conflict-resolution politics – that raises a host of ethical dilemmas in practice, whose resolution is debated along entrenched lines of the historical divide of ethical theories.

Food occupies a central position in humanitarian assistance. It is essential for life. It has a highly political value, since it most easily becomes the object of manipulations by warring parties. And it is decisions on the acceptability of food diversion by warring factions that are among the principal ethical challenges. Food constitutes, therefore, a useful entry point to illustrate the nature of the current debate on humanitarian action.

The following overview highlights some of the principal issues in the current debate on humanitarianism and rights. It begins with a review of humanitarian principles and the international legal framework in the changing global context, with a focus on the right to food in war and peace. It then examines classical and emerging models of humanitarian action and their underlying ethical theories and illustrates ethical dilemmas arising from introducing human rights or broader political considerations into humanitarianism. Emphasising the emerging general agreement on a rights-based approach to humanitarian action, it calls for systematic assessment of its implications at the operational level. And it concludes with a plea for humanitarian actors to be guided by a strong ethical framework whose bottom line would be the primacy of the humanitarian imperative.

2. The changing context

The nature of war has been changing since the conception of modern IHL. Contemporary armed conflicts are fought more frequently within states than between states. Intrastate conflicts are generally not of the same "symmetric" nature, with regular and disciplined armies confronting each other, where military commands could be held accountable for compliance with international law and subordinates would be held accountable by their military commands. In factional warfare typical of contemporary conflict, civilians rather than combatants are often the chief targets and civilians are participating in the perpetration of violence. In these conditions, the conventional distinction between civilians and combatants, central to IHL, becomes blurred or irrelevant.

The humanitarian assistance regime also has dramatically changed. The predominant humanitarian actor of earlier times and the only one referred to

[1] Jonsson, U., Levine, I., and Young, H., *The Right to Nutrition in Conflict Situations*. Discussion Paper presented at the [UN System Standing Committee on Nutrition] Symposium on Nutrition in the Context of Crisis and Conflict, Berlin (11-12 March 2002), p. 9.

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in IHL, the International Red Cross (ICRC) and the Red Cross and Red Crescent Movement as a whole, has been joined by a multitude of NGOs, many of which are surprisingly unfamiliar with relevant international law.[2] In addition, a considerable number of UN agencies are active in conflict situations. Each of these actors is driven by different organization-specific mandates and ethical and moral perspectives, which compound the challenges of logistical co-ordination and of maintaining reasonable quality standards of the assistance provided.

Furthermore, geopolitical changes are putting the traditional humanitarian response in question. The declining interest, notably since the end of the Cold War, of powerful states in "un-strategic" wars has been accompanied by a tendency to have humanitarian action substitute for international political engagement, with an attendant politicisation of humanitarian aid. Also, absolute notions of state sovereignty have been softening, with far-reaching implications for responsibility and accountability of various actors involved in conflict situations. Humanitarian agencies have become themselves significant actors in many conflicts and in international political arenas.

Given the proliferation of armed conflicts and the changing conflict environment, it is indeed surprising that "armed conflicts have received too little attention in current work on human rights and the right to food", according to the Second International Encounter on the Right to Food and Nutrition, organised by IPRFD in Geneva in August 2000.[3] The encounter also emphasised the "urgent need to resolve ethical, legal and operational problems in approaches to humanitarian action in a framework of human rights and international humanitarian law".[4]

3. Humanitarian principles

Humanitarian action in its classical form is founded on a set of principles which originate from Henri Dunant after his experience in the Battle of Solferino in 1859 and which were later adopted by the Red Cross movement as its "fundamental principles". Out of the movement's seven fundamental principles,[5] the following can be considered the core of widely recognised *principles of humanitarian action*:

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2 International Committee of the Red Cross (ICRC), *International Humanitarian Law and Protection*. Report of the Workshop 18-20 November 1996, Geneva (1996), p. 67.

3 International Project on the Right to Food and Development (IPRFD) – *Operationalising the Right to Food and Nutrition: The contribution of international development, humanitarian and human rights organizations and institutions*. Report on the Second International Encounter on the Right to Food and Nutrition, Geneva (21-22 August 2000), p. 23.

4 *Ibid.*

5 Humanity, impartiality, neutrality, independence, voluntary service, unity, universality.

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- *humanity*: prevention and alleviation of human suffering, respect for human life and dignity, with the attendant prohibition of violence to life and person and cruel, humiliating and degrading treatment;
- *impartiality*: provision of humanitarian action on the basis of need alone, *i.e.*, (i) without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria (*principle of non-discrimination*), (ii) proportional to need (*principle of proportionality*), and (iii) without "subjective distinctions" as to whether the recipient is innocent or guilty, "good" or "bad", and hence deserving or undeserving of assistance on any basis other than need;[6]
- *neutrality*: not taking sides, directly or indirectly, in the (physical) hostilities or (ideological) controversies of the parties to the conflict; this includes the "neutrality of relief" which must not result in any military or economic advantage to the enemy;
- *independence*: not being influenced by pressures from governments and any other forces;
- *universality*: provision of humanitarian action to all conflict victims, no *matter* where they live.

These principles find their "purest" application in the *humanitarian imperative*, with its exclusive concern for saving lives and reducing suffering, irrespective of other considerations.

4. The international legal framework

Core principles of humanity and humanitarian action are codified in international humanitarian law and human rights law – two distinct and yet closely related branches of the international legal system. Humanitarian law is the law of armed conflict or the law of war: a body of rules seeking to strike "a

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[6] See Jean Pictet's work on the fundamental principles of the Red Cross and the Geneva Conventions (Jean Pictet, *The Geneva Conventions of 12 August 1949: commentary*. Published under the general editorship of Jean S. Pictet, director for general affairs of the International Committee of the Red Cross, Geneva (1958)).

Compare the "without 'subjective distinctions'" interpretation of impartiality with international refugee law as constituted in the statute of UNHCR, which prohibits the organisation from assisting those accused of international crimes. In other words, it is required *not* to be impartial in the sense just described, where such issues are at stake. And this was precisely the demand made by many humanitarian actors in the Great Lakes refugee crisis in 1994-98 (see Kate Mackintosh, "The Principles of Humanitarian Action in International Humanitarian Law. Study 4" in *The Politics of Principle: the principles of humanitarian action in practice*. Humanitarian Policy Group, HPG Report 5. ODI, London (March 2000), pp. 6, 11).

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compromise between humanitarian considerations and military necessity"[7] – to make war the "least inhumane possible". It imposes obligations on warring parties, traditionally States in international conflicts, to limit warfare and protect and assist war victims. However, these obligations do not translate into rights of victims in the way that human rights law establishes universal rights that every individual should enjoy and be able to claim at all times and that States are obliged *vis-à-vis* the individual living within their jurisdiction to respect, protect and fulfil these rights.

4.1. International humanitarian law

IHL is divided into two strands: the "Law of The Hague" and the "Geneva Law". Hague law regulates means and methods of combat with the aim of limiting the effects of violence in fighting. These rules have been codified in a series of declarations and treaties following the Hague Peace Conferences in 1899 and 1907.[8] Examples of more recent instruments include international conventions on the use of certain conventional weapons (1980), on chemical weapons (1993), and on anti-personnel mines (1997). The most significant principle of Hague law is that war has limits, constraining belligerents in adopting means of injuring the enemy. It is also the origin of the principle of distinguishing between civilians and military targets, or non-combatants and combatants.

The Geneva law, in contrast, is concerned with the treatment of victims of war. The centrepiece of contemporary humanitarian law is *the four 1949 Geneva Conventions for the Protection of War Victims and their two 1977 Additional Protocols.* They build on a series of conventions conceived since the second half of the 19th century, including the first Geneva Convention of 1864 on victims of war, adopted at about the time of the foundation of the Red Cross movement. The Geneva Conventions enjoy almost universal ratification and are thus considered part of customary law.

Of the four 1949 Geneva Conventions, the first three deal, respectively, with the protection of the wounded and sick in armed forces in the field (I), and at sea (II), and with the treatment of prisoners of war (III). The Fourth Convention addresses the protection of *civilian persons* in times of war. All four Conventions refer to *international armed conflicts* between two or more States, but one article (Article 3) common to all of them extends provisions to armed conflicts of a *non-international* character. These provisions contain the core principles of humanitarian action.

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7 United Nations (1996) – Impact of armed conflict on children. Report by the Secretary General. Doc. A/51/30, para. 218.

8 ICRC, *Handbook on War and Public Health*, Geneva (1996), chapter 9.

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In essence, Common Article 3 stipulates that non-combatant persons "shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria". It prohibits "violence to life and person", the taking of hostages and "outrages upon personal dignity". It also states that "an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict". And it calls on the parties to the conflict to "endeavour to bring into force, *by means of special agreements*, all or part of the other provisions of the present Convention" (emphasis added). This clause, in fact, urges the Conventions' full or partial application in non-international armed conflicts. There are today numerous examples of such "special agreements", such as the Southern Sudan SPLM/OLS[9] Agreement on Ground Rules and the 1999 Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of Congo.

Being considered part of customary international law, Common Article 3 applies to all non-international armed conflicts, regardless of state ratification.

Two Additional Protocols to the Conventions were adopted in 1977 to strengthen the original provisions concerning *international armed conflict* (I) and *non-international armed conflict* (II). While the First Protocol strengthens, *inter alia*, the provisions for the protection of civilians, notably women, children and the elderly and sick, in situations of international conflict, the Second Protocol elaborates the Common Article 3 into a legal instrument of 28 articles dealing with the protection of civilians in non-international conflicts, extending provisions of the Conventions and Protocol I to situations of internal armed conflict. Both Protocols combine aspects of Geneva law with Hague law.

The ratification status of the Protocols is significantly less than that of the Conventions (158 and 149 States for Protocol I and II, respectively, against 188 for the Conventions), which means that the Protocols have not become generally accepted as customary law and apply only on territory of a State party to the Protocols.

Like any international treaty, the Geneva Conventions are addressed to *states*. They impose obligations on states which ratify the Conventions, and insofar as they reflect customary law they are binding on all states, whether or not they are parties to the Conventions. According to legal doctrine, when a state has ratified the Conventions or Protocols, the provisions relating to internal wars are also binding on the non-state party to the conflict, now often referred to as non-state entity (NSE). The relevant customary principles

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[9] Sudan's People's Liberation Movement/Operation Lifeline Sudan.

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will be binding on any two or more NSEs to the conflict, even if no state is involved.[10]

4.1.1. Humanitarian relief and the right to food in Geneva law

Contrary to widespread belief, *humanitarian relief provisions* make up only a small proportion of IHL rules in the Fourth Convention and the Additional Protocols. Of a total of 289 articles, only 22 relate to the provision of relief. In particular, Common Article 3, as shown above, is "absolutely minimal in simply referring to the possibility that ICRC may offer its services to the parties to the conflict".[11] But relief measures are not the only IHL provisions relevant to the right to food. IHL also contains preventive or protective measures designed to avert the need for food relief.

Food is specifically referred to in 36 articles of the four Geneva Conventions and their Protocols. About half of these deal quite elaborately with the provision of food for prisoners of war and internees. For both groups, the "umbrella rule" stipulates that the "basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war [internees] in good health and prevent loss of weight or development of nutritional deficiencies. Account shall also be taken of the habitual [customary] diet of the prisoners [internees]" (GC III, 26; GC IV, 89). In the case of internees, the rules make special provisions for "expecting and nursing mothers, and children under fifteen years of age", who "shall be given additional food, in proportion to their physiological needs" (GC IV, 89). The content of these IHL provisions comes remarkably close to the spirit of the current definition of the right to food under human rights law.[12]

Concerning food relief in international conflicts involving the occupation of a territory, it is first and foremost the duty of the "Occupying Power" to ensure the food of the population, "to the fullest extent of the means available to it ... ; it should, in particular, bring in the necessary foodstuffs ... if the resources of the occupied territory are inadequate", according to the Fourth Geneva Convention (GC IV, 55). According to the Convention, the Occupying Power may only requisition foodstuffs for the use of its forces and administrative personnel "if the requirements of the civilian population have been taken into account" (GC IV, 55).

For international and internal conflicts, the Convention and the two Protocols, according to the respective scope of their applicability, provide rules

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10 Mackintosh, *op. cit.*, p. 6.

11 Mackintosh, *op. cit.*, p. 3.

12 As advanced by the Committee on Economic, Social and Cultural Rights in its General Comment No. 12 (United Nations/ECOSOC – General Comment 12 (Twentieth Session, 1999), The right to adequate food (art. 11); E/C.12/1999/5, 12 May 1999.

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for the provision of relief programmes focusing on food, medicines and other supplies essential to the survival of the civilian population. These include the following:

- "If the whole or part of population of an occupied territory is inadequately supplied, the Occupying Power shall agree on relief schemes ... and facilitate them by all the means at its disposal. Such schemes ... shall consist, in particular, of the provisions of consignments of foodstuffs" (CG IV, 59).
- The parties concerned should "permit free passage of these consignments and shall guarantee their protection" (GC IV,59) – a rule strengthened in Protocol I, which calls on the parties concerned to "allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel" (PI, 70).
- There should be no diversion by the Occupying Power of "relief consignments from the purpose for which they are intended" (GC IV, 60).
- "Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts" (P I, 70).
- In the distribution of such relief, "priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who under the Fourth Convention and this Protocol are to be accorded privileged treatment or special protection" (P I, 70).
- Protocol II particularly emphasises the "exclusively humanitarian and impartial nature" of relief actions, which are to be "conducted without any adverse distinction ... subject to the consent of the High Contracting Party concerned" (P II, 18).

4.1.2. Food as a weapon

The two Protocols also raise the issue of the use of food and directly related resources as a method of warfare affecting civilians. They categorically prohibit the use of food and related productive resources as a means of warfare against civilians. Above all, they prohibit the starvation of civilians as an explicit means of warfare (P I, 54; P II, 14). To the same effect, the Protocols stipulate that "objects indispensable to the survival of civilian populations, such as foodstuffs, agricultural areas, crops, livestock, drinking water installations and supplies and irrigation works" must neither be attacked, destroyed, removed or rendered useless (PI, 54; P II, 14). But the prohibition of the destruction or removal of food resources applies only if it is intended "for the specific purpose" of starving civilians – a proposition that may be difficult to prove. By this civilian-focused "specific purpose" clause, the

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Protocol allows, for example, blockades, *i.e.*, measures aimed at "depriving the adversary of supplies needed to conduct hostilities".[13]

In fact, Protocol I states that the protection of food and related productive resources shall not apply if those serve the enemy "as sustenance solely for the members of its armed forces" or as "direct support of military action" – as long as it is ensured "that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement". Nevertheless, "imperative military necessity" for the defence of the national territory against invasion may justify a derogation from the latter clause. As an example, the aforementioned Red Cross commentary notes that "'scorched earth' policies exercised by an Occupying Power withdrawing from occupied territory were judged legitimate if required by imperative military necessity".[14] Yet in a further rule, the First Protocol forbids methods or means of warfare likely to cause widespread, *long-term damage to the environment*, thereby jeopardizing the health or survival of the population (P I, 55).

These provisions vividly illustrate what is meant by referring to IHL as "a body of rules seeking to strike a compromise between humanitarian considerations and military necessity" – a compromise alien to the concept underlying the body of human rights. They also give an idea of the difficulty of interpreting and implementing the law in actual field situations.

4.1.3. Humanitarian relief and the principle of neutrality in IHL[15]

Although the *principle of neutrality* is generally considered a humanitarian principle – and, in fact, it is one of the seven fundamental principles of the Red Cross – it is not explicitly mentioned in relation to relief in the Geneva Conventions. One reason for this may be that the term has a technical meaning in relation to the position of non-belligerent states. Still, some of the more detailed conditions set out in the Conventions are quite explicit expressions of this basic requirement of neutrality. And the drafters of the Conventions were more than aware that the essence of neutrality goes well beyond the question of "not taking sides in the hostilities and controversies between the parties to the conflict" and that the requirement of non-interference with the military efforts and the war economies of the parties to the conflict poses complex difficulties.

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[13] Sandoz Y., Swinarski C., Zimmermann B. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, with the collaboration of Jean Pictet, C. Pilloud, J. de Preux, H. P, n.d., para. 2095.

[14] Sandoz Y., Swinarski C., Zimmermann B., *op. cit.*, para. 2121.

[15] This section draws on: Mackintosh, *op. cit.*, pp. 6-7.

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According to the Fourth Convention (GC IV, 23), a concerned party can refuse the free passage of relief consignments if it has serious reasons to fear that:

> (a) the consignments may be diverted from their destination,
> (b) the control may not be effective,
> (c) a definite advantage may accrue to the military efforts or the economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

Point (c) evidently embraces the humanitarian principle of neutrality, going beyond the notion of "not taking sides" and extending it to the concept that relief must not result in any military or economic advantage to the enemy. All three points taken together, the provisions of article 23 have far-reaching implications in operational, legal and ethical terms. Three issues stand out in particular.

First, unless an organisation can guarantee the above conditions, it cannot insist upon access under IHL. To give the necessary assurances for the conditions under (a) and (b), a humanitarian actor must be in control of the resources it brings into the territory. This is a key issue for current humanitarian operations in complex emergencies.

Secondly, meeting the conditions under point (c) would require humanitarian organisations to assess, prior to delivery, the likely impact of their assistance. Such impact assessment is under discussion in the humanitarian community, but for reasons other than IHL – rather in the context of the "do no harm" debate. And it certainly is not widespread practice at this point, nor is there common awareness of its requirement under IHL.

Thirdly, the conditions under (c) imply that assistance intended to support the local economy runs counter to the strictures of IHL. IHL demands that humanitarian action is assured not to benefit the local economy in enemy territory, it calls more for "do no good" than "do no harm". Developmental approaches to humanitarian assistance, as espoused under some of the emerging humanitarian models, would, strictly speaking, appear to contravene IHL rules.

4.1.4. The right to food in other emergency-related law

Large-scale displacement of people is an attendant outcome of armed conflicts. Some of these people enjoy special protection under international refugee law, but those displaced within the boundaries of their own country largely fall "between the cracks" of various branches of international law. To

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qualify as a refugee, a displaced person has to cross a State border and meet additional criteria laid down in *international refugee law*. Humanitarian law and human rights law do contain certain provisions in their support, but the broader concerns of refugees are elaborated in a separate body of international law, *i.e.*, the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol.[16]

The Convention sets the minimum standards of treatment of refugees, including the basic rights which they are entitled to. It also establishes the juridical status of refugees and contains provisions on their rights to gainful employment and welfare. States have primary responsibility to ensure the protection of refugees within their boundaries. The UN High Commissioner for Refugees (UNHCR) is mandated to provide international protection for refugees and to find permanent solutions to refugee situations. With regard to food, products of primary necessity in short supply and public relief and assistance generally, the Convention essentially stipulates that legally recognised refugees are entitled to the same treatment as nationals of the host country (arts. 20, 23).

"Internal refugees", or *internally displaced persons* (IDPs), are not covered by refugee law. In armed conflict situations, they are protected as civilians under humanitarian law, *i.e.*, the Fourth Geneva Convention and Additional Protocol II, otherwise human rights law applies – leaving, however, important "grey areas" in IDP coverage. Given the growing and complex problems of internal displacement, the UN Secretary General appointed a Representative on Internally Displaced Persons to draw up a set of "Guiding Principles on Internal Displacement", incorporating elements of humanitarian, human rights and refugee law into a single document.[17] Among its 30 legally non-binding principles is the reaffirmation of the right to an adequate standard of living for IDPs, with the obligation of "competent authorities" to provide "at the minimum, ... internally displaced persons with and ensure safe access to: (a) essential food and potable water; (b) basic shelter and housing; (c) appropriate clothing; and (d) essential medical services and sanitation" (Principle 18). The Principles also stipulate that IDPs "have the right to request and receive protection and humanitarian assistance from [national] authorities" (Principle 2).

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[16] United Nations – Convention relating to the Status of Refugees, 1951; and United Nations – Protocol relating to the Status of Refugees, 1967.

[17] United Nations – Report of the Representative of the Secretary General, Mr. Francis Deng, Guiding Principles on Internal Displacement; UN doc. E/CN/1998/53/Add.2.

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4.2. Human rights law and its applicability in armed conflict

International humanitarian law and human rights law have traditionally been treated largely in isolation from one another – due to their profoundly different origins, their separate evolution, their different implementation mechanisms. They do share, however, a fundamental common objective: the respect for human dignity without any discrimination whatsoever as to race, colour, religion or faith, sex, birth or wealth, or any similar criteria. In addition, they share a great number of detailed objectives and conceptual similarities. There has been a tendency, for some time now, of emphasizing the convergence and complementarity between the two instead of the traditional extolling of their differences. The renewed emphasis on the applicability of human rights in both peace and war has reinforced this tendency.

Human rights law establishes universal rights that every individual should enjoy, and be able to claim, at all times. States are obliged *vis-à-vis* the individual living within their jurisdiction to respect, protect and fulfil these.[18] The central human rights instrument is the *International Bill of Human Rights*, consisting of the 1948 *Universal Declaration of Human Rights* (UDHR) and the 1966 *International Covenants on Civil and Political Rights* (ICCPR) and on *Economic, Social and Cultural Rights* (ICESCR). The International Bill of Human Rights has since been extensively elaborated through the adoption of numerous legally binding conventions and treaties and non-binding declarations, at both global level (by the United Nations and its specialized agencies) and regional level. Among them are the Conventions on the Elimination of All Forms of Racial Discrimination, on the Elimination of All Forms of Discrimination against Women (CEDAW), on the Right of the Child (CRC), against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and on the Prevention and Punishment of the Crime of Genocide.

4.2.1. Derogation of human rights "in times of public emergency"

A widely held misunderstanding has it that most human rights law does not apply during conflict situations because it may be derogated. Derogation is a procedure through which a state may temporarily suspend certain of its obligations under HRL. It is this concept of derogation that has lead to the misunderstanding that human rights law has little or no application in conflict. However, on close examination it is clear that a state's scope for derogation from its legal obligations in emergency or conflict is indeed very limited and essentially refers to the ICCPR.

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[18] On the nature and implementation of State obligations towards the realisation of human rights of individuals, see Barth Eide and Oshaug in Chapter 13.

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The derogation clause most commonly referred to is Article 4 of the ICCPR, which states that,

> in time of public emergency which threatens the life of the nation ... , the States Parties ... may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Paragraph 2 of Article 4 goes on to stipulate that there can be no derogation from: Article 6 on the inherent right to life of every human being; Article 7 prohibiting torture and cruel, inhuman or degrading treatment or punishment; Article 8(1) and (2) prohibiting slavery and servitude; Article 11 against imprisonment for failing to fulfil a contractual obligation; Article 15 prohibiting retrospective criminal prosecution; Article 16 on the right of recognition before the law; and Article 18 on the right to freedom of thought, conscience and religion.

There is no such "derogation clause" in the ICESCR, the CRC and most other HRL treaties. Most HRL therefore does apply, in principle, equally during times of conflict and times of peace. In practice, however, implementability is easily impaired in situations of "failing states", given the general emphasis of HRL on the relationship between the individual as rights claimant and the state as duty bearer. There is a need to extend the claim-duty relationship to include additional subjects and objects at sub-national and community levels. This would include identification of obligations and accountabilities of all key non-state actors. As a matter of fact, many of the principles of humanitarian action reflect exactly such relationships. And the preambles of the UDHR, the ICESCR and ICCPR contain provisions that can be understood as recognition of duty bearers others than the state – a so far widely neglected aspect of HRL. In times of both war and peace, more attention needs to be given to this concept of "extended HRL".[19]

4.2.2. The right to adequate food and nutrition as a human right

The right to adequate food is anchored in both the UDHR and the ICESCR. UDHR Article 25 states that, "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food ...". Article 11 of the ICESCR provides that States Parties recognise the right of everyone to adequate food (paragraph 1) and to be free from hunger (paragraph 2).

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[19] See Jonsson, U., Levine, I., and Young, H., *op. cit.*, pp.10 ff.

PURL: https://www.legal-tools.org/doc/5ecf1e/

An authoritative interpretation of Article 11 in terms of the content and implementation of this right has been provided by the Committee on Economic, Social and Cultural Rights, the ICESCR's treaty body, in its General Comment No. 12.[20] The comment is a response to the 1996 World Food Summit (WFS) recommendation

> to clarify the content of the right to food and the fundamental right of everyone to be free from hunger, as stated in the International Covenant on Economic, Social and Cultural Rights and other relevant international and regional instruments, and to give particular attention to the implementation and full and progressive realization of this right ...[21]

As discussed elsewhere in this book,[22] the follow-up Summit five years later (WFS:*fyl*) agreed on the initiation of a political process through which governments would elaborate and adopt, within a period of two years, guidelines specifically directed at the implementation of the right to food.

As noted in the General Comment, the ultimate objective of the right to adequate food is to achieve nutritional well-being. Nutrition is not explicitly mentioned in the UDHR and ICESCR, beyond a reference in the latter to nutrition education. This should not come as a surprise, because at the time of the preparation of these documents the dominant view was that nutrition meant adequate food or being free from hunger. With the current understanding that adequate nutrition requires food, health and care, nutrition is a recognised human right, because both the UDHR and the ICESCR recognise food, health and care/protection as human rights. At a more general level one can argue that human well-being, often referred to in the UDHR and the ICESCR, must include adequate nutritional status. In addition, the Convention on the Rights of the Child (CRC), having near universal application by being the most ratified international human rights treaty and applying equally during times of peace and war, makes specific reference to nutrition.[23]

4.3. Complementarity and convergence of IHL and IHRL

Human rights law and humanitarian law share not only the fundamental objectives of respect for human dignity and non-discrimination, but also have considerable specific common ground.

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20 United Nations/ECOSOC, *op. cit.*

21 World Food Summit – Rome Declaration on World Food Security and World Food Summit Plan of Action, Commitment 7.4, Rome 1996.

22 See the contribution by Bart Eide and Oshaug, *op. cit.*

23 For further details on nutrition as a human right, see Jonsson, U., Levine, I., and Young, H., *op. cit.*

PURL: https://www.legal-tools.org/doc/5ecf1e/

4.3.1. The interface between humanitarian law and human rights law

IHL is supportive of key components of civil and political rights – for example, the right to life, the prohibition of torture and inhuman treatment, the prohibition of slavery and the protection of children and family life – as much as it supports economic and social rights such as the rights to food, shelter and health, and women's, children's and family rights. However, these common grounds do not apply universally to all people, as do human rights, but only to non-combatants – a necessarily discriminatory distinction alien to the spirit of human rights law.

In areas where IHL and HRL interface, they are mutually reinforcing. Taking food as an example, IHL seeks to support the realisation of the human right to food, without recognising it as a right that individuals can claim, but placing certain obligations on parties to the conflict. A human rights approach to food in emergencies would support the notion that victims of emergencies have a right to food relief assistance once the State is no longer in control in the victims' territory, without establishing whose obligation it would be to provide such assistance. While both IHL and HRL seek to achieve the same objective – adequate food for emergency victims – the concept of food assistance as a right would have important consequences: for example, it would exclude the possibility of using food as a bargaining tool to ensure compliance by warring factions with other rights or agreements – a tempting tool in difficult circumstances.

4.3.2. The IHL concept of assistance and protection: towards an integrated IHL-HRL concept of protection in armed conflict

An example of the above noted tendency of emphasizing the interface between the two branches of international law is the evolving understanding of the meaning of "protection" in IHL.

IHL distinguishes between two kinds of humanitarian action: *assistance* (the provision of food, medicine, shelter etc.) and *protection.* While "the term 'protection' per se is not defined in the Geneva Conventions and Protocols",[24] there is now broad based agreement that the "concept of protection encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of relevant bodies of

[24] Cohen, Roberta and Francis M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, Brookings Institution Press, Washington, D.C. (1998), p. 256.

PURL: https://www.legal-tools.org/doc/5ecf1e/

law, i.e. human rights, humanitarian and refugee law" and that both "human rights and humanitarian actors shall conduct these activities impartially".[25]

Protection is, thus, about rights. According to the definition, it engages human rights actors and agencies with a specific protection mandate as well as humanitarian actors mandated to provide assistance. The inclusion of humanitarian actors in rights protection is based on the growing understanding of the interrelation of assistance and protection. The former contributes directly to the realisation of certain human rights, especially economic and social rights, such as the right to adequate food and the right to health. In fact, "the provision of assistance does in itself constitute a form of protection. As such the traditional work of humanitarian and development agencies is, indeed, inherently rights-based and the distinction between protection and assistance is false", according to a UN inter-agency working group.[26] There is thus growing recognition of the need "to overcome the rights-based and assistance-based dichotomy in one approach called protection. Accordingly, assistance activities should consider the full spectrum of protection".[27] But as many agencies have discovered, this "is not an easy fit".[28]

5. International law and humanitarian action in practice: in search of an ethical framework

In "the world of the founders of IHL", the relationship between belligerents and humanitarians has been a simple and straightforward one: belligerents agree to respect humanitarian principles as codified in IHL; and humanitarian actors, operating with impartiality, neutrality and independence, agree not to interfere in conflict. This is the "classical deal" in humanitarian action. However, in many current wars, belligerents appear to have rejected the very notion that war has limits, and attacks on civilians and other abuses of IHL and HRL are often a deliberate strategy. Many humanitarian actors, in turn, have departed from the principle of the humanitarian imperative, moving towards approaches determined by utilitarian ethics, potentially sacrificing established principles of humanitarian action.

There is thus a change in the relationship between the principles and rules of international law that belligerents choose to respect and the principles of humanitarian action that humanitarian actors adopt. This change signals an emerging "new deal" – or "new deals" – in humanitarian action, in

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25 ICRC (International Committee of the Red Cross), *Workshop on Protection for Human Rights and Humanitarian Organizations*. Report. Geneva (1999), p. 21.

26 IASC (Inter-Agency Standing Committee of the UN), *Protection of Internally Displaced Persons*, IASC Policy Paper (December 1999), p. 4.

27 ICRC 1999, *op. cit.*, p. 27.

28 Fiona Fox, "New Humanitarianism: Does It Provide a Moral Banner for the 21st Century?", 25(4) *Disasters* 278 (2001).

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the process of which humanitarian organisations tend to become themselves significant actors in many conflicts and in international political arenas.[29] These dynamics have led to a process of reassessing approaches to humanitarian action, which has brought to the fore entrenched differences in ethical positions.

5.1. Reassessing approaches to humanitarian action

In fact, a 1998 ICRC workshop on humanitarian law and protection confirmed that "at the heart of the current humanitarian debate" lies the historical ethical divide between *duty-bound* ("deontological") ethical theories and *goal-based* ("teleological") theories.[30] The former have their roots in Immanuel Kant's philosophy and his "categorical imperative" focusing on absolute duty. Accordingly, the "humanitarian categorical imperative" in its purest interpretation stipulates "that humanitarianism is only about saving lives and reducing suffering, and that no other consideration may override this principle".[31] Humanitarian law as laid down in the Geneva Conventions can be considered the legal codification of the *humanitarian imperative.*

In contrast, goal-based ("teleological") ethical theories, inspired by the philosophers Jeremy Bentham and John Stuart Mill are concerned with the final outcome. A teleologist would judge whether an action was morally right or wrong by the consequences it produced, rather than by its intrinsic value. *Utilitarianism* is the most important expression of goal-based theories, and advocates of this school of thought favour a more flexible, pragmatic and contextual approach to humanitarian intervention. The teleological counterpart to the humanitarian imperative is what some call the *humanitarian impulse.*[32]

Over the past decade, the debate by relief practitioners and theorists on reforming humanitarian aid in complex emergencies has tended to move from its humanitarian-imperative dominated focus in one or more of several directions: to link it to peace-building, to development or at least towards minimising some imputed "harm" relief might do in conflict. These efforts have, in turn, provoked a "counter-reform movement", arguing for a "back-

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29 Nicholas Leader, *The Politics of Principle: the principles of humanitarian action in practice.* Humanitarian Policy Group (HPG). ODI, London (March 2000).

30 ICRC – Protection: Toward Professional Standards. Report of the Workshop 17-19 March 1998. Geneva 1998, p. 17.

31 *Ibid.*

32 Joanna Macrae, *The Origins of Unease: Setting the Context of Current Ethical Debate.* Background paper I, Forum on Ethics in Humanitarian Aid, Dublin (9-10 December 1996), p. 14.

PURL: https://www.legal-tools.org/doc/5ecf1e/

to-basics concentration on core humanitarian principles" and thus, presumably, for moving closer back to a humanitarian-imperative inspired position.[33]

As a result of this process, three broad types of "humanitarian response models" have developed:[34]

(1) The "classical" humanitarian imperative or "neutrality elevated" response – a position which sees humanitarian action as for the relief of suffering only, which emphasises universal legal principles, and which sees humanitarian action tightly bound by rules of impartiality and neutrality. Thus the manipulation of humanitarian action by political actors should be minimised through operational rules.

(2) Political humanitarianism or "neutrality abandoned" response – a position which argues that humanitarian action should be subordinated to (good) political goals, as this will reduce suffering in the long run; this may mean taking sides and politicising humanitarian action, even to the point of using humanitarian aid as a conflict management tool. Without question, political humanitarianism, also referred to as "new humanitarianism", contravenes the principles on which IHL is founded.

(3) Third-way humanitarianism – a position that seeks a middle way. It emphasises the role of humanitarian aid for developmental relief, peacebuilding and dealing with root causes (and thus, presumably, also human rights). These are in effect political objectives, but this position resists taking sides. It thus tends to be most unclear about the nature and rules of humanitarian politics. As far as developmental relief approaches are concerned, the question of compatibility with IHL depends, above all, on the definition of "developmental relief". The distribution of seeds to civilians in an acute emergency to grow food in the upcoming season is unlikely to be classified as "developmental". But an explicit policy of introducing developmental elements in humanitarian assistance as early as possible into a strategy based on a presumed "emergency-recovery-development continuum" could run foul of IHL provisions such as Article 23 of the Fourth Convention.

5.2. Realising the right to food in armed conflict under different ethical paradigms

The changing relationship between belligerents and humanitarian actors and the emerging "new deals" give rise to a host of ethical dilemmas. Despite their enormous diversity, these can be summarised under one "umbrella" dilemma: the need to negotiate what should be "non-negotiable" or "to bargain for one principle by sacrificing another", as a UNICEF/ESARO-

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[33] Jackson, Stephen and Peter Walker, "Depolarising the 'Broadened' and 'Back-to-basics' Relief Models" 23(2) Disasters 93 (1999).

[34] Leader, Nicholas, *op. cit.*, p. 2.

PURL: https://www.legal-tools.org/doc/5ecf1e/

WANAHR[35] meeting on ethical dilemmas in complex emergencies, held in Nairobi in August 2000, put it.[36]

Issues related to food often present the major ethical challenge to humanitarian actors. Virtually all have had to deal with the issue of *forced diversion of food aid* from civilians to combatants. Some have set informal limits for such diversion, beyond which they feel the positive effects of assistance are outweighed by the negative effect of diversion. Considering that armies are always the last members of society to starve and will take food from civilians by force if necessary, some even have adopted the deliberate feeding of an army as a form of protection of civilians, as some NGOs did in the case of Rwandan refugees in camps in Zaire.[37]

Duty-bound humanitarians tend to be inclined to accept high levels of diversion to combatants as long as civilians still reaped some benefit. In contrast, goal-based humanitarians would be inclined to cut off food aid already at relatively low diversion levels and would oppose the deliberate feeding of an army, on grounds that the indirect or direct feeding of combatants amounts to a prolongation of the conflict. Some goal-based humanitarians may go as far as opposing food aid altogether, arguing that IHL obliges those in power to meet the food needs of civilians and those "authorities" should not be relieved from their duty. Duty-bound humanitarians would counter such arguments by pointing out that civilians should not be punished twice: once by their "authorities" who do not meet their obligations and a second time by humanitarian organisations withdrawing assistance.

The purpose of humanitarian *food aid* is sometimes stretched one step further, using it as *a bargaining tool to encourage respect for human rights and humanitarian law*. From a human rights perspective, using food aid as a bargaining tool would amount to negotiating the non-negotiable, *i.e.*, the right to food. And if human rights violations persist, should food aid be discontinued? Should the provision of food be made conditional on respect for other human rights? For duty-bound humanitarians, "conditionality" is the negation of the principles of humanity and neutrality and does not belong to the humanitarian world but rather to that of politicians.

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35 ESARO is UNICEF's Regional Office for East and Southern Africa; WANAHR is the World Alliance for Nutrition and Human Rights, a network of individuals and institutions dedicated to the promotion of the right to adequate food and nutrition in the broader human rights and development context; Asbjørn Eide was one of its founding fathers and first Coordinator.

36 UNICEF/ESARO-WANAHR (World Alliance for Nutrition and Human Rights) (2000) – Human Rights, Humanitarian Law, Principles for Humanitarian Action and Ethical Dilemmas in Complex Emergencies. Workshop Report, Nairobi, 25-26 August 2000, p. 1.

37 Kate Mackintosh, "International Responses to Acute Crisis: Supporting Human Rights through Protection and Assistance", in DFID and University of Essex/Human Rights Centre, *Conference on The Promotion and Protection of Human Rights in Acute Crisis* (1998), p. 41.

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Similarly, should access to war victims be bargained for at the expense of compliance with other components of IHL or HRL? To what extent should the risk of undesirable side effects influence decisions on the provision of humanitarian assistance? Is it possible – or even acceptable – to be neutral and impartial in the provision of humanitarian aid? Should solidarity be substituted for neutrality? The list of potential ethical dilemmas is long and open-ended. Irrespective of the school of ethical philosophy, there are no generalisable answers to these and other dilemmas, which will have to be scrutinized in each particular situation. In doing so, three principal considerations should be kept in mind:

- Humanitarian law is based on a duty-bound, deontological philosophy, centred on the concept of the humanitarian imperative; it favours a "humanitarian imperative comes first" position.
- Given the evolving understanding of "protection" as an integrated "rights protection-relief assistance" concept, there is a need for striving to include a rights dimension into the humanitarian imperative concept.
- Ethical dilemmas do not only arise from violations of principles and law, but also from poor situation analyses, intervention planning and negotiation; they constitute a challenge to improving humanitarian performance at these fronts, and particularly in the field of drafting and negotiating situation-specific agreements between the warring parties and the humanitarian community, as envisaged in IHL (Common Article 3).

5.3. Humanitarianism, international law and politics – the broader debate

The search for appropriate humanitarian models in modern conflict conditions is a response to both the changing nature of conflict and of the relationship between belligerents and humanitarians and the perceived failure of "pure" humanitarian action in the recent past. The well-known criticism that humanitarian aid can prolong or exacerbate war and can help sustain war economies has fuelled calls for humanitarian assistance to be subject to *risk assessments* that weigh up short- and long-term risks resulting from it[38] and seek to maximize the "do-no-harm" impacts.[39] While such assessments are

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[38] D. Curtis, *Politics and Humanitarian Aid: Debates, Dilemmas and Dissension*. Report of a conference organised by ODI, POLIS at the University of Leeds and CAFOD, London (1 February 2001); HPG Report 10, p. 5.

[39] On the "do-no-harm" argument see in particular: M.B. Anderson, *Do No Harm: How Aid Can Support Peace – or War*, Lynne Rienner Publishers, Boulder, Co./London (1999).

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within the purview of IHL, they also open up temptations for increasingly political manipulation of humanitarian action.

Actual and potential contemporary humanitarian models move along a spectrum of options delineated at its extremes by the classical humanitarian principles model codified in IHL and the "new humanitarianism". The latter is essentially the negation of the former. It sees apolitical, neutral, humanitarian relief as both naïve and ethically questionable. New humanitarians argue for more politically conscious aid which in fact can assess the present and future impact of humanitarian interventions on the politics of conflict, set priorities between short-term humanitarian imperatives and longer-term goals of sustainability and peace and ensure that aid is linked to military and diplomatic tools in a coherent conflict resolution strategy.[40] "New humanitarianism" is, thus, about merging humanitarian action and politics, about merging the humanitarian concerns of aid agencies with the security concerns of Western donor states.[41] In its extreme form, humanitarianism is subordinated to political goals and risks becoming the primary form of political engagement. This scenario has also come to be known as "*coherence agenda*", under which humanitarian action becomes part of a comprehensive political strategy.[42]

In-between the "classic" and "new humanitarianism" extremes lie all kinds and shades of third-way humanitarianism variants, which all digress to a greater or lesser degree from humanitarian principles and IHL. They all give rise to ethical dilemmas of different kinds as they seek to strike compromises and tradeoffs between various principles, rules and rights, "bargaining for one by sacrificing another". At the centre of this balancing act are the principle of neutrality and the issue of human rights in armed conflict.

5.3.1. Neutrality versus solidarity

Neutrality is the most debated and contested humanitarian principle. It implies that humanitarian actors abstain completely from getting involved directly or indirectly, physically or ideologically in a crisis. This has traditionally been associated with "silence", *i.e.*, not taking any position, even in the face of gross abuses and violations of international law. But some agencies, such as Médecins Sans Frontières (MSF), claim to work in the "spirit of neu-

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40 F. Fox, *op. cit.*, p. 275.

41 M. Duffield, D. Curtis, J. Macrae, "Editorial: Politics and Humanitarian Aid" 25(4) Disasters 270 (2001).

42 J. Macrae, *The Politics of Coherence: The Formation of a New Orthodoxy on Linking Aid and Political Responses to Chronic Political Emergencies*. Paper prepared for the ODI/CAFOD/Oxfam Conference on "Politics and Humanitarian Aid: Debates, Dilemmas and Dissension", London (1 February 2001).

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trality", when they denounce parties that breach IHL and commit human-rights abuses; however, they "will not put themselves into a position of solidarity with any particular side in the conflict".[43]

"Classical humanitarians" argue that giving up neutrality risks compromising humanitarian immunity and threatens access to victims. In contrast, "new humanitarians" favour abandoning the principle of neutrality altogether and siding in solidarity with the victims. In their view, neutrality can actually become an unethical position. Yet at the same time, one might question whether "not engaging with certain parties because of their human rights record is an ethical approach".[44] What is fairly clear, however, is the incompatibility of the principle of neutrality and the new convergence concept of a merger of humanitarian action and politics, including the use of humanitarian aid as a conflict-resolution tool.

The humanitarian community seems to be split between (i) those who feel the need for rethinking the fundamental traditional principles and formulating new ones based on solidarity and rights; (ii) those who argue for breathing new life into established principles and moving towards a division of labour between humanitarians, human rights organisations and politicians;[45] and (iii) those who proactively seek to strike a balance between established humanitarian principles, humanitarian law and human rights.

5.3.2. Rights in humanitarian action

While the concept of an integrated approach to providing relief assistance and protecting rights as codified in IHL and HRL is slowly gaining momentum, "understanding of and commitment to the human rights dimensions of humanitarian work remain inconsistent and weak".[46] "Classical humanitarians" largely remain concerned that an integration of human rights issues would compromise access to populations in need and compromise neutrality.

Rights advocates are not always sufficiently sensitive to such fears. In a bold statement, an ECHO discussion paper, for example, submits the position that "[f]rom a rights-based perspective, access to victims of a humanitarian crisis is not an end in itself, and will therefore not be pursued at any cost ... Access will be sought, if it is the most effective way to contribute to the human rights situation".[47] It is exactly this notion of rights conditionality and the implied abandoning of neutrality that "classical humanitarians" object to.

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[43] D. Curtis, *op. cit.*, p. 13.

[44] M. Duffield, D. Curtis, J. Macrae, *op. cit.*, p. 272.

[45] D. Curtis, *op. cit.*, p. 13.

[46] Jonsson, U., Levine, I., and Young, H., *op. cit.*, p. 8.

[47] ECHO (European Community Humanitarian Office) – Towards a Human Rights Approach to European Commission Humanitarian Aid. ECHO Discussion Paper, May 1999.

PURL: https://www.legal-tools.org/doc/5ecf1e/

Humanitarians are traditionally concerned with service delivery to meet such existential needs as food and nutrition, health, shelter, and to meet these in accordance with the principles of humanity and impartiality. Adopting a rights-based approach to humanitarian action would simply mean to adopt the mutually reinforcing legal standards enshrined in both IHL and HRL in these areas. Ethical dilemmas arise when choices have to be made in prioritising these fundamental rights at the expense of other rights, considering that under HRL all rights are equal, indivisible and interrelated. In such situations, a prudent approach would put the humanitarian imperative first and seek to protect the broader spectrum of human rights in ways that safeguard the former. This requires flexibility in rights-based humanitarian action tailored to specific situations. This, in turn, requires a clear and strong *ethical framework* to guide such action.

An example of an such an ethical framework is the *Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief* – drawn up in the early 1990s by the ICRC and a group of NGOs, members of the Steering Committee for Humanitarian Response (SCHR),[48] with a view to raising humanitarian assistance standards in all kinds of disasters, including armed conflict.[49] In the tradition of the Red Cross/Red Crescent Movement, the Code's ten principal commitments place the humanitarian imperative squarely above all others: "The humanitarian imperative comes first". The other commitments are build on the principles of impartiality, neutrality, independence and humanity and also contain human rights principles such as accountability, transparency and participation. However, focusing on assistance aspects, the Code abstains from an explicit statement on rights protection issues.[50]

The Red Cross/Red Crescent/NGO Code is carried further in terms of content and agency participation by the *Sphere Project's Humanitarian Charter and Minimum Standards in Disaster Response*.[51] The Charter constitutes an overall protection framework based on humanitarian principles and relevant international law, within which a limited set of assistance standards

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48 Caritas Internationalis, Catholic Relief Services, the International Federation of Red Cross and Red Crescent Societies, International Save the Children Alliance, Lutheran World Federation, Oxfam, the World Council of Churches.

49 IFRC (International Federation of Red Cross and Red Crescent Societies), Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief. Geneva (1994).

50 However, the ICRC, as guardian of IHL, monitors the observance of IHL and promotes it largely through 'quiet diplomacy'.

51 The Sphere Project is an initiative of the SCHR and InterAction, a coalition of over 150 US-based NGOs, in co-operation with other NGOs from North and South and ICRC, and with the support from UN agencies and bilateral donors. Sphere Project – Humanitarian Charter and Minimum Standards in Disaster Response, 2000 <http://www. sphereproject.org>.

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are to be observed. It reaffirms the *primacy of the humanitarian imperative* to prevent or alleviate human suffering arising out of conflict or calamity, and the *right to protection and assistance* of civilians so affected. Central to the Charter is the *right to life with dignity*, including the right to an adequate standard of living and freedom from cruel, inhuman or degrading treatment or punishment. "Implicit is *the duty not to withhold ... the provision of life-saving assistance*" (emphasis added). The Charter explicitly refers to all major IHL, HRL, refugee law instruments and subsequent legally binding Conventions such as CRC, CEDAW as well as those on torture and genocide as sources of inspiration, and the (non-binding) Guiding Principles on Internal Displacement.

However, the Charter and Minimum Standards "do not attempt to deal with the whole spectrum of humanitarian concerns or actions" and "do not deal with the larger issues of humanitarian protection. ... Comprehensive strategies and mechanisms for ensuring access and protection are not detailed". The Charter stresses that,

> the form of relief assistance can have a significant impact (positive or negative) on the affected population's security. The Humanitarian Charter recognises that the attempt to provide assistance in situations of conflict "may potentially render civilians more vulnerable to attack, or bring unintended advantage to one or more of the warring parties", and it commits agencies to minimising such adverse effects of their interventions as far as possible.[52]

Important lessons in the practical application of the Charter and Minimum Standards are expected from an extensive review of experience to-date undertaken in 2002.

5.4. Ethical dilemmas and their possible resolution: examples from South Sudan and Liberia

How have humanitarian actors applied humanitarian principles, IHL and HRL and resolved ethical dilemmas in specific conflict situations and what was the role of food? The following are illustrations from two separate studies on the Ground Rules in South Sudan[53] and one on the Principles and Protocols of Humanitarian Operation (PPHO) developed in Liberia in late 1995 by UN and NGO humanitarian agencies, and the Joint Policy of Operation

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[52] Sphere Project, *op. cit.*, pp. 2 ff.

[53] I. Levine, *Promoting humanitarian principles: the southern Sudan experience.* Relief and Rehabilitation Network (RRN) Paper, ODI, London (May 1997); M. Bradbury, Nicholas Leader and Kate Mackintosh, "The 'Agreement on Ground Rules' in South Sudan. Study 3" in *The Politics of Principle: the principles of humanitarian action in practice.* Humanitarian Policy Group, ODI, London (2000).

PURL: https://www.legal-tools.org/doc/5ecf1e/

(JPO) drawn up by a group of NGOs in Liberia after the looting of Monrovia in April 1996.[54]

The *SPLM*[55]*/OLS Agreement on Ground Rules* in southern Sudan – a kind of "special agreement" as envisaged in Common Article 3 – commits the humanitarian actors (UN agencies and some 40 NGOs) of Operation Lifeline Sudan (OLS) and the relief wings of the warring factions to a detailed list of mutual responsibilities. The Ground Rules are unique in that they integrate *protection* and *assistance* objectives and are based on the *explicit recognition by the signatories of two sets of international humanitarian law and human rights instruments: the Geneva Conventions and Additional Protocols, and the CRC.* Political constraints prevented the introduction of human rights on a broader front, in the sense of including the instruments of the International Bill of Human Rights, given the extremely difficult human rights environment prevailing in the country. But with, typically, more than 50 per cent of war-affected people being children, the CRC was an appropriate entry point for human rights, covering the largest and most vulnerable segment of the population.[56]

Box 1 provides a brief commentary by Iain Levine on how humanitarian principles and international law were applied in the southern Sudanese context, and how ethical dilemmas were dealt with, with corresponding justifications. These observations are self-explanatory. The stance taken on *neutrality in the face of genocide* is certainly a controversial one. It illustrates a conscious decision to put the humanitarian imperative first, even in a difficult protection situation where, at surface value, there seems be little scope for "pure humanitarianism".

Box 1: Commentary on the Principles upon which the SPLM/OLS Ground Rules are based

The right to humanitarian assistance
International legal scholars have argued long over whether there is any legal right to humanitarian assistance. The Ground Rules sought to take a clear normative position on the issue: that all those in need have a right to it.

Neutrality
There is a growing literature against neutrality and in favour of solidarity. For OLS, with a mandate to provide assistance on all sides, the idea that one cannot be neutral in the

54 P. Atkinson, and N. Leader, "The Joint Policy of Operation and the Principles and Protocols of Humanitarian Action in Liberia, Study 2" in *The Politics of Principles: the principles of humanitarian action in practice*, HPG Report 3, London: Overseas Development Institute (2000).

55 Sudan People's Liberation Movement.

56 I. Levine, *op. cit.*, p. 12.

PURL: https://www.legal-tools.org/doc/5ecf1e/

face of genocide is an intellectually and morally seductive argument, but of little practical value. The Ground Rules therefore defined neutrality, in the ICRC sense, as the refusal to take sides in the conflict or to use the provision of assistance to promote any political or religious agenda.

Impartiality
Again, the ICRC definition of impartiality was used: the provision of humanitarian assistance on the basis of need alone, taking no account of race, religion, political affiliation or any other factor but those of humanitarian need and practicality such as security and access.

Accountability to donors and beneficiaries
The Ground Rules made great efforts to define accountability in an operational sense including: ensuring appropriate end use of supplies provided; fair distribution to identified civilian beneficiaries; and involving them in all decision-making.

Transparency
Openness in reporting and decision-making was called for in the first OLS agreements and is essential for credibility. Agreement was not always reached though on how far transparency should go.

Capacity building
An OLS programme for this was started in 1993 providing support to the humanitarian wings of the movements and to Sudanese NGOs. This initiative was reinforced in the Ground Rules as OLS agencies committed themselves to strengthening the capacity of local institutions, including the humanitarian wings of the rebel movements, and to facilitating and coordinating sustainable, effective and efficient humanitarian assistance. They also committed themselves to ensuring that humanitarian assistance strengthened local structures – rather than establishing parallel structures.

Protection of civilians and relief staff
The statement of humanitarian principles included a specific commitment to the protection of civilians and to the two conventions – CRC and Geneva Convention – that ensure the well-being of children and non-combatants.

Source: Levine, *op. cit*, p. 13.

The Ground Rules have certainly not proved a "cure-all" to such humanitarian challenges as denial of access, human rights abuse, misuse of humanitarian assistance, threats to the security of humanitarian workers, and the problems of working in areas controlled by non-state entities, *i.e.*, rebel forces. But in the circumstances, they have probably provided the best possible framework for pursuing the dual objective of protection and assistance in a fairly effective way.

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The "Bradbury study" further elaborates on some of the principles covered in Levine's observations as well as other points raised earlier:[57]

- *Neutrality:* Several agencies seek to operationalise neutrality by working in more than one area controlled by different warring parties, and many agencies working in northern Sudan chose to work under OLS for the cover of neutrality it confers. However, OLS incorporates a broad range of agencies, some of which are more sympathetic to the movements than others. In the view of some, the neutrality of OLS is already compromised both by its acceptance of government sovereignty and by its partnership with the relief wings of the movements.
- *Impartiality:* Ensuring impartiality of actions, by providing assistance based on "need alone", is difficult to operationalise, given that OLS lacks a clear analysis of needs. The picture is further complicated by a lack of shared analysis on definitions of "need" among aid agencies, between agencies and donors and between agencies and host populations. Anthropological research among Dinka, for example, reveals very different definitions of vulnerability between those claiming rights to give and those receiving.
- *Independence:* The independence of OLS is difficult to sustain, given that it is subject to the influence of warring parties and the foreign policies of donor governments.
- *Resource diversion:* In SPLM/A-controlled areas mass looting and explicit diversion are less common than in the early 1990s. Evidence of significant aid diversion by the SPLM/A, SSRA and local authorities during the Bahr el Ghazal famine, however, does indicate a continuing problem. Importantly, evidence suggests that it is not purely a military problem, but that relief aid is integrated into the local level socio-political structures of the south.
- *Protection:* Integrating *assistance* and *protection* activities within agencies has proven difficult. Problems encountered include:
  - How to respond to human rights abuses that violate the Ground Rules. Shortly after the Ground Rules were signed, the HPP[58] investigated two massacres of civilians in which the SPLM/A and SSIM/A forces were implicated. The leadership of the movements failed to respond to the reports compiled. The ability of OLS to take action was limited. *As the Ground Rules define humanitarian assistance as a "right"*, UNICEF/OLS cannot use public advocacy or aid conditionality as strategies to ensure com-

[57] M. Bradbury, *op. cit.*, pp. 7 ff.
[58] Humanitarian Principles Programme.

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pliance with the Ground Rules. The lack of action by both leaderships indicates that they can be impervious to international opinion on human rights. The HPP's position, therefore, is that they cannot be "humanitarian cops" and instead have pursued a policy of constructive engagement. Consequently, *protection activities* consist of occasional confidential reporting, dissemination of international conventions and the monitoring of the rights of certain groups, especially children.

- Few international NGO aid workers consider protection to be part of their mandate, or are clear what it means.
- No detailed documentation is maintained by HPP on the human rights environment, against which it would be possible to assess the impact of the Ground Rules in respect of HRL and IHL. The lack of human rights monitoring is a lost opportunity. If humanitarian agencies cannot do the work themselves, there would be *a need for a strategic relationship with human rights organisations, which would separate humanitarian action and human rights action.*

- *Capacity-building:* In OLS, institutional capacity-building has become a focus for a variety of concerns: increasing effective aid delivery; enhancing Sudanese participation in the aid programme; reducing aid dependency; and promoting good governance and political reforms within the movements. A *critical problem with elevating capacity-building to a humanitarian principle* revolves around the incorporation of human rights protection in a humanitarian programme, *i.e., the realisation of the integrated assistance-rights concept.* Human rights protection demands not only that abuses be identified, but that assistance is given where necessary to authorities to meet their obligations. However, to increase respect for human rights by strengthening relief wings of the movements, civil society organisations or supporting the restoration of judicial systems within rebel-held areas, *risks influencing the direction of the war and thus compromising the neutrality of humanitarian assistance.*

Box 2: Consolidated findings from recent case studies on the PPHO and JPO agreements in Liberia and the SPLM/OLS Ground Rules in South Sudan

Humanitarian Conditionality

◊ Suspension of humanitarian aid is often **not** a disincentive for abuse. Withholding aid to leverage certain behaviour by the belligerents appears to have had little impact.

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- ◊ Conditionality confuses two approaches: the suspension of aid when conditions no longer exist for agencies to work in a principled fashion, and trying to use the suspension of aid to force the authorities to pursue certain courses of action. The former is necessary on occasion; there needs to be a "bottom line". But the latter is an **explicitly political** course of action. This distinction is not lost on the warring parties and **undermines** perceptions of humanitarian **impartiality** and **neutrality.**
- ◊ There is a real **tension between the ethics of humanitarianism and the use of conditionality**. By demanding certain courses of action, conditionality forces humanitarians to negotiate over what should be non-negotiable – respect for international law – and prevents them from delivering assistance. This is ethically problematic but also, given the disunity of the humanitarian system, frequently practically impossible as negotiation requires agreement across the entire system.

Human rights monitoring and advocacy

- ◊ Public and private advocacy was probably more successful in encouraging respect for rights. However, it was only successful to the extent that the belligerents had already determined that it was in their interest to be, or be seen to be, more respectful of human rights.

Both strategies

- ◊ are closer to coercion than consensus and represent attempts by humanitarian agencies to regulate conflict, which goes beyond the ICRC approach of quiet persuasion. This is obviously a highly political form of "humanitarian" action. It is around strategies such as conditionality and human rights advocacy that many accusations of politicisation have come.

Need for an ethical framework

- ◊ Agencies and staff must have a strong ethical framework that can preserve a humanitarian ideal and minimise manipulation when faced with the realities of conflict. **Implementing any ethical framework is a management task; it is not enough** merely **to state it.**

Food

- ◊ Food is the commodity that most easily becomes the object of manipulation by warring parties, and has a highly political value.
- ◊ Decisions on the acceptability of food diversion by factions are among the **principal ethical challenges.**
- ◊ Food agencies struggled with the implications of a more principled approach for the mechanics of assessment of need, distribution and monitoring of food delivery. For example, the use by food delivery agencies of local partners was problematic, with frequent allegations of corruption and conniving at diversion as local partners were subject to local political pressures.

Recommendations

- ◊ It is crucial for humanitarian organisations to understand the incentives and disincentives for the abuse or respect of humanitarian principles by a particular group in a particular context. This requires ***systematic*** **monitoring and analysis of a conflict, particularly abuses of IHL and HRL.**

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◊ Humanitarian agencies working in conflict **need an ethical framework** to guide and inspire decisions at all levels of the organisation. This has profound implications for the way an organisation works, with the need for explicit conceptual and organisational links to be made between principles and practice.

Source: Based on N. Leader – Humanitarian Principles in Practice: A Critical Review. An RNN Discussion Paper. ODI, London, 1999.

In Box 2, some of the consolidated key findings from both the South Sudan and Liberia studies are highlighted. Taken together, these are an impressive illustration of the ethical challenges faced by any agency involved in humanitarian action. Specifically, they underscore that: (i) the ethical-humanitarian debate is in no way a purely philosophical-theoretical affair; (ii) there is a thin line between "classical humanitarianism" and the "new humanitarianism" poised to interfere, intentionally or unintentionally, "to regulate conflict"; (iii) humanitarian actors, *i.e.*, both the institutions and their staff, require a strong ethical framework to guide difficult decisions in diverse situations; (iv) humanitarian conditionality is problematic both from a practical viewpoint in terms of its effectiveness (or lack of it) and implementability, and from an ethical perspective in terms of its incompatibility with fundamental humanitarian principles; and (v) *food plays a special role* in humanitarian action, because of its centrality to life, its political value and the attendant ethical challenges arising from that value.

6. Conclusion

In conclusion, the changes in the geopolitical environment, in the nature of armed conflict and the relationship between belligerents and humanitarians, in the global humanitarian system and in the understanding of the interrelationship of humanitarian principles, humanitarian law and human rights law make a reassessment of humanitarian response models not only legitimate, but necessary. While the search for appropriate responses to the humanitarian challenges posed by contemporary armed conflict continues, the current overview suggests the following conclusions.

At a time of growing efforts to merge humanitarian action and politics and to link it to comprehensive conflict-resolution strategies under what has become known as the "new humanitarianism", the primacy of the humanitarian imperative with its focus on saving lives and reducing human suffering must not be lost. Humanitarian action cannot fill the vacuum of effective political engagement. While there is a need to rethink and adapt humanitarian responses in a changing global environment, this does not mean aban-

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doning the core principles of humanitarianism, above all humanity and impartiality. Rather, they need to be forcefully reaffirmed.

The primacy of the humanitarian imperative is anchored in international humanitarian law, which is founded on duty-bound, deontological ethics.

International humanitarian law and human rights law are complementary and mutually reinforcing. While human rights apply in both peace and war, with limited derogation possibilities in emergencies, humanitarian law contains provisions specific to armed conflict situations. The nature of contemporary conflicts and especially the often blurred distinction between civilians and combatants pose new challenges for the implementation of IHL.

The complementarity of IHL and HRL is recognised in the emerging broad-based consensus on the meaning of "protection" in IHL. Protection is now broadly understood as all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of relevant bodies of law, *i.e.*, human rights, humanitarian and refugee law. "All activities" refer to both relief assistance and explicit rights protection activities. Many "ground rules" agreements signed by warring parties and humanitarian actors reflect the IHL-HRL complementarity by actually incorporating specific provisions of both branches of law.

This broad conceptual agreement on a rights-based approach to humanitarian action has yet to be fully reflected at the operational level. There is a need for a systematic assessment of the implications of applying specific human rights, such as the rights to food and nutrition, to health and to shelter, in conflict situations. And there is a need to clarify the human rights-related roles of humanitarian actors beyond their traditional concern with service delivery in the areas of food, nutrition, health and shelter.

Among the implications of a rights-based approach is the need to extend the claim-duty relationship between individuals and the state under HRL to include additional subjects and objects, notably in the case of state failure during conflict. This would mean the identification of obligations and accountabilities at different levels of state and non-state actors. Such extended claim-duty relationships can be envisioned under provisions contained in the preambles of the UDHR, ICCPR and ICESCR.

Humanitarian action has always had to face a host of ethical dilemmas. In contemporary conflicts, ethical complexities are on the rise as belligerents tend to eschew respect for the fundamental principles of humanity and humanitarians seek to move beyond action strictly determined by impartiality, neutrality and independence. With the central role of food in humanitarian relief, its essentiality to life and its political value to warring parties, food-related issues are among the major ethical challenges to humanitarians.

Ethical dilemmas essentially arise from the need to negotiate what should be non-negotiable or to bargain for one right or principle by sacrific-

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ing another. In the world of contemporary armed conflict, flexibility and compromise must outweigh strict legal doctrine. More than ever before do humanitarian actors need a clear and strong ethical framework. And the bottom line of such framework should be that, among all other concerns, the humanitarian imperative comes first.

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XII

Defining cultural rights

Stephen P. Marks*

The protection of cultural rights as human rights has been one of the lifelong concerns of Asbjørn Eide, along with a multitude of other vital issues in peace research, conflict resolution and human rights studies where he has had such a positive influence on the evolution of thinking and policy. He noted with perspicacity that the relationship between human rights and cultures and the problem of cultural relativism "go to the core of the human rights debate"[1] and has provided invaluable insights on the meaning and scope of cultural rights, both in the context of general human rights[2] and in relation to minorities.[3] In tribute to his pioneering work on cultural rights, I would like to offer these reflections on the definition of cultural rights and the wide range of creative human activity covered by the explicit and implied references to cultural rights in existing international normative instruments.

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1 Asbjørn Eide, "Cultural rights as Individual Human Rights", in Asbjørn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights. A Textbook* (2nd rev. ed.), Dordrecht/Boston/London: Martinus Nijhoff Publishers (2001), p. 290.

2 *Id.*, pp. 289-301.

3 Asbjørn Eide, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, Report submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN doc. E/CN.4/Sub.2/1993/34 (10 August 1993); Asbjørn Eide, *A Review and Analysis of constructive Approaches to Group Accommodation and Minority Protection in Divided or Multicultural Societies*, Forum for Peace and Reconciliation, Consultancy Studies, No. 3 (July 1996), Dublin Castle; *Towards a comprehensive programme for the prevention of discrimination and protection of minorities, including proposals for the examination of thematic issues relating to racism, xenophobia, minorities and migrant workers: some suggestions*, Working paper submitted by Mr. Asbjørn Eide to the Sub-Commission on Prevention of Discrimination and Protection of Minorities under its agenda item on "Comprehensive Examination of Thematic Issues Relating To Racism, Xenophobia, Minorities and Migrant Workers", UN doc. E/CN.4/Sub.2/1996/30 (25 July 1996); Asbjørn Eide, *Minority rights and the right to participate in cultural life, with special reference to CESCR Article 15(1)(a)*, paper submitted to the International Roundtable on the Right to Take Part in Cultural Life, held at the University of the Philippines, Dilman, Quezon City, Philippines (11-13 February 2002).

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1. Definition of culture and cultural rights

Culture, which Eide described as "an overworked concept with little semantic precision",[4] has been variously defined. From the Latin *cultura*, "cultivation" or "tending", it entered the English language by 1430, according to the *Oxford English Dictionary,* which defines its modern meaning as "the training, development, and refinement of mind, tastes, and manners" (*Oxford English Dictionary*). This definition may be contrasted to that of the *American Heritage English Dictionary*: "The totality of socially transmitted behavior patterns, arts, beliefs, institutions, and all other products of human work and thought". It is defined by the *Encyclopedia Britannica* as "the integrated pattern of human knowledge, belief, and behaviour ... language, ideas, beliefs, customs, taboos, codes, institutions, tools, techniques, works of art, rituals, ceremonies, and other related components ..." (*Encyclopaedia Britannica, 1989*). Another definition is provided by Robert Murphy:

> Culture means the total body of tradition borne by a society and transmitted from generation to generation. It thus refers to the norms, values, standards by which people act, and it includes the ways distinctive in each society of ordering the world and rendering it intelligible. Culture is ... a set of mechanisms for survival, but it provides us also with a definition of reality. It is the matrix into which we are born, it is the anvil upon which our persons and destinies are forged.[5]

A much simpler and more elegant definition was provided by Alfred North Whitehead in 1912: "activity of thought, and receptiveness to beauty and humane feeling".[6] While this simple definition is appealing, neither it nor the multifarious definitions of cultural anthropologists lend themselves to easy application in a human rights framework. In order to make cultural rights operational as human rights we have to draw upon standard setting instruments which governments have accepted as creating obligations for them.

International instruments providing for cultural rights include the International Covenants, other specific UN treaties on racial discrimination, torture, women and children, as well as regional instruments of the Council of Europe, the Organization for Security and Cooperation in Europe,[7] the Or-

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4 *Id.*, p. 290.

5 Robert Murphy, *Culture and Social Anthropology: An Overture.* 2nd edition, Englewood Cliffs, NJ: Prentice Hall (1986), p. 14.

6 Alfred North Whitehead, *The Aims of Education and other Essays*, The Free Press (1929), p. 1.

7 On the European regional instruments and case law, see Ragnar Adalsteinsson and Páll Thórhallson, "Article 27", in Gudmundur Alfredsson and Asbjørn Eide, *The Universal*

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ganization of American States (OAS) and the Organization of African Unity (OAU), now the African Union (AU). The right to cultural participation is set out primarily in Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 14(1)(a) of the Additional Protocol to the American Convention on Human rights in the area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), and Article 17(2) of the African Charter on Human and Peoples' Rights.

However, these general instruments need to be read in relation to more specific normative instruments of the United Nations Educational, Scientific and Cultural Organization (UNESCO). UNESCO's most relevant instrument for a broad explanation of "culture" is the Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It (26 November 1976).[8] While the Recommendation encountered some opposition from certain Member States,[9] the basic concept of culture on which it is based remains valid for most Member States. The text contains a preambular paragraph according to which "culture is, in its essence, a social phenomenon resulting from individuals joining and co-operating in creative activities".[10] The text indicates further that culture "is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate".[11]

The ICESCR, the regional human rights treaties, and the 1976 Cultural Participation Recommendation deal primarily with the right to participate in cultural life. However, the definition of "cultural rights" covers more, although there is no international instrument that defines them as such. Inductively one can conclude from the literature[12] that cultural rights include: the

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Declaration of Human Rights. A Common Standard of Achievement, The Hague, Martinus Nijhoff Publishers (1999), pp. 584-589.

8 Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It, adopted 26 November 1976, Nairobi, in *UNESCO's Standard-setting Instruments*, Sect. IV,B,7. ("Cultural Participation Recommendation").

9 The Recommendation was not universally accepted; the vote at the 19th session of the General Conference was 63 in favor, 5 against, and 15 abstentions. See UNESCO, *Records of the General Conference, 19th session, Proceedings*, vol. 2, part 2, Nairobi, 1976, 19 C/Res. 131.5, p. 402 (1978). Before the vote on the Recommendation, delegations from the United Kingdom, the Federal Republic of Germany, France, Belgium, Italy, Canada, the United States, Portugal, and Guatemala objected, variously, to references to "commercial mass culture", terminology, meanings, and philosophical style of the Recommendation, implied restrictions on freedom of expression and of individual creativity, and possible control of creative activity by an oppressive bureaucracy. The Canadian and Japanese delegations urged postponement of the Recommendation. After the vote, the U.S. delegation disassociated itself from the Recommendation. Paras. 96.1-134, pp. 393-402.

10 Preamble para. (a).

11 Preamble para. (c).

12 See, for example, Halina Niec (ed.), *Cultural Rights and Wrongs*, Paris, UNESCO (1998).

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right to *education*; rights to *cultural identity*, including free determination of cultural future; *participation in cultural life*; *conservation and diffusion* of culture; protection of *cultural property* (in time of armed conflict and from theft or destruction); and *rights of creators, transmitters and interpreters* of artistic and other cultural works.

This enumeration can be reduced into the three categories Eide identifies, namely, material heritage, artistic and scientific creation, and cultural activity.[13] All three are interwoven in the fabric of Article 15 of the ICESCR, although the full realization of cultural rights requires that "related rights" also be identified and realized in the context of cultural life.

2. The architecture of Article 15 of the ICESCR

Article 15 may be analyzed as setting out two substantive human rights, two other human rights which are instrumental to the first two, and two instrumental means for the realization of these same two substantive rights. The two core substantive rights are the "right of everyone ... to take part in cultural life" and "the right of everyone to benefit from the advances of science and its applications", set out in Article 15(1)(a) and (b) of the Covenant. In this sense, the right to participate in cultural life is a sister right of the right to benefit form scientific advancement. The instrumental rights are the rights "to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author", set out in Article 15(1)(c) and the right to benefit from respect of "the freedom indispensable for scientific research and creative activity" (Article 15(3)). Finally, the instrumental means mentioned in support of the core rights are the steps States Parties may take to realize these rights including "those necessary for the conservation, the development and the diffusion of science and culture" (Article 15(2)) and the recognition by states parties of "the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields" (Article 15(4)).

The relations among the two substantive rights, the two supporting rights and the two means may be represented schematically as follows:

[13] Eide, *supra*, note 1.

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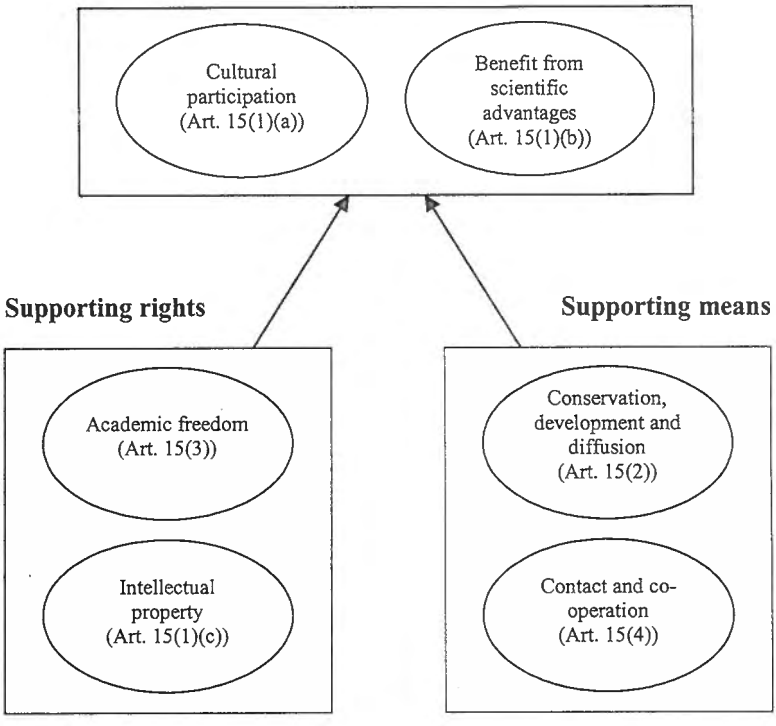
Core substantive rights of Art. 15



This basic architecture of the core edifice of cultural rights functions in a neighborhood of related rights. I will return to the core structure after an excursion into that neighborhood.

3. Related rights

The brief mention of cultural rights in Article 15 did not contain the enumeration of related rights beyond the supporting rights mentioned above. The holistic approach to human rights, confirmed in numerous UN resolutions,[14] supports the position that the realization of cultural rights is depend-

[14] For example, the World Conference on Human Rights (Vienna, 14-25 June 1993) proclaimed that "[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis", Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23 (12 July 1993), para. 5.

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ent not only on measures geared toward the specific right to cultural participation but also requires attention to related rights. Among these rights, that of self-determination is noteworthy since it includes the right of all peoples to "freely to pursue their ... cultural development".[15] That is a collective right belonging to "peoples". Similarly concerned with collective membership, although often expressed as individual rights, are the rights of minorities (or of persons belonging to minorities) and of indigenous peoples (or populations).

Minority rights, as defined in Article 27 of the International Covenant on Civil and Political Rights, include the right of persons belonging to ethnic, religious and linguistic minorities to enjoy the "right, in community with the other members of their groups, to enjoy their own culture, to profess and practice their own religion, or to use their own language". These rights were expanded in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities,[16] which, as Eide points out,[17] does not define minorities. It does set out a wide range of cultural rights.

The minority rights declaration stipulates:

> States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.[18]

It also specifies that persons belonging to minorities "have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination" as well as "the right to participate effectively in cultural, religious, social, economic and public life" and to establish and maintain their own associations.[19] Rodolfo Stavenhagen has correctly pointed out that the minorities' rights declaration overcomes the weakness of the "persons ... shall not be denied" language in Article 27 of the ICCPR by using the more affirmative "States shall protect ...", which he finds more positive.[20] In any case, the cultural, linguistic and educational focus of mi-

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15 Article 1.1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights of 1966.

16 Adopted by General Assembly resolution 47/135 of 18 December 1992.

17 Eide, *supra*, note 1, p. 715.

18 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, Art. 4.2.

19 *Id.*, Art. 2.

20 Rodolfo Stavenhagen, "Cultural Rights and Universal Human Rights", in Asbjørn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights, A Textbook*, Martinus Nijhoff (1995), pp. 74-75.

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norities' rights (or of persons belonging to minorities) is almost entirely cultural.

The same may be said of the Draft United Nations Declaration on the Rights of Indigenous Peoples,[21] essentially a cultural rights instrument considering that so much of the essence of the rights of indigenous peoples relate to their culture. After reaffirming the right of indigenous peoples to self-determination, including to freely pursue their cultural development[22] and "to maintain and strengthen their distinct political, economic, social and cultural characteristics",[23] the Declaration calls for prevention and redress of ethnocide and cultural genocide.[24] Indigenous peoples also have "the right to practise and revitalize their cultural traditions and customs", including

> the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.[25]

Other provisions concern "the right to manifest, practise, develop and teach their spiritual and religious traditions"[26] and to protect histories, languages, oral traditions, philosophies, writing systems and literatures,[27] and the right to education[28] and to expression of indigenous cultural diversity in the media.[29] Another important cultural dimension included in the declaration is respect for their traditional medicines and health practices[30] and "the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources",[31] as well as land ownership[32] and environmental protection.[33] Finally, they have the right to autonomy or self-government and to international contacts in many areas including culture.[34]

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21 Adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1994/45 of 26 August 1994.

22 Draft United Nations Declaration on the Rights of Indigenous Peoples, Article 3.

23 *Id.*, Article 4. See also Article 8.

24 *Id.*, Article 7.

25 *Id.*, Article 12.

26 *Id.*, Article 13.

27 *Id.*, Article 14.

28 *Id.*, Article 15.

29 *Id.*, Articles 16 and 17.

30 *Id.*, Article 24.

31 *Id.*, Article 25.

32 *Id.*, Article 26.

33 *Id.*, Article 28.

34 *Id.*, Articles 31 and 35.

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Foremost among the related individual rights is the right to education. As this right is already the object of a General Comment[35] and has been studied by the Special Rapporteur Katarina Tomaševski,[36] it is not necessary to dwell on the content of that related right in this overview of definitional aspects of cultural rights. As Asbjørn Eide correctly points out,[37] the other related rights span the two Covenants and include: freedom of expression; freedom of information; freedom of religion; freedom of assembly; and freedom of association.

To these I would add the rights that need to be affirmed because cultural belief systems are usually the principal barriers to their realization, such as the rights to sexual equality, to free consent to marriage, and to the highest attainable standard of physical and mental health. Regarding the right to health, culture is not necessarily an impediment, since culturally-based traditional forms of healing may have a positive role in realizing this right. However, some cultural practices are harmful to health and well-being and their elimination has been advocated by the NGOs and various UN agencies. In 1984, the Sub-Commission on Prevention of Discrimination and Protection of Minorities established a Working Group to study all aspects of traditional practices affecting the health of women and girls, which drew up a list of the most harmful traditional practices, including female excision, other forms of mutilation (facial scarring), force-feeding of women, early marriage, various nutritional taboos and traditional practices associated with childbirth, noting also other culturally related issues, such as dowries, crimes of honour and the consequences of son preference. A Special Rapporteur on the issue was appointed in 1991 and seminars were organized in Africa and Asia, leading to a programme of action for the elimination of harmful traditional practices affecting the health of women and children, which the Sub-Commission adopted in 1994.[38] At the 1993 World Conference on Human Rights, governments had agreed that "gender-based violence and all forms of sexual

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35 General Comment No. 11 (1999) on plans of action for primary education (Article 14 of the International Covenant on Economic, Social and Cultural Rights) and No. 13 (1999) on the Right to Education (Art. 13 of the Covenant) adopted by the Committee on Economic, Social and Cultural Rights, and General Comment No. 1 (2001) on the aims of education (Art. 29, para. 1, of the Convention on the Rights of the Child) adopted by the Committee on the Rights of the Child. See also The Realization Of The Right To Education, Including Education In Human Rights, *The Content Of The Right To Education, Working Paper Presented By Mr. Mustapha Mehedi*, E/CN.4/Sub.2/1999/10, 8 July 1999.

36 *Annual report of the Special Rapporteur on the right to education, Katarina Tomaševski, submitted in accordance with Commission on Human Rights resolution 2000/9*, E/CN.4/2001/52, 11 January 2001.

37 Asbjørn Eide, "Cultural Rights as Individual Human Rights", in Asbjørn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights, A Textbook*, Martinus Nijhoff (2001), p. 292.

38 E/CN.4/Sub.2/1994/10/Add.1.

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harassment and exploitation, including those resulting from *cultural prejudice* and international trafficking, are incompatible with the dignity and worth of the human person and must be eliminated".[39]

Further work to respect cultures while eliminating harmful practices have been undertaken on the basis of the Beijing Declaration and Platform for Action, the Declaration on the Elimination of Violence (1993), the Programme of Action of the International Conference on Population and Development, the joint statement in 1997 of WHO, UNICEF and UNFPA supporting Governments' and communities' strategies to eliminate female genital mutilation, the WHO Regional Plan of Action to Accelerate the Elimination of Female Genital Mutilation in Africa, and UNESCO's Plan of Action for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children, among others. Finally, the Committee on the Elimination of Discrimination against Women adopted General Recommendation 24 in 1999 dealing with Article 12 of the Convention concerning women and health, emphasizing the need for the enactment and effective enforcement of laws that prohibit female genital mutilation and the marriage of girl children.

Protection from genocide, as Stavenhagen points out,[40] is also related to cultural rights since genocide denies the rights of national, ethnic, racial and religious groups to exist. The prohibition of slavery and slave-like practices and of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence are also dependant on the realization of cultural rights of the victims.

In addition, cultural rights relate to fair trials and the right to be informed in a language the defendant understands and to have free assistance if an interpreter if necessary. As Eide has pointed out,

> [f]or members of minorities ... it is important to be able to address the court and other authorities in their own language, in order to feel secure that their own language is sufficient to be able to function in society, and thus be at ease in the preservation of one's identity.[41]

There are cultural aspects of the right to privacy (non-interference with family, home or correspondence) and protection from attacks on one's honor or reputation.

Finally, culture figures in the limitations that may be placed on the six rights in the International Covenant on Civil and Political Rights (ICCPR) and similar provisions of regional instruments for the protection of various

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39 Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, 12 July 1993, para. 18 (emphasis added).

40 Stavenhagen, *op. cit.*, pp. 64-65 (citing Buergenthal on this point).

41 Asbjørn Eide, *A Review and Analysis of Constructive Approaches to Group Accommodation and Minority Protection in Divided or Multicultural Societies*, Forum for Peace and Reconciliation, Consultancy Studies, No. 3 (July 1996), Dublin Castle, p. 74.

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social goods. The clauses permitting limitations on certain rights refer to "morals", suggesting that cultural rights of the dominant population prevail over the rights of those who are perceived to threaten the "morals" of the dominant group.[42]

An analysis of all these related rights is part of an understanding of cultural rights. The core normative elements of these rights, however, are found in the elaboration of the rights contained in Article 15, specifically as regards cultural identity and diversity, access and participation, as well as conservation and diffusion of culture, protection of cultural property from loss, and protection of creators, transmitters and interpreters of culture.

4. Cultural identity and diversity

Two core concepts of cultural rights, not explicitly mentioned in Article 15 of the ICESCR, are cultural identity and diversity. Without them the other dimensions of cultural rights are without object, since there is no human rights purpose in providing access to or preserving goods that do not respond to something fundamental in human existence.

4.1. Cultural identity

The basic meaning of culture involves individual and group identity. One of the earlier instruments on cultural rights is the 1966 Declaration of the Principles of International Cultural Cooperation. It is significant for our purposes because of what it says about the value of each culture. In particular, the Declaration specifies that,

> 1. Each culture has a dignity and value which must be respected and preserved.
> 2. Every people has the right and the duty to develop its culture.
> 3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.[43]

As Eide has noted,[44] various UN and regional texts reaffirm the right to cultural identity for specific categories of people. For example, children have

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[42] The articles of the ICCPR which allow for restrictions based on the culturally determined concept of "public ... morals" or "morals" are Art. 12(3) (freedom of movement), Art. 14(1) (right to a public trial), Art. 18(3) (freedom of religion), Art. 19(3) (freedom of opinion), Art. 21 (right to peaceful assembly), and Art. 22 (2) (freedom of association).

[43] Declaration of the Principles of International Cultural Co-operation, Resolution 14C/8.1, adopted on 4 November 1966, *UNESCO's Standard-Setting Instruments,* Sect. IV.C.1, Article I.

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the right to education that includes developing "his or her own cultural identity"[45] and, as a member of a minority, "to enjoy his or her own culture".[46] The Migrant Workers Convention provides that states shall "ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin".[47] Finally, the ILO convention on indigenous peoples refers to the promotion of the "full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions".[48]

The Committee on Economic, Social and Cultural rights has included in its revised reporting guidelines the request that reporting states provide information on measures of "promotion of cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions". Cultural diversity has been another dimension in which norms have been agreed upon of significance to cultural identity. The rights of minorities and of indigenous peoples, already discussed, are also essential to the concept of cultural identity.[49]

4.2. Cultural diversity

On 2 November 2001, the General Conference adopted the Declaration on Cultural Diversity, along with the main lines of an action plan for its implementation. Rather than providing a definition, the Declaration explains:

> Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.[50]

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[44] Asbjørn Eide, *A Review and Analysis of constructive Approaches to Group Accommodation and Minority Protection in Divided or Multicultural Societies*, Forum for Peace and Reconciliation, Consultancy Studies, No. 3 (July 1996), Dublin Castle, p. 73.

[45] Convention on the Rights of the Child, Article 29(c).

[46] Convention on the Rights of the Child, adapted on 27 June 1989, Article 30.

[47] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of 18 December 1990, Article 31.

[48] Convention concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention 169, Article 2(2)(b).

[49] The reporting guidelines also refer to "promotion of awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous peoples".

[50] UNESCO Declaration on Cultural Diversity, Resolution 31 C/25 of 2 November 2001.

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The Declaration contains an article on "cultural rights as an enabling environment for cultural diversity", which reads:

> Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.[51]

From these reaffirmations of cultural identity and diversity arise the need to ensure access to, participation in, and diffusion and preservation of culture.

5. Access to and participation in cultural life

The first paragraph of Article 15 of the ICESCR refers to the right of everyone to take part in cultural life, which is the basic purpose of the Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It. The first article defines its scope as covering:

> everything that should be done by Member States or the authorities to democratize the means and instruments of cultural activity, so as to enable all individuals to participate freely and fully in cultural creation and its benefits, in accordance with the requirements of social progress.

The key concepts of "access to culture" and "participation in cultural life" are defined in Paragraph 2 of Section I of the Recommendation as follows:

> (a) *by access to culture* is meant the concrete opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property;
>
> (b) *by participation in cultural life* is meant the concrete opportunities guaranteed for all – groups or individuals – to express themselves freely, to communicate, act, and engage in creative activities with a view to the full development of their personalities, a harmonious life and cultural progress of society.

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[51] *Id.*, Article 5.

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In addition to the general definition of culture cited *supra*, the Recommendation specifies that "participation by the greatest possible number of people and associations in a wide variety of cultural activities of their own free choice is essential to the development of the basic human values and dignity of the individual", and that "access to culture and participation in cultural life are essential components of an overall social policy dealing with the conditions of the working masses, the organization of labour, leisure time, family life, education and training, town-planning and the environment".[52] The text stresses a non-elitist approach to cultural participation based on the idea that,

> culture is not merely an accumulation of works and knowledge which an elite produces, collects and conserves in order to place it within reach of all; or that a people rich in its past and its heritage offers to others as a model which their own history has failed to provide for them; that culture is not limited to access to works of art and the humanities.[53]

In addition, the Preamble notes that cultural action often involves only a minute proportion of the population and that, moreover, existing organizations and means used do not always meet the needs of those who are in a particularly vulnerable position because of their inadequate education, low standard of living, poor housing conditions and economic and social dependence in general. It also notes that there is often a wide discrepancy between reality and proclaimed ideals, declared intentions, programs or expected results. The text recognizes that, while it is essential and urgent to define objectives, contents and methods for a policy of participation by the people at large in cultural life, the solutions envisaged cannot be identical for all countries, in view of the current differences between the socio-economic and political situations in states.

The Recommendation provides that free participation in cultural life is related to policy in a wide range of other areas including development in general, life-long education, science and technology, social progress, environment, communication and international co-operation.[54] In the section on legislation and regulations, the Recommendation emphasizes the need to modify and adapt national laws and practices in order to "guarantee as human rights those rights bearing on access to and participation in cultural life", and to provide "effective safeguards for free access to national and world cultures by all members of society without distinction based on race,

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[52] Cultural Participation Recommendation, *supra*, note 8, preamble.

[53] *Id.*

[54] *Id.*, Sect. I, para. 3(d).

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colour, sex, language, religion, political convictions, national or social origin, or financial consideration".[55]

The text further calls upon Member States to pay "special attention to women's full entitlement to access to culture and to effective participation in cultural life", and to the creation of "appropriate conditions enabling the populations to play an increasingly active part in building the future of their society, to assume responsibilities and duties and exercise rights in that process".[56] A particular reference is made to national and foreign minorities; legislation should be adopted or practices modified in order to:

> guarantee the recognition of the equality of cultures, including the cultures of national minorities and of foreign minorities if they exist, as forming part of the common heritage of all mankind, and ensure that they are promoted at all levels without discrimination; ensure that national minorities and foreign minorities have full opportunities for gaining access to and participating in the cultural life of the countries in which they find themselves in order to enrich it with their specific contributions, while safeguarding their right to preserve their cultural identity.[57]

Further, such provisions and practices should protect "all forms of cultural expression such as national and regional languages, dialects, folk arts and traditions both past and present, and rural cultures as well as the cultures of other social groups".[58] The Recommendation emphasizes international cooperation. The responsibilities of Member States in this regard are set out in Section IV of the Recommendations, including, *inter alia*, the strengthening of bilateral, multilateral, regional and international cultural cooperation with due regard for the UN and the equality of cultures; the encouragement of the circulation of ideas and of cultural values conducive to a better understanding among peoples; and the provision of appropriate financial facilities for activities which aim at promoting international exchanges and cultural cooperation. Additional guidance with respect to technical, administrative, economic and financial measures is set out in Section III of the Recommendation.

6. Conservation and diffusion of culture

Paragraph 2 of Article 15 of the ICESCR refers to one of the two supporting means by which states parties realize cultural participation, specifically through the conservation, the development and the diffusion of science and

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[55] *Id.*, Sect. II, para. 4(a) and (b).
[56] *Id.*, Sect. II, para. 4(c) and (e).
[57] *Id.*, Sect. II, para. 4(f).
[58] *Id.*, Sect. IV, para. (g).

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culture. Conservation relates both to museums and traditional culture and folklore, which will be mentioned here, and to protection of monuments, sites and cultural property, which will be covered in the section of protection from loss. Diffusion relates to the circulation of materials of cultural value.

6.1. Museums

According to the Recommendation Concerning the Most Effective Means of Rendering Museums Accessible to Everyone, adopted by the General Conference at its eleventh session, on 14 December 1960,[59] "museums by preserving works of art and scientific material and presenting them to the public, help to disseminate a knowledge of the various cultures and this promotes mutual understanding among nations".[60] This instrument defines "museum" as "any permanent establishment administered in the general interest for the purpose of preserving, studying, enhancing by various means and, in particular, exhibiting to the public for its delectation and instruction groups of objects and specimens of cultural value ...".[61] Member States are urged to make museums "accessible to all without regard to economic or social status".[62] Other provisions of the Recommendation deal with material arrangements in and admission to museums,[63] publicity for museums[64] and the place and role of museums in the community.[65]

6.2. Traditional culture and folklore

Section A of the Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989 defines folklore as:

> the totality of tradition-based creations of a cultural community, expressed by a group of individuals and recognized as reflecting the expectations of a community insofar as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation of by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

In order to safeguard folklore, the Recommendation provides that Member States should encourage national, regional, and international research surveys. The goals of surveying are: to develop a national inventory of folk-

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59 See *UNESCO's Standard-Setting Instruments,* Sect. IV.B.2.
60 *Id.*, Preamble.
61 *Id.*, para. 1.
62 *Id.*, para. 2.
63 *Id.*, paras. 4-10.
64 *Id.*, paras. 11-12.
65 *Id.*, paras. 13-18.

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lore institutions which will be included in regional and global registers of folklore institutions; to create new systems or improve existing systems for collecting, identifying, and transcribing folklore; and to stimulate the creation of a standard topology of folklore.

Folklore that has been fixed in a tangible form should be effectively protected. To this end, Member States should: establish national archives for collected folklore; establish a central national archive function for providing services such as cataloguing; create museums or folklore sections at existing museums; present traditional and popular cultures in ways that emphasize the living or past aspects of those cultures; harmonize collecting and archiving methods; train collectors in the conservation of folklore; and provide the means for making copies of folklore materials.

The Recommendation provides that measures must be taken to guarantee the status of and economic support for folk traditions. To this end, Member States should: design and introduce the teaching and study of folklore into school curricula; support the work of various cultural communities, thus guaranteeing their right to access to their own folklore; establish a national folklore council represented by various interest groups; provide moral and economic support for individuals and institutions studying, making known, cultivating, or holding items of folklore; and promote scientific research relevant to the preservation of folklore.

Folklore items must be widely disseminated, but distortion during dissemination should be avoided to safeguard the integrity of the traditions. To promote fair dissemination, Member States should: encourage the organization of national, regional, and international events and support dissemination and publication of their results; encourage broader coverage of folklore material through national and regional media; encourage the establishment of full-time jobs for folklorists; support the production of education materials; ensure the availability of adequate information on folklore; facilitate meetings and exchanges, taking into account bilateral cultural agreements; and encourage the international scientific community to adopt a code of ethics ensuring a proper approach to and respect for traditional cultures.

Finally, Member States are urged to cooperate with international and regional associations concerned with folklore; cooperate in the field of knowledge, dissemination, and protection of folklore through exchanges of information, training of specialists, awarding of travel grants, sending of scientific and technical personnel and equipment, promotion of bilateral or multilateral documentation projects, and organization of meetings between specialists; cooperate closely on an international level; guarantee that Member States on whose territory research has been carried out obtain copies of all materials; refrain from acts likely to damage folklore materials; and take

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necessary measures to safeguard folklore against all human and natural dangers to which it is exposed, including risks deriving from armed conflicts.

6.3. Circulation of educational, scientific and cultural materials

At its third session, held in Beirut, the General Conference adopted, on 10 December 1948, the Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character (the "Beirut Agreement").[66] This agreement applies to films, filmstrips and microfilm, sound recordings, glass slides, wall charts, props and posters, when their primary purpose or effect is to instruct or inform or when their content is such as to maintain, increase or diffuse knowledge.[67] Such material originating in a State Party is exempt from customs duties, quantitative restrictions and the need for import licenses in any other State Party.[68]

The exemptions of the Beirut Agreement were considerably expanded two years later by the Agreement on the Importation of Education Scientific and Cultural Materials (the "Florence Agreement")[69] adopted on 17 June 1950 by UNESCO's General Conference at its 5th session, held in Florence. The Contracting Parties undertake not to apply customs duties or other charges on the importation of selected books, publications, documents, and scientific, cultural, and educational materials listened in the Annexes attached to the Agreement which are the products of another Contracting Party.[70] While internal or related taxes may be levied, they are not to exceed charges for similar domestic materials. Contracting Parties further agree to grant licenses and/or foreign exchange for the importation of selected articles, including materials for educational and related institutions, official government documents, materials distributed by the UN, and materials for the blind, among others.[71] They also agree to facilitate the importation of such materials for public exhibit and in general to promote the free circulation of scientific, educational, and cultural materials, including by simplify-

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66 Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, 17 U.S.T. 1578, T.I.A.S. No. 6116, 197 U.N.T.S. 3, *UNESCO's Standard-Setting Instruments*, Sect. IV.A.1.

67 *Id.*, Articles I and II.

68 *Id.*, Article III.

69 Agreement on the Importation of Educational Scientific and Cultural Materials, 17 U.S.T. 1835, T.I.A.S. No. 6129, 131 U.N.T. 25, *UNESCO's Standard-Setting Instruments*, Sect. IV.A.2.

70 *Id.*, Article I.

71 *Id.*, Article II.

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ing administrative procedures and facilitating customs clearance of such materials.[72]

A Protocol of the Florence Agreement, adopted by the UNESCO General Conference at its 19th session in Nairobi on 26 November 1976,[73] extends the types of materials to which import exemptions apply to a wide range of articles not covered by the Agreement and provides special measures to protect nascent indigenous industries in developing countries.[74]

6.4. Satellite broadcasting

The Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange, adopted by the General Conference at its seventeenth session on 15 November 1972,[75] provides additional guidelines on the diffusion of culture. Recognizing that satellite broadcasting "provides a new means of disseminating knowledge",[76] this text seeks to balance the concern for transfer of technology to developing countries ("the benefits of satellite broadcasting should be available to all countries without discrimination and regardless of their degree of development")[77] with freedom of expression ("[i]t is necessary that States, taking into account the principles of freedom of information, reach or promote prior agreement concerning direct satellite broadcasting to the population of countries other than the country of origin of the transmission").[78] Other articles deal with the objectives of free flow of information,[79] the spread of education,[80] and the promotion of culture[81] through satellite broadcasting.

7. Cultural co-operation

Paragraph 4 of ICESCR Article 15 refers to the second means of supporting the core substantive right, namely, international contacts and co-operation in the cultural field. Virtually all of UNESCO's standard-setting instruments support the proposition that international contacts and co-operation in the

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72 *Id.*, Articles III and IV.
73 *UNESCO's Standard-Setting Instruments*, Sect. IV.A.2: Protocol to the Florence Agreement.
74 *Id.*, para. 10.
75 *UNESCO's Standard-Setting Instruments*, Sect. IV.C.2.
76 *Id.*, Article IV.1.
77 *Id.*, Article III.1.
78 *Id.*, Article IX.1.
79 *Id.*, Article V.
80 *Id.*, Article VI.
81 *Id.*, Article VII.

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scientific and cultural fields benefit international peace and the welfare of humanity.

Particularly relevant in this regard is the Declaration of the Principles of International Cultural Co-operation.[82] The Declaration was prepared in response to a request from the Economic and Social Council that UNESCO "study the possibilities of formulating principles which could serve as guiding lines for bilateral, regional and international action regarding relations and exchanges in the fields of education, science and culture".[83] The text also affirms that "Cultural co-operation is a right and a duty for all peoples and all nations, which should share with one another their knowledge and skills".[84] The text stipulates that international cultural co-operation covers "all aspects of intellectual and creative activities relating to education, science and culture".[85] The aims of international cultural co-operation, according to this text, include:

> [t]o spread knowledge, to stimulate talent and to enrich cultures; to develop peaceful relations and friendship among the peoples and bring about a better understanding of each other's way of life; ... to enable everyone to have access to knowledge, to enjoy the arts and literature of all peoples, to share in advances made in science in all parts of the world and in the resulting benefits, and to contribute to the enrichment of cultural life.[86]

8. Protection of cultural property from loss

The protection of cultural property from loss concerns the preservation of a) *international* heritage, which the Hague and World Heritage Conventions and related instruments cover; and b) *national* cultural heritage, which the Convention and Recommendation on Illicit Import, Export and Transfer of Ownership of Cultural Property deal with.[87]

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[82] Declaration of the Principles of International Cultural Co-operation, adopted on 4 November 1966, *supra*, note 43.

[83] ECOSOC Res. 803 (XXX), August 1960.

[84] *Id.*, Article V.

[85] See *supra*, note 43, at Article III.

[86] *Id.*, Article IV.

[87] The distinction between "cultural internationalism" and "cultural nationalism" is the basis of a study of the protection of cultural property through the 1954 Hague Convention and the 1970 Convention. See John Henry Merryman, "Two Ways of Thinking about Cultural Property", 80 *American Journal of International Law* 831-853 (1986).

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8.1. Protection of cultural property from destruction

The principal instrument for protection of internationally recognized cultural property is the Convention for the Protection of Cultural Property in the Event of Armed Conflict (the Hague Convention). The definition of cultural property given in Article 1 of the Hague Convention includes:

> movable and immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular, archaeological sites, groups of buildings which, as a whole, are of historical or artistic interest, works of art, manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collection of books or archives or of reproductions of the property defined above; buildings whose main and effective purpose is to preserve or exhibit the movable cultural property ... [and] centres containing a large amount of cultural property ... .[88]

The Convention provides for measures of special protection, including an emblem for identification of property under protection, peace-time preparations by the military to uphold such protection, the agreement by the High Contracting Parties to refrain from acts of hostility against such property under protection, an immunity from seizure for cultural property enjoying protection, and the movement of such property under designated special protection. Besides peacetime preparations, the Convention is to take effect in the event of war (whether declared or not) between High Contracting Parties. Separate regulations (execution regulations) for the execution of the Convention are considered an integral part of the Convention.

The Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted by UNESCO's General Conference at its seventeenth session on 16 November 1972,[89] extends to the world's natural heritage a protection formerly reserved for cultural heritage. The Convention defines "cultural heritage" as

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[88] The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted 14 May 1954, by the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 358, entered into force 7 August 1956; reprinted in [1954] *Y.B. on Human Rights* 380 (United Nations); *UNESCO's Standard-Setting Instruments*, Sect. IV.A.3. On the implementation of the Convention see Hanna Saba, UNESCO and Human Rights, in Vasak and Alston (eds.), *The International Dimensions of Human Rights*, 401 at 403-410; Stephen Marks, UNESCO and Human Rights: The Implementation of Rights Relating to Education, Science, Culture and Communication, 13 *Texas Int. L.J.* 35 at 59; and Merryman, *supra*, note 87, at 833-842.

[89] Convention concerning the Protection of the World Cultural and Natural Heritage, adopted 18 November 1972, 1037 U.N.T.S. 151, 27 U.S. T 37; TIAS 8226; *UNESCO's Standard-Setting Instruments*, sect. IV.A.5 Convention, Articles 3 and 5.

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> monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
>
> groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
>
> sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.[90]

Property falling with the category of "natural heritage" includes outstanding physical or biological formations, the habitat of threatened species and outstanding natural sites.[91] States Parties to the Convention recognize the "duty of ensuring the identification, protection, conversation, presentation and transmission to future generations of the cultural and natural heritage".[92] They also recognize that the cultural and natural heritage "constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate".[93]

The preservation of monuments and works of the past is vital to the conservation and diffusion of most of the cultures of the world. The protection of these remains may be threatened by improper excavation or appropriation of archaeological property. These issues are covered by the Recommendation on International Principles Applicable to Archaeological Excavations, adopted by the UNESCO General Conference at its ninth session, New Delhi, on 5 December 1956.[94] According to this instrument, archaeological excavations means "any research aimed at the discovery of objects of archaeological character, whether such research involves digging of the ground or systematic exploration of its surface or is carried out on the bed or in sub-soil of inland or territorial waters of a Member State".[95] The Recommendation seeks to protect any remains, in particular any monument and movable or immovable object of archaeological interest "whose preservation is in the public interest from the point of view of history or art and architecture" as determined by each Member State.[96] In order to protect its archaeo-

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90 *Id.*, Article 1.
91 *Id.*, Article 2.
92 *Id.*, Article 4.
93 *Id.*, Article 6.
94 Recommendation on International Principles Applicable to Archaeological Excavations, *UNESCO's Standard-Setting Instruments*, Sect. IV.B.1.
95 *Id.*, para. 1.
96 *Id.*, para. 2.

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logical heritage, each Member State is urged to establish a system of supervision of archaeological explorations and excavations, including procedures for prior authorization before excavations begin, declaration of findings, confiscations of undeclared objects and classifying of monuments.[97] Other provisions set out regulations governing excavation and international collaboration, including granting authorization to excavate to foreigners, preservation of archaeological remains, access to excavation sites, assignment of finds, and rights and obligations of the excavator.[98] These regulations provide, *inter alia*, that conditions imposed on foreign excavators should be the same as those on nationals;[99] that Member States should encourage excavations by a liberal policy of allowing qualified foreign individuals and learned bodies concessions to excavate and of joint missions;[100] and that they should use finds first to build up national museums and then consider lending or ceding to foreign museums objects not required in national collections.[101]

More recently, UNESCO has devoted a convention to the protection of underwater cultural heritage. The Convention on the Protection of Underwater Cultural Heritage was adopted by the General Conference on 2 November 2001. It defines the object of protection as follows:

> (a) "Underwater cultural heritage" means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:
>
> (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
>
> (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
>
> (iii) objects of prehistoric character.
>
> (b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage.
>
> (c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage.

The obligations of States Parties include that of preserving "underwater cultural heritage for the benefit of humanity" and taking "all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their ca-

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97 *Id.*, paras. 4-5.
98 *Id.*, Sect. III.
99 *Id.*, para. 14.
100 *Id.*, para. 15.
101 *Id.* para. 23.

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pabilities".[102] In addition, the Convention establishes a priority of protection of such property, beginning with the preservation *in situ* of underwater cultural heritage "as the first option" and then recovery of underwater cultural heritage to "be deposited, conserved and managed in a manner that ensures its long-term preservation".[103] Finally, the Convention provides that "underwater cultural heritage shall not be commercially exploited".

8.2. Landscapes and sites and historic areas

The Recommendation Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites, adopted by the UNESCO General Conference at its 12th session on 11 December 1986,[104] is concerned with the protection of the beauty and character of landscapes and sites and seeks "the preservation and, where possible, the restoration of the aspect of natural, rural and urban landscapes and sites, whether natural or man-made, which have a cultural or aesthetic interest or form typical natural surroundings".[105] The text sets out a number of preventative[106] and protective measures[107] the authorities can take, including proper supervision of construction of buildings and roads, and other potentially harmful activities, insertion of protective obligations into urban development plans, scheduling of landscapes by zones and isolated sites, and the creation and maintenance of natural reserves and national parks. Public education to arouse and develop public respect for such natural landscapes and sites is also deemed appropriate both in school and out, and Member States should facilitate such education.[108]

Conservation of culture is the focus of yet another UNESCO instrument, the Recommendation Concerning the Safeguarding and Contemporary role of Historic Areas, adopted by the UNESCO General Conference at its nineteenth session on 26 November 1976.[109] This Recommendation defines "safeguarding" as "the identification, protection, conservation, restoration, renovation, maintenance and revitalization of historic or traditional areas and their environment".[110] Such areas are considered to form "an irreplaceable universal heritage" which both governments and citizens are duty-bound to safeguard.[111] According to the Recommendation, a policy of safeguard

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[102] Convention on the Protection of Underwater Cultural Heritage, Article 2.
[103] *Id.*
[104] See *UNESCO's Standard Setting Instruments*, Sect. IV.B.3.
[105] *Id.*, para. 1.
[106] *Id.*, paras. 7-11.
[107] *Id.*, paras. 12-29.
[108] *Id.*, paras. 37-42.
[109] See *UNESCO's Standard-Setting Instruments,* Sect. IV.B.9.
[110] *Id.*, para. 1(c).
[111] *Id.*, para. 2(a).

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should influence national, regional and local planning and provide guidelines for town-planning and regional and rural development planning at all levels. The Recommendation further sets out legal and administrative measures,[112] technical, economic and social measures,[113] provisions regarding research, education and information,[114] and international co-operation.[115]

8.3. Movable cultural property

The Recommendation for the Protection of Movable Cultural Property, adopted by UNESCO's General Conference at its twentieth session on 28 November 1978,[116] defines "movable cultural property" as "all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific or technical value and interest".[117] According to this Recommendation,

> 'protection' shall be taken to mean the prevention and coverage of risks as defined below:
>
> (i) 'prevention of risks' means all the measures required, within a comprehensive protection system, to safeguard movable cultural property from every risk to which such property may be exposed, including those resulting from armed conflict, riots or other public disorders;
>
> (ii) 'risk coverage' means the guarantee of indemnification in the case of damage to, deterioration, alteration or loss of movable cultural property resulting from any risk whatsoever ... whether such coverage is effected through a system of governmental guarantees and indemnities, through the partial assumption of the risks by the State under a deductible or excess loss arrangement, through commercial or national insurance or through mutual insurance arrangements.[118]

This Recommendation enumerates measures relating to the prevention of risks in museums and similar institutions,[119] private collections,[120] and in religious buildings and archaeological sites.[121] It also indicates ways of drawing public attention to the need for protection,[122] control measures,[123]

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[112] *Id.*, paras. 9-17.
[113] *Id.*, paras. 18-46.
[114] *Id.*, paras. 47-53.
[115] *Id.* paras. 54-55.
[116] See *UNESCO's Standard-Setting Instruments*, Sect. IV.B.10.
[117] *Id.*, para. 1. The definition further sets out eleven categories of movable cultural property.
[118] *Id.*
[119] *Id.*, paras. 12-13.
[120] *Id.*, para. 14.
[121] *Id.*, paras. 15-16.
[122] *Id.*, para. 17.
[123] *Id.*, paras. 18-20

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measures to improve the financing of risk coverage[124] and international co-operation in this area.[125]

8.4. Protection of cultural property from illicit import, export and transfer

The preservation of national cultural heritage has been the primary concern of the Recommendation (1964)[126] and the Convention (1970)[127] on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Article 1 of the Convention defines "cultural property", *i.e.*, what is to be conserved, as property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

> (a) rare collections and specimens of fauna, flora, minerals and anatomy and objects of palaeontological interest;
> (b) property relating to history ... ;
> (c) products of archaeological excavations ... ;
> (d) elements of artistic of historical monuments or archaeological sites which have been dismembered;
> (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
> (f) objects of ethnological interest;
> (g) property of artistic interest ... ;
> (h) rare manuscripts and incunabula, old books, documents and publications of special interest;
> (i) postage, revenue and similar stamps ... ;
> (j) archives, including sound, photographic and cinematographic archives;
> (k) articles of furniture more than one hundred years old and old musical instruments.

In Article 2 the States Parties to the Convention recognize that the illicit import, export and transfer of ownership of cultural property are a main cause of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against

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[124] *Id.*, paras. 21-23.

[125] *Id.*, paras. 21-23.

[126] Recommendation on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted on 19 November 1964; *UNESCO's Standard-Setting Instruments*, Sect. IV.B.4.

[127] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted on 14 November 1970, *id.*, Sect. IV.A.4; 823 U.N.T.S. 231.

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all the dangers of resulting therefrom. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

Further, States Parties to the Convention undertake a range of specific obligations including setting up one or more national services for the protection of cultural heritage, introducing export certificates, preventing museums from acquiring illegally exported cultural property and preventing transfer of ownership of such property. The Convention provides that States Parties submit reports to the General Conference of UNESCO in order to give information on the measures adopted to implement the Convention. Technical assistance by UNESCO is available to States Parties on request.

In 1992, the International Workshop on the Protection of Artistic and Cultural Patrimony, held at Courmayeur, Aosta Valley, Italy, adopted the "Charter of Courmayeur", which enumerates national and international measures to be taken to prevent and suppress the illicit trade with objects belonging to the world cultural patrimony, including establishing focal points to collaborate with ICPO/INTERPOL on matters of transnational traffic with art objects and items belonging to the cultural patrimony, legislation to criminalize the illicit export and import of cultural objects, consideration of an internationally recognized licensing system for art dealers, improvement of recording and dissemination of information about the legal status of cultural items and about crimes against the cultural patrimony.

9. Protection of creators, transmitters and interpreters of culture

Article 15(1)(c) of the ICESCR refers to the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. This instrumental right supports the core substantive right contained in Article 15(1). Similarly, Article 15(3) sets out the second instrumental right in support of the core right, namely, "the freedom indispensable for scientific research and creative activity". Both of these supporting or instrumental rights have been developed through norms that further define the rights relating to those who create and transmit culture, whether it is the general protection of copyright or special consideration for artists, translators and similar professions.

9.1. Copyright

The principal normative instruments relevant to promoting the right to benefit from the protection of the moral and material interests in intellectual property is the Universal Copyright Convention of 1952 as revised in Paris

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in 1971,[128] which is administered by UNESCO, and has been ratified by 62 states, and the Berne Convention for the Protection of Literary and Artistic Works of 24 July 1971, originally adopted in 1886, commonly known as the "Berne Convention", which has been revised several times to take into account new technology (most recently on 28 September 1979). It has been ratified by 149 states and is administered by the World Intellectual Property Organization (WIPO). Other texts that protect intellectual property relate to patents and will not be discussed here.

Both the Convention (1952) and the revised Convention (1971) require that each Contracting State protect the rights of authors and other copyright holders and provide the right to the same protection for authors of any Contracting State publishing in its state as that Contracting State provides for its own nationals publishing first in its own territory.[129] Article I of both Conventions stipulates that,

> [e]ach Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

Article VI common to both instruments defines publication as "the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived".

Along with the worldwide introduction of the principle of assimilation of foreign authors to national authors, other features of the 1952 Convention include the following: the simplifying of copyright formalities, by printing on all copies of a published work, the symbol ©; particular arrangements pertaining to translation rights; and the establishment of a minimum period of protection equal to the remainder of an author's life and twenty-five years after his death.

The 1952 Convention further provides that each State Party shall, according to its Constitution, adopt measures to bring its laws and practices into harmony with the provisions of this Convention. An Intergovernmental Committee was established by the Convention to study problems related to the application and periodic revisions thereof.[130] Protocol 1 annexed to the

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[128] Adopted in Geneva on 6 September 1952 by the Inter-governmental Copyright Conference convened by UNESCO; 6 U.S.T.2731, T.I.A.S. No. 3324, 216 U.N.T.S.132, *UNESCO's Standard-Setting Instruments*, Sect. V.2.A.1; revised in Paris on 24 July 1971 by the Conference for Revision of the Universal Copyright Convention convened by UNESCO, 25 U.S.T.1341, T.I.A.S. No. 7868, *UNESCO's Standard-Setting Instruments*, Sect. V.2.A.2.

[129] *Id.*, Articles I and II.

[130] *Id.*, Articles XI.

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Universal Copyright Convention (1952) assimilates, for the purposes of the Convention, refugees and stateless persons with habitual residences in a State Party to the nationals of that State; Protocol 2 provides protection for those works published for the first time by the United Nations, by the Specialized Agencies, and by the Organization of American States; Protocol 3 relates to the effective date of instruments of ratification, acceptance or accession to the Convention.[131]

The 1971 revision of the 1952 Convention was designed to take into account the economic, social and cultural conditions of the developing countries. It also extends the author's basic rights. Thus, the Revised Convention establishes criteria to be satisfied by States and the procedures to be followed to gain the benefits of special provisions for developing countries, including a translation license more favorable than that instituted by the common system referred to in Article V of the 1952 Convention.[132]

Besides the Universal Copyright Convention, several other normative instruments adopted by international conferences or the General Conference of UNESCO are relevant to the right to benefit from the protection of the moral and material interests in intellectual property. These are: the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, of 26 October 1961;[133] the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, of 14 November 1970;[134] the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, of 29 October 1971;[135] the Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, of 13 December 1979;[136] the Recommendation on the Legal Protection of Translators and Translations and the Practical Means to Improve the Status of Translators, of 22 November 1976;[137] and the Recommendation for the Safeguarding and Preservation of Moving Images, of 27 October 1980.

To site an example, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations provides the following definitions:

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[131] *UNESCO's Standard-Setting Instruments*, Sect. V.2.A.1 pp. 14 (Protocol 1), 15 (Protocol 2) and 17 (Protocol 3).

[132] Universal Copyright Convention as Revised in 1971, *supra*, note 128, Articles V*bis*, V*ter* and V*quarter*.

[133] *UNESCO's Standard-Setting Instruments*, Sect. V.2.A.3.

[134] *Id.*, Sect. IV.A.4.

[135] *Id.*, Sect. V.2.A.4. See also Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted on 14 November 1970, *id.*, Sect. IV.A.4; 823 U.N.T.S. 231 and accompanying text.

[136] *Id.*, Sect. V.2.A.6.

[137] *Id.*, Sect. V.2.B.1.

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> (a) "performers" means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works;
>
> (b) "phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds;
>
> (c) "producer of phonograms" means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds;
>
> (d) "publication" means the offering of copies of a phonogram to the public in reasonable quantity;
>
> (e) "reproduction" means the making of a copy or copies of a fixation;
>
> (f) "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds;
>
> (g) "rebroadcasting" means the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.[138]

The protection to which they are entitled includes the prevention of broadcasting and the communication to the public, without their consent, of their performance, the fixation, without their consent, of their unfixed performance; and the reproduction, without their consent, of a fixation of their performance under specified circumstances.[139] WIPO administers other texts[140] that add other layers of protection of various economic and moral rights of creators and producers.

9.2. Status of the artist, scientific researchers and of translators

The Recommendation concerning the Status of the Artist,[141] recognizes "that it is necessary and appropriate for Governments to help create and sustain ... a climate encouraging freedom of artistic expression ...".[142] The text is also based on the conviction that,

> action by the public authorities is becoming necessary and urgent in order to remedy the disquieting situation of artists in a large number of member States, particularly with regard to human rights, economic and social circumstances and their conditions of employment, with a view to providing artists with the conditions necessary for the development and flowering of their talents and appropriate to the role that they are able to play in the planning and implementation of cultural policies and

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[138] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Article 3.

[139] *Id.*, Article 7.

[140] See list at <http://www.wipo.int/treaties/ip/index.html>.

[141] Recommendation on the Status of the Artist, 21 C/Res., Annex I, at 147, adopted on 27 October 1980.

[142] *Id.*, Preamble.

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> cultural development activities of communities and countries and in the improvement of the quality of life.[143]

Eight "guiding principles" contained in Part III of the Recommendation relate to such matters as Member States' "duty to protect, defend and assist artists and their freedom of creation", and to "see that artists are unequivocally accorded the protection provided for in this respect by international and national legislation concerning human rights", and that they are not discriminated against in preparing their careers or in employment.

Part IV of the Recommendation acknowledges that, if it is to be effective, the stimulation of artistic creativity calls for provision of the necessary professional training of talent to produce works of outstanding quality. Accordingly, a number of measures which should be taken by Member States are listed. Other parts of the Recommendation deal with the social status of artists,[144] their employment, working and living conditions, their professional and trade union organizations[145] and the process of formulating cultural policies.[146]

Creative freedom is also supported by the Cultural Participation Recommendations, which calls on Member States, if they have not already done so, to adopt legislation or regulations in conformity with their national constitutional procedures, or otherwise modify existing practices in order to "bring about conditions conducive to creative work and ensure the freedom of creative artists and the protection of their works and rights".[147]

As already mentioned, the right to the "the freedom indispensable for scientific research and creative activity" of ICESCR Article 15(3) is instrumental to both aspects of the core substantive right of Article 15, namely, cultural participation and benefit from scientific advances. Scientific development is also part of culture as broadly defined and therefore the norms that apply the freedom of scientific research are relevant to the realization of cultural rights. As Richard Claude has written, the "scientific freedom embedded in Article 15 of the ESC Covenant is like a ship's anchor on which scientists daily depend, a mainstay for freedom of information, association and inquiry".[148]

Thus, cultural rights are supported by the professional rights of scientific researchers, the principal reaffirmation of which is contained in the Recommendation on the Status of Scientific Researchers adopted by

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[143] *Id.*
[144] *Id.*, Part V.
[145] *Id.*, Part VI.
[146] *Id.*, Part VII.
[147] Cultural Participation Recommendation, para. 4(k).
[148] Richard Pierre Claude, *Science in the Service of Human Rights*, Philadelphia, University of Pennsylvania Press (2002), p. 63.

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UNESCO's General Conference in 1974.[149] It defines scientific researchers as "those persons responsible for investigating a specific domain of science or technology"[150] and takes a strong position on academic freedom by recognizing "that open communication of the results, hypotheses and opinions – as suggested by the phrase 'academic freedom' – lies at the very heart of the scientific process and provides the strongest guarantee of accuracy and objectivity of scientific results".[151] With respect to publicly-supported scientific research, Member States are expected to allow researchers to enjoy "the degree of autonomy appropriate to their task and to the advancement of science and technology" and to take fully into account "that creative activities of scientific researchers should be promoted in the national science policy on the basis of utmost respect for the autonomy and freedom of research necessary to scientific progress".[152] Similarly, the Recommendation provides that "Member States should be actively concerned to stimulate creative performance in the field of science and technology by all scientific researchers".[153]

In the section devoted to the civic and ethical aspects of the work of scientific researchers, the Recommendation addresses at some length the "spirit of intellectual freedom to pursue, expound and defend the scientific truth as they see it", their role in defining aims and objectives of the programs in which they are engaged and determining the methods "which should be humanely, socially and ecologically responsible", as well as their responsibility and right "to express themselves freely on the human, social or ecological value of certain projects and in the last resort withdraw from those projects if their conscience so dictates".[154]

The Recommendation on the legal protection of translators and translations and the practical means to improve the status of translators was adopted by the General Conference on 22 November 1976.[155] Its definitions are:

> (a) the term "translation" denotes the transposition of a literary or scientific work, including technical work, from one language into another language, whether or not the initial work, or the translation, is intended for publication in book, magazine, periodical, or other form, or

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[149] Recommendation on the Status of Scientific Researchers, 18C/Res. 40, 20 November 1974, reprinted in *UNESCO's Standard-Setting Instruments*, Sect. II.B.1.

[150] *Id.*, para. 1(d)(i).

[151] *Id.*, Preamble.

[152] *Id.*, para. 8.

[153] *Id.*, para. 31.

[154] *Id.*, para. 14.

[155] Recommendation on the Legal Protection of Translators and Translations and the Practical Means to Improve the Status of Translators, *UNESCO's Standard-Setting Instruments*, Sect. V.2.B.1.

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for performance in the theatre, in a film, on radio or television, or in any other media;

(b) the term "translators" denotes translators of literary or scientific works, including technical works;

(c) the term "users" denotes the persons or legal entities for which a translation is made.[156]

The Recommendation provides that translators should receive the same protection accorded to authors under the provisions of the international copyright conventions and/or under their national laws, but without prejudice to the rights of the authors of the original works translated.[157]

10. Final remarks

Cultural rights are often neglected in the cataloguing of human rights in favor of the more succinct "economic and social rights". And yet they constitute a complex web of rights that merits a more central place in human rights theory, diplomacy and policy. Article 15 of the Covenant enumerates these rights in six main areas: cultural participation (Article 15(1)(a)); benefits of science (Article 15(1)(b)); intellectual property (Article 15(1)(c)); conservation and diffusion (Article 15(2)); academic freedom (Article 15(3)); and contact and co-operation (Article 15(4)).

I have attempted here to structure these six elements as part of an unplanned architectural construction into which the first two are core substantive rights; the third and fifth are supporting rights; and the fourth and sixth are supporting means. When each element is examined more thoroughly, a rich fabric of concepts, definitions, guidelines, and state obligations appears. This overview is aimed at clarifying how the international human rights regime has defined cultural rights.

For several decades, Asbjørn Eide has opened the way and provided the best and most insightful analysis of cultural rights, on which the preceding pages are but a modest addition. While other human rights are essential to human survival, to bodily integrity, and to material existence, cultural rights are much more than accessory rights. Recalling Whitehead's definition of culture as "activity of thought, and receptiveness to beauty and humane feeling", it is not an exaggeration to say that cultural rights guarantee to individuals and to culturally defined groups their sense of meaning. They merit much more attention than they have received, for they are in a real sense the grounding of the aesthetic, cognitive, spiritual, and emotional bonds of all humans to their society and, for many, to the cosmos and, in any case, they provide the means of expressing those bonds.

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[156] *Id.*, Article I.

[157] *Id.*, Article II.

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XIII

The long process of giving content to an economic, social and cultural right: twenty-five years with the case of the right to adequate food

By Arne Oshaug* and Wenche Barth Eide**

1. Introduction: everything has a beginning

The human right to adequate food and to be free from hunger has probably received more attention than any other of the economic, social and cultural rights in recent years. In this chapter we shall highlight Asbjørn Eide's scholarly contributions to what has come to be today's normative interpretation of the existing major international legal provisions for this right. We shall also reflect on his continuing role as a leading promoter of the right to food and its significance to some of the major issues on the contemporary development agenda.

As partners for more than two decades with Asbjørn Eide in the strive to give content to the right to food, and as advocates attempting to complement his efforts in our various international research and institutional constituen-

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cies and networks, we portray an example of truly transdisciplinary mutual learning, research and exchange of ideas for the practical application of theoretical concepts. Asbjørn's openness to interdisciplinary challenges gave two non-legal novices sufficient initial courage that we could and should indeed continue on the hitherto unpaved path to bring human rights into the fields of nutrition, food and agriculture. His patience as a teacher and mentor kept up this encouragement as our insight and understanding of human rights developed, until we could effectively consolidate a mature professional partnership. In this partnership we continue to experience the mutuality and reward of transdisciplinary exchange, inspiration and collaboration.

The story here, in part a critical appraisal of a process in the international community to carry forward one particular ESCR, also tells about how a small academic milieu can make a contribution to moving frontiers in an initially uphill, and at times seemingly impossible task – given time, stamina and patience. The idea of linking human rights in general with development was typically rejected in the political climate surrounding development research and international development co-operation at the time when the Covenant on Economic, Social and Cultural Rights entered into force in 1976. This attitude continued at least as long as the Cold War prevailed. More specifically, bringing a human rights perspective into the broad technical food, nutrition and agricultural circles appeared near to futile, well beyond the end of the Cold War, up to as late as 5-6 years ago. And yet today the right to food "movement" is here to stay and steadily growing, notwithstanding continued opposition from some influential states, as we shall return to. One factor behind the relatively rapid acceptance of the concept once the political climate had eased, has no doubt been the academically based groundwork coupled with focused lobbyist activities by a few well-informed NGOs.

The right to food constituencies now include leading representatives of international agencies and a growing number of governments with expressed interest and initiatives in addressing food and nutrition problems in a human rights perspective. A network of senior scholars provides intellectual backstopping and self-established quality control on much of what evolves in the international human rights and development communities. Also, many young researchers in different parts of the world are being attracted to work on the right to food and will progressively enrich our understanding of many aspects of this right and its implementation. Above all however, there is a capable civil society that has been aware of how to lobby for the right to food in national and international circles, besides contributing to the continuous refinement of its operationalisation.

So what happened on the way to all this? Certainly too much to attribute it to one or only a few actors. But everything has a beginning, and it is fair to

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say that Asbjørn Eide's contribution to the beginning of a better understanding of the right to adequate food as a human right, as well as to its follow-up until this day, has been significant. Devoted to the protection of the whole spectrum of human rights from when he started working with human rights in the late 1960s, he also brought a wider perspective to the more topical issue of the right to food and helped linking it to a range of other relevant international legal and development concerns.[1]

2. The initial test: how to operationalise an ESCR, for whom and by whom – the case of food and nutrition

In 1976 when the two international Covenants entered into force, the then Norwegian Minister of Foreign Affairs – Mr. Knut Frydenlund, a man of great personal dedication to human rights – lamented how the contemporary political climate during the Cold War frustrated the ability of states to support efforts to promote and protect human rights where this was needed. He requested Asbjørn Eide to make a study of ways in which states could act more indirectly in countries where human rights were clearly violated, if necessary by circumventing governments through direct contact with and support for non-governmental channels. Asbjørn submitted a study in November that year, later published as the first official public report in Norway on "Human Rights in the World Society. Norms, reality and the international system of protection".[2]

With his loyalty to a holistic approach to international human rights, Asbjørn decided to deal with the full spectrum of human rights, including economic, social and cultural rights. But at that time, little work had been done on what these rights, as articulated in the Covenant on ESCR, imply in terms of content and corresponding obligations. Firstly, there was the weak interest in ESCR within legal human rights circles, as compared with civil and political rights. At the same time non-legal development constituencies would hardly be aware of their existence. Added to this was the political sensitivity surrounding ESCR in the context of the East-West ideological divide.

While there was little a study could do to reduce that sensitivity, at least some conceptual normative work could be triggered. Asbjørn asked a few academic friends and colleagues working in areas of interest to public policy, in particular third world development, to provide him with ideas and

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1 The readers will hopefully bear with the questionable objectivity of the present authors who have been close to this particular side of Asbjørn's professional service the last twenty-five years. We can, however, claim primary insight into how it developed.

2 Eide A, *Human Rights in the World Society. Norms, reality and the international system of protection*. NOU 1977:23. Universitetsforlaget, Oslo (1977).

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working notes on how they would see human rights having a bearing on their specific domains of expertise and action. The present authors were invited to try to relate nutrition to human rights and to come up with thoughts on what might be the normative basis for addressing food and nutrition problems from a human rights perspective.

2.1. Nutrition and human rights

Joined by a couple of colleagues we set out with blank pages to meet Asbjørn's request. With non-legal mindsets, we had come to understand the fundamental feature of normative thinking in the human rights discourse. In fact this was not too difficult insofar as in the nutrition or health fields the fundamental "norm" is human wellbeing of some sort. But it soon became clear that this applied above all to the ultimate *outcome* objectives in biological or dietary terms at the level of the human being – more specifically in terms of an adequate food intake measured by its nutritional value, and a good nutritional status assessed by means of biochemical, anthropometric or clinical indicators. Being concerned also with how to arrive to these "norms" in procedural terms, including how to ensure access to adequate food in the first place, we had to acknowledge that the nutrition community still had little to contribute, beyond telling people how to eat better.[3]

Admittedly, this happened in the midst of the evolving "nutrition planning period" of the 1970s. Many had become concerned with the need to identify stronger public action in the fight against hunger and malnutrition, or in generating conditions for good nutrition for all – as was the case in Norway, the first among the richer countries to take up a state policy for food and nutrition. This new emphasis on the role of the state in improving people's nutrition could in principle be thought of as a significant step towards a possible opening for normative human rights thinking. In those early years, however, "nutrition planning" was conceived very much in terms of a centralized, mechanistic top-down exercise that had little resemblance with today's concerns with participation, empowerment, good governance and accountability. These concepts are now firmly embedded in the understanding and language both of human rights and of development and provide the necessary pillars for building bridges across disciplinary and sectoral gaps.

As nutritionists we were intrigued and unable to leave the issue of rights. Could we envisage, through a human rights lens, the contours of a new approach to addressing the nutrition problems in the world? Could a

[3] An improved version of the original working note appeared as a non-printed annex to Eide A, Helgesen J and Opsahl T (1981), *Menneskerettigheter. Behovet for informasjon, undervisning og forskning*, NOU 1981:43, Eide WB, Oshaug A, Solem I, Wandel M, *Ernæring og menneskerettigheter.*

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focus on food and nutrition from a human rights perspective possibly lead to a new paradigm for the nutritional sciences – to allow a broader analysis of the causes of hunger and malnutrition and subsequently, ideas for bolder solutions than those to be found in the immediate environments of the individual child, woman or man, however important in the short term perspective? Being in the 1970s, many subscribed to the prevailing radical ideology at the time implying that the causes of hunger and malnutrition are mainly to be found in capitalism and bad behaviour of multinational companies. Normative thinking and especially in relation to individual states' responsibility and desirable performance was not particularly favoured in development research circles in general – "good governance" was not yet invented! But could the nutrition community, through demonstrating with hard evidence to governments in affected countries the gravity of the nutrition problems, one day expect that their authorities would recognise that they had in fact *obligations* under international human rights law for promoting and protecting people's right to food and to health? This was the vision twenty-five years ago that kept some of us firmly determined to learn more about this world of human rights and to examine more closely how to make it ours, too. To do so, however, it was clear that one needed to go beyond the very general provisions of the ESCR and penetrate more specifically the meaning and implication of the human right to food.[4]

2.2. From the general to the particular

Asbjørn on his side had, however, initially no intention of penetrating any one human right more than any other. Devoted to economic, social and cultural rights as such, he was a generalist and wanted to remain so. But it did not take him very long to see that if human rights experts were to "sell" human rights to developmentalists, the case would have to be presented on their terms, relative to their technical background and tasks they would be working on. It is a fact that for non-legal people, economic, social and cultural rights are initially very difficult to understand in abstract terms.[5] However, if one discusses with a technical specialist how his/her field of expertise could be seen in terms of a *specific* human right, there may be a basis for constructive exchange. This typically applies to the right to food. At the

[4] It should be noted from the outset than when we use the term right to "food", we imply the modern understanding of "nutrition" as the wider concept where food is a necessary, but not by itself sufficient component to ensure nutritional status. Good health (adequate control and prevention of disease) and care for the vulnerable (such as infants and young children, elderly, and disabled who may have difficulty in feeding themselves) are necessary to ensure the full enjoyment of the right to food by all.

[5] In our own experience, prior exposure to the basis of civil and political rights helps the understanding of ESCR.

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same time, the right to food is closely related to the rights to health, education, housing and to employment, while the civil and political rights – such as the right to free speech, to information and to organise – are indispensable for sustainable enjoyment of other rights. To juxtapose all rights on an equal basis has indeed characterised Asbjørn's broad stand in this matter, while recognizing also the necessity of a high level of precision in determining the content of a specific right such as the right to food and its corresponding obligations of states, and duties and responsibilities of non-state actors in different contexts. The challenge lies in finding the appropriate balance between how far these can be spelled out in universally valid terms and how much specificity needs to be left to the particular circumstances.

When Asbjørn decided, in the early 1980s, to engage more directly in addressing the right to food and exploring what ought to be expected from governments, the international instruments themselves were of limited help in defining its content. Neither the Universal Declaration on Human Rights nor Article 11 of the subsequent Covenant on Economic, Social and Cultural Rights included any concretisation of the right to food beyond the very general and not further explained "adequate food", in both instruments embedded in the context of an "adequate standard of living". The ICESCR attempted to describe obligations of states in ensuring this (undefined) right and promoting freedom from hunger and preventing malnutrition according to the notions held at the time of drafting in 1963, which meant addressing implementation of the right to food basically as a matter of greater production combined with nutrition education. Clearly this was no longer sufficient for the contemporary concerns with hunger and the many forms of malnutrition from which hundreds of millions of people were suffering.

3. A human right in search of content – the debate in the early 1980s

A systematic debate was obviously needed. It was sparked off with the first ever international seminar on food as a human right, organised for the United Nations University in September 1981 at Gran in Norway, with support from UNICEF and the Norwegian Government. This first international gathering to discuss the right to food, which included legal human rights experts, general developmentalists and food and nutrition analysts, came about as a consequence of a vision that this right might inspire new approaches to the hunger problems in the world.[6]

There was, however, no conceptual basis established for what this might imply, especially with no precedence regarding implementation of economic, social and cultural rights. In an overview of the international human

[6] Eide A, Eide WB, Goonatilake S, Gussow J, Omawale (eds.) (1984), *Food as a human right*. The United Nations University, Tokyo.

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rights system in general, Asbjørn Eide[7] underlined at the seminar his firm conviction that this system not only sets restrictions on state behaviour, but also requires proactive action by states in order to protect the freedom of all individuals including their freedom from want:

> The notion of human rights is intimately linked to the role of the "state". Only in the context of an organized society with public authorities does the notion of "human rights" make sense. It is important not to lose sight of this point when we seek to clarify the concept. "Human rights" refers to norms concerning the relationship between individuals (sometimes groups of individuals) and the state.

The rights fall in two main categories or dimensions: freedoms and demands, the former concerning the integrity of the individual from state power, the latter being of a different nature:

> They may consist of demands on state authority to be protected against violations by other individuals or groups, or in demands for the state to assist in ensuring the satisfaction of certain recognized needs of the individuals or groups concerned. While freedom sets limits to the exercise of state authority, demands require action by the state, which necessitates the existence of state administrative machinery equipped for this task.

It has been Asbjørn's thesis all along that without such a firm anchoring of human rights obligations with the state, the debate and pretended action on specific issues in the name of human rights risks becoming wobbly and without direction. This is far from saying that only the state has responsibilities for human rights, including the right to food, when so much depends for their realization on an active and concerned civil society practicing direct solidarity with the rights of all including the weak and marginalised, and holding the state accountable for its actions affecting human rights.

Thus, Dias,[8] at the same 1981 seminar, underscored the danger of relying too much on the law as such which traditionally had been a resource for the rich and powerful and thus a means of domination. He introduced the "legal resources approach" – or, building capacity to use the law for marginalised people to advance shared interests. Alston[9] expressed a similar notion at a later seminar.

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7 Eide A (1984), "The international human rights system". In: Eide *et al.* (eds.), *ibid.*, p. 153.

8 Dias C (1984), "The legal approach". In Eide *et al.* (1984), *op. cit.*, p. 177.

9 "An emphasis on the role of law must not be permitted to obscure the importance of viewing the concept of the right to food essentially as a mobilizing force, as a rallying point, through which people themselves are encouraged to assert their rights by making use of all appropriate legal and extra-legal means". Alston in: Alston P and Tomasevski K (1984), *The Right to Food.* International Studies in Human Rights. Netherlands Institute of Human Rights/SIM, Martinus Nijhoff Publishers, Utrecht, p. 62.

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It was at the 1981 seminar that Asbjørn introduced his ideas on the nature of state obligations for economic, social and cultural rights in general, as a three-tiered system of obligations, as follows:

> These fall in three categories: the obligation to respect, to protect and to fulfill human rights. The obligation to *respect* requires the state, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on his or her freedom beyond what is permitted in the human rights system. The obligation to *protect* requires the state to take the necessary measures to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual. The obligation to *fulfil* requires the state to take measures necessary to ensure possibilities for everyone within their jurisdiction to obtain satisfaction of those needs which have found expression in the human rights system (the right to work, to an adequate standard of living, to health services, education, and so on). [10]

Alston[11] reviewed specifically the place of the right to food in international law, pointing to the low attention it had been given to date both in legal and development circles. He ended his review as follows:

> The foregoing survey of issues raised by the right to food provision of article 11 of the ESCR Covenant does not provide us with a particularly encouraging picture. Rather, it shows that while the basic norm is clearly enunciated, no amount of strict legal construction or interpretation of the subsidiary norms[12] will suffice to produce a clear and widely acceptable framework within which the right to food could be effectively operationalized. As foreseen in article 23 of the Covenant, a convention spelling out the normative implications on the right to food is thus a fundamental prerequisite to effective action by states and the international community towards operationalization of the right to food. Until such an exercise is undertaken the concept of a right to food as a human right will continue to be abused for rhetorical purposes while being ignored for all practical purposes.[13]

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10 Eide A (1984), "The international human rights system". In Eide *et al.* (1984), *op. cit.*, p. 154.

11 Alston P (1984), "International law and the right to food". In Eide *et al.* (1984), *op. cit.*, pp. 173-4.

12 Alston refers here to the two sub-norms of article 11, *i.e.*, to "the right to adequate food" in para. 1 and "the right to be free from hunger" in para. 2 (authors' comment).

13 This makes interesting reading today when the farthest that has or will be achieved in terms of an instrument to advance the right to food in the foreseeable future, is the "voluntary guidelines" for implementation of the right to food recommended by the June 2002 World Food Summit: *five years later*, to which we shall return.

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In a joint chapter Alston and Eide[14] spell out the framework for state obligations for the right to food in more detail, to be developed on the following premise:

> People will strive to satisfy their own needs, including food. To do so, they need freedom, both as peoples and as individuals, and they need a resource base sufficient to make satisfaction of the need possible.

It can be concluded that, as illustrated by much of subsequent discourse and experience, it is precisely through this way of looking at state obligations that those can be identified in ways that clearly bring out the expected and respected contributions of people themselves or their representatives.

It has often been stated by later authors that the three-tiered framework for economic, social and cultural rights presented by Asbjørn in 1981 builds on that launched by philosopher Henry Shue in his book on basic rights the year before.[15] While the point is less who said what first, the two frameworks have some basic differences, as noted by Shue himself at a SIM seminar in Utrecht in 1984, analyzing and comparing what he called the "Shue typology" and the "Eide typology". Disregarding the more subtle nuances in terminology, the most important difference was probably that Shue very much had developed his framework to apply in foreign policy and aid, while Eide related his primarily to obligations of states *vis-à-vis* citizens and residents within their jurisdiction. In any case, the "Eide typology" has become the basis for the subsequent efforts to discuss the nature of state obligations for the right to adequate food, and has also been picked up and elaborated for other specific rights by several other researchers (see section 10. below).

This makes interesting reading today in light of the extensive further normative work that has been done to interpret article 11, consolidated through General Comment No. 12 (GC 12) on the right to food by the Committee on ESCR in 1999 (discussed in sub-section 7.6. below). In between lies almost two decades of further preparatory works towards that milestone.

Triggered by the early debate, the right to food was brought up in the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1982, where Asbjørn had been a member since 1980. A recommendation was made to the Commission on Human Rights that the theme be made the subject of a special thematic study. The Commission approved

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[14] Alston P, Eide A (1984), "Advancing the right to food in international law". In Eide *et al.* (1984), *op. cit.*, p. 251. Here the "fulfil" part of the framework, now applied to obligations of the specific right to food, was further nuanced into the obligation to "assist and fulfil" and broken down into a range of sub-categories of obligations that would be meaningful both in a development and a human rights context.

[15] Shue H (1980), *Basic Rights, Subsistence and US Foreign Policy*. Princeton University Press, Princeton, N.J.

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the recommendation in 1983,[16] and ECOSOC subsequently authorized the Sub-Commission to entrust Asbjørn Eide with the preparation of a study on the right to food as a human right.[17] It were to be the first study ever to penetrate a specific ESCR. ECOSOC stated that the Special Rapporteur should give special attention to the normative content of the right to food and its significance in relation to the establishment of a new economic order – the dominating theme and overall focus of the general international development debate at the time – and take into account all relevant work being done by the UN system. A preliminary report was presented in 1984[18] and the final report in 1987 (see section 5. below).

4. Further elaboration of a framework within which to identify specific state obligations for the right to food

Asbjørn's work on a framework for state obligations for ESCR is today adopted as the prototype for discussions on such obligations by most international organisations and research groups in the field. It released a fruitful effort to design a broader composite framework for identifying more precisely state obligations in relation to specific components of the right to food.

4.1. The evolving concept of food and nutrition security – a conceptual basis for what one has a right to

In spite of our own and others' strong wish to come to grips with a human rights approach to food and nutrition analysis and action, the conceptualization of such an approach was initially difficult, as reflected in the early publications on the issue.[19] The question of what a right to food actually ought to mean posed problems. Many were of the view that it would have to be closely linked to the discussion of food security, but at the same time one could not equal the right to food with food security. Yet one might conceive of food security as the foundation for the enjoyment of the right to food. Or, a good definition of food security might point to what it is one should have the right to under international human rights law.

The concept of food security had come increasingly in focus for the food and nutrition policy debate since the 1970s. As a response to the "world food crisis" in the early part of that decade, FAO launched an International

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16 Resolution 1983/16.

17 Decision 1983/140 of 27 May 1983.

18 E/CN.4/Sub.2/1984/22 and Add.1-2.

19 Eide *et al.* (eds.) (1984), *Food as a human right*, *op. cit.* Alston P, Tomasevski K (eds.) (1984), *The Right to Food*. International Studies in Human Rights. Netherlands Institute of Human Rights/SIM, Martinus Nijhoff Publishers, Utrecht.

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Undertaking on World Food Security in 1974. A Committee on World Food Security was established on the recommendation of the 1974 World Food Conference. A special Food Security Assistance Scheme with the objective to help countries overcome problems of food supply instability was started,[20] and an expansion and liberalization of world trade was called for as a means of achieving world food security.

From the mid-1970s, there was a growing discussion of different aspects of food security, mostly within a global and national perspective. That included a long-short (acute-chronic) term perspective, pricing, building cereal stocks, trade, agriculture, technologies, ecology, and food security policy implications for countries and regions (see Oshaug (1985) and Maxwell and Frankenberger (1992) for specific issues in the food security discourse at the time).[21] There was, however, an increasing recognition that national food security was no guarantee for food security at the level of the household. Also, the focus was usually on cereals, disregarding that cereals form only a part of what is needed for an adequate diet, An increasing criticism to defining food security in terms of national grain reserves for stable grain supplies at national level was acknowledged by the member states of the World Food Council at the Eight Session in 1982 and at the 21st General Conference of FAO in 1983.[22] There was little discussion on what food security would mean in practice, especially what should be the meaning and content of food security at the household level which is where people live, prepare and eat their food.

Our own research group's preoccupation with the content of household food security coincided with the initial discussion of the conceptualization of the right to food. In our food security discourse we had coined the term "food norm"[23] as an important part of the definition of household food security, clearly influenced by the parallel discussions on the *right* to adequate food and the more general principles of human rights. Thus, in our early writings to bring nutrition-relevant dimensions into the food security con-

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20 FAO (1983) Progress in implementation of the plan of action to strengthen World Food Security – re-appraisal of concepts and approaches. C/83/20, Rome.

21 Oshaug A (1985), "The composite concept of food security". In Eide WB, Holmboe-Ottesen G, Oshaug A, Wandel M, Perera D, Tilakaratna S (eds.) (1985), *Introducing nutritional considerations into Rural Development Programs with focus on Agriculture*. Report No.1.A theoretical contribution. Section for International Nutrition, Institute for Nutrition Research, University of Oslo. Maxwell S, Frankenberger T (1992), *Household Food Security: Concepts, indicators, measurements*. A study commissioned by IFAD and UNICEF, Rome and New York.

22 FAO (1983) Progress in implementation of the plan of action to strengthen World Food Security – re-appraisal of concepts and approaches. C/83/20, Rome.

23 We used the term "food norm" as an aspiration, some ideal to strive towards, *i.e.*, a desired standard. It was not used in the meaning of social science, namely what is common in the social group in question.

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cept,[24] we proposed that a "food norm" had to cover at least three dimensions, all embedded in the notion of adequacy: nutritional adequacy of a household's food supply, the cultural dimension of food, and human dignity.[25] All three dimensions were universally applicable and could be operationalized in all local communities and for all households, taking account of an immense variety of dietary compositions, processing methods and culinary skills. In particular *food culture* and *human dignity*[26] were proposed as new dimensions in the food security discussion. Our full definition of the "food norm" thus became: "A basket of food, nutritionally adequate, culturally acceptable, and procured in keeping with human dignity".[27] Food safety was later added to this definition.[28]

In addition to a food norm as such, which in development terms could be compared to the desirable *outcome objective*, we also addressed the means and capacity to achieve the norm, that is mechanisms and processes for continuing improvement, and buffers against factors and forces that might threaten an achieved level of food consumption. We encapsulated it all in the notion of "endurance",[29] meaning the capacity of a given social

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24 Eide WB, Holmboe-Ottesen G, Oshaug A, Wandel M, Perera D, Tilakaratna S (1985), *Introducing nutritional considerations into Rural Development Programs with focus on Agriculture*. Report No. 1. A theoretical contribution. Section for International Nutrition, Institute for Nutrition Research, University of Oslo; Eide WB, Holmboe-Ottesen G, Oshaug A, Wandel M, Perera D, Tilakaratna S (1986), *Introducing nutritional considerations into Rural Development Programs with focus on Agriculture*. Report No. 2. Towards practice. Section for International Nutrition, Institute for Nutrition Research, University of Oslo.

25 Oshaug A (1985) *op. cit.*

26 Human dignity included self-respect, freedom of choice and action, and mutually beneficial exchanges. Participation was seen as essential. Poverty was seen as an attack on human dignity, and in extreme situations human dignity may be of less significance. Human dignity as a factor to consider was seen to increase in importance with the availability of greater options and opportunities (Oshaug 1985, *op. cit.*, Eide *et al.* 1986, *op. cit.*, Tilakaratna (1986), "Further theoretical development: Household food security". In Eide *et al.* 1986, *op. cit.*).

27 We acknowledge with deep respect and affection the invaluable inspiration and contribution to this pioneering work of the late professor Sirisena Tilakaratna, Department of Economics, Sri Jayawardenapura University, Sri Lanka, who died much too early in August 2002, just as we had plans for a resumption of our collaboration with focus on the need to build better bridges between human rights and economist thinking and approaches.

28 Eide *et al.* (1986), *op. cit.*

29 This thinking was stimulated by research within socio-ecology, and the term "endurance" was used by Garcia (Garcia RV (1981), *Drought and man. The 1972 Case History*. Vol. 1: Nature pleads not guilty. Pergamon Press) in a suggested categorization of "socio-ecosystems" using three elemental characteristics of a system: endurance, resilience and fragility. The implication for and use in food security thinking is discussed by Oshaug (1995, *op. cit.*) and in relation to progressive state involvement in governance for food security by Eide and Oshaug (Eide WB, Oshaug A (1999), "The nature and levels of state involvement in governance towards food security: A conceptual, normative approach with

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system or unit to undergo a crisis situation without compromising the food norm. The normative definition of food security was thus that a household was food secure if *it had achieved the food norm and at the same time could maintain it in times of crisis* (endurance).

We later adapted the definition or framework for household food security on two major points, applying the *adequacy* of the food supply to replace the food norm and *stability of food availability and access* to illustrate more concretely what was meant by "endurance". The first adaptation was to relieve the concerns of sociologists who would understand "norm" in a different way from that which is natural for both nutritionists and legal people – as an ideal, or that which one should strive for, rather than as the "typical" in human values and behaviour as used in sociology. The second adaptation was inspired by the 1992 Rio Conference on Environment and Development that launched the concept of *sustainability*, which we found fitted our framework better.

Little by little most of the concepts included in this early comprehensive definition almost twenty years ago found their way into subsequent definitions, writings and practice. Both adequacy and sustainability of the food supply made it to the current official definition of food security, while human dignity got lost. Frequently appearing in the poverty discourse it should be forcefully highlighted in the further refinement of the content of the right to adequate food. Also, food security has increasingly been conceived as an integral part of *livelihood security* and thus considered in relation to health, education, housing, employment etc., and to the sustainable use of resources in general and to the means for food production in particular.[30]

Finally, it should always be remembered that food security is not by itself a sufficient condition for preventing hunger and malnutrition. Thus the right to food must be accompanied by the realization of other rights to exert its full effect in preventing malnutrition and enjoying the right to nutritional wellbeing.[31] In a framework launched by UNICEF in 1990 for the analysis

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practical implications". In Ogunrinade A, Oniango R and May J (eds.), *Not by bread alone. Food security and governance in Africa.* Toda Institute for Global Peace and Policy Research. Witwatersrand University, Johannesburg).

30 Oshaug A, Eide WB, Eide A (1994), "Human rights: a normative basis for food and nutrition policies". Food Policy 19, pp. 491-516. Eide A, Eide WB (1999), "Article 25. Adequate standard of living". In: *Universal Declaration on Human Rights. A Common Standard of Achievement*, Martinus Nijhoff Pub. Hague/Boston/London; Maxwell S, Frankenberger T (1992), *Household Food Security: Concepts, indicators, measurements.* A study commissioned by IFAD and UNICEF, Rome and New York.

31 The concept of "nutritional wellbeing" was coined by the International Conference on Nutrition in 1992 and has since been frequently used to reflect that, given the many functions and meanings of food to people, "good nutrition" must have a wider expression than "good nutritional status" which is based entirely on biological and health parameters; see also footnote 2.

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of the causes of malnutrition, the three clusters of food insecurity (or inadequacy of food intake), inadequate care for the vulnerable, and inadequate prevention and control of disease depicted underlying causes of malnutrition.[32] By reformulating them into the positive as sub-goals for achieving nutrition security: food security (or adequate food intake), adequate care, and adequate prevention and control of disease, they fit as building blocks for defining what the right to adequate food as such is.

Our early efforts to give substantive content to the concept of food security for people was from the beginning inspired by the right to adequate food:

> A definition of food security as used here also provides a meaningful input into the concept of the "right to food" as a human right ... [and] give[s] more precise content to the legal norm for the right to food ... The process of realizing the human right to food thus requires, on the one hand, that a population progressively moves toward the realization of the food norm but also develops the capacity to maintain and protect the new level at each stage of the process, that is never deviating from it downwards. This has fundamental implications for the role of the State in fulfilling their obligations for ensuring food security for all people ... [33]

But could the framework in turn be used also to advance the concept of the right to food?

4.3. Intellectual breakthrough: the right to food matrix

At hand was now Asbjørn's framework for the levels of state obligations as well as a normative conceptual framework for food security. In an enlightened moment for the three of us (incidentally while walking in the deserted streets of Harare during Easter 1987) the two dimensions were coming together, leading to the idea of a *right to food matrix*. Asbjørn was at that time working on his study on the right to food for the Sub Commission on the Prevention of Discrimination and Protection of Human Rights.[34] He decided to insert the matrix idea as an educative illustration of cross-fertilization between human rights and development concerns, and as a prospective new tool that might be used systematically in national and local needs assessment, identification of specific obligations, policy gap analysis, and the formulation of strategies and means.

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[32] Jonsson U (1993), *Nutrition and the United Nations convention on the rights of the child.* Innocenti occasional papers, Child Rights Series, No. 5. UNICEF International Child Development Centre, Florence. Oshaug, Eide and Eide (1994), *op. cit.*

[33] Oshaug A (1985), *op. cit.*

[34] From 2001, the UN Sub-Commission on the Promotion and Protection of Human Rights.

The fundamental idea was that for any given situation, the starting point would be to work out the context-specific meaning of each element of food security, link it to the appropriate level of state involvement, and concretize the appropriate state obligations, with the overall aim of progressive realization of the right to food. Collecting, organizing and analyzing information according to the logic suggested in the matrix could enable policy-makers and technical personnel to better comprehend the complexity of a system of state obligations taken together, and help them become aware of how and where specific obligations, defined with regard to content and degree of state involvement, might fit into their situations.

After the initial right to food matrix appeared in Asbjørn's first study for the UN on the right to food,[35] it was further elaborated and published in international journals.[36] The matrix can easily be developed also for other rights, as shown by several other scholars (see sub-section 9.4. below).

5. The first study for the United Nations

As mentioned, a preliminary report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities was presented in 1984[37] and the final report in 1987, later published as the first in a new Human Rights Study Series of the UN Center for Human Rights in 1989.[38] It became an important reference document and laid the ground for much of the normative and other substantive work on the right to food that was to follow. We review it in some detail to illustrate the importance of Asbjørn's early work on subsequent developments.

The study opened with a review of the issues and the setting for food and hunger problems in the world. Inspired by the report *Our Common Future* which had just become available in its first draft from the World Commission on Environment and Development (the Brundtland Commission), it reiterated the Commission's concern with the interlocking effects of the economic and ecological crises and the related processes of impoverishment of the environmental resource base, both locally and more broadly in many parts of the world. It also discussed Amartya Sen's theories about entitlements launched a few years earlier, which would help overcome the simplicity of focusing on the ratio of food to population that continued to plague

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35 UN (1989) The right to adequate food as a human right. Special Report. UN Study in Human Rights, No 1. Geneva and New York.

36 Eide A, Oshaug A, Eide WB (1991), "Food security and the right to food in international law and development". Transnational Law and Contemporary Problems 1, pp. 416-467. Oshaug, Eide and Eide (1994), *op. cit.*

37 E/CN.4/Sub.2/1984/22 and Add.1-2.

38 UN (1989) Right to adequate food as a human right. Prepared by Asbjørn Eide. Human Rights Study Series No. 1, Geneva and New York.

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policy discussions about hunger, but requiring a shift in thinking of *what exists* to *who can command what*:

> The entitlement approach ... fits well with a human rights thinking, and can provide a link between the analysis of how various development processes affect people's command over food in different ways and the right to have command at all. It provides a bridge between the legal and "development" thinking, making it possible to avoid simplistic assumptions such as the one that the fulfilment of the right to food for all can be achieved simply by distribution of available food resources. *Concretization of the entitlements provides an opportunity to develop some of the indicators that will be needed to assess the impact on household food security of economic or social changes that take place at more distant levels* (our emphasis).

The study proceeded to reflect on the nature of economic, social and cultural rights, making it clear from the outset that an examination of the right to adequate food as a human right cannot be undertaken without also considering the broader international legal framework within which it has been proclaimed, *i.e.*, the International Covenant on Economic, Social and Cultural Rights. The importance of these rights and their indivisibility from civil and political rights was "a fundamental tenet of the United Nations approach to human rights", although this had not always been reflected in practice whether at national or international levels. The study saw a rationale for addressing ESCR more generally insofar as "no other studies (had) been undertaken within the framework of the human rights organs of the United Nations on any of the specific rights proclaimed in the ICESCR". The study therefore addressed such broad issues as the difference between needs and rights, the distinction between (past) systems of rights and the (modern) international human rights, individual versus programmatic ESCR, and problems with their precision and enforceability.

The key question was nevertheless how, against this background, one could go about delineating obligations that could be defined by and for states in a process of implementing an ESCR such as the right to food. Here the framework first proposed at the 1981 UN University seminar became outlined in full, in conjunction with what Asbjørn has termed "the Janus-faced role of the State", which should be obliged to

> ... respect human rights limitations and constraints in its scope of action, but ... also [be] obliged to be active in its role as protector and provider. By necessity there is some tension between the two aspects of the role of the State; it is both an ideological and a practical question whether the main emphasis should be on the constraint side or the action side.

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By thus crystallizing the very foundation of the East-West divide that was splitting the world also with regard to attitudes towards the two sets of human rights, Asbjørn takes a down-to-earth stand:

> This is a problem which should be tackled pragmatically, taking into account the different contexts and possibilities in various parts of the world. Different levels of development and variations in social organization call for different responses to achieve the results called for by the human rights system.

The framework of respect, protect and fulfil would allow this to be worked out in the given context, not promising a recipe for action but a menu of needs and opportunities for state involvement according to circumstances and as far as the political environment would accept it at any given time. This led to an examination of another notion important for understanding the practice of human rights: the distinction between obligations of *result* vs. obligations of *conduct*, with immense implications for delineating the context in which to assess, analyse and advance economic and social rights in general:

> An obligation of conduct (active or passive) points to a behaviour which the duty-holder should follow or abstain from. An obligation of result is less concerned with the choice of the line of action taken, but more concerned with the results which the duty-holder should achieve or avoid. The relationship between these two classifications of obligations is complex. The obligation to respect the freedom of the individual is an obligation of conduct, but it does not follow that an obligation of result necessarily requires that the State actively fulfils the needs of individuals, by being a provider of material goods. It may well be that the State can avoid hunger better by being passive, by *not* interfering with the freedom of the individuals and with their control over their own resources. Whether this is so depends on the concrete circumstances, the context, and cannot be answered in the abstract.

It was further argued that although this shows that certain human rights are imperfect in some respect for the individual even if legal under human rights law, this is shared by most rights under international law, "*their imperfection being a challenge to legal creativity*" (our emphasis) – and, we would add in 2002, to *interdisciplinary creativity* that came to grow out of this and other work on economic, social and cultural rights for which Asbjørn has paved a good part of the way.

Following the discussion on ESCR in general and a subsequent perusal of international law to identify provisions on, or relevant to the right to food, Asbjørn's study went into more detail on the nature of the right and especially of the obligations of states that can be derived from it, using the principles of the general framework for obligations of ESCR but now merged

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with the elements of the conceptual framework for food security into the rights-based *food security matrix* described above in sub-section 4.2. It was offered as a practical tool for exploring the content of state obligations, enabling an identification of the nature and levels of such obligations, in particular national contexts, and underlining that these should be expressed both as obligations of result and obligations of conduct with emphasis on the latter. The two categories of obligations have later been picked up especially by UNICEF and made a foundation for its rights-based approach to programming that distinguishes between *outcome* and *process* and with a strong call for developing indicators for both.[39]

From states' domestic obligations, the study proceeded to questioning whether states have also obligations to the international community and to the people of other states. The author pointed to the numerous "building blocks" available in national human rights law as well as international law more generally, for a justification of an international responsibility for the right to food. A section on "Co-ordinators of global food security: the food and other relevant agencies" raises issues about ways in which these agencies could function if they were to give priority to the realization of the right to food. The conclusion offered was that the lack of common frameworks for analysis and action within which the specific mandates and terms of operation of an agency could be interpreted and concretized to better interface with those of other agencies, increases the difficulties of co-ordination both in policy and methodological issues as well as in practical operations at field level.

The study also visited the potentially forceful international human rights monitoring and supervision system, outlining a large number of weaknesses as regards monitoring of ESCR due to a range of factors. They included the vagueness of the obligations implied, unsatisfactory guidance to states parties on how to report, the non-involvement of non-governmental organizations (in part because so few of them addressed ESCR at the time), inadequate co-operation with the specialized agencies (in spite of the fact that in drafting the Covenant a major role was envisaged for them), and limitations to the mode of work of the treaty-body in question, the Committee on ESCR. As a major component of the international monitoring system, states parties' own national monitoring and preparation of reports, which could become a continuing learning process and help raise awareness at different levels, were grossly inadequate both for practical reasons and for the potential conflict they might give rise to regarding allocation of resources.

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[39] Jonsson, U (1996), "Nutrition and the rights of the child". In: Eide WB, Kracht U and Robertson RE (guest eds.) *Food Policy*, Special Issue on Nutrition and Human Rights, 21(1): 42-55.

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It should be noted that all these points remain at the forefront of the discourse today, but also that there is reason for optimism that they are now being taken seriously and that one may expect some real advances in the near future.

The study concluded that while the right to food is well recognized in international law, the corresponding obligations are less developed but that it was nevertheless necessary to consolidate and further develop existing law "through the drafting of an appropriate instrument on the right to food ... (which) might contain declaratory and obligatory parts". Recommendations were made to states, national and international non-governmental organizations, universities and research institutions dealing with development and human rights issues, UN specialized agencies, ECOSOC, the Committee on ESCR and, finally – the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which should

> seek authorization, through the Commission on Human Rights, from the Economic and Social Council to initiate an effort to consolidate and further develop existing law through the drafting of an appropriate instrument on the right to food. Such an instrument might contain declaratory and obligatory parts, and should give due account also to methods for monitoring and implementation. In this endeavour, account should be taken of the efforts currently made within the International Law Association to prepare a model draft instrument on the right to food.

The thinking at the time about "an instrument" clearly focused on a binding one, as witnessed by the work of the International Law Association's Sub-committee to draft a Convention on the right to food which Asbjørn chaired. In retrospect, it seems clear that the reason why this never really took off was simply that the time was not right for trying to develop a new instrument, whether binding or not. Almost ten years were to pass before there was a sufficient momentum to start on such a path, and then through a slow but necessary examination of what the right to food actually "is" and how obligations to implement it can be derived from it.

There can be no doubt that this first study prepared by Asbjørn for the UN contained a wealth of ideas and suggestions that in one form or another have been carried forward (including through his second updated study in 1999), refined and consolidated as the basis for contemporary thinking on the right to food and related rights and how they should be advanced in practical terms. We shall now consider new contexts through which the matter could be moved forward.

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6. Networking and consolidation of the right to food movement

From the embryonic efforts in the late 1970s to raise interest in the right to adequate food and nutrition as a human right, a "movement" developed slowly but steadily that became both an intellectual force behind the gradual advancement of the right and its relatives in the international human rights system, and a constant reminder of the very reason for the intellectual endeavours: the unacceptable number of poor, hungry and malnourished people in all parts of the world, too constrained biologically, economically and socially to fulfil their genetic potential for physical and mental development, for learning, and for a healthy and productive life and wellbeing, while politically constrained from taking active part in society and in matters affecting their own lives and those of their offspring in the future. Scholars, NGOs and interested persons within national and international agencies and organizations, joined in a determined effort to develop the concept in more practical and user-applicable terms, and preferably to generate a situation where a human rights approach to food and nutrition in development would be seen as a new paradigm for both scientific, professional, political and practical-programmatic endeavours to fight food insecurity and hunger and malnutrition in all its forms.

Networking took place and occasional opportunities were found for individual members of the movement to meet during the 1980s. However, the need for a certain institutional context became clear at the beginning of the 1990s. Through various moves led by the early promoters in Norway together with leading human rights advocates within UNICEF in particular,[40] a meeting was organized in 1994 at the UNICEF International Child Development Centre (*Innocenti*) in Florence, inaugurating the "World Alliance for Nutrition and Human Rights" (WANAHR). Under shared co-ordination by Asbjørn Eide and Uwe Kracht[41] for the first six years, WANAHR played an active role in creating more interest in the right to food, especially in NGO circles, and in directly promoting the right to food in a number of contexts.

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[40] Above all Urban Jonsson must be mentioned, at the time Chief of Nutrition in UNICEF HQ in New York, whose early support for and participation in the right to food and nutrition movement dating back to his time at the UN University in the beginning of the 1980s, has continued on an untiring and substantive basis to date, making it hard to say what the movement had been without his active facilitation at critical points. Besides his extensive intellectual contributions, his field-based contributions as Regional Director for two different UNICEF regional offices successively (South Asia and (currently) Eastern and Southern Africa) in building and testing a model for programming based on human rights principles, have brought important experience and lessons to the movement.

[41] Kracht is another pillar of the right to food movement from its early years, with long experience from the UN and more grass-root oriented activities, and a strong intellectual resource along the various stages in the recent history of development and application of the right to food concept.

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A vigorous lobbying for a human rights focus took place prior to and at the World Food Summit in 1996 (ses section 7. below), with WANAHR as an active player. WANAHR also helped trigger and has subsequently provided intellectual support for a thematic working group on "Nutrition, Ethics and Human Rights" in the UN interagency arrangement ACC/Sub-Committee on Nutrition,[42] and in developing the substantive content for the ACC/SCN symposium on "The substance and politics of a human rights approach to food and nutrition security policies and programmes" in co-operation with the UN High Commissioner for Human Rights in Geneva in 1999, to mention some initiatives.

It proved to be difficult for a loose, non-hierarchical network – the chosen model for WANAHR – to raise funds to enable activities to be planned and undertaken on a systematic basis. To facilitate the movement to proceed beyond the uncertainties of idealism and free time provided by single persons, the International Project on the Right to Food in Development (IPRFD) was established in 2000, linked to university institutions in Norway and intended to serve as a knowledge producer and provider, while WANAHR retains its general mobilizing functions besides acting as a clearing house for information to be disseminated more broadly. The specific aims of IPRFD[43] are

> to contribute to the formation of a culture of understanding development as the realization of all human rights, to help strengthen the understanding of the linkages between human rights and food and nutrition in development, and to enhance human capacity for a rights based approach in activities related to food and nutrition security.

Start-up funding provided by the Norwegian Ministry of Foreign Affairs made it possible to strengthen the human resource base and to organise two international "encounters" in 2000 (in Oslo and Geneva) to take stock of the development to date and consider next steps for and within the various constituencies working to promote the right to food (see sub-section 7.8. below). IPRFD has been further strengthened through three research fellowship grants from the Norwegian Research Council for the period 2002-04. The Project is institutionally anchored in Norway as a collaborative undertaking

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[42] Abbreviated ACC/SCN from its inception in 1978, following the recent abolishment of the UN Administrative Committee on Coordination (ACC), the last part of the acronym – SCN – has been retained in its new name "United Nations System Standing Committee on Nutrition" from 2002.

[43] Project document on "The International Project on the Right to Food in Development (IPRFD)". It was established at the University of Oslo on 1 April 2000.

PURL: https://www.legal-tools.org/doc/5ec11e/

involving three institutions,[44] with three co-directors[45] and with Asbjørn as the formal lead person.

Twenty-one years after the UN University seminar in Norway, new NGOs, academic and other groups wanting to take up the right to food are proliferating, which is important and necessary. While one must welcome this new and rapidly growing interest in the subject, it is increasingly important to ensure that the movement maintain a high-quality intellectual basis, constantly bringing new experiences and ideas to the fore with which to test and concretize the theoretical foundations of the right to food and its corresponding obligations of states and other stakeholders. IPRFD together with WANAHR and two other leading international NGOs in the movement – the FoodFirst Information and Action Network (FIAN) in Heidelberg and the International Jacques Maritain Institute in Rome – will continue as spearheads until the efforts are eventually reflected in international agreements about how to approach and implement the right to food in particular country contexts.

7. The right to food at the World Food Summit, Rome 1996: leverage and follow-up

We have considered some of the general preparatory efforts to get the right to food on the international development agenda and give it a firmer place in international human rights circles. The World Food Summit (WFS) organised by FAO in Rome in November 1996 was a milestone in the efforts to bring attention to the right to food and nutrition as a human right in the wider development circles dealing with food, nutrition and agriculture.[46] The world leaders gathered in Rome not only formally renewed their commitment to the right to food, but also specifically interpreted it as "the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger". The WFS adopted a Plan of Action formulated in seven Commitments. Commitment 7, Objective 7.4 specifically requested a clarification of the

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[44] Norwegian Institute of Human Rights, Faculty of Law, and Institute for Nutrition Research, Faculty of Medicine at the University of Oslo, and Akershus University College, Bekkestua.

[45] Asbjørn Eide and the two authors of this paper.

[46] Already at the previous International Conference on Nutrition in 1992, organised by FAO and WHO in Rome, Norway presented a conference paper on the topic (Oshaug A, Eide WB, Eide A (1992), *Food, Nutrition and Human Rights*. Conference Paper. Commissioned paper by the Norwegian Ministry of Foreign Affairs to the ICN, Nordic School of Nutrition/Norwegian Institute of Human Rights, University of Oslo). It was, however, cleary premature to have human rights properly reflected in the final documents where the right to food was barely mentioned, despite the efforts by Norway.

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content of the right to food and the fundamental right of everyone to be free from hunger and to give particular attention to implementation and progressive and full realization of this right as a means to achieving food security for all. This outcome was the result of intensive lobbying and negotiations preceding and during the Summit itself, with Asbjørn, the present writers and many others in the growing right to food movement playing an active role.

7.1. The lobby

Numerous contributions, in various forms and emanating from different institutions and constituencies, combine in the efforts to shape the final documents coming out of summits or other global conferences and then later in their follow-up. An important event in the lobbying preceding the 1996 WFS Summit was a special seminar initiated by several institutions and personalities in Latin America, organized by the International Jacques Maritain Institute in Rome, and hosted by the Venezuelan government in Caracas in July 1996. The Latin American group in the FAO Committee on Food Security, the home for the preparations for the WFS, had decided to pursue the right to food issue and especially call for a new legal instrument on the right to food.[47] Michael Windfuhr presented ideas for a possible code of conduct on the right to food,[48] while Asbjørn went further and proposed an "additional protocol" on the right to food to the Covenant on ESCR.[49] Basically in favour of a fully binding instrument, he and other human rights experts had realized that the time was not yet mature for this, but raised the question whether there was not still a great need for more precision of the elements of the right to food so as to make it more justiciable. He further reasoned that an additional protocol would build on what already exists and carry the prestige and authority of being part of the existing Bill of Human Rights, but would make opposition less likely (than in the case of a proposed new binding instrument) and in any case meaningless from those who had not ratified

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47 As often is the case, an occasional exchange between people with common interests led to this important incident, in that Pierre Spitz, the then Director of IFAD's Office of Evaluation and Studies and a veteran in the right to food debate, triggered the interest – on the basis of an article by him in Newsweek in 1995 – of the chair of the CFS and made him take the initiative for a joint Latin American approach to the issue at the forthcoming Summit, through a preparatory discussion with experts and representatives of governments and NGOs in the Caracas conference. (Spitz, personal communication).

48 Windfuhr M (1996), "Guidelines for a Draft International Code of Conduct on the Right to Food". In: *Memorias del Seminario El Derecho a la Alimentación como Derecho Humano Fundamental*. Caracas, Fundación Polar, pp. 105-119

49 Eide A (1996), "Right to Food: Work of the United Nations Human Rights Bodies". In: *Memorias del Seminario El Derecho a la Alimentación como Derecho Humano Fundamental*. Caracas, Fundación Polar, pp. 139-152.

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the ICESCR. The consensus of the Caracas conference became nevertheless to go for the softer alternative of making a code of conduct the focus of the WFS recommendations. The fact that not even this type of instrument "made it" at the WFS showed that the inherent opposition was stronger than foreseen by many.

Apart from the Latin-American member states lobbying for the right to food prior to and at the Summit, the number of supporters was hardly overwhelming, yet those who involved themselves had done their homework and were firm that there should be a tangible outcome that would help advance the promotion of the right to food and "legitimise" further work by the movement. It should come as no surprise that the Norwegian government was in the frontline of the efforts and probably did more than any other state to ensure the outcome. The opposition was clear, coming above all from the United States, but without sufficient strength to prevent that Objective 7.4 got a formulation that has been highly significant to what has happened since the Summit.[50]

Another less well-known part of what may be referred to as the preparatory work of the important Objective 7.4 of the WFS Plan of Action, is a resolution adopted by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities in August 1996, a few months prior to the Summit in Rome in November that same year. It was formulated as an appeal to the world's leaders, through the Commission on Human Rights when they were to assemble for the Summit, not only to reaffirm the fundamental right of every man, woman and child to be free from hunger as firmly established in international human rights law, but also "*to propose ways in which the right to food can be further clarified and implemented*". As we shall see below, the wording is clearly recognized in Objective 7.4, as the next best choice of focus for the right to food promoters when a recommendation for an instrument on the right to food did not receive sufficient support by member states.

7.2. The negotiations

The negotiations for the World Food Summit took place in the FAO Committee on Food Security (CFS). The planning process towards the WFS was initially in the hands of a secretariat set up by FAO for the purpose. However, the CFS member states found the planning insufficient from its inception and the early drafts of the final Summit documents totally inadequate. For example, a provisional document made available in December 1995 (WFS 96/3) had no clear quantifiable objectives, was inconsistent, non-

[50] Oshaug A, Eide WB (1998), "The World Food Summit: A milestone in developing a human rights approach to food and nutrition", Hunger Notes 23 (3/4), pp. 16-18.

PURL: https://www.legal-tools.org/doc/5e1f67/

committing, and bureaucratic in nature. Member states therefore decided to establish their own intersessional working group (ISWG) that met three times between May and August 1996. This changed the process drastically from one basically being steered and controlled by FAO, to one steered and controlled by the member states. It also meant a better opportunity for the right to food: from there being no reference to food as a human right in the initial draft policy statement and plan of action, the issue of human rights now appeared in all the unofficial drafts from when the ISWG took over. However, as there were no real negotiations in the ISWG most of the "hot" topics (including the right to food) were put in brackets.

The main formal negotiations took place in the CFS in September 1996 and again shortly before the Summit in November. One of the main priorities of the Norwegian delegation to the CFS was to have the right to food firmly embedded in the final documents.[51] The obvious thing was to join the Latin American countries in pushing for a code of conduct on the right to adequate food.[52] When the negotiations started, it became clear that very few of the delegates even knew that there was such a thing as a human right to food. Thus, the first task was essentially educational, handing out basic texts of the Universal Declaration on Human Rights and the ICESCR, and beginning a dialogue on what a code of conduct might imply.

The initial reaction from almost all the members of the CFS (except the Latin American group) was a complete rejection of the notion of a code of conduct. Such a code was by some countries considered close to a law that could be used to punish countries with malnutrition, rather than a guide for policy. It became clear that the possibility to get a consensus on a code of conduct was less than faint. The Norwegian delegation therefore changed strategy to focus on the *need to clarify the content of the right to food*. And it did indeed prove to be easier to convince delegates of the need for such clarification, because the text of article 11 of the ICESCR provides very little in terms of substantive content. Those how wanted a code were not happy with this change, including the Latin American group, while the USA objected all along to any reference to the right to food in the final document.

The agreed paragraph, which later became Objective 7.4, was the very last issue to be solved in the WFS negotiations. Canada was initially against,

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51 One of the authors (AO) was a member of the Norwegian delegation with the mandate to negotiate the text on the right to food.

52 Norway was sympathetic to a possible code of conduct, as for example expressed by WANAHR in a note handed out to participants at the CFS meeting in November 1996, named "World Food Summit and the right to food". This note argued for the usefulness of a code of conduct, suggested changes in paragraphs in the draft Declaration and Plan of Action that was on the agenda of the CFS, and gave considerable information on the outcome of the Caracas meeting. It was signed by Asbjørn Eide and Uwe Kracht (dated September 1996).

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but in the end turned to be a strong supporter, actively involved in the final drafting of the text on the right to food.

All in all, given the initial resistance and many negative perceptions by WFS delegates of what a human right to food would mean – combined with the very strong opposition from the USA – the result must be considered a victory for the work on the human right to food. It created a strong momentum for a continued process.

7.3. The mandate to the High Commissioner for Human Rights

The World Food Summit Plan of Action was adopted by consensus on the 17 November 1996. In six of the seven Commitments, the Plan had outlined ways to achieve universal food security. The seventh Commitment had outline procedural questions in relation to their follow-up. Thus, in Objective 7.4(e), governments, in partnership with all actors of civil society, invited

> [t]he United Nations High Commissioner for Human Rights, in consultation with relevant treaty bodies, and in collaboration with relevant specialized agencies and programs of the United Nations system and appropriate intergovernmental mechanisms, to define better the rights related to food in article 11 of the [International] Covenant [on Economic, Social and Cultural Rights] and to propose ways to implement and realize these rights as a means of achieving the commitments and objectives of the World Food Summit, taking into account the possibility of formulating voluntary guidelines for food security for all.

This mandate was significant for the further development of a definition of the meaning of the right to adequate food. It was particularly important that the overall responsibility for the co-ordination of the work implied in Objective 7.4 was placed with the High Commissioner for Human Rights in Geneva, to ensure the full commitment to the cause by the human rights bodies of the UN. This has no doubt increased the status of and attention to the right to food as a key human right, beyond what might otherwise have resulted in mere lipservice in many development circles.

Insofar as a concerted definition of the right to food would also require broad insight into development issues, this arrangement soon led to positive spin-offs in terms of cross-disciplinary and cross-organizational collaboration, between the Office of the High Commissioner and FAO and other UN development bodies, NGOs and academia, besides a few interested governments. More specifically, the High Commissioner decided to hold an expert consultation on the right to food in early December 1997, timed so as to coincide with the last session of the Committee on ESCR that year and allow joint discussions between the Committee and invited experts in an initial response to the call for clarification by the WFS. Two further consultations

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were held in 1998 and 2001, both devoted to implementation issues. FAO offered to host the second consultation in Rome in November 1998, with focus on the role of international organizations. The third and hitherto latest consultation was hosted by the German Government in Bonn in March 2001, geared to issues of national implementation. Asbjørn and the network were closely involved with the OHCHR in drawing up ideas for the consultations. He served as rapporteur for the first two consultations, and as chairman-rapporteur for the third (see further on the third consultation in section 8. below). The three consultations were very valuable each in their own right and underscored once again the importance of the clarification task being placed under the auspices of the High Commissioner for Human Rights with direct links to the various human rights bodies.[53]

The High Commissioner, in her report to the World Food Summit: *five years later* in 2002[54], pointed out that many events had had an impact on the work of her office in pursuing the Objective 7.4, including three expert consultations, the two studies conducted by the Special Rapporteur of the Sub-Commission,[55] the reports of the Special Rapporteur appointed by the Commission in 2000 (Jean Ziegler),[56] the work on a draft optional protocol to the ICESCR, policy developments at national level, work of the civil society,[57] the reaffirming of the WFS goals and objectives at the Millennium Summit (encapsulated in the eight Millennium Development Goals),[58] and the mainstreaming of human rights in the UN system.[59] All have played a role in the achievement of the mandate, beyond General Comment 12. The High Commissioner reviewed in some detail the wide collaboration with other UN organizations before concluding:

> This report shows that the mandate entrusted to the High Commissioner under Objective 7.4 of the World Food Summit Plan of Action has been largely accomplished. The international legal framework to

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53 A fourth consultation may be held in 2003, as recommended by the Commission on Human Rights in 2001.

54 The right to food: Achievements and challenges. Report by Mary Robinson, United Nations High Commissioner for Human Rights. World Food Summit: *five years later*. Rome, Italy, 8-19 June 2002.

55 "The right to adequate food and to be free from hunger", updated study on the right to food submitted by Mr. Asbjørn Eide pursuant to Sub-Commission decision 1998/106 (E/CN.4/Sub.2/1999/12).

56 "Report by the Special Rapporteur on the right to food" submitted pursuant to Commission on Human Rights resolution 2000/1 (E/CN.4/2001/53). "Report by the Special Rapporteur on the right to food" submitted pursuant to Commission on Human Rights resolution 2001/25 (E/CN.4/2002/58).

57 In particular the NGO Code of Conduct.

58 General Assembly resolution 55/2, 8 September 2000.

59 "Renewing the United Nations: A programme for reform." Report of the Secretary General, 14 July 1997 (A/51/950).

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> respect, protect and fulfil the right to food is more fully in place. Progress in understanding the right to food and in clarifying its content has been made possible by the efforts of the international human rights system, Governments, organizations of the United Nations system and NGOs. The Committee on Economic, Social and Cultural Rights has made a significant contribution through General Comment 12.

It must be assumed that the value of all this will eventually also be understood by those representatives in Rome who continue to see human rights as having nothing to do in Rome – to them human rights belong in Geneva, end of story.[60] This is an additional reason why the negotiations around the right to food were and still may be difficult. But this will hopefully be of limited duration as one enters the next phase: the development of voluntary guidelines for the implementation of the right to food as decided by the WFS:*fyl* in June 2002.

7.4. The NGO Draft Code of Conduct on the Right to Adequate Food as a Human Right

A decision on developing a Code of Conduct on the Right to Adequate Food was, as we have seen, a major objective of a group of Latin American countries and NGOs before the World Food Summit in 1996, supported by a few other countries, including Norway (see sub-section 7.2. above). When it became clear that it was impossible to get the Summit to endorse the idea of a Code of Conduct, the fallback option was to "take into account the possibility of formulating voluntary guidelines for food security for all".[61] Negotiations for a code of conduct on the right to food remained, however, a key demand of the parallel NGO Forum. In response to that demand a group of non-governmental organizations and academic scholars, including in particular the Food First Information and Action Network (FIAN), WANAHR and the International Jacques Maritain Institute, took upon themselves the task of drafting a code of conduct on the human right to adequate food. Representatives of those institutions met in Maastricht in January 1997[62] to begin the drafting of a Code. This was followed up with a larger gathering of NGOs in Geneva in May 1997 and finalized in September that year. A Draft Code of Conduct was subsequently circulated to and eventually endorsed by more than 800 NGOs.

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60 Incidentally representatives of the EU Commission have been particularly vocal in this.

61 See Objective 7.4 in World Plan of Action of the World Food Summit.

62 The meeting was organised to coincide with the meeting of a group legal human rights experts to formulate what became the "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", so as to be able to draw also on some of those experts, several of whom had been involved in the development of the right to food at earlier stages.

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The existence of this document undoubtedly had a significant influence on the follow-up process, as the objective of the Code was to clarify the content of the right to food and the responsibilities of all actors involved in ensuring its full realization. The Draft Code consisted of a Preamble and 15 substantive articles. It defined the right to adequate food as meaning that

> every man, woman and child alone and in community with others must have physical and economic access to adequate food or by using a resource base appropriate for its procurement in ways consistent with human dignity.

The realization of the right to adequate food requires the availability of food, free from adverse substances and culturally acceptable, in a quantity and quality which satisfy the nutritional and dietary needs of individuals, and the accessibility of such food in ways that do not interfere with the enjoyment of other human rights and that are sustainable. The realization of the right to adequate food is inseparable from social justice, requiring the adoption of appropriate policies oriented to the eradication of poverty. While the full realization of the right to adequate food can only be achieved progressively, states parties to the Covenant on Economic, Social and Cultural Rights are required to take immediate steps to fulfill their obligations under the Covenant and to move as expeditiously as possible towards the full realization of the right to adequate food.

In dealing with state obligations at the national level, the Draft Code defined, following the previous work of Asbjørn, the three levels of obligations to respect, to protect and to fulfil, as follows:

> The obligation to *respect* implies that the State will respect existing physical and economic access to adequate food or to a resource base appropriate to its acquisition and will not take measures that would destroy that access. The obligation to *protect* includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their access to adequate food. This involves the protection of the freedom to feed oneself and the use of resources to regulate other actors, through, inter alia the adoption of legislation and administrative measure that protect the access to adequate food. The obligation to *fulfil*, on the other hand, requires more positive action by the State to identify and provide adequate food for vulnerable populations within their jurisdiction, including victims of natural or other disasters.

As regards the international level, the Draft Code of Conduct (Article 7) made reference to Article 56 of the UN Charter, the Rome Declaration of the World Food Summit and the specific provisions contained in Articles 2(1), 11, 15, 22 and 23 of the ICESCR. It pointed out that states must recognize

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the essential role of international co-operation and should consider the development of further international legal instruments regarding the right to adequate food. Their international policies and programs should respect the full realization of people's right to adequate food. In cases of emergency, states must provide disaster relief and humanitarian assistance to any country that may need it. Food aid should be organized in such a way as to facilitate the return to food self-reliance. International organization must also respect the right to adequate food and never pressure states or international organizations to violate that right. In particular, nothing in international treaties establishing international organizations or regarding international finance and trade should be construed as overriding the obligations of international organizations under the right to adequate food.

According to the Draft Code, States are also required to refrain from assisting or tolerating action by individuals, corporations or other non-state actors that would deprive persons of their right to adequate food. States are under a duty to prohibit such acts and prosecute those responsible. The Code, however, applies to all actors in civil society (Part IV), whether they act as individuals, families, local communities or NGOs, the active participation of all being essential for the full realization of the right to adequate food. Every individual, in particular, is under a responsibility to strive for the promotion and observance of the right.

The Code also dealt with means and methods of implementation of the right to adequate food. The implementation of the right requires steps to be taken by all actors including states and by all appropriate means, including in particular the adoption of legislative measures supported by the necessary administrative capacity. These measures should address all aspects of the food system, including the production, processing, distribution and consumption of food, and measures in the fields of health, care and education, with emphasis on the strengthening of community organizations and the empowerment of civil society. The document gives many examples of actions that may be necessary to give proper effect to the right to adequate food, including, for example, the establishment and maintenance of land registries, respect for the usage of ancestral lands, access to land for vulnerable smallholders and landless peasants under agrarian reforms, the control of soil, water pollution, access to markets for local food producers and the development of local and regional agro-industries. States should avoid the dumping of food products that can harm local production and should abstain from trade embargoes endangering access to food in other countries or preventing access to humanitarian food aid in internal conflicts.

States should also develop and maintain mechanisms to monitor progress towards the realization of the right to adequate food to identify problems and difficulties and facilitate the adoption of corrective legislative and

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administrative measures and to establish effective and accessible recourse procedures.

Finally, the document dealt with international reporting, monitoring and support mechanisms. The Committee on Economic, Social and Cultural Rights and other treaty bodies are called upon to strengthen their capacities for monitoring. NGOs are to be fully involved in the monitoring process.

An important next development furthering the ideas in the Draft Code of Conduct was the second updated study on the right to food prepared by Asbjørn. It provided a link between work on the Code of Conduct and yet another advancement, namely what came to be General Comment No. 12 on the right to food (as discussed in sub-section 7.6. below).

7.5. The second, updated United Nations study on the right to food

Following the Summit and in response to Objective 7.4, the Sub-Commission on the Promotion and Protection of Human Rights took steps to contribute to the follow-up of that call, by requesting Asbjørn, at its 49th session in 1997, to review and update his first study on the right to food. He presented a progress report the following year, which focused on major trends in the food and nutrition situation and highlighted major events in the promotion of the right to food and nutrition. It provided information not repeated in the final report submitted the following year (in 1999). The two documents were therefore to be examined together.

An especially significant event since the first report was the adoption of the International Convention on the Rights of the Child and its rapid entry into force with almost universal ratification. It had considerably strengthened the place of the right to food and nutrition in international human rights law. The report describes the scope and consequences of malnutrition and hunger and underlines the gravity of the situation by building on the latest knowledge on the long-range consequences of early malnutrition, including in foetal life, as being much more serious than previously known, with possible inter-generational effects. It also pointed out that the human rights issues were now taken seriously, as witnessed by the commitments made at the World Food Summit in 1996 and the special attention given to it in calling for a clarification and the preparation of a co-ordinated strategy for its implementation. It discussed steps to be taken by states in order to ensure freedom from hunger and to implement the right to food, and gave two examples of country situations where efforts to develop a human rights strategy to food had been started (South Africa and Brazil). It further examined the treatment of the right to food and nutrition in relevant treaty bodies as well as by the Commission on Human Rights and its special rapporteurs on country situations. As in the previous report, the evolving roles of the specialized

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agencies and other bodies in regard to the right were examined, but the study also showed that there had now been a great increase in support for a human rights approach to food and nutrition issues by these bodies.

Asbjørn's concerns about human ESCR in the context of the processes of globalization, especially economic globalization, was reflected in his considerations of how these processes have created new challenges and dangers as well as new opportunities, but that corrective action in any case has to be taken in order to prevent avoidable negative consequences.

The conclusions and the recommendations are addressed to several actors: first to the states with regard to their implementation of the right to food and nutrition within their jurisdiction; others are addressed to states with regard to their international obligations towards other states and to the population living in other states. Still others are addressed to the High Commissioner for Human Rights, to the treaty bodies, and to UN bodies and the specialized agencies.

The final updated study was submitted to the Sub-Commission at its annual session in 1999. Its content must be seen as a substantive component in the totality of intellectual goods developed and injected into the process of giving content to the right to food, not surprisingly with considerable overlapping and mutual reinforcement among them. Each has had their special role and influence depending on the timing and institutional context in which they have been launched and for which primary user group. There is thus a clear line from the Draft Code of Conduct in 1997 to the updated study and the document issued by the Committee on ESCR in 1999 as an authoritative international interpretation of the meaning of the right to food, to which we now turn.

7.6. General Comment No. 12 of the United Nations Committee on Economic, Social and Cultural Rights[63]

General Comment No. 12 is the most significant international response to the call for clarification of the right to food. The formulation of General Comments by the Committee on Economic, Social and Cultural Rights on the various sectoral dimensions of its mandate, is an important tool in its own work and should be equally helpful for states in their reporting on the

[63] This section draws in parts on the paper "A tool for helping states in interpreting the right to adequate food: General Comment 12 on the right to adequate food", prepared by Gerald Moore for the international seminar "The Right to Adequate Food – Focusing on National Implementation", organised in Oslo 10-11 April 2002 by the Ministry of Agriculture and Ministry of Foreign Affairs, with support from IPRFD.

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realization of ESCR in their countries[64] as well as for other stakeholders. The Committee has to date formulated fifteen such General Comments.[65]

In preparing for General Comment 12 on the Right to Adequate Food, the Committee drew on relevant reports and documentation of the Commission on Human Rights and the Sub-commission on the Prevention of Discrimination and Protection of Minorities. This included the previous reports by Asbjørn, a day of general discussion on the issue in 1997, the two consultations on the right to adequate food organized by the High Commissioner for Human Rights in 1997 and 1998, as well as the symposium organised by the ACC Sub-Committee on Nutrition and the HCHR in 1999.[66]

The Committee took special note of the Draft International Code of Conduct on the Human Right to Adequate Food (CoC) that had been prepared by three NGOs and endorsed by many others in 1997. Indeed the CoC had a significant impact on the form and content of the General Comment. This includes its definition of the right as such,[67] its emphasis on poverty and the consequent lack of access to available food by large segments of the world's population as a root cause of hunger, and the analysis of the three levels of state obligations which was at the very core of the CoC. General

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[64] The Committee itself has explained the purpose of General Comments in its report to ECOSOC in 1989 in the following terms:

> The Committee endeavours, through its general comments, to make the experience gained so far through the examination of these reports available for the benefit of all States parties in order to assist and promote their further implementation of the Covenant; to draw the attention of the States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures and to stimulate the activities of the States parties, the international organizations and the specialized agencies concerned in achieving progressively and effectively the full realization of the rights recognized in the Covenant. Whenever necessary, the Committee may, in the light of the experience of States parties and of the conclusions which it has drawn there from, revise and update its general comments.

[65] Other General Comments cover cross-cutting and procedural issues, and substantive sectoral issues such as the right to adequate housing, the right to education and the right to the highest attainable standard of health, and the right to drinking water, the latter being the latest to date (GC15).

[66] "The right to food: Achievements and challenges." Report by Mary Robinson, United Nations High Commissioner for Human Rights. World Food Summit: *five years later*. Rome, Italy, 8-19 June 2002.

[67] "The right to adequate food is realized when every man, woman, and child alone or in community with others has physical and economic access at all times to adequate food or means for its procurement. The right to adequate food implies availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances and acceptable within a given culture, and accessibility of such food in ways that are sustainable and do not interfere with the enjoyment of other human rights." This definition strongly relies on the definition of food security in the documents of the World Food Summit 1996. There runs a red thread from the early definitions going back to the 1980s (see Oshaug 1985) to the definition by WFS and its application in General Comment No. 12.

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Comment No. 12, however, goes into further detail in proposing two sub-categories of the obligation to fulfil, namely the obligation to *facilitate* and the obligation to *provide.* The former requires the state to engage pro-actively in activities intended to strengthen people's access to and utilisation of resources and means to ensure their livelihood, including food security. The latter requires the state to actually provide food in situations where the individuals are, for reasons beyond their control, unable to provide for themselves, as for example in situations of natural disasters, or for particularly vulnerable groups such as the elderly, the poor and the infirm. General Comment No. 12 follows the Code in identifying the immediate core obligation of states as ensuring that, as a minimum, people are free from hunger. Other aspects of the right to adequate food are to be realised progressively.

General Comment No. 12 goes into more detail in its treatment of violations of the right to adequate food. Violations of the Covenant occur when a state party fails to ensure the satisfaction of, at the very least, the minimum essential level of food required to be free from hunger through its voluntary actions or lack thereof. Should a state argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the state must demonstrate that every effort has been made to use all the resources at its disposal to meet the minimum levels. Violations also occur where a state takes positive action to deny or prevent access to adequate food, or fails to regulate properly the actions of other entities where such failure has the effect of denying access to adequate food. Examples are the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food, or the prevention of access to humanitarian food aid in internal conflicts or other emergency situations.

Both the CoC and General Comment No. 12 recognise the responsibilities of civil society and the private sector as well as states in the full realisation of the right to food. But the approaches differ. While the Code explicitly addresses itself to all actors of civil society as well as states, the General Comment recognises that only states are parties to the Covenant and thus ultimately accountable for compliance with it. While all members of society have responsibilities in the realisation of the right to food, the obligation of the state in this regard is to provide an environment that facilitates implementation of these responsibilities. In this context the General Comment refers to the need for the private business sector to pursue its activities within the framework of a code of conduct conducive to respect for the right to adequate food, agreed upon jointly with the government and civil society.

General Comment No. 12 also differs somewhat from the Code in its approach to implementation of the right to food at the national level. While the Code lists specific measures that need to be taken, such as the establishment of land registries and development of local and regional agro-

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industries, the General Comment recognises that states have a margin of discretion in choosing their own approaches to achieving the right to adequate food and that the most appropriate ways will vary from one state to another. Rather than trying to impose model substantive solutions, the Comment prefers to stress the *process* that states are encouraged to follow. It stresses the need for each state to adopt a national strategy to ensure food and nutritional security for all based on human rights principles that define the objectives and the formulation of policies and corresponding benchmarks. The formulation and implementation of national strategies require full compliance with the principles of accountability, transparency, people's participation, decentralisation, legislative capacity and the independence of the judiciary. Of particular interest is the stress the Comment places on the need to set verifiable benchmarks for subsequent national and international monitoring, and the recommendation that states should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the right to food. Framework laws should include provisions on the targets or goals to be achieved, the means by which these targets should be achieved, the collaboration to be undertaken with civil society and the private sector, institutional responsibility for the process, national mechanisms for monitoring and possible recourse procedures.

The Comment follows the Draft Code in stressing the need for states to develop mechanisms to monitor progress in achieving the realisation of the right to adequate food and provide effective remedies and accountability. The Comment goes further in encouraging the incorporation into national law of international instruments recognising the right to food. Courts would then be empowered to adjudicate violations of the core content of the right to food by direct reference to obligations under the Covenant. At the international level, the Comment follows the Code in stressing that states should refrain at all times from food embargoes or similar measures that endanger conditions for food production and access to food in other countries, and should never use food as an instrument of political and economic pressure.

The Comment is the most authoritative exposition of the content of the right to adequate food to date, emanating from the very treaty body responsible for the Covenant on Economic, Social and Cultural Rights. As such it can serve as a point of reference for states parties to the Covenant in seeking ways to implement the right to adequate food in their own countries. It can also help set benchmarks against which states' performance will be measured when their reports on implementation of the Covenant are considered by the Committee, particularly insofar as violations of the right are concerned. Finally, it can serve as an authoritative guide for international agencies in deciding on the measures that they can take to assist states in implementing the right to adequate food.

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Of particular significance and usefulness are the provisions of the General Comment regarding the steps to be taken by national governments in implementing the right to adequate food at the national level. These provisions deal more with the *process* of national implementation than the actual *substance* of the policies to be adopted. They deal with the adoption of national strategies and especially with the process by which these strategies should be formulated, a process that should involve all elements of public and civil society and provide a valuable vehicle for the realisation of the right to adequate food in practice in a particular country.

7.7. The IPRFD International Encounters 2000 in Oslo and Geneva

Following the important year of 1999, the International Project on the Right to Food in Development (IPRFD, see section 6. above) organized two International Encounters on the right to food in 2000: the first in Oslo in June in co-operation with FIAN (FoodFirst Information and Action Network), and the second in Geneva in August in co-operation with the Office of the High Commissioner for Human Rights and the Working Group on Nutrition, Ethics and Human Rights of the UN ACC/Sub-Committee for Nutrition. The purpose was to take stock of the process since the WFS with regard to Objective 7.4 and to draw up lines for future action.

The first Encounter gathered more than 40 professionals from over 15 countries in Africa, Asia, the Americas and Europe, working in the fields of food, nutrition, health and other development-related areas, humanitarian action and international law in universities and research institutions, non-governmental and civil society organizations, and some working in government services and multilateral agencies. The Encounter took stock of developments with ESCR in general, assessed progress in the area of the right to food since the World Food Summit, devoted a considerable part of its time to the question of operationalizing the right to food and nutrition from both a legal and development perspective and, in this context, considered research and capacity-building priorities and discussed the next steps to be taken.

While no formal recommendations on priorities for future activities were made, certain areas emerged from the discussions as having particular urgency: work on right-to-food related indicators, framework legislation, the compilation of case studies, a review of available teaching/training materials, and the preparation of a manual on the practical application of General Comment No. 12 in the operationalization of the right to food and nutrition. The Oslo Encounter also laid the groundwork for and agreed on the basic elements of an agenda for the second Encounter to be held in Geneva 21-22 August 2000, with emphasis on the international agencies. Similarly, it developed, for the High Commissioner's consideration, the basic issues and

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agenda items for the third consultation of the High Commissioner for Human Rights to be held with government experts in 2001.[68] Participants also reflected on how the Special Rapporteur on the right to food to be appointed by the UN Commission on Human Rights might most effectively execute the mandate assigned to him or her. There was consensus that the Rapporteur should act proactively, responding to violations of the right to food by governments, seeking to actively improve co-operation with national governments and inter-governmental organisations to facilitate the further operationalization of the right to food, and identifying new and emerging issues affecting the right to food, often as identified by NGOs reporting on actual situations of food insecurity.

The Second Encounter in Geneva was of an informal professional nature and aimed at bringing to the fore some of the critical issues involved in ensuring an effective operationalization of the right to adequate food as a human right by the UN system. Effective operationalization requires an understanding of the respective roles of the two major groups of actors – the development-oriented agencies and the human rights organs – and especially an understanding of what is needed for the two groups to co-operate effectively across disciplinary and institutional borders in their joint interaction with member states. The Second Encounter was organised with a view to contributing to such understanding.

Specifically, the objectives were to facilitate an open professional exchange of concrete relevant experiences, to strengthen dialogue and understanding between international development and humanitarian agencies and human rights institutions, to examine the existing pattern and future opportunities for co-operation between expert human rights bodies and international development and humanitarian agencies, to identify specific areas in which relevant UN agencies can offer their co-operation to governments in the field of the right to food and nutrition and related rights also as input to the HCHR's Third Consultation on the right to food, and to identify priorities for advancing the capacity of international agencies in operationalizing the right to food and nutrition and related rights.

The about 50 participants came from four groups: professionals in international organisations working with economic and social development, emergencies, and/or with human rights relevant to the realisation of the right to food and nutrition, members of the UN Sub-Commission on the Protection and Promotion of Human Rights especially interested in ESCR, and of the UN Committee on ESCR, NGOs, and independent resource persons.

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[68] This eventually took place in Bonn in March 2001.

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8. Towards implementation: triggering national dialogues

The international normative work to give content to the right to food has been indispensable to efforts to develop rights based approaches to food and nutrition security in practice. The issues at stake were discussed and consolidated by the Third Consultation of the HCHR, which concluded that international attempts to promote and protect the right to food can only go so far and that the real challenges lie at the national level. As the appointed Chairman-Rapporteur for the Third Consultation, Asbjørn introduced the issues by stating that the main task was to advance the understanding of ways in which governments, in co-operation with civil society, could implement the right to food drawing on General Comment No. 12 which called upon states to elaborate a strategy and then to take concrete, meaningful steps towards the realization for everyone within their territory of freedom from hunger and the right to adequate food. Such a strategy required detailed and exact knowledge about the situation of the different groups in society, in order to know precisely who among them were food insecure and vulnerable to lack of adequate food and therefore required special attention.

He reminded the participants that the strategy preferably should make use of national framework legislation clarifying the contents of the right, the benchmarks for its realization, the institutional responsibility for advancing the right to food and the mechanisms for monitoring compliance with the benchmarks set up. How this should be done should be a primary concern during the consultation. He noted that while it was important to explore the content and nature of international obligations related to the right to food, this issue could hopefully be further explored in a subsequent consultation.[69]

The consultation focused on strategies for implementation and was in this greatly facilitated by several country presentations on ongoing and planned initiatives. It was proposed that the right to food should be inserted into the growing framework of poverty reduction strategies, which to succeed would need to apply a human rights perspective and to identify the reasons why some people were poorer than others, since it was not only a question of low income but also of "wrong" processes of development.

Among the recommendations by the consultation were new and stronger measures at the national level to increase the accountability of states through a multi-pronged strategy for national implementation, as set out in General Comment No. 12. The strategy should make an inventory or checklist of issue areas, which needed national regulation through legislation and other measures. The most appropriate ways and means would vary significantly from one state party to another, though some features would be common to many, such as guaranteeing access to productive resources for the food-

[69] Report on the Third Expert Consultation on the Right to Food, E/CN.4/2001/148.

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insecure and the vulnerable, including land tenure and access to water. The elaboration of the strategy should start with a careful auditing of existing national legislation, policy and administrative measures and available recourse procedures, followed by the adoption of an administrative agenda for change and amendment. It should include the development of indicators and benchmarks to facilitate and measure the implementation of the right to adequate food.

It follows that a primary task ahead is to trigger and, as may be needed, facilitate national dialogues on these issues in all countries, rich and poor alike. In a first effort to obtain insight into what such dialogues might imply and achieve in practice, IPRFD took the initiative together with colleagues in a few interested countries to catalyze a series of altogether five national seminars in 2002-03, in South Africa, Norway, Uganda, Mali and Nepal. In South Africa in January 2002, seminar[70] participants had access to a draft act on food security and the opportunity to consider it with a view to what it might look like with an explicit human rights perspective. A similar seminar was held at provincial level in May 2002. National seminar objectives and agendas are currently being formulated and implemented in Uganda, Mali and Nepal.

The special case of Norway offers an illustration of a situation where a white paper on agricultural policy has put food security and the right to food as the basis for the country's agricultural policy, with General Comment No. 12 as a non-printed annex. The white paper set in motion an unusual internal process in the Ministry of Agriculture insofar as the respective departments took on to apply the right to food matrix to the specific technical and policy concerns within their domains, as a tool for stimulating new and more rights oriented thinking and strategy formulation on concrete issues within the overall policy. The new policy has a strong focus on consumers' needs. It may provide inspiration to other countries both as regards principles and process.

9. The right to food as an entry point to understanding and operationalizing economic, social and cultural rights

Two dimensions of Asbjørn's approach to economic, social and cultural rights are particularly significant: first, his insistence that international human rights law is "law-in-the making";[71] and second, his distinction between

[70] The seminar was organized jointly by the South Africa Human Rights Commission, the University of Pretoria and IPRFD, with funding from NORAD.

[71] Eide A (2001), *Making Human Rights Universal: Achievements and Prospects. Human Rights in Development.* Yearbook 1999/2000. The Millennium Edition. Stokke H and Tostensen A (eds.), *Nordic Human Rights Publications*. Kluwer Law International, The Hague.

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universalisation and *globalization* in the language and advancement of human rights in general.[72] Both points have proven very useful in the normative work with the right to food, as underlying axioms for how to conceive and address the role and obligations of states in promoting and protecting this right as part of the wider ESCR.

9.1. Law-in-the-making

"Law-in-the-making" rejects that the purpose of law simply should be

> to set standards and to establish the appropriate institutions and procedures for their enforcement. What counts, in the end, is whether human rights are realised in practice – whether the standards and the attendant institutions serve to bring about the changes required in order to make it possible for all to enjoy all human rights. There is a constant need to check the reality and to move forward with determination when it can be shown that reality falls short of the promises contained in the international instruments.[73]

In our experience as self-established brokers between human rights and food and nutrition experts and activists, this fundamentally contrasts with many lay people's often misdirected respect – or the contrary – for laws as something static and irreversible, unaffected by the dynamics of social change and behaviour, temporally and spatially, and therefore unable to add much to regular development activities in "the real world". Such a perception tends to overlook that all laws are being made at some point – and by human beings, thus often reflecting contemporary values at the time. More worrisome is it that it probably helps to nourish the equally mis-directed characterisation of ESCR, including of the right to food, as being non-justiciable and therefore without any added potency beyond what well-managed development efforts already can do. Indeed, the debate on the right to food and nutrition in specialist development circles has at times intended to become caught in such notions.

But then precisely the prospect of legislation as a process has brought hope and inspiration to a growing number of human rights-friendly developmentalists who welcome the idea of a "legislative agenda" for establishing more firmly goals and objectives and set clear benchmarks for action. Slowly also the concept of a "framework law" is being seen as a potential legal dynamic context in which to progressively develop focused policies and plans for the implementation of particular rights in fulfilling the corre-

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[72] Eide A (1999), "Globalization, universalization and the human right to adequate food". In: Ogunrinade A, Oniang OR and May J (eds.), *Not by Bread Alone: Food Security and Governance in Africa*. Johannesburg, University of Witwatersrand Press.

[73] Eide A (2001), *op. cit.*, p. 3.

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sponding development goals. In other words, for non-legal people interested in human rights Asbjørn has helped bringing down "the making of law" from an imaginary pedestal to something to be actively explored by all who strive to improve the human condition.

9.2. Universalisation vs. globalisation

In contrasting universalisation and globalisation in human rights discourse and outlook, Asbjørn takes as the point of departure "the project of making human rights universal", which was started by the UN with the adoption of the UDHR in 1948. While he sees globalisation – especially economic globalisation – as a market-driven process, universalisation is "a deliberate process to set and to implement universal standards for human equality and dignity".[74] More specifically, he understands the main feature of globalization as

> a corporation-driven process of investment, trade and technological change in an expanding market, with continuously expanding mass communications, and homogenization and standardization of production and consumption. Within that process there are some actors with great power and others who are almost powerless.

As to the relationship between the two processes, the universalization of rights and the globalization of (economic) power, he sees a great difference in intention:

> Universalization of rights seeks to ensure that everyone is free and equal in dignity and rights ... The process of globalization has no such intention or aim; its sole purpose is to eliminate barriers to worldwide access of investments and products. It is not inherently good or bad; it has to be judged by its consequences.

Many protesters today tend to think that one can stop or arrest the process of globalization. Asbjørn's position is that,

> [g]lobalization as a process is likely to continue. It is driven by powerful, but often faceless forces, the main actors on the international markets. It can also bring some positive gains for many, while it causes great harm to others.

What, then, can universalization do given this scenario?

> Universalization should be seen as a corrective process. Its function is to try to prevent or redress the negative aspects of globalization, while putting the possible benefits from an expanding market to good use through redistribution and the pursuit of social justice.

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[74] Eide A (1999), *op. cit.*, p. 15.

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Asbjørn maintains that globalization requires global responsibility to assist in the creation of conditions for the full enjoyment of human rights. He sees the right to development in this context, with its dual emphasis on domestic implementation of all human rights and international co-operation to make that possible.[75] One can therefore see the emerging national dialogues on the implementation of the right to food as critical contributions to the universalisation of the right to food, not through strategic blueprints and identical legal provisions, but by applying universal principles of human rights and the right to adequate food to local needs and circumstances.

9.3. Links with specific development challenges

An interesting spin-off of Asbjørn's commitment to and work with the right to food from a legal perspective is the way he has come to link this right to certain other major development challenges of our time. When he in 1999 was appointed by the Director-General of FAO to the FAO Panel of Eminent Experts on Ethics in Food and Agriculture and also to serve as its chair for the first year, he may not have known much about the subject in technical terms, yet soon obtained the confidence of the other panelists as one who could bring their different backgrounds and views together for a coherent discussion and eventual recommendations, and who was therefore asked by them to continue as chair throughout the panel's four year period. Already in the panel's first report the links between ethics in food and agriculture and the human right to food and related rights are made clear:

> The Panel noted that some differences of opinion exist in the world today concerning ethical values, including utilitarian versus libertarian approaches and ethical assessments of actions versus ethical assessments of consequences or outcomes. Cultural differences also influence ethical positions. Common ground, however, can be found in the Universal Declaration of Human Rights; since this was adopted in 1948, there has been one basic value framework that spans cultures, religions and ideologies. ... The Universal Declaration of Human Rights is a comprehensive package of concerns in which the separate rights encompassed are considered to be interdependent and indivisible. Among them is the right to an adequate standard of living, including food. The Declaration also includes the right of everyone to benefit from the achievements of modern science and technology.

The report brings the right to food up-front by using the definition in General Comment No. 12, paragraph 8, which it sees as central to FAO's

[75] Eide A (2001), *op. cit.*, p. 40.

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mandate.[76] The panel has had a second meeting in 2002 (report not yet available) and may have one more in 2003. It is to be hoped that ethical and human rights approaches to food and nutrition security policies in general will be fully integrated rather than dealt with as separate areas of concern.

Another area where Asbjørn is active in linking in ESCR perspectives, and which may in the future become important also in the further work with the right to food, include the ongoing work in the Sub-Commission on the Promotion and Protection of Human Rights (led by expert member Professor David Weissbrodt) pertaining to the impact of the activities of transnational corporations.[77] Furthermore, the right to food in relation to TRIPS (Trade Related Intellectual Property Rights) regulations and negotiations has for a long time been of interest to Asbjørn and is being pursued in an IPRFD doctoral thesis supervised by him.[78] Moreover, the whole area of minority rights (perhaps his foremost special interest area and field of activity) has not yet been explored with a view to assessing whether there are issues of interest also in relation to the right to food and livelihood rights, beyond the obvious special problems of indigenous populations in this regard.[79] Finally, there is the concern with the right to food in the context of the HIV/AIDS epidemic, where Asbjørn provides guidance as regards the human rights dimensions to a doctoral thesis work.[80]

10. Bringing it together – towards international guidelines for implementation of the right to food

This chronological and in part analytical exposé of Asbjørn Eide's contributions to giving content to the right to adequate food as a human right, has touched upon various dimensions of the kind of package that is necessary to move frontiers in the international efforts towards standard-setting and work

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[76] FAO Ethics Series. 1 Ethical issues in food and agriculture. Food and Agriculture Organization of the United Nations, Rome 2001.

[77] Eide A (2001) Corporations, states, and human rights: A note on responsibilities and procedures for implementation and compliance. Non-printed background document, Report of the sessional working group on the working methods and activities of transnational corporations on its third session, Sub-Commission on the Promotion and Protection of Human Rights Fifty-third session, Agenda item 4, E/CN.4/Sub.2/2001/9.

[78] Haugen HM, *The Right to Food and the TRIPS agreement*, Norwegian Institute of Human Rights/IPRFD (in preparation).

[79] Indigenous peoples' situation as a special version of minority rights in many cases offers itself to food security and right to food analyses, as currently explored by doctoral research fellow Siri Damman under the IPRFD with Asbjørn and ourselves involved as supervisors and advisors: *Indigenous peoples and the right to adequate food*, Institute for Nutrition Research/IPRFD (in preparation).

[80] Engh I-E, *HIV/AIDS and the right to food*, Norwegian Institute of Human Rights/IPRFD (in preparation).

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for new international agreements and approaches to old problems affecting the human condition. The issues here have been food insecurity, hunger and malnutrition in all its forms. It has been rewarding to observe the maturing concept of the right to food as Asbjørn has significantly contributed to it, thereby also generating renewed strength and initiatives among colleagues in the network while he himself draws from it in full.[81]

Summing up, the theoretical development of the nature and level of state obligations for economic, social and cultural rights may be Asbjørn's single most important contribution to a logical and systematic conception of such obligations. While the framework for state obligations in terms or respect, protect, fulfil (*facilitate/provide*), now considered part of international human rights law, was developed and proposed for broader use for ESCR in general, it was clearly inspired by thinking on what state obligations would mean in the case of the right to food. It has since been shown that by linking this generic framework systematically to the substantive elements also of other specific rights, a tool in the form of a matrix appears that may help in the conceptualisation and eventually in the operationalization of those rights in practical terms. Hence after the original first version of the right to food matrix we conceived together appeared in Asbjørn's first study for the UN, it was picked up by several scholars working with other ESCR; thus Toebes[82] shaped and defended a right to health matrix, while Coomans[83] applied the basic idea and structure to an examination of state obligations for the right to education.

This contribution alone might, however, have remained an academic endeavor were it not from the beginning combined with contributions to lobbying and influencing of international and national policy development, by necessity through other constituencies than academic ones but with the academic legitimacy often required for effective influence. Thus, the NGO/civil society channels of WANAHR, FIAN and the International Jacques Maritain Institute in particular have been necessary both as a frame of operation in preparing the Draft International Code of Conduct and in disseminating information about it in wider circles. Various human rights and development

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81 A significant number of scholars, NGO representatives and practitioners have been instrumental in driving the right to food movement ahead, at various points in time and from various positions and angles. Our thanks go to all those who well know about their own invaluable contributions to where we are today regarding the status and role of the right to adequate food and nutrition as a human right. We know that Asbjørn himself when he sees this, more than anyone will share these thanks.

82 Toebes B (1999), *The Right to Health as a Human Right in International Law*. Intersentia-Hart, Antwerp/Groeningen/Oxford, pp. 194-197.

83 Coomans APM (1995), "Clarifying the Core Element of the Right to Education", in: Coomans APM and Van Hoof GJH (eds.) *The Right to Complain about Economic, Social and Cultural Rights*, SIM Special 18, The Netherlands Institute of Human Rights (SIM), Utrecht.

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bodies of the UN have been important recipients and users besides serving as lobbying arenas. Furthermore, input to the process of drafting General Comment No. 12 could draw upon both the work with the Draft Code and the updating of the UN study, besides the numerous recommendations made during expert consultations and through various NGO initiatives and positions.

Although a long and slow process, the steady passing of milestones in interpreting general international human rights norms pertaining to food and nutrition illustrates that human rights law is indeed law-in-the-making, the axiom that Asbjørn does not fail to remind his colleagues of and that gives meaning and hope to our work. The prospect of now entering into a new phase with emphasis on national interpretations and initiatives in local contexts, give added impetus to that hope. We shall also be reminded that the growing interest in human rights is not to be seen as an aspect of globalisation as has often been suggested, but rather points to a collective effort towards the *universalisation* of principles that should serve as corrective to the potentially negative effects of globalization.

Last, but not least, in the process of making human rights universal, one must be constantly alert to "new" issues not originally formulated in a human rights context. Questions around ethics in food and agriculture is a case in point, and there is reason to believe that Asbjørn may capture other opportunities to apply his vision of economic, social and cultural rights, including the right to food, to special topics which may benefit from such perspectives.

Since June 2002, the opportunity to bring it all together has been laid out by the decision of the World Food Summit: *five years later* to develop "voluntary guidelines" on the implementation of the right to food. This new part of the process of advancing the right to food will be in the hands of governments supported by all other stakeholder groups, through an intergovernmental drafting group established by the FAO Council in late 2002. Effective from March 2003, we may with this be in for a great leap forward in trying to get to a global agreement about the needs ahead for all to eventually enjoy their universal right to adequate food and nutrition through a different approach to food and nutrition security. Central in this new approach could be the opportunity to *claim* the right to adequate food, and to hold states *accountable* for their obligations. The forces against are many. Both intellectual skill and practical diplomacy will continue to be needed from an alert right to food movement.

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XIV

Development co-operation and the right to development

Arjun Sengupta*

Asbjørn Eide has been a pioneer in the field of research and analysis about international human rights law, including economic, social and cultural rights. His contributions have had a lasting impact on the human rights discourse in many international fora and in the conduct and monitoring of human rights practice of the different states and treaty bodies. As a newcomer in this field, I have benefited immensely from his writings and from the many discussions I have had with him. It is a privilege to be associated with this endeavour to bring out a publication in his honour, and I dedicate this paper as a mark of my respect for his wisdom, his understanding of the details of the legal and practical issues, and his commitment to the cause of human rights.

The paper presents a brief overview of the nature and content of the right to development as elaborated in my reports to the UN Human Rights Commission as the Independent Expert on the Right to Development.[1] The acceptance of the right to development (RTD) as a human right involves the recognition of international cooperation as an obligation of the international community consisting of bilateral authorities and international agencies. In the reports of the independent expert, a model of such international cooperation built on the principle of reciprocal obligation, was developed in the name of "Development Compact". This paper describes that model in some detail and then compares that with some of the existing frameworks of development cooperation, such as the Comprehensive Development Frameworks (CDF) and the Poverty Reduction Strategy (PRSP) of the World Bank and the International Monetary Fund (IMF), the Common Country Assessments (CCA) and the United Nations Development Assistance Framework (UNDAF) of the UNDP. It then discusses the just proposed new initiative of

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1 This paper makes extensive use of, in particular, the author's third and fifth report on the right to development to the Working Group of the Human Rights Commission, Geneva (Fifth Report, E/CN.4/2002/WG.18/6, 18 September 2002; Third Report, E/CN.4/2001/WG.18/2, 2 January 2001). The author gratefully acknowledges the work done by his Research Assistant, Diana Aubourg at the FXB Center for Health and Human Rights, Harvard School of Public Health, which was extremely helpful for preparing this paper.

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the African countries, known as NEPAD or New Partnership for Africa's Development, and how that can be made to conform to the right to development – development compact model (RTD–DC). It elaborates an illustrative burden sharing framework for development assistance based on a "callable contribution" contingent on the full implementation of a right to development program by a developing country. This is not the only possible method of burden sharing. But it does serve the purpose of demonstrating that the implementation of a development compact model is eminently feasible, if the world intends to encourage the fulfilment of the right to development.

1. The operational model of the Right to Development – Development Compact (RTD-DC)

My independent expert reports to the Human Rights Commission on the right to development examined the content of the right to development in great detail.[2] The right to development has been defined as the right to a particular process of development in which "all human rights and fundamental freedoms can be fully realized". It is a process in time, not a finite event, where all the elements whose improvement constitutes development are interdependent, both at a point of time and over time. There may be many different processes of development, many different ways through which a country can develop. But it is the particular process in which all freedoms and human rights can be realized that is regarded as the human right to development.

This definition is derived from the text of the Declaration on the Right to Development which was adopted by the United Nations in 1986. The preamble of that Declaration defines development as a "comprehensive, economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom". It is a "comprehensive process", not just economic, but also social, cultural and political, and is aimed at the constant improvement of well-being. It is also participatory, with "active free and meaningful participation", and equitable, with fair distribution of benefits.

Article 1 of the Declaration states that "the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social,

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[2] First Report: E/CN.4/1999/WG.18/2, 27 July 1999; Second Report: A/55/306, 17 August 2000; Third Report: E/CN.4/2001/WG.18/2, 2 January 2001; Fourth Report: E/CN.4/2002/WG.18/2, 20 December 2001. These reports are available on Website <http://www.unhchr.ch/html/menu2/7/b/mdev.htm>.

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cultural and political development in which all human rights and fundamental freedoms can be fully realized". Accordingly, a development process will be regarded as a human right when it enables the full realization of "all human rights and fundamental freedoms". In effect, this defines the notion of "well-being", the improvement of which is the aim of a development process, in the perspective of human rights norms and standards. Well-being means the level of realization of human rights and freedoms.

There is sometimes a misunderstanding about a process being considered as a right although, in principle, a process can be regarded as a right just as much as the outcomes of the process can as objects of claim or entitlement. This is possible so long as the corresponding obligations for realizing those rights can be clearly specified and the improvement in the realization of the rights can be properly identified and when the process is carried out in a manner that is rights-based, in other words, consistent with human rights standards. Rights, in principle, can be both substantive and instrumental. A human right to development can be both instrumental in realizing the outcome-rights and substantive in that it is a goal in itself being realized respecting the human rights norms. In other words, the outcomes of development realized step-by-step overtime, as well as the way in which the outcomes are realized, constitute the process of development, and are regarded as a human right. The outcomes are the improved realization of the different rights and the process is the phasing, over time, of their "progressive realization" which has been recognized as the way to realize them, as they can not be realized immediately and in full because of the constraints on available resources. A sustained process of development would therefore require a steady relaxation of resource constraints on their realization. That can happen only through economic growth, provided it takes place in a manner consistent with human rights norms and does not conflict with the realization of all the different rights.

The description of development as a comprehensive, economic, social, cultural and political process is also consistent with the approach of the human rights movement, which led to the recognition of the international law of human rights. The preambles of the two international Covenants on economic, social and cultural rights and civil and political rights affirm that

> the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights as well as his economic social and cultural rights.

So the particular process of development which is claimed to be a human right is the one in which all rights and freedoms can be fully realized in their totality, as an integrated whole, as all these rights are regarded as interrelated and inter-dependent.

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However, the right to development can not just be an umbrella right or the sum of a set of rights. It is a composite right when all these rights are realized together in an integrated manner. The integrity of these rights implies that if anyone of them is violated, the whole composite right to development is also violated. It is convenient to describe this in terms of an improvement of a "vector" of human rights, which is composed of various elements that represent the different economic, social and cultural rights as well as the civil and political rights.[3] The improvement of this vector, or in the realization of the right to development, would be defined as the improvement of some – or at least one – of those rights without the violation of any other rights.

All these rights, in turn, are dependent on each other and on the availability as well as the access to the goods and services which correspond to the fulfillment of any of these rights. Both the availability and the access of those goods and services are constrained by the country's resources, usually represented by its gross domestic product (GDP). The availability of one such good or service cannot be increased indefinitely without decreasing the availability of another if these resources do not increase. Similarly, the access to those goods and services would depend upon public policies including public expenditure that cannot be expanded indefinitely without an increase in public revenue which, in turn, would be related to an increase in the country's gross domestic product. A process of development where all these rights are to be realized together would, therefore, include growth of gross domestic product as an element that eases the country's resource constraints. The right to development as a process represented by a vector of human rights would therefore be composed of elements representing the improvement of different rights as well as the growth of gross domestic product carried out in a rights-based manner.[4]

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3 Second Report: A/55/306, 17 August 2000.

4 The logic of this process as discussed above, can be described in simple terms as follows. The state of well-being of a country or the level of the rights-based development (R_D) can be defined as: $R_D = (R_1, R_2 \ldots R_n)$ or a vector of the level of realization of the "n" different rights, recognized as human rights in the international instruments. Each R_i is an index of the realization of the ith right, which depends on the availability or supply of the ith good or service, corresponding to that right and the access or the manner in which individuals can enjoy that good and service. Both the availability and the access of these goods depend on resources or GDP, determining their supply and public policy, using these resources. R_i's, which are interdependent, can be described as $R_i = f(R_j, \text{GDP, policy})$, $j = 1,2 \ldots n$; $i = j$.

The right to development is an improvement of the level of well-being, over a span of time and can be described as a vector $dR_D = (dR_1, dR_2 \ldots dR_n, g^*)$, where g^* denotes a rights-based growth of GDP or a growth with equity, participation and other norms of human rights. The policies, that determine the access and availability of the goods and

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2. The importance of economic growth in the right to development

The significance of including rights-based economic growth with equity and justice (or g* as described in footnote 4) as a constituent element of the right to development is not always fully appreciated. All other rights as the constituent elements of the vector, whose improvement is regarded as the right to development, have been recognized as human rights in different international treaties, such as the Covenants on economic, social and cultural rights and civil and political rights. Claiming a rights-based economic growth as a human right appears to be new and is unrecognized in the international human rights discourse. But as a constituent element of the process of development, recognized as the human right to development, it is a logical and natural extension of all the other rights to be realized over time as a process in which no rights can be violated.

It is, of course, possible to improve the realization of some of the rights, separately and individually, for a limited period and to a limited extent without economic growth, by reallocating and redistributing the existing resources through appropriate policies. Indeed, the lack of economic growth cannot be used as an excuse for not implementing the policies to realize these rights by making the maximum use of the available resources. However, it must be recognized that all rights, including the civil and political rights, involve using resources to expand the supply of the corresponding goods and services and, possibly, public expenditure. So, if all or most of these rights have to be realized, fully and together and in a sustainable manner, steps have to be taken to relax the resource constraint by ensuring economic growth. In the absence of such economic growth a redistributive policy cannot succeed for long in improving the realization of even a few rights, without reducing the availability, and therefore the realization, of some other rights. In the process, the composite right to development will be violated. Without economic growth being explicitly brought into the picture, the right to development would have to be confined to the possible realization of only some of the rights, and that too individually and separately. It may be possible to have some, but not all, of the civil and political rights that may require relatively smaller amounts of resources. It may also be possible to realize

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services corresponding to these rights and the expansion of GDP in a rights-based manner, are the obligations that the duty holders must carry out to fulfil these rights.

The condition for the improvement of this right to development $dR_D>0$ is specified in terms of the improvement of the vector, such that there is at least one *i*, for which $dR_i>0$, and no other right is negative, or $dR_j \geq 0$, meaning that some or at least one right must have improved realization, and no right, civil, political, economic, social or cultural, is violated.

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only a few of the economic and social rights. But it will not be possible to have development.

However, for economic growth to be included as one of the elements of the claim of the right to development, it must satisfy the basic condition of facilitating the realization of all the other rights. Not only must all the social development indicators improve with the increasing availability of the corresponding goods and services, but policies adopted to increase economic growth must be consistent with human rights standards, so as not to negate the policies to realize all the other rights. It must be equitable, non-discriminatory, and participatory, which are generally the features of equity. If it is pursued with accountability and transparency, it would be in conformity with the principles of both equity and justice.

This characterization of economic growth in the context of the realization of all the rights follows from its instrumental role in the right to development. However, a rights-based economic growth, with equity and justice, also has a substantive role as a constituent element of the right to development, similar to all other rights, which are desirable in themselves, as standards of achievement of a society. It is precisely in this sense that the developing countries have always championed the cause of the right to development. From the very beginning, they clamored for an international order and social arrangement that would allow them to rise above the quagmire of underdevelopment, the vicious circle of poverty and all-round deprivation, and move to a higher level of income and living standards so that their people can live with dignity and other nations would treat them as equal partners and with fairness. Economic growth with equity and justice has always been central to their economic and social transformation and the basis of their claims for the right to development.

The understandable and legitimate urge of the developing countries for economic growth has sometimes been misconstrued as being supportive of only the economic, social and cultural rights at the expense of civil and political rights. Similarly, the pressure put by some countries for recognizing only the civil and political rights as objects of human rights claims has been resented by most developing countries. They see this as the rejection of their demand for economic growth in an equitable international order, considered necessary for realizing their economic, social and cultural rights.

The formulation of the right to development presented in my reports as Independent Expert can fully reconcile these tensions. The civil and political rights and the economic, social and cultural rights can be seen as fully integrated with the demand for the rights-based economic growth, when they are all perceived as constituent elements of the right to development. None of these elements can be allowed to deteriorate, and the policies of the national and international duty-holders would aim at maximizing the realization of at

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least some, if not all, of these elements as rights, depending upon the context and the prevailing condition of a country, as well as the preferences of the people determined through public choice.[5]

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[5] In my Fourth Report (p. 7) to the Human Rights Commission, I had compared the right to development as the right to a process of development to what Amartya Sen described as a "meta-right". (See Amartya Sen: "The Right not to be hungry" in Philip Alston and Katarina Tomasevski (eds.), *The Right to Food*, SIM, Netherlands, 1984). A meta-right to something x can be defined as the right to have policies p (x), that genuinely pursue the objective of making the right to x realizable. Even if the right to x remains unfulfilled or immediately unrealizable the meta right to x, p (x) can be a fully valid right if all the obligations associated with p (x) can be clearly specified. The outcomes of the process of development are human rights while the process of development that leads to these outcome are also human rights. But the process of development entails a programme of policies and phased realization of the target-rights executed over time, maintaining consistency and sustainability, with a high-probability to lead to the realization of the final outcomes. Therefore the right to the process of development can be regarded as a "meta right".

It has, however, been pointed out to me that in the context of the human rights laws, policies are related to "obligations" and since "rights" and "obligations" are two sides of the same coin, having a "right" would imply that the duty holders would have the "obligation" to adopt policies that lead to the realization of those rights. So if people can claim a right, they can also demand that the State and other duty holders carry out their obligations of adopting appropriate policies. There may, however, still be an advantage in claiming the discharge of those obligations of policies as meta-rights, if those policies can be precisely specified in terms of responsibilities and therefore become realizable, and valid claims, while the corresponding rights may remain abstract or background rights that may not be realized in the immediate future.

It is also possible to describe the right to development as the right to a process of development, as a "basic right" in the sense in which Henry Shue used this term (Henry Shue, *Basic Rights*, Princeton (1980)). A basic right is one, the enjoyment of which is essential to the enjoyment of all other rights. A basic right is not necessarily superior or preferable to other rights. But if the point is that people should be able to "enjoy" or "exercise" other rights, "the basic rights need to be established securely before other rights can be secured". Further, "when a right is genuinely basic, any attempt to enjoy any other right by sacrificing the basic right would be quite literally self-defeating cutting the ground from beneath itself" (Henry Shue, pp. 19-20). The right to a process of development can in that sense, effectively be described as basic, relatively to all the other rights, civil, political, economic, social and cultural. Without the realization of the basic right, none of the other rights can be enjoyed effectively, in a sustained manner or secured for a long period. This is brought out effectively in the extreme case when no right is improving but none is violated (*i.e.*, $dRi = 0, i - 1 \ldots n$), and the process of development claimed as a human right becomes essentially the rights-based process of economic growth (*i.e.*, $d R_D = (g^*)$). At least such a process of economic growth with equity and justice, or the rights-based growth mentioned above, would be basic or essential for the eventual realization of the different rights, in a sustainable manner over time. Adopting a development policy or programme to realize such economic growth would be the minimal obligation of both the state and the international agencies who are the main duty bearers.

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3. Operational elements

The most important feature of the RTD approach is its emphasis on carrying out the obligations, corresponding to the right to development, by the duty-holders through an operational program with specific policies of national actions and international co-operation. A model of such a programme was presented in terms of a development compact (DC).

The RTD is guided by principles drawn from both the normative framework of human rights and the human development approach. As the *Human Development Report*, 2000, put it,

> [t]he human rights approach focuses on claims that individuals have on the conduct of the State parties, duty holders and other agents to secure their capabilities and freedoms while human development thinking focuses on the outcomes of various kinds of social arrangements. Many of the tools of (this human development) approach measure the outcomes of social arrangements in a way that is not sensitive to how these outcomes were brought about.

In the human rights approach both the outcomes and the way those outcomes are realized are important. So the first step in operationalizing the process is to build up indicators for the different rights, which should combine the indicators of availability of the corresponding goods and services, with the indicators of access to them according to the human rights norms. Such indicators, in other words, should extend the conventional human development indices to incorporate the characteristics of rights. When they are treated as rights, they would imply specified obligations on the parties which are identified as duty-holders with accountability and subjected to appropriate monitoring. Those duty-holders are primarily the states of the right holders and the international community consisting of other states and international agencies. The nation states would have to adopt policies and implement those rights. The international community would have the obligation to co-operate with each other and with the concerned nation states to enable those policies to be implemented.

There are four basic operational elements of the RTD-DC model:

(1) Rights-based Development Program: A development approach and policy prescription that is rights-based implies a process that is equitable, non-discriminatory, participatory, accountable and transparent.

a. Equitable: Equity (or diminishing disparities) is an over-arching theme in the right to development, and equity with respect to growth of resources (including GDP, technology and institutions) is central to the RTD-DC approach. As mentioned in my Fourth Report, "this would imply a change in the structure of production and distribution in the econ-

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omy to ensure growth and equity. It would also imply providing for equality of opportunity or capabilities which could translate to equitable distribution of income or amount of benefits accruing from the exercise of the rights".

b. Non-discriminatory: Non-discrimination and equality are twin principles. There should be no discrimination on the grounds of sex, race, language, political affiliation or socio-economic status in the design and implementation of policies and practices, nor should there be discrimination between agents, stakeholders and the beneficiaries.

c. Participatory: All decisions should fully involve the beneficiaries who must have full access to the decision-making process and ownership over the development program. This means that the beneficiaries, especially the poor, should be active and informed participants in the formulation, implementation, and monitoring of the development policies. They must be free to organize, meet and speak out publicly in order to fully enjoy the right to participate, in accordance with democratic principles.

d. Accountable: Rights and obligations have to be supported by a system of accountability, requiring that duty-holders such as states and inter-governmental organizations are held responsible for respecting, protecting and fulfilling human rights. This would imply specifying obligations for different duty-holders who are responsible for carrying out the program. It involves establishing appropriate adjudicating and monitoring mechanisms through a formal, legal process or through an alternative (and legitimate) independent process.

e. Transparent: Transparency implies bringing out openly all the interrelations and linkages between different actions and actors. It is an essential requirement for establishing accountability.

(2) Poverty Reduction and Social Indicator Targets: As elaborated earlier, a rights-based design and implementation of a development program requires *identifying* appropriate indicators and benchmarks to monitor the status of realization of each of the rights, as well as a mechanism for evaluating the interaction among the indicators. A simple operational model may begin with a poverty reduction program with targets of reducing income-poverty and associated targets regarding food, nutrition, health, education and possibly housing and employment that affect capability poverty, formulated both in terms of the availability of and access to the corresponding gods and services.

(3) Development Compacts: A development compact is a mechanism for ensuring the *recognition*, among all stakeholders, of the "mutuality of the obligations", so that the obligations of developing countries to carry out

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these rights-based programs are matched with reciprocal obligations of the international community to co-operate to enable the implementation of those programs. The process of instituting a development compact involves several steps:

a. Focusing on realizing a few rights, such as poverty reduction, or the Millennium Development Goals consistent with human rights norms;

b. designing of a development program by the country concerned, followed by a request for a development compact;

c. developing the program in consultation with civil society:

i. adopting legislation to incorporate in domestic law;

ii. appoint a national human rights commission;

d. specifying the obligations of both the national authorities and the international community;

e. establishing a focal organization for members of the international community to meet the implementing country;

f. organizing a support group for the concerned developing country comprised of a range of stakeholders who, among other things, would scrutinize and review development programs, examine the obligations specified and decide on burden-sharing among the agents of the international community to meet their obligations to co-operate;

g. assessing and implementing appropriate measures at both the bilateral and multilateral levels (*e.g.*, debt relief, trade, investment);

h. setting up a financial facility called the Fund for Financing Development Compacts, with contributions in the form of Callable Commitments from all the members of Development Assistance Committee (DAC) of OECD. The Official Development Assistance (ODA) of most countries of the Organisation for Economic Cooperation and Development (OECD) fall far short of the target of 0.7% of GDP. As all of them have recognized the right to development, especially after the Vienna Declaration of 1993, they are expected to make at least some provisional callable commitment of additional ODA for this Fund, which may be invoked only in the event of the need to bridge the resource gaps of countries implementing on RTD program fully in accordance with the obligations agreed upon;

i. determining the financing requirement of a particular development compact as a residual, after implementing all other measures of development co-operation and after taking into account the possible contribution of the IMF, the World Bank and other regional agencies and the contribution of the donors specially interested in the country; and

j. establishing a mechanism with the help of a support group to invoke the Callable Commitments of the different DAC members from the

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Fund for Financing Development Compact according to some agreed principles of burden sharing.

The whole purpose of development compacts would be to assure the developing countries that if they fulfil their part of the obligations, the program for realizing the right to development will not be disrupted due to lack of financing.

(4) Monitoring Mechanisms: A mechanism for monitoring the right to development would have to assess the implementation of various rights both individually and in a composite manner (as a vector). The support group in a development compact is one proposed international instrument (separate from the treaty bodies) to facilitate the implementation of the right to development as well as the financing of certain measures.

4. CDF/PRSP/CCA-UNDAF frameworks

In this section, we shall provide a brief overview of some of the major existing frameworks of international development co-operation, such as the Comprehensive Development Framework (CDF), Poverty Reduction Strategy Papers (PRSP) and the Common Country Assessment (CCA) and United Nations Development Assistance Frameworks (UNDAF).

4.1. Comprehensive Development Framework (CDF)

In 1999, the World Bank president proposed the CDF as a step to address the need to balance sound macroeconomic policy and growth with an equal concern for effective poverty reduction and increased institutional development, consistent with satisfying human and physical development needs. According to the World Bank, CDF principles have been widely accepted by the international community as a framework for poverty reduction and sustainable development, encouraging a transition from donor-led development assistance strategies to country-led strategies of development. To date, over fifty countries have adopted CDF principles in their national development plans. The CDF also involves a commitment to expanded partnership, transparency, and accountability with the active involvement and leadership of government.

4.2. Poverty Reduction Strategy Papers (PRSP)

In 1999, the World Bank and IMF adopted nationally-owned participatory poverty reduction strategies as a basis for their concessional lending. Sharing and building upon the principles of the CDF, the poverty reduction strategy approach led to the development of the PRSPs. Previously, the IMF pro-

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moted structural adjustment programs (SAPs) without an explicit link to poverty reduction goals. The PRSP is a tripartite agreement between the IMF, World Bank and the participating government and is envisaged as the primary forum for policy dialogue in all countries receiving concessional lending from these international financial institutions (IFIs). A PRSP (or Interim PRSP) is now a condition for World Bank and IMF poverty reduction programs including debt relief measures the Heavily Indebted Poor Country Initiative (HIPC), the IMF Poverty Reduction Growth Facility (PRGF), Poverty Reduction Support Credits (PRSCs) and IDA of Word Bank. The PRGF was formally the IMF's Enhanced Structural Adjustment Facility – the primary lending facility for poor countries. For countries not fully capable of completing a PRSP, an Interim PRSP (I-PRSP) can be developed which outlines the country's existing poverty reduction strategy and serves as a blueprint for completion of the full PRSP. The PRSP process is the main instrument for implementing the CDF principles.

In 2002, it was reported that over 60 low-income countries have undertaken poverty reduction strategies. Since 1999, ten countries have completed their first full PRS, three countries have completed their annual PRSP implementation reports and 42 countries have completed I-PRSPs, of which seven have submitted their PRSP preparation status reports for consideration.

4.3. Common Country Assessment and United Nations Development Assistance Framework (CCA/UNDAF)

The CCA and UNDAF were launched in 1997 in 18 pilot countries as key elements of the reform of UN operational activities. The overall aim is to increase the impact of UN development efforts by fostering greater integration of UN agencies working at the country level and linking to the development efforts of the host country. Though the two processes are referenced together, there is a distinction between their functions. The CCA is primarily a tool for information gathering from various sources such as civil society consultations. Government approval is not needed for the CCA and, therefore, it has the latitude to comment on a range of issues including human rights and governance. The UNDAF is a narrowly UN-focused process and is intended to define appropriate responses to the development priorities identified in the CCA. The CCA is an essential first step for the formulation of the UNDAF, to assess and analyze the national development problems leading to the preparation of a common planning framework for the programming of the UN's development operations at the country level.

According to a UN assessment, in 2001, the UNDAF had been completed in 28 countries and work was in progress in 31 other countries. As of

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15 April 2001, CCAs had been completed in 76 countries and 38 countries were in the process of preparing CCAs and CCAs were being planned in eight countries.

4.4. Principles and policy objectives of PRSP/CDF

The PRSPs, which are built upon CDFs, are guided by five core principles: a) country driven – broad-based participation by civil society and the private sector; b) results oriented – focused on outcomes that benefit the poor; c) comprehensive – taking into account the many dimensions of poverty; d) partnership oriented – co-ordinated participation of bilateral, multilateral and non-governmental partners; and e) long-term perspective – for poverty reduction.

The 2001 CDF Progress Report, the first report covering the implementation of CDF as well as PRSP principles beyond the first 12 pilots, provides a somewhat detailed explanation of these.

4.4.1. Long-term vision and strategy

A long-term vision and strategy is meant to incorporate macro, social, structural, and institutional issues focused on sustainable development. For instance, Ghana's Vision 2020 (prepared in 1995 as a constitutional requirement) reflects CDF principles. It seeks to balance economic growth with agricultural reform and modernization while also pursuing expanded manufacturing and service sectors, investment in human resources, closer integration with the international economy, and strengthening economic infrastructure. Several countries developing PRSPs had pre-existing long-term national plans. Nigeria developed a Vision 2015 and Gambia and Uganda both developed a Vision 2020. Vietnam's PRSP process is linked to its medium term (2001-2005) and long-term (2001-2010) socio-economic plans. Burkino Faso, Ghana, Guyana, Kenya, Mauritania, Senegal, Tanzania and Uganda have been successful in developing long term strategies that are closely linked to the long-term vision of the country.

4.4.2. Country ownership

To achieve genuine country ownership, a government must develop broad-based participatory approaches, building the institutional capacity and a policy framework around which an agenda for development can be shared by all the major stakeholders. The 2001 CDF Progress report noted that there was good progress in building ownership within governments in Bolivia, Burkino Faso, Eritrea, Ghana, Guinea, Mauritania and Uganda. In Uganda, a few key

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players initially drove the PRSP process but it was later extended to the wider public through a process of national debates and consultations.[6]

Country ownership also requires sufficient administrative support (*e.g.*, skilled employees), decentralized decision making and enforcement of regulations. In addition, countries must engage in social impact assessments, effective co-ordination of external partners and holding consultative group meetings.

4.4.3. Strategic partnership

Strategic partnership calls for the engagement of government at all levels, civil society, the private sector, donors, international agencies and other development actors. For example, in Vietnam, the Private Sector Forum puts forth regulatory proposals for government consideration and operates working groups on legal, banking, and manufacturing and distribution sectors, and seeks to establish a regular dialogue with the government. Apart from engaging the private sector, partnership should bring about: alignment of donor actions to the national strategy and harmonization of common procedures and practices amongst all development partners.

A better donor co-ordination would improve donors' collective impact on reducing poverty. Countries that have made progress in this area have found that regular in-country meetings under government leadership, at both the national and sectoral level, improves information flows and allows donors to better adapt their future programs.

4.4.4. Focus on results

It is necessary to draw links between a country's national goals and measuring progress towards those goals. Within the CDF framework, the International and Millennium Development Goals serve as a point of reference and comparison. It may take several years to identify the discernible impact of adopting CDF principles on development. Therefore, it is useful to focus on elements that need to be in place to assess impact. These include: the systems to collect and analyze key information, transparency of such information, and arrangements for monitoring progress.

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[6] However, it should be noted here that CSOs have criticized the extent of this process. One critique by the World Development Movement (2001) asserts that while Uganda is often considered a model for consultative processes, the consultations were limited to the social sectors and civil society was largely excluded from the macroeconomic planning.

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4.5. Overall achievements

Measuring progress for these development frameworks poses a challenge for both the participating country and the sponsoring agency. Nonetheless, the World Bank and the IMF have noted areas of progress for such frameworks. In March 2002, the staffs of the World Bank and IMF conducted a review of the PRSP and cited four key achievements of this approach to date:

(1) A growing ownership among most governments of their poverty reduction strategies, and increased commitment to the PRSP by an array of civil society organizations;

(2) more open dialogue within governments and with parts of civil society and increased participation and monitoring by civil society organizations;

(3) a more prominent place for poverty reduction in policy debates which extend beyond social sector interventions;

(4) an acceptance by the donor community (including UN organizations and bilateral donors) of the principles of the PRSP approach which can lead to stronger partnerships with countries and better donor coordination.

After conducting two reviews of the CDF since its inception, the World Bank identified progress in the following areas:

(1) The CDF principles, widely accepted by the international community as a basis for achieving greater poverty reduction and sustainable development, have become the basis for the way World Bank staff work;

(2) the introduction of PRSPs has significantly increased the number of countries adopting the CDF approach;

(3) all major bilateral donors, the UN and the development agencies contribute to learning and sharing about the implementation of CDF principles;

(4) many more governments are beginning to lead the setting of the policy agenda in the IPRSP and this will be reinforced further as full PRSPs are put in place;

(5) in some countries, this process is complemented by more active roles for parliament, civil society and the private sector in policy discussions and calls for better flows of information;

(6) governments are engaged in aid co-ordination at all levels. Discussions are held in-country, allowing for much broader participation by domestic stakeholders, including sectoral consultations;

(7) some key development partners are taking steps to achieve better alignment of their assistance policies with national strategies.

5. Shared principles and basic difference with the RTD-DC model

The PRSP and CDF models share with the RTD model similar theoretical concerns about effective poverty reduction strategies with country ownership

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and civil society participation. They would all accept the notion that development measures should be "participatory, accountable, transparent, equitable and non-discriminatory" – the principles behind the rights-based approach to development. Each of the development frameworks is geared toward achieving a holistic approach to development – meeting basic needs, expanding capabilities and reforming institutions. While the degrees to which each addresses growth and sound macroeconomic policies vary, each seeks a better balance between economic growth, governance and social development. Both the PRSPs and RTD models explicitly articulate an interest in growth of resources (GDP, technology and institutions) as a means of achieving poverty reduction for the PRSP and realization of basic rights for the RTD-DC. Both would endorse the adoption of policies for macroeconomic stability to achieve sustainable growth, although in the RTD approach, that growth has to be consistent with human rights norms, with equity and social justice, and not just any kind of GDP growth.

Co-operation of stakeholders (both at the domestic and international levels) is also a principle all these development frameworks share. The RTD-DC relies on a model of international co-operation facilitated through a development compact. The PRSPs are also supposed to be "partnership oriented", involving participation of bilateral, multilateral and non-governmental actors in both the development and implementation of the PRSP.

Each framework also views country ownership as critical to sustainable and effective practices. While the RTD-DC encourages development plans that are "fully drawn up by a developing country seeking a development compact", the PRSP is intended to be "homegrown" and tailored to the specific needs, circumstances and goals of the participating country. Each framework expresses a commitment to building the capacity of countries to develop, implement and manage their poverty reduction strategies and national plans through technical assistance and institution building.

Lastly, each framework is concerned with identifying indicators and measures of progress and sets specific target periods and goals while taking into account the reality of progressive realization of their objectives as well as the difficulty of meeting all the objectives simultaneously.

The basic difference between the RTD and the other development frameworks, however, is the centrality of human rights in the former approach, where all the objectives of policy, different indices of social development or economic growth have to be seen as human rights and have to be achieved in a manner satisfying the human rights norms. The principles of participation, accountability and transparency would go far beyond the operational principles of governance and fully incorporate equity and non-discrimination to make them into effective human rights norms. The devel-

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opment process to which everybody is entitled as a human right would entail obligations on nation states and the international community that have to be fulfilled with accountable monitoring and enforceable remedies.

6. Analysis of the rights-based norms in the different frameworks

The PRSPs and CDF have encountered many challenges to their implementation. Some challenges stem from the particular circumstances of a country (*e.g.*, conflict-affected countries). Other challenges or constraints are inherent in the structure and process enjoined by the development framework, their design and policy formulations, restrictive time lines and bureaucratic practices. Most of these challenges can be effectively addressed in the RTD approach in general and in the Development Compact proposal with explicit rights-based measures and reciprocal obligations for all duty-holders.

The PRSPs have been subjected to wide public scrutiny, criticism and civil society debate about both the process and the outcomes. The most common concerns related to the PRSPs – some of which are also shared by other frameworks like the CCA/UNDAF – may be examined in light of the principles that will contrast them with the RTD-DC, namely, how far they conform to the human rights norms of being "participatory, accountable, transparent, equitable and non-discriminatory".

6.1. Participatory

The participation process of the PRSP has been the most problematic. Critics have questioned the extent to which the process is inclusive of all stakeholders, or accessible, informative and transparent about policies and practices of the government. The 2002 reports by the staffs of the World Bank and IMF noted that donors had expressed concerns about the lack of involvement of specific groups in the participatory process.[7] Among those not fully involved in the PRSP process are civil society organizations (especially those out of favor with the government), local government officials, private sector representatives, trade unions, women's groups and direct representatives of the poor.

In a 2001 World Vision report, case studies demonstrated an inherent tension between the pressure to produce PRSPs that are repackaged versions of existing plans and the emphasis on a participatory process. A frequent complaint of civil society organizations is that governments call them for meetings intended to provide endorsement of an already formulated plan. Bank-Fund staff have referred to criticisms, that discussions are limited to a

[7] World Bank and IMF, "Review of the PRSP Approach: Main Findings, March 15, 2002", prepared by staffs of the World Bank and IMF.

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narrow set of issues about poverty reduction programs and exclude debate about structural reforms and macro-economic policies. They have noted the concerns of donors as well, including lack of clarity about their role as donors, frustration with lack of engagement in the participation of I-PRSPs and lack of involvement in dialogue between the government and the Bank and Fund during missions. Some donors stated that the prominent role of the Bank-Fund Joint Staff Assessments (JSA) has overshadowed the assessment of others, and that the PRSP process has been dominated by the Bank and the Fund.

A report by Christian AID (2001) found that poor people were typically excluded from dialogues that are planned around broad macro-economic reforms. Non-governmental organizations (NGOs) consistently reported that there were two parallel processes – one in which "social issues" were discussed with respect to the PRSP and another process in which "macro issues" are discussed. A EURODAD assessment of the PRSPs (cited by Christian AID) found that civil society organizations were given little space in which to discuss the package of adjustment policies that still dominate national PRSP. In some cases, such as in Bolivia, IMF representatives stated that recommendations drawn from dialogues with civil society organizations would only apply to the allocation of HIPC debt funds and not macro-economic targets and policies. This serves as a barrier to genuine national ownership of development plans. The report also found that involvement in the PRSP has often excluded grassroots community groups such as rural organizations and local civil society groups. Also, specific measures to involve poor women have not been implemented and PRSP documents have been largely silent on specific efforts to address gender equity.

6.2. Accountable

The centrality of accountability in poverty reduction and development strategies is indeed acknowledged in the frameworks of the PRSP, CDF and also CCA/UNDAF. For example, one of the interdependent principles of the CDF is "accountability for development results", where a country is expected to link its overall aims to concrete development results in order to assess the progress of tangible development. Similarly, the PRSPs are designed to be "result oriented", which includes building the capacity of countries to develop poverty diagnostics, targets and indicators, and monitoring and evaluation. However, the key issue regarding accountability in these frameworks is the accessibility of transparent and effective mechanisms of accountability to the poor people of the country and their organizations on the part of different duty-holders allowing for appropriate adjudication of their complaints and enforceable remedies.

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The 2001 Report of the CDF in 46 countries found very slow progress on the accountability front. Less than half the countries had adequate information systems for development co-ordination and only a quarter had established systems to track development results. Bolivia has developed a results-based budget, which links the initial country strategy objectives and resource allocations with actual outlays and results. However, the process of the approval of indicators by donors and government agencies took over a year. Uganda has also used innovative approaches to track public expenditures in water management and in education but the study found that many more countries need to develop and strengthen their monitoring mechanisms.

Reviews of the progress of PRSPs in 2002 raised concern about "the potential tension between the principle of country ownership and the need for donors to be accountable for the effective use of their resources". An issue paper warns of "divergence in views about the right policies and about capacities for implementation" because the donor must negotiate its desire to respect country ownership while supporting policies and programs that contribute to results consistent with the donor's mandate. Governments have often complained about the tendency of donors to seek the inclusion of their agendas or priority areas as well as a range of disparate issues (*e.g.*, AIDS, governance, rural development, corruption).

These frameworks, however, have not always successfully matched conditionalities with specific obligations for the country or for actors in the donor community. Most countries that have undertaken PRSPs are seriously short of resources. They also lack the capacity to carry out broad-based participation processes, which are critical to the success of the PRSPs. Many countries have not received the appropriate levels of financial and technical support from IFIs and the OECD countries, either for carrying out an effective participatory process or for fully implementing the programs. Insufficient funding of HIPC, to which the PRSPs are linked, have also greatly increased the problem. There is a case for further and deeper debt relief and greater levels of budget support – including expanding the proportion of bilateral aid devoted to budget support rather than project-based assistance. But without a firm commitment from the donor community (and appropriate enforcement mechanism to which they are held accountable), there is no guarantee that any of these programs can actualy by carried out.

Indeed, appropriate mechanisms of accountability and enforcement are lacking among duty holders – at both the country level and in relation to the obligations of the international community. Accountability at the country level is hampered also by weak capacity, lack of country ownership and of monitoring practice. At the international level, even if the IFIs have not provided countries with the appropriate levels of financial and technical support

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needed to implement the programs, there is hardly any formal forum to remedy that situation.

6.3. Transparent

Transparency and accountability are closely linked. A certain level of transparency in all transactions is assumed in accountability, and is necessary for an effective participation process based on country-ownership and engagement of civil society stakeholders. Transparency in the design and implementation of programs is essential for carrying out a development program, and an appropriate adjudicating and monitoring mechanism is needed to ensure accountability based on transparency.

The 2001 report on the progress of CDF implementation in low and middle-income countries stated that very few countries had published or had plans to publish information about the progress of the programs. Countries with Internet access, such as the Kyrgyz Republic and Romania, have used the worldwide web to disseminate and publicize information. Other countries with little Internet access (such as Guinea, Guinea Bissau and FYR Macedonia) were more focused on the use of traditional media. Uganda, as an exception, publishes its education budget at the local or national levels. However, overall both governments and external partners remain cautious about a free exchange of information. Also, while consultations raised the level of demands for transparency, only a few countries made development information accessible in a transparent manner to all stakeholders.

There is also criticism of the level of transparency of donors, in particular IFIs such as the World Bank and IMF. In examining the PRSP, the Christian Aid report states that "despite their concern with 'good governance' at a national level, and their international influence over billions of people's lives, the IFI's own institutional structures and cultures are scandalously undemocratic". This is reflected in their voting structure (G7 countries hold 57% of votes) and their lack of transparency (their most important documents remain confidential and closed to public scrutiny).

6.4. Equitable

Equity and non-discrimination are commonly linked and are considered the most fundamental elements of international human rights law. Inequality and discrimination take on many forms such as legal inequalities in status and entitlements as well as policies that ignore a particular people. There has been much debate about the content of equality. While human rights instruments tend to discuss equality in law and equality in rights, the RTD approach seeks to address the need for equality in the level or amount of benefits accruing from the exercise of the rights. From the capabilities perspec-

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tive, equality in rights implies equality of opportunity or capabilities (with income as a major determinant). As a result, policies and measures must be based on a development framework that reduces income disparities or does not allow these disparities to increase.

Concerns about equity and social justice must inform the development policies, especially the macroeconomic policies and programs for structural adjustment. The macroeconomic policies of the PRSPs persist with their old pattern of policy prescriptions (such as cost recovery, privatizations, and trade liberalization). They may be helpful in promoting efficiency and preparing the ground for increased private sector involvement for higher growth, but such policies must not compromise the ability of a country to meet the basic needs and rights of its people. In many cases, the basic ingredients of PRSP macro-economic packages appear to be traditional adjustment policies with little substantive innovation. The Bank-Fund reviews noted that certain countries (especially in Latin America) stressed that more attention needs to be spent on finding ways to encourage private investment and private sector growth, other than removing barriers and restrictions and promoting privatization.

The independent expert on structural adjustment contends:

> What the architects of the HIPC initiative failed to realize is that it was the failure of two decades of SAPs to help countries export their way out of the crisis, and their inability to service their debts and the social erosion that followed that gave the impetus for the establishment of the HIPC initiative. Increasing malnutrition, falling school enrollments and rising unemployment have been attributed to the policies of structural adjustment. Yet these same institutions continue to prescribe the same medicine as a condition for debt relief, dismissing the overwhelming evidence that SAPs have increased poverty.[8]

Uganda is often presented as the success story in the HIPC initiative. The IMF and World Bank have lauded it for sustaining high rates of economic growth and adoption of prudent fiscal and monetary polices and efforts at trade liberalization and public enterprise reform. Uganda was the first country in the HIPC initiative to receive substantial debt relief ($650 million of its multilateral debt stock) and establish a successful Poverty Action Fund – a mechanism to direct debt relief resources for poverty reducing expenditures. But Uganda's success has been marred by a decline in living standards for certain segments of the population and a dramatic increase in

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[8] United Nations, "The Highly Indebted Poor Countries (HIPC) Initiative: a human rights assessment of the Poverty Reduction Strategy Papers (PRSP)", a report submitted by Mr. Fantu Cheru, independent expert on the effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights, 18 January 2001.

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income inequality. In fact, Uganda received its debt relief a year later than was anticipated, in spite of its strict adherence to structural adjustment. The Ugandan government projected that the cost of the one year delay amounted to $193 million in lost relief – more than double the projected spending on education or six times total government spending on health in that year. Less than one year after receiving relief, Uganda's debt burden returned to an unsustainable level based on HIPC criteria.[9] While poverty has declined, inequality in Uganda increased and growth slowed down between 1997 and 2000. Poverty continues to be concentrated in the rural areas (96% of the poor living in rural areas in 2000). In the education and health sectors there was an acute shortage of qualified staff. In 2000, only 40% of health units had trained staff.

The Tanzania 2001 PRSP report cites some rise in growth of GDP and decrease in inflation. The government has abolished school fees at the primary level and increased the budget allocation for education. In addition, public spending on health marginally increased and progress was made in expanding the coverage of primary health services and immunization. However, there has been little change in the mortality rates of infants and for children under five years. Government surveys indicated a decrease in formal employment. Overall there was limited change in poverty and welfare indicators from the baseline in 1991.[10]

The government of Mauritania stated in its 2001 progress report that it pursued policies to maintain macro-economic stability, spur growth and reinforce competitiveness and attractiveness of the economy to foreign investors. Poverty reduction expenditures were substantially increased (in education, health, and programs targeting the poor). Integrated rural and urban development programs, micro-credit and job training schemes targeted the poorest areas and strata of the population. Inequality increased between 1996 and 2000. Though, statistically, the number of people below the poverty line has decreased, the perception of poverty, however, remains very high. In a 2001 survey, over 80% of people rated themselves as poor and nearly 82.2% of those interviewed consider that all or most of the people in their district or village are poor. In education, while enrollment rates increased, there are significant disparities between urban and rural areas and between the rich and the poor. Inequalities in health still persist. For example, the number of children less than one year of age who have not received any vaccination is four times greater in poor households than in non-poor households. Children

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9 According to the World Bank's projections, Uganda's debt to export ratio was 210% in 2000/01and is projected at 250% for 2002/03. This means that Uganda's debt will remain above the world sustainability levels as much as 100%.

10 Tanzania, "Poverty Reduction Strategy Paper: Progress Report 2000/01" and "Joint Staff Assessment of the Poverty Reducton Strategy Paper, 1 November 2001.

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in rural areas are more likely to be undernourished than those in urban areas. Also, the health care coverage ratio remains low in rural areas – where almost half the population still has to travel over 5 km to receive care. Access to potable water is still rare – with less than 15% of households hooked up.

These country experiences highlight the challenges of balancing economic growth with equity. While each country experienced some levels of growth or gains in the social sectors, the level of disparities persisted or worsened. What followed was a "mixed bag" of results rather than progress resembling the RTD notion of development. For that, the objectives of realizing certain rights are interlinked and development measures should seek to reduce disparities or, at the very least, prevent them from increasing.

6.5. Non-discriminatory

The PRSPs have not given serious consideration to the issue of non-discrimination, like the concerns about human rights in general. The Bank-Fund staff assessments, official reviews and CSO reports all found that many PRSPs failed to concretely address the status of women (*e.g.*, gender equity, freedom from gender discrimination) and other marginalized vulnerable groups or indigenous people. PRSPs also failed to sufficiently stress the need for national level action for child safety, such as safety nets to protect children particularly during times of economic growth and/or rising income inequality.

The most obvious gap thus is the failure to draw concrete links between the development frameworks and human rights standards. In particular, the notion that the objectives of development are to be treated as entitlements or rights that are legitimately claimed by individuals holds limited currency among donors such as the IMF and World Bank. While rights-based language is cautiously referenced in some official documents, the human rights approach to development is not treated as a core principle. A 2001 UN report on "a human rights assessment of the PRSP" found that none of the I-PRSPs attempted to integrate major international human rights principles such as those found in the International Covenant on Economic, Social and Cultural Rights and a number of International Labor Organization (ILO) conventions. There is also an absence of the language and intent of human rights in the discussions of governance and judicial and legal reform, all pointing to the reality that states are not expected to fulfill their obligations to address matters of human rights in their domestic legal systems.

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7. NEPAD: the New Partnership for Africa's Development

This section discusses a new Africa initiative of development co-operation called the New Partnership for Africa's Development (NEPAD) in comparison with the RTD-DC model.

NEPAD was launched in July 2001 at the Organization of African Unity (OAU) Summit in Lusaka, and is described by its architects as "a vision and programme of action for the redevelopment of the African continent" as well as a "comprehensive integrated development plan that addresses key social, economic and political priorities in a coherent and balanced manner". This is a remarkable development in the evolution of the international process of realizing the right to development. A group of African countries have come together to formulate a program for development that explicitly integrates economic growth (at 7% a year) with the promotion of democracy, human rights and poverty eradication with social development. It also sets up mechanisms to monitor their own performance and subjects them to the discipline of peer review and the scrutiny of the IFIs. It gives the international community an opportunity to help in full measure to implement a program very close to the approach of the right to development. We discuss in brief the details of this framework and how they can be seen and implemented as a right to development program.

7.1. Goals

The broad aims (or long-term objectives) of NEPAD include:

- Promoting accelerated growth and sustainable development;
- eradicating widespread and severe poverty in Africa;
- achieving the agreed International Development Goals by 2015, such as school enrolment of children, eliminating gender disparities in education, reducing infant, child and maternal mortality, access to reproductive health and protecting the environment; and
- halting the marginalization of Africa in the globalization process.

The institutional arrangement requires NEPAD to serve as a catalyst in facilitating the program of action by designated institutions. These entities are expected to "internalize the NEPAD spirit and programmes in their development strategies and investment plans". At the national level, governments will be primarily responsible for engaging and mobilizing civil society around the ideas and program of NEPAD. At the sub-regional level, regional economic committees (RECs) will organize sub-regional stakeholders in the planning, development and implementation. The AU works at the continental level, designating special committees to drive the NEPAD process along. Additionally, a Heads of State Implementation Committee (composed of 15

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heads of state) will be responsible for identifying strategic issues at the continental level, establishing mechanisms for reviewing progress on targets and standards as well as the progress in the implementation of past decisions.

The NEPAD main policy documents pledge working with the World Bank, the IMF, the Asian Development Bank (ADB), and the United Nations agencies, to "accelerate implementation and adoption of the Comprehensive Development Framework, the Poverty Reduction Strategy and related approaches". The full implementation and expansion of the HIPC initiative is considered essential to achieve macroeconomic goals such as improving the investment environment. They call for an expanded HIPC initiative that includes provisions for middle-income countries engaged in the Paris Club debt relief process and a movement towards 100% debt cancellation. They assert that HIPC still leaves many of its participating countries with unsustainable debt levels and that countries not included in HIPC should also receive debt relief to free resources for poverty reduction. Thus, NEPAD does not seek to replace or compete with existing development initiatives.

7.2. NEPAD and RTD-DC model

The NEPAD model is perfectly consistent with the RTD-DC model. Its development policy framework is very similar to the approach spelt out in the development compact. It is country-driven, comprehensive, partnership- and result-oriented and, as such, it should gain acceptance and endorsement from Western donors. However, in the designing and the implementation of the programs, mechanisms have to be established to ensure that they follow the rights-based approach, with equity, non-discrimination, participation, accountability and transparency – and to monitor them effectively. They must also allow the civil society organisations to review and scrutinize the program and take appropriate actions. Two main concerns of the civil society organizations are:

(a) *Participation*: The NEPAD progress report recognizes that "popularization of NEPAD" is an area of concern and that the private sector and civil society have not, to date, been sufficiently mobilized in support of the process through deeper engagement. The civil society organizations have complained that NEPAD was drawn up and debated without the input and consultation from the groups that will be most affected by its policies. The concept of participation in the RTD-DC model goes beyond just consultations. Beneficiaries have to be involved in the designing, implementation and the monitoring of the programs. NEPAD must be prepared to work out the methods for ensuring that participation.

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(b) *Market-oriented approach to be adjusted with human rights concerns, equity and justice*: The NEPAD authorities should be able to adjust the market-oriented approach to development policy that would improve the overall efficiency of their economies, with the rights-based approach, especially with equity and justice. It must be able to, and must be seen by its peoples and the civil society as being able to, modify and monitor the programs suitably to avoid the mistakes of the earlier standard adjustment policies.

The RTD-DC model is not against the market-oriented approach. It firmly believes that it is possible to build upon a market-oriented approach to development, based upon liberalization and deregulation and private initiatives, a right to development policy that will promote a high rate of economic growth with equity and justice realizing social development as human rights. Indeed the NEPAD programs, carried out in this manner may become test-cases for realizing the right to development from which even the international agencies, such as the World Bank and the IMF, can learn.

7.2.1. Peer review

The most important operational similarity is the development of the African Peer Review Mechanism (APRM) which is designed to encourage adoption of policies, and practices that lead to political stability and sustainable development.[11] The peer review process that entails periodic reviews of the policies and practices of participating states to assess progress, can be likened to the Development Compact model's mechanism for ensuring the assessment of the "mutuality of the obligations" between the developing countries and the international community. The major difference is that the APRM does not apply to external actors such as donors and IFIs who wield influence on the development process, whereas the Development Compact is primarily concerned with holding both donor countries and developing countries accountable to each other. To rectify this, a method has to be worked out to extend the APRM to incorporate the accountability of the international partners.

7.2.2. Financing

Similar to the RTD-DC's proposed trust fund which calls for an increase in ODA from OECD nations, NEPAD also calls for an expansion of ODA. Yearly investments of US $64 billion from developed countries are expected for the establishment of two separate trust funds to carry out the goals of the

[11] "The New Partnership for Africa's Development (NEPAD) – The African Peer Review Mechanism (APRM), 10 June 2002".

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initiative. One trust fund would finance peacekeeping and conflict prevention activities and another would focus on supporting capacity building in policy formation and implementation, service provision, trade facilitation and financial and policy negotiations in international trade. In creating such funding facilities, the RTD-DC model for financing the implementation of development compacts through "callable contributions" of international partners, may be helpful, especially in determining the burden-sharing among the international community.

7.2.3. Democracy and good governance

Unlike previous regional and continent-wide plans for African development, NEPAD places a strong emphasis on democracy and good governance, which is in keeping with the RTD-DC approach. The "Declaration on Democracy, Political, Economic and Corporate Governance" is a statement by NEPAD member states of their commitment to democracy and good political governance and the promotion and protection of human rights. It calls for the development of vibrant civil society organizations, including strengthening human rights institutions at the national, sub-regional and regional levels. It also pledges support for the African Charter, African Commission and the Court on Human and Peoples' Rights as important instruments for ensuring the promotion, protection and observance of human rights. It also commits to strengthening the co-operation with the UN High Commissioner for Human Rights, and to ensure responsible free expression, inclusive of the freedom of the press. Each of these measures is explicitly articulated in the RTD-DC approach.

In sum, the RTD-DC and NEPAD share the same basic premise: poverty eradication and sustainable development. It may, however, be possible to suggest that unlike the RTD-DC approach, NEPAD does not yet explicitly state the centrality (or primacy) of human rights. Rather, human rights concerns (namely within the context of peace, security, democracy and political governance) are addressed as broadly defined actions and not quite a clear rights-based approach. The principles and objectives of human rights – as they relate to the NEPAD plan – are mostly contained within the "Declaration on Democracy, Political, Economic and Corporate Governance" and are not sufficiently woven or integrated into the overall strategic plan of action, fully recognizing the interdependence of rights. In the RTD approach, all the civil, political, economic, social and cultural rights are integrated with the rights-based economic growth as a vector of inter-dependent elements. Development is seen as expanding the capabilities and freedoms of individuals and realizing fundamental rights, when the vector of composite rights increases, with at least some rights improving but no rights violated.

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In a May 2002 review of NEPAD, the organization Rights and Democracy expressed the concerns of many civil society organizations and sympathizers with NEPAD, when it stated that,

> a human-rights approach to development in Africa depends not only on prudent fiscal management, foreign investment and expanded market access, but also on the re-orientation of development objectives towards meeting the human rights obligations of States within a transparent, accountable and non-discriminatory process.[12]

It further stated that NEPAD does not concretely address the means by which a rights-based approach to development can be implemented and how governments will be monitored and held accountable to their obligations under the international treaties.

Such a monitoring mechanism must be also able to recommend and implement "enforceable remedies", when the programs cannot be completed or one party or another among the duty-bearers fails to meet its obligations. The development compacts provide such a mechanism, in the form of a support group conducting the peer review and making appropriate recommendations, and the Fund for Financing the RTD to bridge the gap in the financing requirements for a program, after taking into account the use of all other measures of co-operation. PRSPs have now become the basis of most of the concessional finance from the IMF and the World Bank.

But even if all the modifications that have been suggested to make the PRSP (and CDF) frameworks conform to the standards of the rights-based approach to development as built up in the RTD-DC model, the funds available to them will not be sufficient to meet the requirements for implementing the right to development on a global scale or even the financial needs for just NEPAD.

7.2.4. Financing development compacts

Intensive additional efforts have to be made to mobilize resources from the donor community, supplementing with other trade, market access, financial restructuring measures to attract commercial flows and private investment, so that countries trying to implement programs for the right to development are not left without the required finance. For that purpose, the Development Compact Framework may serve as a very useful model. When a Fund for Financing Development Compacts is created, on the basis of callable contribution – meaning commitments made by the donors on a notional basis, whose disbursements can be decided on a case-by-case basis with the sup-

[12] Human Rights and Democratic Development in Africa – Policy Considerations for Africa's Development in the New Millennium in preparation for the G8 Summit, May 21, 2002, prepared by Rights and Democracy.

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port group assessing the performance and the fulfilment of the rights in a RTD program – that will be a systematic way to supplement the Bank-Fund financing of PRSPs as well as HIPC initiatives. Indeed, a modified and rights-based PRSP should in principle not conflict with the Bank-Fund approach, or the intent of the Executive Boards of these organisations, if that is seen as catalyzing additional finance from the donor community. NEPAD, for example, clearly believes that their programs can be built on the PRSPs, and so can other programs of the right to development.

In my Fourth Report on the right to development I had provided an illustrative model of burden sharing of ODA. A modified version of that exercise, based on the data of OECD 2000, is provided in the attached table. This exercise is based on three assumptions: (a) DAC member countries are genuinely interested in helping countries implementing a rights-based development program; (b) even if the ODA/GNP ratio for a country is far below the 0.7% target, they may at least try to maintain their best performance of the last three years as their disbursement in the coming years; and (c) they will be prepared to make additional commitments in the form of callable contribution to a Fund for Financing the Right to Development, maintained by the DAC or any other agency. These funds can be used only by countries that are implementing the rights-based programs of development, such as NEPAD or other country-plans. Support groups that would be established for such countries would monitor their performance and recommend the use of this Fund. The callable contribution of the members would then be invoked according to some agreed principle of burden sharing.

The exercise shows that while the total ODA from DAC in 2000 was only about $ 54 billion, if each country had followed its peak contribution to GNP of the last three years also in 2000, the total ODA would have been roughly $ 59 billion. But if they had followed the 0.7% target, the total would have been more than $ 169 billion. There would, therefore have been the possibility of raising $ 110 billion for this proposed fund, if the 0.7% target were universally accepted. The size would be reduced if the proposed target was lowered. But still there would be immense scope for raising funds, especially when the actual disbursement based on invoking the callable capital would be much less, depending on the successful implementation of the rights-based program. This can easily meet the NEPAD requirements. It could also meet the requirements of several other countries, supplementing the PRSP and other international programs.

8. Conclusion: overview of development co-operation

It can thus be seen that the RTD-DC model can fully accommodate all the major existing mechanisms and frameworks for development co-operation

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that aim at poverty reduction and social development. The basic PRSP/CDF models address the goals of poverty reduction in the context of economic growth. The RTD model integrates economic growth with social development and the sustainable elements of both income and capability poverty. There are, however, two fundamental and indispensable requirements for integrating all such efforts. First, the realization of human rights and fundamental freedoms, as spelt out in the RTD-DC model must be the central aim of all these efforts. Second, there must be an independent rights-based mechanism to monitor the performances of all the countries, the obligations of the developing countries to implement the programs for the right to development and the obligations of the international community to co-operate with these countries, effectively and in full measure.

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Annex: ODA from the DAC member countries in 2000

DAC Countries	ODA%GNI (GNP)	ODA (US$ Million)	ODA if 0.7% of GNI (GNP)	Peak of ODA contribution in the last 3 years	If ODA contribution in 2000 was at the peak level (US$ Million)	Difference between 0.7% and the Peak (US$ Million)
Australia	0.27	987	2558.89	0.27	987.00	1571.89
Austria	0.23	423	1287.39	0.26	478.17	809.22
Belgium	0.36	820	1594.44	0.36	820.00	774.44
Canada	0.25	1744	4883.20	0.30	2092.80	2790.40
Denmark	***1.06***	***1664***	***1664.00***	***1.06***	***1664.00***	***0.00***
Finland	0.31	371	837.74	0.33	394.94	442.81
France	0.32	4105	8979.69	0.40	5131.25	3848.44
Germany	0.27	5030	13040.74	0.27	5030.00	8010.74
Greece	0.20	226	791.00	0.20	226.00	565.00
Ireland	0.30	235	548.33	0.31	242.83	305.50
Italy	0.13	1376	7409.23	0.20	2116.92	5292.31
Japan	0.28	13508	33770.00	0.34	16402.57	17367.43
Luxembourg	***0.71***	***127***	***127.00***	***0.71***	***127.00***	***0.00***
Netherlands	***0.84***	***3135***	***3135.00***	***0.84***	***3135.00***	***0.00***
New Zealand	0.25	113	316.40	0.27	122.04	194.36
Norway	***0.80***	***1264***	***1264.00***	***0.91***	***1437.80***	***-173.80***
Portugal	0.26	271	729.62	0.26	271.00	458.62
Spain	0.22	1195	3802.27	0.24	1303.64	2498.64
Sweden	***0.80***	***1799***	***1799.00***	***0.8***	***1799.00***	***0.00***
Switzerland	0.34	890	1832.35	0.35	916.18	916.18
United Kingdom	0.32	4501	9845.94	0.32	4501.00	5344.94
United States	0.10	9955	69685.00	0.10	9955.00	59730.00
Total	**0.22**	**53739**	**169901.24**		**59154.14**	**110747.10**

Sources: OECD (2002), *Development Cooperation Report*, 2001 at <www.oecd.org>; and Sengupta, Arjun (2001), *Fourth Report of the Independent Expert on the Right to Development*, Commission on Human Rights, United Nations, Geneva.

Note: The countries given in bold italics represent those countries whose ODA contribution exceeds 0.7% of GNI (GNP). While calculating what would have been the ODA amount if it were 0.7% of GNI (GNP), for these countries, the peak ratio is applied.

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XV

The obligation of international assistance and co-operation in the International Covenant on Economic, Social and Cultural Rights

Sigrun I. Skogly*

1. Introduction

International human rights law has traditionally been regarded to be part of international law, and the processes employed to create obligations in relationship to human rights are similar to those used to enter into international law obligations. Thus, international human rights law is largely built through states entering into treaties, the functioning of which are governed by the international law of treaties as expressed through customary international law and the Vienna Convention on the Law of Treaties (1969).

Although much of the regulation of international human rights has been done through the adoption of treaties, and states are under international obligations to perform the treaties in accordance with the *pacta sunt servanda* principle,[1] the practical implementation of the human rights treaties, and the observance of obligations are seen through a direct relationship between the state and its subjects, rather than among states. In this sense, international human rights law has been seen to create a vertical relationship between the individual and his/her state,[2] in addition to a horizontal relationship among states as is common for other areas of international law.

Thus, traditionally international human rights law is seen to represent a relationship between the state that has ratified human rights conventions and the individuals within that state. This is reflected in certain provisions in international human rights treaties, *inter alia*, in the International Covenant on Civil and Political Rights,[3] where it is provided that each "State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ...".[4] Likewise, in the European Convention on Human Rights, the "High Contracting Parties shall secure to everyone within their

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1 As codified in Article 26 of the Vienna Convention on the Law of Treaties.

2 Rosas, Allan "State Sovereignty and Human Rights: Towards a Global Constitutional Project", XLIII, *Political Studies,* 1995, p. 61, at 62/63.

3 Adopted by the United Nations General Assembly in December 1966, entered into force in 1976 (hereinafter: ICCPR).

4 ICCPR, Article 2(1).

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jurisdiction the rights and freedoms contained in Section 1 of this Convention".[5]

There are, however, other instruments that contain different provisions that may indicate that the obligations to protect human rights go further than to the national setting. This implies that obligations may be more than vertical within the jurisdiction of a state, or horizontal among states: they may be *diagonal*. In other words, there may be human rights obligations that concern the relationship between a state and individuals in another state. Thus, these will be transborder, transnational or extraterritorial obligations.[6]

The extraterritorial obligations are possibly the least developed in the theory and practice of international human rights law. This does not imply that they do not exist, but rather that the human rights community have not focused sufficiently on them. However, in recent years when the full implications of human rights and the variety of actors that influence their enjoyment are increasingly being understood, and when the forces of globalisation and international interaction are intensifying, the need to address human rights obligations in a fuller light is being recognised. This recognition is also paralleled by the further elaboration and comprehension of economic, social and cultural rights that has marked the last fifteen years or so.

In this paper, I will address the extraterritorial obligations that derive from the International Covenant on Economic, Social and Cultural Rights (ICESCR). This is not to imply that extraterritorial obligations are confined to the field of economic, social and cultural rights. Just as the obligations to respect, protect and to fulfil[7] are common for all human rights – economic, social, cultural, civil and political alike – so are the extraterritorial obligations not confined to a few rights. Based on customary international law, general principles of international law, and treaty law, the extraterritorial obligations may be extrapolated from all sources of international human rights law.

Nevertheless, this paper will concentrate on the ICESCR. This Covenant provides for obligations beyond national borders more directly and more contextualised than any other individual treaty, and it is therefore merited to concentrate the discussion on this particular instrument.

This paper will be divided into the following sections. Section 2 will discuss briefly the notion of obligations, and the various levels of obligations that are commonly accepted in the theory of international human rights law,

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5 The European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by Council of Europe, 1950, entered into force in 1953 (hereinafter: ECHR), Article 1.

6 In order to avoid confusion, I will employ the term "extraterritorial" in this paper. Transnational or international may be associated with different meanings of the words, and will not be used.

7 See further discussion below.

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and set the extraterritorial obligations in this context. Section 3 will elaborate on some of the specific provisions calling for international action in the ICESCR. Before the conclusion, Section 4 will briefly address the areas of states' interaction in which these obligations may become relevant, with a particular emphasis on the role of states' actions through specialised agencies.

2. The theory of obligations

The concept of rights and the corresponding concepts of obligations are rooted in a philosophy developed in the 18th and 19th centuries that as individuals each and every human being have certain rights that the sovereign could not violate, that there are limits to what an authoritarian ruler (it being a king, emperor, or another autocratic authority) can do to his/her subjects. This notion was further developed to include the state and all the public authorities. Traditional human rights law sees the public authorities as the only obligation holders in regards to human rights.

The early ideas of human right obligations saw these as obligations not to interfere with certain aspects of the individual's life. This coincided with a liberal political philosophy regarding the state's role as a "'night-watchman" state, namely that the role of the state was to protect its citizens from danger, and otherwise refrain from interference. This understanding of obligations has retained significant strength among a number of political and legal commentators on human rights, particularly during the ideological war that was fought between the East and West in the Cold War period. This negative approach to human rights obligations has, however, not been substantiated in the drafting of treaties in this area,[8] nor in the practice of the bodies established to monitor compliance with the treaty provisions.

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[8] Article 1(3) of the UN Charter provides that the purposes of the United Nations are, *inter alia*, to "achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging* respect for fundamental freedoms for all without distinction as to race, sex, language, or religion" (emphasis added). Further, in article 55, "... the United Nations shall promote: (c) universal respect for, and observance of, human rights and fundamental freedoms for all ...", and "[a]ll Members pledge themselves *to take joint and separate action* in co-operation with the Organisation for the achievement" of this (Article 56, emphasis added). Thus, both Article 1 and Articles 55 and 56 reaffirm that action needs to be taken in order to honour the obligations laid down in the Charter and also that this action may be "joint". The UN Committee on Economic, Social and Cultural Rights have taken this view in their General comment on State Obligations pertaining to the Covenant on Economic, Social and Cultural Rights:

> The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for develop-

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Not only is the positive obligation to act in order to ensure individuals' human rights enjoyment recognised,[9] but the division of levels of obligations into different "categories" of obligations is also now generally accepted. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights[10] express this in the following terms:

> Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. ... The obligation to protect requires States to prevent violations of such rights by third parties. ... the obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.[11]

It can thus be concluded that the obligations are complex, and involve both duties to refrain from interference and duties to act. In terms of obligation subjects, the state has always been seen as the main obligation holder,[12] and the territorial sphere in which these obligations are to be adhered to,

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ment and thus for the realization of economic, social and cultural rights is an obligation of all States (General Comment No. 3, 1990, para. 14).

Likewise, in the ICCPR, the ratifying states are under an obligations to "respect and *to ensure* to all individuals within [their] territory ... the rights recognized in the ..." Covenant (Article 2(1), emphasis added). Further, the ICESCR reaffirms this point in providing that the ratifying state "undertakes to *take steps*" to realise the rights contained in the Covenant (Article 2(1), emphasis added). Similar language is used in all the regional human rights conventions. (European Convention on Human Rights and Fundamental Freedoms; Article 1, the African Charter of Human and Peoples' Rights , Article 1; and the American Convention on Human Rights, Article 1). Thus, in all the major universal human rights treaties, and the regional human rights treaties, obligations that go beyond the negative obligation to refrain from interference are recognised.

9 This can for instance be illustrated by the opinion of the Human Rights Committee in their General Comment on Article 6 of the International Covenant on Civil and Political Rights. In this General Comment the Committee stated that the "expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures", General Comment No. 6, adopted in 1982, para. 5.

10 Adopted by a group of thirty experts in Maastricht, 22-26 January 1997. The objective of the meeting was to "elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies", Introduction to the Maastricht Guidelines, as published by the International Commission of Jurists, November 1997, p. 81.

11 Maastricht Guidelines, Article 6.

12 There is now a growing discussion in human rights circles about the need to address possible other obligation holders, such as individuals, private companies, NGOs, and others. As this paper addresses the extraterritorial obligations of *states*, that very interesting debate is outside the framework of the present discussion.

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have generally been seen to concern the state's own territory. This obviously builds on the concepts of sovereignty and the *comity* principle. As was indicated in the introduction however, the strict territorial application of the obligations may be outdated in the current climate of globalisation and strong international interaction. The need for addressing extraterritorial obligations in terms of respect, protect and fulfil will become apparent from the next section of this paper. However, already at this point, one could mention the strong obligation to *respect* economic, social and cultural rights in extraterritorial activities as stated by the UN Committee on Economic, Social and Cultural Rights in their general comment on Economic Sanctions. In this General Comment they state that,

> [e]conomic sanctions are being imposed with increasing frequency, internationally, regionally and unilaterally. The purpose of this general comment is to emphasize that, whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights.[13]

3. Extraterritorial obligations in the ICESCR

When the International Covenant on Economic, Social and Cultural Rights was negotiated and adopted, the drafters included language in several articles that specifically indicate that obligations may go beyond the national border of the ratifying state. This language is to be found most clearly in Article 2(1) – the general obligation clause; Article 11 – the right to an adequate standard of living and in particular the right to food and to be free from hunger; Article 15(4) – international contacts and co-operation in the scientific and cultural fields; Article 22 – the role of the specialised agencies; and Article 23 – on international action to achieve the rights in the Covenant. It would lead too far to go into depth of all these articles. However, the paper will address the drafting history of some of them, and analyse the implications for the obligations that the ratifying states have undertaken by becoming parties to the Covenant.

3.1. Article 2(1)

Article 2(1) of the Covenant provides for the general obligations that the ratifying states are supposed to fulfil. Article 2(1) reads:

> Each State Party to the present Covenant undertakes to take steps, *individually and through international assistance and co-operation*, espe-

[13] UN Committee on Economic, Social and Cultural Rights, *The Relationship between Economic Sanctions and the Respect for Economic Social and Cultural Rights*, General Comment No. 8 (1997), para. 1.

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> cially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures (emphasis added).

The important section for the present discussion is the one emphasised – *individually and through international assistance and co-operation.* The question as to the meaning of this passage is currently being raised by a number of commentators, and the UN Committee on Economic, Social and Cultural Rights have started to address this in their comments and observations.

During the drafting of this article, the discussions in the Commission on Human Rights and the Third Committee of the General Assembly are interesting to revisit. There were some discussions of this passage, and the drafting of it during two particular periods: in 1951/52 and in 1962. In 1951/52 the discussion was held in the framework of the drafting of a single legally binding Covenant, while in 1962, the drafting had long since moved on to two separate Covenants.[14]

The main aspects of the debates in the first drafting stages in 1951/52 seemed not to cause much controversy. The suggestion to include *international assistance and co-operation* came, *inter alia*, from the US delegation,[15] and was strongly supported by a large number of delegations.[16] This passage was included as a recognition that "countries with insufficient resources should be able to obtain help under the technical assistance programmes or similar projects",[17] that "the available resources of the small countries, even if utilised to the maximum, would be insufficient; [and] as a result, those countries would have to fall back on international co-operation ...";[18] and that "international co-operation [was] a point which was of cardinal importance to the under-developed countries, which needed help if they were to be capable of implementing economic rights".[19] Thus, it seems that in 1951/52 there was a general consensus that the inclusion of international co-operation in the Covenant would be necessary to implement economic

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[14] The decision to draft two Covenants rather than one was taken by the General Assembly in 1952. For the discussion in the Third Committee, see *Draft International Covenant on Human Rights and Measures of Implementation. Report of the Third Committee*, UN doc. A/2112, 3 February 1952.

[15] E/CN.4/L.54/Rev.2.

[16] For instance Chile (E/CN.4/SR.216), France (E/CN.4/L.55), India (E/CN.4/SR.231), Greece (E/CN.4/SR.236), Egypt (E/CN.4/SR. 236), and Denmark (E/CN.4/SR. 236).

[17] Denmark, *ibid.*

[18] Egypt, *ibid.*

[19] India, E/CN.4/SR.231.

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and social rights,[20] that it would be necessary in order to get developing countries to ratify the Covenant,[21] and that international co-operation and assistance should be considered part of "available resources".[22] In the discussions at this stage, there did not seem to be a clear view as to whether states facing resource shortages would have a duty to try to obtain resources from wealthier states, or whether wealthier states had a duty to provide such assistance. Both views were voiced,[23] and no substantial discussion as to either way of looking at it seems to have taken place. Only Egypt made quite a strong statement as to the nature of this international co-operation and assistance at this point in time, asserting that,

> [b]y international co-operation he meant the co-operation achieved through international bodies such as the United Nations, the International Monetary Fund, the Technical Assistance Board, etc.[24]

When these provisions were discussed in the Third Committee in 1962, the emphasis of the discussion was slightly different. While the Commission's discussion very much had focused on the link between resources and international co-operation and assistance, the discussion in the Third Committee at this stage was to a large part confined to the discussion on whether or not this international co-operation and assistance was only financial and technical.[25] Chile held that "the effective realization of the rights recognized in the Covenant very often necessitated technical assistance by experts from abroad and the investment of foreign capital".[26] However, the word "technical"

> no longer applied solely to the activities of engineers but also to legislative and cultural efforts and – a very important point – to commercial activities relating to basic commodities.[27]

The Tunisian representative confirmed this wider view on "technical and financial" and held that it was now applied to cultural and social matters.[28]

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20 *Ibid.*

21 The United States, E/CN.4/SR. 236.

22 Greece, E/CN.4/SR.236, p. 26.

23 France held that "... in implementing the rights in question, ... countries with substantial resources should lend their assistance internationally" (E/CN.4/SR.233, p. 8; 2 July 1951); India held the view that if "the meaning was that when the resources of a State were inadequate it would receive international help on certain conditions which it would have to accept, she would be unable to agree to that text. It should be for a State to declare that its resources were inadequate and to ask the United Nations for assistance, which should be granted provided the request was justified", E/CN.4/SR.233, p. 12.

24 E/CN.4/SR.236, p. 22.

25 General Assembly, Seventeenth Session, Third Committee 1202nd meeting, Official Records, Agenda Item 43, para. 14.

26 *Ibid.*, para. 15.

27 *Ibid.*, para. 17.

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The United States shared the view that international co-operation should not be limited, and that the text without "technical and financial" adequately covered all forms of international assistance.[29] The Third Committee also discussed the voluntary/mandatory nature of this co-operation, and some delegations held that this co-operation should be voluntary,[30] while Chile for instance held that,

> [i]nternational assistance to under-developed countries has in a sense become mandatory as a result of commitments assumed by States in the United Nations. This history and structure of United Nations technical assistance funds and programmes clearly demonstrated the trend to replace or supplement voluntary bilateral aid with multilateral assistance that tended, by its nature, to entail binding commitments.[31]

This view was shared by Iraq, whose delegation held that "the obligation on States to resort to international co-operation for the advancement of human rights was an extremely important and novel element of the draft Covenant".[32]

Thus, the drafting history of Article 2(1) shows that there are some inconsistencies in the approaches held as to the concrete meaning of *through international co-operation and assistance*. However, it seems that the delegations were quite agreed that international co-operation and assistance is needed for the full implementation of the rights, and that the resources available based upon this co-operation and assistance should be part of the resources used for the full realization of these rights. The controversies did not arise significantly as to whether there would be a duty to assist, and indeed the representative from the United States held that,

> ... her government vigorously supported all efforts to co-operate with the world's developing nations. Its record in extending assistance through international co-operation to all countries spoke for itself. ... the words "international co-operation" in the original text of article 2, paragraph 1 adequately covered all forms of international assistance. The addition of qualifying phrases could only limit the range of possible co-operative activities.[33]

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28 General Assembly, Seventeenth Session, Third Committee 1203rd meeting, Official Records, para. 8.

29 General Assembly, Seventeenth Session, Third Committee 1204th meeting, Official Records, para. 49.

30 General Assembly, Seventeenth Session, Third Committee 1203rd meeting, Official Records, Saudi Arabia, *ibid.*, para. 5.

31 Chile, *ibid.*, para. 10.

32 Iraq, *ibid.*, para. 21.

33 General Assembly, Seventeenth Session, Third Committee 1204th meeting, Official Records, para. 49.

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Another aspect that needs to be emphasised is that initially civil political, economic, social and cultural rights were intended to be covered in one covenant. During the drafting period of this covenant, much discussion took place whether to have a separate general clause on the obligations pertaining to economic, social and cultural rights. The first drafts for the article that has become Article 2 of the ICESCR were draft Article 19 in the single covenant. There was therefore a clear distinction between the two sets of rights as to the perception of the general obligations, as the civil and political rights part of the "unified" covenant referred to states obligations in regards to "individuals within its territory and subject to its jurisdiction",[34] while draft Article 19 did not make any references to "within territory" or "its jurisdiction". Quite the contrary, the representatives in the drafting process clearly recognised the need for international co-operation and assistance, and that wealthier states had a duty to assist less well-off states to realise the economic, social and cultural rights.

During the last 25 years, since the Covenant has been in force, the understanding of the obligations pertaining to Article 2(1) has become more sophisticated. Particularly in the last fifteen years, with the experience of the Committee on Economic, Social and Cultural Rights, this has moved forward rapidly. Nevertheless, the implications of the highlighted passage have not been thoroughly debated. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights[35] (1986) contain a section on this passage.[36] The principles in this section, however, are not very specific in terms of what states are under an obligation to do. Principle 29 refers to Articles 55 and 56 of the United Nations Charter;[37] principle 30 refers to the right to an international order in which the rights and freedoms set forth in the Covenant can be fully realized (paraphrasing from Article 28 of the Universal Declaration of Human Rights); principle 31 relates to international co-operation irrespective of differences in political, economic and social systems to promote international social, economic, and cultural progress; while principle 32 confirms that "States parties shall take steps by international means to assist and co-operate in the realization of the rights recognized by the Covenant". The final two principles in this section confirm that international co-operation and assistance

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34 Wording of current Article 2(1) of the ICCPR.

35 The Limburg Principles were adopted by a group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg, and the Urban Morgan Institute for Human Rights, who met in Maastricht on 2-6 June 1986 to consider the nature and scope of the obligations of states parties to the International Covenant on Economic, Social and Cultural Rights. The principles may be accessed on <http://www.law.uu.nl/english/sim/instr/limburg.asp>.

36 Limburg Principles, principles nos. 29-34.

37 See discussion above.

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shall be based on the sovereign equality of states, and that international organisations and non-governmental organisations have contributions to make.

However, in the experience of the Committee on Economic, Social and Cultural Rights, the significance of this passage has been made more explicit. In General Comment No. 3 on State obligations, the Committee emphasises that the "maximum resources" that should be used for the realization of economic, social and cultural rights include both those "existing within a State and those available from the international community through international cooperation and assistance".[38]

It further recognises that,

> [i]t is particularly incumbent upon those States that are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.[39]

The Committee has included this approach to obligations in regards to states' international activities in its deliberations on reports by states parties. For instance, in the recent observations on the report submitted by the United Kingdom, the Committee encouraged

> the State party, as a member of international financial institutions, in particular the International Monetary Fund and the World Bank, to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties to the Covenant, in particular with the obligations contained in articles 2(1), 11(2), 15(4), and 23 concerning international assistance and cooperation.[40]

Thus, the Committee is now actively acknowledging that the implementation of economic, social and cultural rights should be approached through not only domestic but also foreign policy means, and that this is an obligation based, *inter alia*, on Article 2(1) of the Covenant.[41]

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[38] UN Committee on Economic, Social and Cultural Rights, *The nature of States parties obligations*, General Comment No. 3 (1990), para. 13.

[39] *Ibid.*, para. 14.

[40] The UN Committee on Economic, Social and Cultural Rights, Concluding Observations United Kingdom Of Great Britain And Northern Ireland, The Crown Dependencies And The Overseas Dependent Territories, 17 May 2002; UN doc. E/C.12/1/Add.79, para. 26.

[41] This approach is also reflected in the Committee's guidelines for reporting. Paragraph 7 of the Guidelines asks if "your State participates in development cooperation, is any effort

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3.2. Article 11

One of the two substantive Articles of the Covenant that contains specific obligations of international co-operation is Article 11.[42] This Article guarantees everyone's right to an adequate standard of living, including adequate food, clothing and housing, and to be free from hunger. The article contains references to international co-operation in two separate paragraphs. In Article 11(1) it is stated that,

> States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Article 11(2) provides that the

> States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed ... .

The drafting history of this article reveals that it was early on envisaged that the rights in current Article 11 would be covered in two articles, one dealing with adequate food, clothing and housing;[43] while an Article 12 would cover the right to an adequate standard of living.[44] The Third Committee, however, decided that the two articles should be combined. In the deliberations on a combined article, the delegations of Chile and Japan suggested to add the following passage: "and likewise recognize the particular importance of international co-operation with a view to ensuring the full exercise of that right".[45] Syria proposed to add the words "based on free consent" after "international cooperation".[46]

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made to ensure that it is used, on a priority basis, to promote the realization of economic, social and cultural rights?". *Compilation Of Guidelines On The Form And Content Of Reports To Be Submitted By States Parties To The International Human Rights Treaties*, UN doc. HRI/GEN/2/Rev. 1; 9 May 2001, p. 6.

42 The other substantive article specifying obligations of international co-operation is Article 15(4) which reads: "The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields".

43 According to the Report of the Third Committee in 1957, the earlier draft Article 11 read: "The States Parties to the Covenant recognize the right of everyone to adequate food, clothing and housing", UN doc. A/3525, 9 February 1957, para. 120.

44 This draft article read: "The States Parties to the Covenant recognize the right of everyone to an adequate standard of living and the continuous improvement of living conditions", *ibid.*

45 *Ibid.*, para. 131.

46 *Ibid.*, para. 137.

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In the discussions of the issues in the Third Committee, the discussion on the inclusion of "international co-operation" is of particular interest. The opposition to including this passage held that it was not necessary to refer specifically to international co-operation as "the matter was fully covered not only in article 2, but also in articles 17 to 25".[47] However, the proponents of retaining this clause claimed that the "inclusion of a reference to international co-operation in the article which dealt with the question of standard of living was deemed particularly essential since some countries, especially those which were under-developed, would not be able to provide their people with adequate food, clothing and shelter without international assistance".[48] The voting in the Third Committee is interesting to note as well. The draft without the amendment of "based on free consent" was adopted by 58 votes to none, with 4 abstentions;[49] while the next vote on the Syrian proposal to add "based on free consent" was adopted by 20 votes to 19, with 21 abstentions.[50] Thus, there was close to consensus on the inclusion of "international co-operation", while the "free consent" part was not given much support.

At the end of the deliberations in the Third Committee in 1957, draft Article 11, which now combined the right to adequate housing, food, and clothing with a right to adequate standard of living, included a specific obligation of international co-operation. This article remained in this form until 1963. At this point, the Director General of the FAO, Mr. Sen, gave a statement to the Third Committee, in which he expressed his concerns about the present version of the draft Article, in that it only contained an indirect reference to a right to be free from hunger.[51] He was also concerned that "no detailed enumeration of the measures which should be taken to ensure the enjoyment of the right" was included.[52] He then proposed a text that, *inter alia*, contained the following passages:

> 1. The State parties to the present Covenant recognize the right of everyone to be free from hunger. They undertake, individually and through international co-operation, to develop programmes aimed at achieving freedom from hunger within the shortest possible time.
> 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right, national and international action should be geared to the realization of this right by paying particular attention to: … .[53]

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47 *Ibid.*, para. 142.
48 *Ibid.*
49 *Ibid.*, para. 143.
50 *Ibid.*
51 UN General Assembly, Third Committee, 1232nd meeting, para. 10.
52 *Ibid.*
53 *Ibid.*

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As is thus apparent, the final draft that was adopted by the General Assembly in 1966, contains a combination of the draft from 1957 and the one from 1963 of the Third Committee, and retains important passages on international co-operation in two paragraphs of the Article. The views expressed by the representatives in the Third Committee is further evidence that obligations to assist in the implementation of the rights of the Covenant were seen to go beyond national borders and relate to all individuals suffering from lack of adequate food, housing, etc.

Indeed, in his important work on the right to adequate food as a human right, Asbjørn Eide has made the following recommendations in terms of international co-operation:

> (a) States should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food;
>
> (b) States should respect the enjoyment of the right to food in other countries; among other things this means that they should at all times refrain from using food as a weapon. States participating in international sanctions should ensure that they do not lead to the deprivation of necessary food for the population;
>
> (c) States should protect the right to food in other countries that, *inter alia*, requires that they should monitor the impact of their external aid and trade, as well as the impact of transnational corporations under their jurisdiction, on the enjoyment of the right to food in other countries and take corrective measures where a negative impact can be shown;
>
> (d) States should facilitate access to food in countries other than their own, and provide the necessary aid when required. This does not necessarily or only mean food aid, but various categories of aid, which enable the local population, concerned to develop sustainable and effective entitlements to food either by its own production or by income generation. Donor States should increase their awareness of the importance of the effective enjoyment of the right to food, and make it a major concern in their development assistance;
>
> (e) Creditor countries should adopt substantial debt relief measures in ways that facilitate the realization of the right to food and other economic and social rights for vulnerable groups in developing countries;
>
> (f) States parties to international agreements, whenever relevant, should ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.[54]

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[54] *The right to adequate food and to be free from hunger, Updated study on the right to food*, submitted by Mr. Asbjørn Eide in accordance with Sub-Commission decision 1998/106, UN doc. E/CN.4/Sub.2/1999/12, para. 130.

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These recommendations are in line with the views of the UN Committee on Economic, Social and Cultural Rights, which in their General Comment No. 12, on the right to adequate food, states that,

> [i]n the spirit of Article 56 of the Charter of the United Nations, the specific provisions contained in articles 11, 2.1 and 23 of the Covenant and the Rome Declaration of the World Food Summit, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.[55]

It can thus be summarized that both in the drafting of the Article, and in its implementation through the international mechanisms, the central role of international co-operation is emphasized in regards to the right to adequate food and indeed an adequate standard of living in general. The central role of international co-operation has been qualified in terms of the "fundamental right of everyone to be free from hunger", which is provided for in Article 11(2). In terms of this right, the international measures to be taken have been made quite specific in sub-paragraphs a) and b).[56]

3.3. Articles 22 and 23

Part IV of the Covenant (Articles 16 to 25) covers its implementation provisions, or in other words how the implementation of the Covenant may be supervised and assisted by the organs of the United Nations and other institutions. It also contains provisions of measures that states are expected to undertake in order to ensure the full implementation of the Covenant. The role of international action is recognised throughout Part IV of the Covenant,[57] and in particular in Articles 22[58] and 23.[59] These two Articles reiterate

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[55] UN Committee on Economic Social and Cultural Rights, *The Right to Adequate Food*, General Comment No. 12 (1999), para. 36.

[56] Article 11(2) reads: "The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; and (b) Take into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need".

[57] See comments made in the Third Committee in 1957, *supra*, note 43 and accompanying text.

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the importance that the drafters envisaged international assistance and co-operation would have in the implementation of the Covenant. The need to include an article such as Article 22 in the final version of the Covenant was not heavily debated. The draft from the Commission on Human Rights to the Third Committee[60] included a proposed text for this article, which only slightly differs from the one that was adopted.[61] Indeed, the Third Committee adopted without debate the final text with the amendments proposed by a number of states.[62] As is apparent from the two texts, the main difference was a specification of the international organs which the Economic and Social Council may point to, and making this somewhat less open-ended.

In the work of the Committee on Economic, Social and Cultural Rights, the content of Article 22 has been seen as particularly important. As early as in its forth session, the Committee adopted a General Comment concerning Article 22.[63] In this General Comment, the Committee establishes that the recommendations according to this Article may be of two different kinds: a) recommendations of a general policy nature, or b) more narrowly focused relating to a specific situation.[64] The importance of this Article is emphasised as well, stating that the Committee considers that a

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58 Article 22 reads: "The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance, any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant".

59 Article 23 reads: "The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultations and study organized in conjunction with the Governments concerned".

60 UN doc. A/6342, annex II A (the article was at this point in the drafting process Article 23).

61 The proposal from the Human Rights Commission read: "The Economic and Social Council may bring to the attention of the international organs concerned with technical assistance or of any other appropriate international organ any matters arising out of the reports referred to in this part of the Covenant which may assist such organs in deciding, each within its competence, on the advisability of international measures likely to contribute to the progressive implementation of this Covenant".

62 The states proposing and supporting the amended text were India, Iran, Nigeria, Pakistan, the United Arab Republic, Upper Volta, Afghanistan, Congo, Libya, Saudi Arabia and Syria, UN doc. A/6546, 13 December 1966, para. 81.

63 UN Committee on Economic, Social and Cultural Rights, *General Comment no. 2 – International technical assistance measures (article 22 of the Covenant)*, UN doc. E/1990/23.

64 *Ibid.*, para. 3.

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> deeper understanding of the relevance of economic, social and cultural rights in the context of international development cooperation activities would be considerably facilitated through greater interaction between the Committee and the appropriate agencies.[65]

The role of the states parties to the Covenant is also emphasised, and in particular with a view to adjustment programmes, as

> States parties to the Covenant, as well as the relevant United Nations agencies, should [...] make a particular effort to ensure that protection [of the most basic economic, social and cultural right] is, to the maximum extent possible built-in to programmes and policies designed to promote adjustment.[66]

The importance of states' actions through international organisations, as well as in their international co-operation generally, in the implementation of economic, social and cultural rights has been emphasised by the UN Committee on Economic, Social and Cultural Rights in a number of General Comments and Statements,[67] and also in the Maastricht Guidelines.[68]

The drafting history of Article 23 is very similar to that of Article 22, in that it did not bring about much debate. It seems that the delegations both in the Human Rights Commission and in the Third Committee generally agreed

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65 *Ibid.*, para. 4.

66 *Ibid.*, para. 9.

67 See, *inter alia*, General Comment No. 2 (1990) on Article 22; No. 3 (1990) on Article 2; No. 4 (1990) on adequate housing; No. 5 (1994) on Persons with Disabilities; No. 6 (1995) on Economic, Social and Cultural Rights for Elderly People; No. 12 (1999) on the Right to Adequate Food as a Human Right; No. 13 (2000) on the right to education; No. 14 (2001) on the Right to Health. See also Substantive Issues Arising In The Implementation Of The International Covenant On Economic, Social And Cultural Rights: Poverty And The International Covenant On Economic, Social And Cultural Rights. Statement Adopted By The Committee On Economic, Social And Cultural Rights On 4 May 2001, UN doc. E/CN.12/2001/10; and Statement Of The Committee On Economic, Social And Cultural Rights To The Third Ministerial Conference Of The World Trade Organization; UN doc. E/2000/22, E/C.12/1999/11.

68 Paragraph 19 reads: "The obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights. Member States of such organizations, individually or through the governing bodies, as well as the secretariat and nongovernmental organizations should encourage and generalize the trend of several such organizations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights".

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on the principles contained in the Article, and that they saw international action for the fulfilment of the Covenant as imperative and as a natural continuation of the principles contained in Article 2. The changes that the Third Committee included before the final adoption of the Article implied that the means for international action became more specified,[69] but the general nature of the Article was preserved, as both the proposal and the final text have the words "includes such methods as" and thus renders the listing of measures open-ended.

4. Implications

From the brief account of the drafting history of the Covenant above, and the implementation experience of the Committee on Economic, Social and Cultural Rights, there is a strong case for recognition of the obligations to enter into international co-operation for the implementation of the Covenant. As with other areas related to economic, social and cultural rights, the content of these obligations have been neglected too long. Even though the drafters of the Covenant in the 1950s and 1960s took these aspects of the obligations for granted, they have largely been neglected by the states parties, and also the international human rights community. It is only recently that the international co-operation aspect of human rights implementation has been raised by the Committee on Economic, Social and Cultural Rights, as discussed above.

The implementation of economic, social and cultural rights through international co-operation and assistance has largely been neglected and to some extent resisted. Just as the drafters emphasized – without international co-operation it will impossible to implement these rights for many countries. However, if this is to be accepted there are certain conditions that need to be met. First, all states should recognise that the first "level" of obligations is the respect level. This implies that the first obligation is to ensure that the activities of one state do not jeopardize or violate human rights for individuals in another state. This is what was labelled the "diagonal" relationship in the introduction. It will be easier for poorer states to honour their primary obligations towards their own population if other states ensure that their activities do not have a negative impact on the human rights situation in these poorer states. It is also necessary for all states to take their obligation to protect people in other states seriously as well. This would imply that they need to ensure that non-state actors within their jurisdiction do not infringe or

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[69] The proposal from the Commission read: "The State Parties to the Covenant agree that international action for the achievement of these rights includes such methods as conventions, recommendations, technical assistance, regional meetings and technical meetings and studies with Governments", UN doc. A/6546, 13 December 1966, para. 83.

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contribute to a deteriorated human rights situation in other states. And finally, the obligation to fulfil would imply an obligation to actively assist in the implementation of economic, social and cultural rights in other states. However, in this regard, it is paramount that foreign states recognize the primary responsibility of the home state to implement these rights, and that this is not interpreted as an opportune way in which richer states may impose further conditionality upon poorer states.

If human rights are being used as leverage for international assistance and co-operation, the spirit of the Covenant will be hard to achieve, as a withholding of assistance generally harm those already suffering from human rights violations the most. In the context of globalisation and increased international interaction, the effects of states' actions both nationally and internationally should be taken seriously in regards to human rights. The challenge to the states parties to the Covenant[70] is to develop ways in which an environment for conducive international co-operation may be used as the most efficient way of fulfilling the obligations they have all undertaken when ratifying the Covenant.

[70] As of July 2002, 145 states have ratified the Covenant.

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XVI

Business and human rights

David Weissbrodt* **and Muria Kruger****

1. Introduction

In his sixteen years as a member of the Sub-Commission on the Promotion and Protection of Human Rights, Asbjørn Eide has developed several important human rights norms and mechanisms. For example, he was the first chair of the Working Group on Indigenous Populations and skillfully sent that group on its way to establishing the draft Declaration on the Rights of Indigenous Peoples, and ultimately led to indigenous concerns becoming an important part of the United Nations and world community. As the chair of the Working Group on Minorities, he has worked to address concerns relating to minority rights and to identify major issues and obstacles facing minority populations. Eide also wrote seminal studies on conscientious objection to military service, which aided in the establishment of conscientious objection to military service as a human right. Further, his work on the right to food helped to develop a global understanding and recognition of that right.

In 1998, Eide was a founding member of the Working Group on the Working Methods and Activities of Transnational Corporations. The Sub-Commission established this group to consider the impact transnational corporations and other business enterprises have upon human rights. Since the creation of this group, Eide has been an active participant both as a member of the Working Group and as a member of the Sub-Commission. In 2001, Eide prepared an influential paper regarding the responsibilities and procedures for implementation and compliance in connection with establishing human rights norms for businesses.[1] This paper has served and will serve as

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1 Asbjørn Eide, Sub-Commission on the Promotion and Protection of Human Rights, *Corporations, states, and human rights: A note on responsibilities and procedures for implementation and compliance*, UN doc. E/CN.4/Sub.2/WG.2/WP.2 (2001) [hereinafter Eide Working Paper].

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an agenda for the Working Group, especially as the Working Group focuses more upon implementation issues in the future.

In light of Eide's efforts at the beginning of the Working Group and his important paper on implementation of human rights standards, this article will begin with a discussion of the background surrounding the development of any human rights standards with regard to businesses. It will then trace the history of the Working Group in its attempts to draft human rights standards for businesses, starting with the group's creation and ending with their most current meeting in August 2002. Finally, this paper suggests possible implementation mechanisms for any human rights standards adopted by the Working Group and takes into account the suggestions given by Eide in his 2001 working paper.

During the past half century governments have codified international human rights law protecting the rights of individuals against governmental violations. With increasing attention to the emergence of international criminal law as a response to war crimes, genocide, and other crimes against humanity, there has also been growing attention to individual responsibility for grave human rights abuses. In addition, international humanitarian law and international criminal law have placed obligations on armed opposition forces engaged in civil wars or other non-international armed conflicts. This web of human rights obligations, however, has not paid sufficient attention to some of the most powerful non-state actors in the world, that is, transnational corporations and other business enterprises. With power should come responsibility,[2] but international human rights law has not yet focused adequately on these extremely potent international non-state actors.

Transnational corporations are of particular concern in relation to recent global trends because they are active in some of the most dynamic sectors of national economies, such as the extractive industries,[3] telecommunications, information technology, electronic consumer goods, footwear and apparel, transport, banking and finance, insurance, securities trading, etc. They bring new jobs, capital, and technology. Some corporations make real efforts to achieve international standards by improving working conditions and raising local living conditions. They certainly have the capacity to assert a positive

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2 Mary Robinson, Address at the Second Global Ethic Lecture at the University of Tübingen, Germany (January 21, 2002), reprinted in "Globalization has to take human rights into account", *Irish Times*, January 22, 2002.

3 For an in-depth discussion of human rights in the oil industry, *see* Asbjørn Eide, Helge Ole Bergeson, and Pia Rudolfsson Goyer (eds.), *Human Rights and the Oil Industry* (2000). *See also*, Human Rights Watch, *The Price of Oil Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (1999), *at* <http://www.hrw.org/reports/1999/nigeria/index.htm>; Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), *at* <http://www.hrw.org/reports/1999/enron/>.

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influence in fostering development. Some transnational corporations, however, do not respect international minimum human rights standards and can thus be implicated in abuses such as employing child labourers, discriminating against certain groups of employees, failing to provide safe and healthy working conditions as well as just and favorable conditions of work, attempting to repress independent trade unions and discouraging the right to bargain collectively, limiting the broad dissemination of appropriate technology and intellectual property, dumping toxic wastes, etc. Some of these abuses disproportionately affect developing countries, children, minorities, and women who work in unsafe and poorly paid production jobs as well as indigenous communities and other vulnerable groups.

There is also increasing reason to believe that greater respect for human rights by companies leads to greater sustainability in emerging markets[4] and better business performance.[5] For example, observance of human rights aids businesses by protecting and maintaining their corporate reputation, and creating a stable and peaceful society in which businesses can prosper and attract the best and brightest employees.[6] Consumers have also demonstrated they are willing to pay attention to standards and practices used by a business regarding human rights and may even boycott products that are produced in violation of human rights standards.[7] There is also evidence that a

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4 A large-scale study of evidence from developing countries found that emerging market companies gain financially from stability. *See* International Finance Corporation, Sustainability, Instituto Ethos, *Groundbreaking Report Challenges Conventional Wisdom on Role of Business in Emerging Markets,* Press Release No. 02/0098, July 17, 2002.

5 *See* Roger Cowe, *ABI Research Reports, Investing in Social Responsibility: Risks and Opportunities* (2001) (supporting the proposition that corporate social responsibility has a positive impact on businesses by increasing their potential for competitive advantage and increasing shareholder value through promotion of risk management).

6 *See* Christopher Avery, Amnesty International, *Business and Human Rights in a time of change* (February 2000), *at* <http://www.business-humanrights.org/Avery-Report.htm>. *See also* United Nations High Commissioner for Human Rights, Business and Human Rights, <http://www.unhchr.ch/global.htm> (visited June 14, 2002).

7 For example, consumer discontent that soccer/footballs were made by child labour led to a consumer boycott forcing the manufacturers to stop using child labour. *See* Robert J. Liubicic, "Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Standards Through Private Initiatives", 30 *Law and Pol'y Int'l Bus* 111 (1998). Another example occurred in regard to the promotion of infant formula in developing countries. Certain companies were encouraging mothers in developing countries to use infant formula instead of breast-milk feeding. The use of infant formula led to increased infant mortality because of lack of clean water and because mothers were not properly instructed on how to use the formula. Once consumers learned about the increased infant mortality, they began boycotting *Nestlé* products. *See* Nancy E. Zelman, "The Nestlé Infant Formula Controversy: Restricting the Marketing Practice of Multinational Corporations in the Third World", 3 *Transnat'l L.* 697 (1990). *See also,* David Weissbrodt, "Strategies for the Selection and Pursuit of International Human Rights Objectives", 8 *Yale J. World Pub. Ord.* 62 (1981). Out of that

CUP... https://www.cambridge.org/core/terms. https://doi.org/10.1017/cbo9780511494079.022 https://www.cambridge.org/core/books/the-role-of-corporate-reputation-in-the-boardroom/5ecf1e/

growing proportion of investors seek to purchase shares in socially responsible companies.[8]

All-in-all, business enterprises have increased their power in the world.[9] International, national, state, and local law-makers are beginning to realize that this power must be addressed, and there is a special need to address the human rights obligations of business enterprises.

2. Developments in corporate codes of conduct

One of the early efforts to hold corporations accountable to human rights standards occurred within the United Nations in the late 1970s and 1980s. The UN Commission on Transnational Corporations prepared the draft United Nations Code of Conduct for Transnational Corporations which was to be a statement from the international community regarding the international legal obligations of businesses.[10] Although the Commission spent approximately 13 years drafting this document, the Code of Conduct was never fully adopted by the UN body.[11] The Organisation for Economic Co-operation and Development (OECD) undertook a similar effort in 1976 when it established its first Guidelines for Multinational Enterprises to promote responsible business conduct consistent with applicable laws.[12] Unlike

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controversy arose the World Health Assembly International Code of Marketing of Breast-Milk Substitutes (1981).

8 *See infra*, notes 28-31 and corresponding text.

9 A 1999 study found that 51 of the 100 largest economies in the world are corporations, while only 49 are countries; the combined sales of the world's top 200 corporations are greater than a quarter of the world's economic activity; and the top 200 corporations have almost twice the clout of the poorest four-fifths of humanity. *See* Sarah Anderson & John Cavanagh, *The Top 200: The Rise of Global Corporate Power* (1999), *at* <http://www.ips-dc.org/reports/top200text.htm >.

10 Development and International Economic Cooperation: Transnational Corporations, UN doc. E/1990/94 (1990); *see also* United Nations Draft International Code of Conduct on Transnational Corporations, reprinted in 23 *International Legal Materials* 626 (1984).

11 In 1972 the Economic and Social Council requested the Secretary-General to appoint a group of eminent persons to study the impact of multinational corporations on the world economy. In 1977 the United Nations Commission on Transnational Corporations began formulating a Code of Conduct for Transnational Corporations; the most recent draft was completed in 1990, but the Code of Conduct was never concluded. *See* Paul Lansing & Alex Rosaria, "An Analysis of the United Nations Proposed Code of Conduct for Transnational Corporations", 14 *World Competition* 35, 37 (1991); John Christopher Anderson, "Respecting Human Rights: Multinational Corporations Strike Out", 2 *U. Pa. J. Lab. & Emp. L.* 463, 474-75 (2000).

12 Organisation for Economic Cooperation and Development, Guidelines for Multinational Enterprises, reprinted in 15 *International Legal Materials* 967 (1976). The OECD has established National Contact Points for handling inquiries and contributing to the solution of problems that may arise in connection with the OECD Guidelines. The OECD has also established the Committee on International Investment and Multinational Enterprises.

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the UN Code, the 1976 effort resulted in the successful adoption and promulgation of the Guidelines by the OECD. In 2000, the OECD substantially updated and revised the Guidelines and added enhanced implementation procedures.[13] In 1977, the International Labour Organisation (ILO) adopted its Tripartite Declaration of Principles concerning Multinational Enterprises[14] which incorporated relevant ILO conventions and recommendations. The Tripartite Declaration has been amended in 1987, 1995, and 2000 to incorporate new conventions and recommendations adopted after its original passage.[15] For example, in March 2000 the ILO Governing Body incorporated into the Tripartite Declaration the 1998 Declaration on Fundamental Principles and Rights at Work and its Follow-Up, which had been adopted to modernize, strengthen, and ensure implementation of its system of labour standards.[16] In addition, the ILO will assist private voluntary initiatives to establish and implement their own codes of conduct.[17]

During the period when the United Nations, OECD, and ILO were preparing codes of conduct for businesses, other groups were also considering the obligations of businesses with regard to human rights conduct. For example, the Sullivan Principles, developed by Reverend Leon H. Sullivan, originated in 1977 as a set of guidelines for companies doing business in

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(CIME) that periodically or at the request of a Member country can hold an exchange of views on matters related to the Guidelines, *at* <http://www.oecd.org/daf/investment/guidelines/faq.htm> (June 14, 2002). Over 30 cases have been submitted to the CIME – principally involving employment and industrial relations.

13 OECD Guidelines for Multinational Enterprises, Revision 2000, *at* <http://www.oecd.org/daf/investment/guidelines/index.htm> (visited June 14, 2002).

14 International Labour Organisation, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977), reprinted in 17 *International Legal Materials* 422, para. 6 (1978), *available at* <http://www.ilo.org/public/english/employment/multi/tridecl/index.htm>.

15 *See* International Labour Organisation, Updating of references annexed to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO Doc. GB.277/MNE/3 (2000).

16 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, adopted by the International Labour Conference at its eighty-sixth session, Geneva, June 18, 1998. The ILO Declaration is monitored through a quadrennial survey and through interpretations rendered by the Subcommittee on Multinational Enterprises. As of November 15, 1999, the Subcommittee had received over 23 requests for interpretations with very few passing the test of receivability so that an interpretation has been issued. Follow-up and Promotion March 2000 by Subcommittee on Multinational Enterprises, ILO Doc. GB.277/MNE/1 (2000), *available at* <http://www.ilo.org/public/english/standards/relm/gb/docs/gb277/pdf/mne-3.pdf>. *See also*, International Labour Organisation, *Your Voice at Work, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (2000), *available at* <http://www.ilo.org/public/english/standards/decl/declaration/text/>.

17 *See* International Labour Organisation, *The International Labour Organisation and Private Voluntary Initiatives* (2000).

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South Africa during *Apartheid*.[18] The Sullivan Principles specifically targeted racial discrimination and called for companies to divest from business activities with any entity that was engaging in discriminatory practices. Corporations that followed the Sullivan Principles influenced the South African Government and ultimately had a role in bringing about the end of *Apartheid* in South Africa. Many years after the abolition of *Apartheid* in South Africa, Reverend Sullivan announced the new Global Sullivan Principles, which are guidelines for ethical business practices in developing countries and are being used by businesses today.[19]

Throughout the 1980s and 1990s efforts grew as an increasing number of consumers, investors, local communities, NGOs, and others started to take note of and call for action regarding human rights violations by businesses. In January 1999, United Nations Secretary-General, Kofi Annan, proposed a Global Compact of shared values and principles at the Davos Conference.[20] As further explained in connection with the Davos Conference in 2000, the Global Compact has nine core principles that are divided into categories dealing with general human rights obligations, standards of labour, and standards of environmental protection.[21] Businesses are asked to support and adopt those principles, the first two of which are to support and respect the protection of internationally proclaimed rights within their sphere of influence and to make sure they are not complicit in human rights abuses. "A clear demonstration that basic and broadly popular social values, are being advanced as part and parcel of the globalization process will help ensure that markets remain open, and will truly bring the people of the world closer together."[22]

Governments have also begun to address issues with regard to the human rights conduct of businesses. In 1998, the European Parliament (EP)

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[18] *See* The Sullivan Statement of Principles (4th Amplification), November 8, 1984, reprinted in 24 *International Legal Materials* 1496 (1985).

[19] *See* Global Sullivan Principles on Corporate Social Responsibility, *at* <http://www.globalsullivanprinciples.org/principles.htm> (visited June 14, 2002).

[20] Secretary-General Kofi Annan, Address at the World Economic Forum in Davos, Switzerland (January 31, 1999), *in* UN doc. SG/SM/6448 (1999).

[21] The principles are that businesses should: (1) support and respect the protection of internationally proclaimed human rights within their sphere of influence; (2) make sure they are not complicit in human right abuses; (3) uphold the freedom of association and the effective recognition of the right to collective bargaining; (4) eliminate all forms of forced and compulsory labour; (5) abolish child labour; (6) eliminate discrimination in respect of employment and occupation; (7) support a precautionary approach to environmental challenges; (8) undertake initiatives to promote greater environmental responsibility; and (9) encourage the development and diffusion of environmentally friendly technologies. The Global Compact, *at* <http://www.unhchr.ch/global.htm> (visited June 14, 2002).

[22] The Global Compact Website, Global Compact Newsletter, December 2001, *at* <http://www.unglobalcompact.org/un/gc/unweb.nst/content/newsletter.htm> (visited June 14, 2002).

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passed a resolution calling on the European Union (EU) to draft a Code of Conduct for European Multinationals.[23] The EP resolution calls for the creation of a legally binding code on European Multinationals and the establishment of a monitoring mechanism to ensure implementation of the Code provisions.[24] France now requires that all French firms listed on the stock exchange must include information regarding the social and environmental impact of their activities.[25] Further, the United Kingdom has enacted legislation requiring pension funds to take into account social, ethical, and environmental issues before making pension fund investments.[26]

In December 2000, the United Kingdom and United States governments, along with many of the leading extractive and energy companies, released the "Voluntary Principles on Security and Human Rights in the Extractive Sector".[27] The heightened awareness of human rights abuses by security forces hired by large corporations in the extractive and energy sectors led to the drafting of these Principles. The Principles attempt to address abuses by setting standards extractive and energy companies should follow with regard to risk assessment, relations with public security, and relations with private security.

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23 European Parliament (EP), *Resolution on EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct,* Resolution A4-0508/98 (1998). In November 2000, the Development Committee of the EP held parliamentary hearings on the Resolution. This resolution led to the Green Paper Promoting a European Framework for Corporate Social Responsibility (Eur. Parl. Doc. COM(2001) 366 (2000)).

24 The European Parliament recently voted upon the legislation and it now moves to the European Commission. The Commission will decide whether to add the reporting requirement to an updated directive on company law due to be unveiled later in 2002. *See* Stephen Castle, "Firms may be forced to pay for pollution", *The Independent*, May 31, 2002; Alison Maitland & Michael Mann, "Inside Track: Challenge to voluntary preserve", *Financial Times*, May 30, 2002.

25 *See* « Transparence sociale et environnementale au menu des sociétés françaises », *Le Monde*, February 22, 2002. ARESE, a social and environmental rating agency based in Paris, has criticized the legislation for its failure to provide specific indicators, auditing requirements, and sanctions for non-compliance. William Baue, *New French Law Mandates Corporate Social and Environmental Reporting*, March 14, 2002, *at* <http://www.socialfunds.com/news/article.cgi?sfArticleId=798> (visited June 14, 2002).

26 The 1995 U.K. Pension Act was amended in 2000 requiring pension fund trustees to state their policy on social, environmental, and ethical issues. *See* Amnesty International, *UK pension law amendment requiring pension fund trustees to disclose to what extent they take account of social factors: New regulation opens door to human rights* (autumn 2000/winter 2001), *at* <http://www.amnesty.org.uk/business/newslet/autumn00/regulation.shtml>.

27 United States/United Kingdom Voluntary Principles on Security and Human Rights in the Extractive Sector, *at* <http://hrpd.fco.gov.uk/Combi-Vol_Prin_Sec_Hum_Rights_13Dec.pdf> (visited June 14, 2002).

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Consumers are also responding to the call to hold businesses accountable for human rights. The number of institutional and individual investors placing money in socially responsible funds is increasing rapidly.[28] There is evidence that professionally managed socially responsible funds provide a higher return than professionally managed assets which are not socially screened.[29] While socially responsible investing originally focused on excluding certain industries such as companies producing arms and tobacco, socially responsible investing today includes evaluating businesses with regard to their environmental and human rights records, and on their approaches to social issues and stakeholder relations. Stock markets have created indexes to guide socially responsible investors. The indexes provide benchmarks for measuring and marketing socially responsible funds, and include indexes such as the FTSE4Good series[30] and the Dow Jones Sustainability Indexes.[31]

Transnational corporations and other business enterprises themselves also have begun to consider the human rights implications of their activities, for example, by (1) carefully assessing the context in which they are investing or doing business; (2) planning and implementing internal business policies; and (3) establishing workplace codes of conduct as to overseas offices, subsidiaries, suppliers, and contractors. Not only have many businesses developed their own ethical codes, but trade groups, NGOs, and many others also have written codes of conduct for businesses.

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28 The ethical market share in the United Kingdom has grown 15% from 1999 to 2000. *See* Deborah Doane, *New Economics Foundation Taking Flight, The Rapid Growth of Ethical Consumerism* (2001), *at* <http://www.neweconomics.org> (visited June 14, 2002). A recent study in the United States found that one out of every eight professionally managed investment dollars is used in socially responsible investing. *See* Social Investment Forum, 2001 Report of Socially Responsible Investing Trends in the United States, *at* <http://www.socialinvest.org/areas/research/trends/2001-Trends.htm> (visited June 14, 2002).

29 The U.S. Social investment Forum study socially screened assets grew at a rate 1.5 times faster than all professionally managed assets combined in the United States. *See* SRI Report, *supra*, note 28.

30 FTSE4Good tracks business performance in three key areas: environmental, relations with stock holders, and support and respect for the protection on international human rights. The FTSE4Good contains four benchmark indexes including: FTSE4Good UK, FTSE4Good Europe, and FTSE4Good Global Index, as well as four tradable indexes: FTSE4Good UK 50, FTSE4Good Europe 50, FTSE4Good USA 100, and FTSE4Good Global 100. *See* FTSE4Good website, *at* <http://www.ftse4good.com> (visited June 14, 2002).

31 The Dow Jones STOXX Sustainability Indexes track the financial performance of leading companies in terms of economic, environmental, and social criteria. *See* Dow Jones Sustainability Indexes website, <http://www.sustainability-indexes.com> (visited June 14, 2002).

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Despite all of the recent developments in the area of human rights and businesses, there is still a call for a comprehensive set of international standards which would hold all transnational corporations and other business enterprises accountable to the same level of international human rights standards. Although the Working Group on the Working Methods and Activities of Transnational Corporations did not necessarily start as a body to develop international standards, one of the Working Group's main activities up to this point has been standard setting.

3. Drafting history of the human rights responsibilities

The idea for a sessional Working Group on the Working Methods and Activities of Transnational Corporations arose from Sub-Commission resolution 1997/11,[32] which asked El-Hadji Guissé to present a working document to the Sub-Commission at its fiftieth session (in 1998) on the issue of human rights and transnational corporations. Guissé's document briefly addressed the impact of transnational economic actors on income inequality both nationally and internationally.[33] Guissé's document further raised concerns about the far-reaching impact of transnational corporation policies and practices – for example, the threat to environmental sustainability posed by transnational corporations.

In response to this paper, in its resolution 1998/8 of 20 August 1998 the Sub-Commission decided

> to establish for a three-year period a sessional working group of the Sub-Commission, composed of five of its members, taking into account the principle of equitable geographic distribution, to examine the working methods and activities of transnational corporations.[34]

The mandate of the sessional Working Group included tasks such as: identifying issues, and gathering and examining information regarding the effects of transnational corporations on human rights; examining investment agreements for their compatibility with human rights agreements; making recommendations regarding the methods of work and activities of transnational corporations in order to ensure the protection of human rights; and

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[32] *See* Sub-Commission, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Ninth Session, 1997/11, UN doc. E/CN.4/1998/2, E/CN.4/Sub.2/1997/50 (1997).

[33] *See* Sub-Commission, Working document on the impact of the activities of transnational corporations on the realization of economic, social and cultural rights, UN doc. E/CN.4/Sub.2/1998/6 (1998).

[34] Sub-Commission, The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations, 1998/8, UN doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 (1998).

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considering the scope of the State's obligation to regulate transnational corporations.

In 1999, Eide, as one of the founding members of the Working Group, worked to set and adopt an agenda to put the goals of the Working Group into action for the next two years. The 1999 meeting ended by asking David Weissbrodt to prepare a draft code of conduct for transnational corporations.[35] At its second meeting in August 2000, the Working Group considered the first "Draft Code of Conduct for Companies".[36] During this discussion, two main issues arose: (1) whether the document should be binding or voluntary; and (2) whether the document should apply to all businesses or only transnational corporations. The Working Group further recognized the necessity of addressing issues such as implementation in conjunction with this drafting exercise. By the end of the 2000 session, David Weissbrodt was asked to continue to draft and update the standards for another year and Eide was asked to prepare a paper on implementation of standards.

Pursuant to encouragement from the Working Group at its 2000 meeting to gather further comments on the 2000 Draft, a March 2001 seminar was held at the Office of the UN High Commissioner for Human Rights.[37] The participants included members of the Working Group; representatives from nongovernmental organisations interested in corporate responsibility, human rights, development, and the environment; representatives from companies; and knowledgeable scholars. Eide and his colleague Pia Rudolfsson Goyer of the Norwegian Institute of Human Rights played an influential role at this conference through their attendance and participation in the three days of discussions. Individuals at the conference suggested many substantive and formatting changes for the Guidelines, such as adding a preamble, radically

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35 *See* Sub-Commission, Report of the sessional working group on the working methods and activities of transnational corporations on its first session, UN doc. E/CN.4/Sub.2/1999/9 (1999).

36 *See* Sub-Commission, Report on the sessional working group on the working methods and activities of transnational corporations on its second session, UN doc. E/CN.4/Sub.2/2000/12, paras. 26-58 (2000). For drafts of the documents considered by the working group, *see* Sub-Commission, Principles Relating to the Human Rights Conduct of Companies, UN doc. E/CN.4/Sub.2/2000/WG.2/WP.1 (2000); Sub-Commission, Proposed Draft Human Rights Code of Conduct for Companies: Addendum, UN doc. E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1 (2000); and Sub-Commission, Proposed Draft Human Rights Code of Conduct for Companies: Addendum, List of Principal Source Materials for the Draft Code of Conduct for Companies, UN doc. E/CN.4/Sub.2/2000/WG.2/WP.1/Add.2 (2000). The document title has changed many times in the drafting process.

37 *See* Sub-Commission, Draft Universal Human Right Guidelines for Companies: Addendum 3, Report of the Seminar to Discuss UN Human Rights Guidelines for Companies, UN doc. E/CN.4/Sub.2/2001/WG.1/WP.1/Add.3 (2001), *available at* <http://www1.umn.edu/humanrts/links/draftguidelines-ad3.html> [hereinafter Seminar Report].

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shortening the main text into broad provisions, and adding a commentary following each principle to address more specific issues.[38]

At its third meeting in August 2001, Weissbrodt contributed a second draft of the document, this time referred to as "Draft Universal Human Rights Guidelines for Companies".[39] The Working Group also considered papers by Guissé on the impact of transnational corporation activities on the enjoyment of economic, social and cultural rights,[40] and by Eide on responsibilities and procedures for implementation and compliance with regard to human rights guidelines for transnational corporations.[41] Eide's paper examined several methods of implementation such as: (1) using existing national procedures based on national laws; (2) using existing international procedures, including mechanisms under the Commission or regional international human rights courts; and (3) creating international procedures to give transnational corporations and other business enterprises direct human rights responsibilities under international law.[42] His suggestions are discussed individually at greater length in the implementation section of this paper.

At the Working Group's third session, there was recognition of a common desire to implement the "Draft Guidelines" as binding standards as opposed to a voluntary initiative. There was also continued to debate whether the Guidelines should apply to all business entities or only to transnational corporations. In his paper, Eide pointed out that:

> The role of multinationals is overwhelming. Nevertheless, it is difficult to entirely disentangle these from other corporations in regard to the human rights impact of their activities. In my view, the Working Group should address the needs to develop and implement appropriate regulations applicable to all corporations, but give special attention to

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38 The suggestion to shorten the text into broad substantive provisions and then follow each provision with a commentary was adopted and incorporated into the 2001 draft. The approach was based on the structure of several other UN human rights instruments, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), GA Res. 40/33, annex, 40 UN GAOR Supp. (No. 53) at 207, UN doc. A/40/53 (1985). Additionally, the order of the subjects in the Draft Guidelines was reformulated to follow the somewhat analogous provisions in Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

39 Sub-Commission, Draft Universal Human Rights Guidelines for Companies, Introduction, UN doc. E/CN.4/Sub.2/2001/WG.2/WP.1 (2001); Sub-Commission, Draft Universal Human Rights Guidelines for Companies, UN doc. E/CN.4/Sub.2/2001/WG.1/WP.1/Add.1 (2001); Sub-Commission, Draft Universal Human Rights Guidelines for Companies: Addendum 2, Draft Universal Human Rights Guidelines for Companies with Source Materials, UN doc. E/CN.4/Sub.2/2001/WG.2/WP.1/Add.2 (2001); Seminar Report, *supra*, note 37.

40 *See* Eide Working Paper, *supra*, note 1.

41 *See id.*

42 *See id.*, at 18-20.

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the special problems caused by the multinational composition of some corporations.[43]

The Working Group discussed this issue extensively in its 2000 and 2001 sessions and partially resolved the issue in the Sub-Commission's resolution of August 2001. Sub-Commission resolution 2001/3 asked the Working Group to "contribute to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights".[44] At its February 2002 session the Working Group decided that the Human Rights Responsibilities would apply to "transnational corporations and other business enterprises". It is worthy of note that even at this stage the Responsibilities prominently mentioned transnational corporations as a significant focus of concern, but still addressed the responsibilities of all businesses.

Since the Working Group had not completed its tasks pursuant to its three-year mandate, the Sub-Commission decided in August 2001 to extend the Group's mandate for another three years. The renewed mandate, while substantially similar to the old mandate, includes new activities such as: compiling a list of relevant instruments and norms concerning human rights with regard to transnational corporations; contributing to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights; and analyzing and drafting norms for the establishment of a monitoring mechanism in order to apply sanctions to transnational corporations when appropriate.[45]

At an informal meeting in February 2002, the five members of the Working Group on the Working Methods and Activities of Transnational Corporations created a revised draft of the Guidelines, renamed the "Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises" (Responsibilities), for consideration at its session during the fifty-fourth session of the Sub-Commission in July/August 2002. The new draft of the Responsibilities consisted of eighteen fundamental human rights norms with regard to business activities of transnational corporations and other business enterprises and also included a section on definitions.

During the three full days of the February 2002 meeting the Working Group lacked sufficient time to review comprehensively the commentary on

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[43] *Id.*, at 5.

[44] Sub-Commission, The effects of the working methods and activities of transnational corporations on the enjoyment of human rights, UN doc. E/CN.4/Sub.2/RES/2001/3 at 4(c)(2001).

[45] *Id.*

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the Responsibilities,[46] but agreed that individual members should present the commentary as a separate document at the fifty-fourth session of the Sub-Commission. Accordingly, the Responsibilities with Commentary reflected the views of Vladimir Khartashkin, Soo-Gil Park, and David Weissbrodt.

Speaking at the Working Group meeting at the fifty-fourth session of the Sub-Commission in August 2002, Eide discussed several important issues with regard to the Responsibilities. First, he expressed his wishes that the document apply to all businesses generally. Whether the impact of a business is only upon child workers at a cocoa factory or upon buyers and sellers all over the world, the business affects human rights and therefore should be required to follow human rights standards regardless of its transnational or wholly national character. He also stressed the importance of moving beyond sole reliance upon States to enforce companies' compliance with human rights. Second, he stressed that even though the document properly gives States the primary responsibility to enforce human rights, governments may still be too weak, corrupt, or constrained by other elements of human rights law in order to enforce the human rights obligations of businesses.[47]

Also during the fifty-fourth session of the Sub-Commission, the Working Group again decided to change the name of the document. Now entitled "Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", the document continued to take into account comments and feedback from those attending the Working Group meetings.[48] A version of the Responsibilities taking into account comments made at the Working Group meeting at the fifty-fourth session of the Sub-Commission was attached to the 2002 Working Group Report with the aim to promote even greater dissemination of the document and in the expectation the Working Group would adopt the Human Rights Responsibilities in 2003 and send them to the Sub-Commission and eventually to the Commission for adoption.

Several NGOs and other groups have expressed support for the Responsibilities, including organizations such as Amnesty International, Christian Aid, Human Rights Advocates, Human Rights Watch, Lawyers Committee for Human Rights, Federation Internationale des Ligues des Droits de l'Homme (FIDH), the Novartis Foundation, Oxfam, Prince of Wales International Business Leaders Forum, and the World Organization Against Torture (OMCT).

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[46] The commentary had been an integral part of the previous draft considered by the Working Group at its meeting in August 2001.

[47] Sub-Commission on the Promotion and Protection of Human Rights, Report of the Working Group on the Working Methods and Activities of Transnational Corporations and Other Business Enterprises, UN doc. E/CN.4/Sub.2/2002/13 (2002).

[48] *See id.*

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As to the substance of the document, the Working Group agreed to language which makes a small exception to application of the Responsibilities to all businesses. A business will not be subject to the Responsibilities if it can prove (1) it has no connection with a transnational corporation, (2) its impact is entirely local, and (3) there was no violation of the right to security as defined in the Responsibilities.[49] Further, the Sub-Commission adopted a resolution on 13 August 2002 suggesting particular methods of implementation, such as asking the United Nations and its specialized agencies to use the norms as the basis for determining what goods and services they purchase and what partnerships they develop with transnational corporations and other business enterprises; or establishing of a group of experts, a Special Rapporteur, or a working group of the Commission to receive information and take effective action in regard to human rights abuses committed by businesses.[50] The Working Group will continue to consider such implementation suggestions during its meetings at the fifty-fifth session of the Sub-Commission in 2003.

4. Issues regarding implementation

The next steps of the Working Group will be to adopt the standards and begin focusing on methods of implementation. Although other groups implementing human rights standards for businesses claim that voluntary methods of implementation are the most appropriate,[51] there is basic agreement among the Working Group and Sub-Commission members that the Responsibilities should be implemented as more binding standards. In his working paper for the Working Group in 2001, Eide recognized the importance of voluntary codes to help States identify regulations they should adopt with regard to corporations and to serve as a substitute when regulation is ineffective, but stated that "... it is necessary to move beyond voluntarism as expeditiously as possible ...".[52]

4.1. Methods of creating binding responsibilities

There are many ways the Responsibilities could become binding to some extent, with the most obvious being becoming a treaty. Treaties constitute

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[49] Sub-Commission, Responsibilities of Transnational Corporation and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2002/13/Add.1 (2002) and E/CN.4/Sub.2/2003/–, at 20.

[50] Sub-Commission, The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations, E/CN.4/Sub.2/RES/2002/8 (2002).

[51] *See, e.g.*, Global Compact, *supra*, note 21.

[52] *See* Eide Working Paper, *supra*, note 1, at 3-4.

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the primary sources of international human rights law. The UN Charter is both the most prominent treaty and contains seminal human rights provisions in Articles 1, 55, and 56. The United Nations has further codified and more specifically defined international human rights law in a number of treaties. Treaties create legal obligations for those nations that are party to them.

In addition to treaties, the United Nations has promulgated dozens of declarations, codes, rules, guidelines, principles, responsibilities, resolutions, and other instruments that interpret the general human rights obligations of member States under Articles 55 and 56 of the UN Charter and may reflect customary international law. The Universal Declaration of Human Rights is the most prominent of those human rights instruments, which not only provides an authoritative, comprehensive, and nearly contemporaneous interpretation of the human rights obligations under the UN Charter, but also has provisions that have been recognized as reflective of customary international law. The Universal Declaration announces the fundamental rights of individuals and places responsibility on both governments and other "organs of society" for affording those rights.[53]

Although the interplay of treaty law, non-treaty law, and customary international law is quite complex, some observers have for working purposes identified two types of international law: "hard" law, such as treaties, and "soft" law such as recommendations.[54] Hard law is clearly intended to create legally binding obligations from the outset, whereas soft law starts in the form of recommendations and over a period of time is viewed as creating binding obligations or may serve as the basis for later drafting of treaties.

It would be unrealistic to suggest that human rights standards with regard to business enterprises should immediately become the subject of treaty obligations. The development of a treaty requires a high degree of consensus among nations. As discussed above, there have been some treaties and other international norms that apply to businesses and their officers, but there does not yet appear to be an international consensus on precisely what place businesses and other non-state actors have in the international legal order. Therefore, if the Responsibilities are to become a treaty or customary norm, they would more than likely start with some form of soft law drafting exercise.

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[53] A preambular phrase of the Universal Declaration calls upon "every individual and *every organ of society* ... to promote respect for these rights ... and by progressive measures, national and international, to secure their universal and effective recognition and observance ...", Universal Declaration of Human Rights, GA Res. 217A (III), UN doc. A/180 at 71 (1948) (emphasis added). *See generally* International Council on Human Rights Policy, *Taking Duties Seriously: Individual Duties in International Human Rights Law, A Commentary* (1999).

[54] *See* Dinah L. Shelton, "Compliance with International Human Rights Soft Law", in Edith Brown Weiss (ed.), *International Compliance with Non-Binding Accords* (1998), 119.

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In preparation for drafting almost all human rights treaties, the United Nations has begun with declarations, principles, or other soft law instruments. Such steps are necessary to develop the consensus required for treaty drafting. The consensus surrounding some declarations has evolved quite quickly to prompt the development of a treaty. For example, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1975[55] was followed quite rapidly by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.[56] Some declarations, however, have not been codified in the form of treaties because of a lack of adequate consensus, for example, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.[57]

Any treaty takes years of preliminary work and consensus building before it has a chance of receiving the approval necessary to be adopted and enter into force. Even soft law instruments may take years to develop. For example, the UN Draft Declaration on the Rights of Indigenous Peoples,[58] in which Eide took a key role in initiating, took twelve years of drafting in the Sub-Commission's Working Group on Indigenous Populations, has already been the subject of deliberations in the Commission's Open-Ended Working Group for another eight years, and is likely to require some additional time.

After drafting by lesser UN bodies, such as the Sub-Commission and the Commission, the General Assembly adopts and promulgates treaties. For example, after the General Assembly in 1948 adopted the Universal Declaration of Human Rights containing several provisions on social and economic rights, it took eighteen years before the General Assembly in 1966 adopted and promulgated the International Covenant on Economic, Social and Cultural Rights[59] as a multilateral treaty. Soft law standards, however, may be adopted at any one of the many different levels within the United Nations, although they are ordinarily considered more authoritative if they are adopted by such higher organs as the General Assembly. For example, the

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55 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 3452 (XXX), annex, 30 UN GAOR Supp. (No. 34) at 91, UN doc. A/10034 (1975).

56 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN doc. A/39/51 (1984), *entered into force* June 26, 1987.

57 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res. 36/55, 36 UN GAOR Supp. (No. 51) at 171, UN doc. A/36/684 (1981).

58 Sub-Commission, Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2/Add.1 (1994).

59 International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN doc. A/6316 (1966), 993 UNTS 3, *entered into force* January 3, 1976.

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Responsibilities could be adopted and promulgated: (1) at the Working Group level, such as the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" adopted by the Working Group on Arbitrary Detention;[60] (2) at the Sub-Commission level, such as the resolution on "Housing and property restitution in the context of the return of refugees and internally displaced persons";[61] (3) by the Commission on Human Rights, such as "[t]he protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS)";[62] (4) by the Economic and Social Council, such as the "Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions";[63] (5) and, of course, by the General Assembly, such as the "Declaration on the Elimination of Violence against Women".[64]

4.2. Avenues for implementation

Once the Responsibilities are adopted by a UN body there remains the critical task of assuring that the provisions are brought into practice. Implementation may be pursued by (a) business enterprises, (b) business groups or trade associations, (c) unions, (d) NGOs, (e) intergovernmental organisations, (f) governments, and (g) the United Nations. The first step towards implementation, however, would be broad adoption by these various categories of actors. The categories of potential actors do not necessarily suggest implementation by a single category. As indicated periodically in the following paragraphs, effective implementation may result from the co-ordinated efforts of groups in one or more of these categories.

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60 UN Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers, UN doc. E/CN.4/2000/4/Annex 2 (1999).

61 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Housing and property restitution in the context of the return of refugees and internally displaced persons, UN doc. E/CN.4/SUB.2/RES/1998/26 (1998).

62 UN Commission on Human Rights, Protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS), UN doc. E/CN.4/RES/1997/33 (1997).

63 Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ESC Res. 1989/65, annex, 1989 UN ESCOR Supp. (No. 1) at 52, UN doc. E/1989/89 (1989). This suggestion was also made by Eide in his working paper and is discussed further in note 89.

64 Declaration on the Elimination of Violence against Women, GA Res. 48/104, 48 UN GAOR Supp. (No. 49) at 217, UN doc. A/48/49 (1993).

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4.2.1. Business enterprises

Realizing that the Responsibilities will be most effective if internalized as a matter of company policy and practice, the Responsibilities call for businesses themselves to adopt the substance of the Responsibilities as the minimal standards for their own company codes of conduct or internal rules of operation. Business enterprises with pre-existing codes could update their codes if necessary to conform to the international standards in the Responsibilities. Those businesses currently without codes of conduct would have a clear model for the issues that should be addressed in their codes of conduct.

Effective implementation of the Responsibilities will involve the creation of effective mechanisms of accountability within the company. Depending on the resources and capabilities of the business enterprise, businesses should consider creating ethics committees and/or appointing ethics officers to provide oversight, counseling, and promotion of the code. Employee incentives can also be used to create accountability within a company. For example, conduct consistent with the code could be used as a basis for promotion or wage increases. Further, businesses should create adequate systems for addressing violations that include guarantees of non-retaliation and allow employees to remain anonymous when reporting violations.

Once a company adopts the Responsibilities, they need to be disseminated. Business enterprises should make their codes available to employees and other stakeholders. Promulgation assures that those who are most affected by the company's actions know of the company's responsibility to promote and protect human rights. It also ensures that the company's responsibilities will be made known to the general public – further legitimating and institutionalizing the existence of their responsibilities. In his paper on implementation, Eide points out that this sort of adoption and dissemination by a company could create implicit contractual obligations, and thereby be used by stakeholders as a basis for litigation if the company fails to meet the standards stated in their promulgated human rights statements or assessments.[65]

Business enterprises adopting and disseminating their codes of conduct should also work to improve their compliance with the Responsibilities. One way of improving compliance would be periodic assessment and the preparation of impact statements. Any assessment of a company's performance under the Responsibilities should be objective. For example, business management can conduct a self-assessment or they can retain outside consultants on a confidential basis with or without an assurance of confidentiality. Although self-assessment by a company's own management may be simpler and less expensive, such self-assessment may not yield results acceptable to

[65] *See* Eide Working Paper, *supra*, note 1, at 10.

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outsiders. Confidential assessment by independent consultants may give company managers sufficient confidence to provide necessary information and would be more likely to be accepted by outsiders. Business enterprises with human rights concerns would be able to assess the situation and perhaps take steps to rectify any problems. Some outsiders may not, however, have confidence in the adequacy and certainly the transparency of confidential assessments. Both management self-assessments and assessments done by independent consultants could be made public. Such dissemination would increase the transparency and legitimacy of the evaluation process, but the expectation of publicity may discourage adequate disclosure of information. If an evaluation is expected to be made public, the standardized reporting system of the Global Reporting Initiative (GRI) could be used,[66] or a company could undergo evaluation by NGOs with expertise in the area, trade unions, labour associations, or governments.

In addition to assessment of past actions, businesses should prepare impact statements to describe and analyze any proposed actions that may have a significant impact on human rights as enumerated in the Responsibilities. Impact statements can be used to examine ways to avoid or reduce adverse human rights consequences related to a proposed action. They include a description of the action, its need, anticipated benefits, an analysis of any human rights impact related to the action, an analysis of reasonable alternatives to the action, and identification of ways to reduce any negative human rights impacts. All impact statements should be made available to stakeholders for comment before any action is taken with regard to the proposed action. Impact statements, similar to assessments, may be created by the company itself, through the use of independent consultants, or in co-operation with NGOs having expertise in the area, trade unions or labour associations, or governments.

Businesses may also want to assess the human rights impact and conduct of potential suppliers and sub-contractors. An outside assessment by an outside company may also encourage companies who act as suppliers and sub-contractors to examine their own human rights conduct and undergo assessment and verification themselves. Such interaction between businesses would further encourage all businesses to assess and verify their human rights impact.

The next step to effective implementation of a UN or similar standard would be the verification of the assessment. Verification can be accomplished through dissemination and by other means. Businesses could, for example, publish their self-assessments in their annual reports just as they

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[66] The GRI is an international, multi-stakeholder effort to create a common framework for voluntary reporting. *See* Global Reporting Initiative website, *at* <http://www.globalreporting.org> (visited June 14, 2002).

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now publish their annual financial audits. A business can also be asked to transmit its assessment to a government agency, some nongovernmental clearinghouse, or an international institution.

Another way of disseminating such assessments and making the assessments more comparable would be to establish a standardized numerical system for evaluating company performance under the Responsibilities. One such standardized numerical system has been proposed by the Secretariat of the Caux Roundtable.[67]

Another means of verification would be through a corporate social audit similar to the current system used by public accountants for auditing company financial statements. The results of such an independent social audit could then be separately published or attached to the company annual report.

4.2.2. Investors, lenders, and consumers

Self-assessments, assessments by consultants, independent social audits, etc. could be used by individual investors and socially responsible mutual funds in making their investment decisions. Banks and other lending institutions may use this information in deciding whether to lend credit. Consumers or consumer groups could use the Responsibilities in formulating socially responsible purchasing decisions. They could also be used as a standard for promoting ethical investment initiatives.

4.2.3. Business groups or trade associations

Business groups, for example a trade association or an industry group, might adopt or adapt the Responsibilities as their own industry code of conduct for those businesses which are members. Such industry-wide acceptance will encourage compliance because competitors will be assured of equal responsibility. The Responsibilities could be used by a consortium of business enterprises as a prerequisite of membership.[68] Industry-wide standards can elaborate the Responsibilities reflecting the specific character and practices of the industry. The Responsibilities could also support the creation of a labeling system to identify products and services created under the specific standards so as to promote ethical purchasing patterns.

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[67] The Caux Round Table, Caux Round Table Self-Assessment and Improvement Program.

[68] For example, Caux Round Table Principles for Business (1986); Clean Clothes Campaign, Code of Labour Practices for the Apparel Industry Including Sportswear; International Chamber of Commerce, Guidelines for International Investment and Business Charter for Sustainable Development.

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4.2.4. Unions

Unions may wish to use the Responsibilities as a basis for negotiating agreements with businesses and monitoring compliance of businesses with the Responsibilities.

4.2.5. NGOs

Similarly, NGOs may also adopt the Responsibilities as the basis for their expectations of business conduct and monitoring compliance of businesses with the Responsibilities.[69]

4.2.6. Intergovernmental organisations other than the United Nations

There exist a number of intergovernmental bodies that may find the Responsibilities useful in developing their own standards. For example, the ILO and OECD could take the Responsibilities into account when making clarifications on their already existing standards for businesses. Similarly, the OECD could use the Responsibilities in the context of their National Contact Points. The World Bank and its constituent institutions have adopted standards for loans relating to their impact on indigenous peoples, the environment, transfer of populations, sustainable development, and gender equality.[70] The Responsibilities might be helpful in amplifying and interpreting those World Bank standards as well as encouraging further World Bank standards.

The World Trade Organisation agreements, which generally prohibit states from creating trade limitations, contain several exceptions allowing states to restrict trade when certain conditions are met.[71] For example, in its Agreement on Sanitary and Phytosanitary Measures, the WTO prefers to follow international standards in determining if certain technical regulations which create trade limitations are necessary to protect human, animal or plant

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[69] For an example of an NGO making a statement on human rights principles it believes all companies should follow, *see* Mark Curtis, *Trade for Life: Making trade work for poor people* (2001).

[70] *See* World Bank Operational Policy (OP) 4.0 *et seq.* (environmental protection and sustainable development guidelines); World Bank Operational Policies/Bank Procedures (OP/BP) 4.2 (protection of indigenous peoples and promotion); and Operational Policy (OP) 4.20 (promotion of gender equality).

[71] Article XX of the 1947 General Agreement on Tariffs and Trade states ten exceptions in which a State may use trade-restrictive measures, including things such as the protection of public morals; the protection human, animal or plant life or health; and the preservation of exhaustible natural resources. *See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (April 15, 1994), reprinted in *The Results of the Uruguay Round of Multilateral Trade Negotiations – The Legal Texts* (1994), and in 33 *International Legal Materials* 1140 (1994).

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life or health.[72] Similarly, the WTO's Agreement on Technical Barriers to Trade states that "[g]eneral terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies ... ".[73] It is conceivable that the Responsibilities could be considered one such international standard.

The Responsibilities can also be used for the creation of human rights standards on a region-by-region basis to address specific issues.[74] For example, after the passage of the North American Free Trade Agreement (NAFTA), two mechanisms were created to oversee the implementation of NAFTA with regard to environmental and labour standards. Those two mechanisms – the North American Agreement on Environmental Cooperation[75] and the Agreement on Labour Cooperation[76] – do not rely upon existing international standards for their decisions; however, the Responsibilities could be used as a basis for fact-finding or interpreting the NAFTA standards. The European Parliament has adopted a resolution referring to basic international standards applicable to multinationals and calling upon the European Union to create a legally binding code of conduct for all multinationals headquartered in the European Union (EU). In addition, Eide aptly points to the request of the EU Commission to study the possibility of creating a European Monitoring Platform (EMP) in connection with their code of conduct. The Commission requested that creation of the EMP involve participation from northern and southern NGOs, as well as indigenous and local communities. This consultative process would help to ensure that the EMP would protect individuals in host countries anywhere in the world. Eide highlights the EMP as it would be open to receive complaints from community and/or workers' representatives, nongovermental organisations, individual victims, or other sources from all over the world. The Working Group may take lessons from the establishment of the EMP, or the EMP may ultimately decide to use the Responsibilities to help determine liability.[77]

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72 *See id.*, at Agreement on Sanitary and Phytosanitary Measures, art. 2.1.

73 *Id.*, at Agreement on Technical Barriers to Trade, art. 1.1.

74 Examples of regional codes used to address specific issues include: The Sullivan Statement of Principles (4th Application, November 8, 1984, reprinted in 24 *International Legal Materials* 1464 (1985); Irish National Caucus; The MacBride Principles (1984); Council of Economic Priorities Accreditation Authority; Macquiladora Standards of Conduct; Miller Principles; Partner's Agreement to Eliminate Child Labour in the Soccer Ball Industry in Pakistan.

75 *See* North American Agreement on Environmental Cooperation, reprinted in 32 *International Legal Materials* 1480 (1993).

76 *See* North American Agreement on Labour Cooperation, reprinted in 32 *International Legal Materials* 1499 (1993).

77 *See* Eide Working Paper, *supra*, note 1, at 16.

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Regional human rights commissions and courts could also use the Responsibilities as a basis for determining liability. Eide's paper cited examples of two European Court of Human Rights cases which involved corporate environmental pollution negatively affecting private and family life under Article 8 of the European Convention on Human Rights. The European Court found the State in violation of human rights by not taking the necessary measures through regulation and inspection to prevent the corporate conduct.[78] In situations such as this, regional courts could use these Responsibilities to determine the liability of States and thereby encourage States to regulate the conduct of businesses within their borders. Additionally, the African Commission on Human and Peoples' Rights could have used the Responsibilities as an additional basis for its decision against the military government in Nigeria as to its involvement and failure to limit the activities of oil companies in violating the economic and environmental rights of Ogoni residents.[79]

4.2.7. States

States can use the Responsibilities as a model for legislation or administrative provisions with regard to the activities of each company having a statutory seat in that country, under whose law it was incorporated or formed, where it has its central administration, where it has its principal place of business, or where it is doing business. In those countries where legislation already applies to the activities of business enterprises, courts could use the Responsibilities to interpret legal standards. For example, courts might refer to the Responsibilities in assessing whether a company has provided consumers or investors adequate information about their products and services.[80] In some countries compliance with the Responsibilities might be relevant to

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[78] *See* Eide Working Paper, *supra*, note 1, at 14 (citing Lopez Ostra v. Spain, judgment of 9 December 1994, Publication of the European Court of Human Rights, Series A, No. 303-C; Guerra and Others v. Italy, judgment of 19 February 1998, European Court of Human Rights, Reports of Judgments and Decisions, 1998-I, No. 64).

[79] *See* Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Comm. Hum. & Peoples' Rights, Comm. No. 155/96 (13-27 October 2001).

[80] *See* Su-Ping Lu, "Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law", 38 *Colum. J. Transnat'l L.* 603 (2000) (discussing how company human rights codes of conduct may be used by courts to hold companies liable under deceptive advertising laws). The California Supreme Court in the United States upheld the right of consumers to sue a large corporation under the California state deceptive advertising laws for false statements regarding labor practices and working conditions in factories. *See* Kasky v. Nike, 27 Cal.4th 939, 45 P.3d 243 (2002), *certiorari granted*.

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determining liability for injuries caused by businesses and their officers.[81] Revisions by the Working Group at its sessional meeting in 2002 placed special emphasis on the use of the Responsibilities by national courts in stating that the Responsibilities "shall be enforced by national courts" particularly when determining damages but also in all other respects.[82]

In his paper on implementation, Eide observed that although implementation by national courts is a desirable goal, the use of the Responsibilities by national courts alone would not be enough. Large, wealthy corporations are more likely to have access to powerful legal expertise which could give them an advantage in potentially contentious and lengthly legal battles. He therefore stressed the importance of having quasi-judicial institutions, such as ombudspersons, commissions protecting consumers, or other special tribunals or institutions, which could be used by victims at a lower cost. These institutions could provide publicity and criticism where appropriate, or serve as an independent observer to ensure compliance.[83]

States could further encourage or require businesses to file reports about their compliance with the Responsibilities in a central office or could make the filing of such annual reports a requirement of business registration, licensing, securities law, tax law, consumer protection law, etc. The Responsibilities should not replace, but should encourage existing governmental procedures for assuring compliance of business enterprises with human rights standards, for example, through the use of labour inspections.

In his paper for the Working Group, Eide also points out the importance of creating independent community procedures in addition to national procedures. Often there are conflicting interests between national governments and local communities, and the State may not adequately protect the rights of the community. Therefore, in addition to national procedures there should be procedures which safeguard informed consent by the local population, both

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81 For example, the Responsibilities could be used to interpret the human rights violations that fall under the U.S. Alien Tort Claims Act (ATCA). The ATCA permits aliens to bring private tort suits against corporations for certain human rights violations committed in the U.S. or abroad. *See* 28 U.S.C. §1350 (1993). Actions under the ATCA have been brought against large multinational corporations such as Royal Dutch Petroleum/Shell, Pfizer, Unocal Chevron, Rio Tinto, and the Gap. *See* Wiwa v. Royal Dutch Petroleum, 96 Civ. 8386(KMW), 96 Civ. 8386(KMW) 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 2, 2002); Adbullahi v. Pfizer (S.D.N.Y., filed Aug. 29, 2001); Doe/Roe v. Unocal, Case Nos. 00-56603, 00-57197 (9th Cir. 2002); Tamuasi v. Rio Tinto, No. 00 CV-308 (N.D. Cal., filed Sept. 6, 2000); Bano v. Union Carbide Corp., 99 Civ. 11329 (JFK) (S.D.N.Y. 1999); Bowoto v. Chevron, Case No.C99-2506 CAL (N.D. Cal 1999); Doe v. Gap, Civ 99-329 (filed C.D. Cal., Jan.13, 1999).

82 *See* 2002 Working Group Report, *supra*, note 47, at 17.

83 *See* Eide Working Paper, *supra*, note 1, at 8.

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in terms of whether the project should be started and subsequent assessments once the conditions of operation are set.[84]

4.2.8. United Nations

Human rights treaty bodies could further use the Responsibilities in the creation of additional reporting requirements for States.[85] The Responsibilities could be helpful to most of the human rights treaty bodies as the basis for their efforts to draft general comments and recommendations relevant to the activities of business enterprises. For example, the Committee on Economic, Social and Cultural Rights might use the Responsibilities in drafting, adopting, and applying a General Comment on the obligations of businesses to protect rights set forth in the International Covenant on Economic, Social and Cultural Rights.[86] The additional reporting requirements would request States to include reports about the compliance of business enterprises within their respective treaty regimes.[87] The treaty bodies could also use such a General Comment and thus the Responsibilities in preparing their country comments and recommendations on States' compliance with already existing treaty provisions. A further mechanism would be to allow the four treaty bodies with individual communications procedures to receive communications regarding governments that have failed to take effective action in response to business abuses under the respective treaties as elaborated by the Responsibilities and General Comments and Recommendations.[88]

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84 *See id.*, at 11.

85 *See* Anne Bayefsky, *The UN Human Rights Treaty System in the 21st Century* (2000); Philip Alston & James Crawford (eds.), *The Future of Human Rights Treaty Monitoring* (2000).

86 *See* Committee on Economic, Social and Cultural Rights, General Comment 7, The right to adequate housing (Art. 11 (1) of the Covenant): forced evictions, UN doc. E/C.12/1997/4 (1997).

87 Eide points to the Committee on the Elimination of All Forms of Racial Discrimination, and in particular the States' obligation under Article 5 which requires extensive regulation of the activities of private parties in order to prevent discrimination in areas such as the right to work, right to form and join trade unions, and the right to housing. The Committee could increase its attention to a State's regulation of corporations and ask States particularly to report on corporate behaviour in light of the Responsibilities. This same requirement could be used for reporting in connection with the Convention for the Elimination of Discrimination Against Women, and the Convention on the Rights of the Child. *See* Eide Working Paper, *supra*, note 1, at 11-12.

88 Mechanisms for individual complaints have already been accepted in connection with Article 14 of the Convention for the Elimination of Racial Discrimination and Article 22 of the Convention Against Torture as well as the optional protocols to the Covenant on Civil and Political Rights and the Convention for the Elimination of Discrimination Against Women. *See id.*, at 12.

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Special rapporteurs or other thematic procedures of the UN Commission on Human Rights could use the Responsibilities and other relevant international standards for raising concerns about actions by business enterprises within their respective mandates. For example, the Commission's Special Rapporteur on Adequate Housing might express concerns about company actions that have resulted in forced evictions.[89] The Responsibilities could also be used to create a new thematic procedure within the context of the Commission or the General Assembly. Unfortunately, however, there are so many thematic procedures within the context of the Commission that there are insufficient resources to staff such procedures and inadequate time within the agenda of the Commission to give appropriate attention to each of the thematic procedures. A thematic procedure on the human rights responsibilities of businesses would add to the overload on the limited resources of the Office of the High Commissioner for Human Rights and the overburdened agenda of the Commission. Nonetheless, the Sub-Commission and Working Group are considering such implementation mechanisms.[90]

The Responsibilities may also be used in the development of UN procurement standards. For example, the UNHCR uses procurement standards which call for consideration of the vendor's environmental practices.[91] UNICEF similarly uses procurement standards specifically regarding the suppliers' compliance with national child labour laws and involvement in the sale or manufacture of land mines.[92] Using the Responsibilities, procurement standards could be created or enlarged so as to evaluate the overall human rights practices of a supplier before engaging in any business with the supplier.[93]

Business enterprises and others may be aided in their implementation of the Responsibilities by the creation of a resource center. The resource center could be used by businesses, governments, NGOs, individuals, or other groups to assist with: the dissemination of the Responsibilities within each company including all the places where the company does business and with affiliated entities; mechanisms for training company personnel and suppliers about the code; and gathering information about implementation of the Responsibilities.

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89 Eide's paper on implementation also points out the potential role of the Special Rapporteur on the Right to Food; the Special Rapporteur on extra-judicial, summary or arbitrary executions; and the Special Rapporteur on the situation and fundamental freedoms of indigenous people. *See id.*, at 12.

90 *See* 2002 Resolution, *supra*, note 50, at 4.

91 UNHCR, UNHCR Guidelines for Environmentally Friendlier Procurement, OSCEA/STS (1996).

92 *See* UNICEF Procurement Information, *at* <http://www.supply.unicef.dk/business/proc-info.htm> (visited June 14, 2002).

93 *See* 2002 Resolution, *supra*, note 50, at 4.

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Another mechanism for implementation would be the establishment of an interactive website which would post international human rights standards with regard to businesses, including the Responsibilities being prepared by the Sub-Commission, company codes of conduct, and other norm-setting documents. The website would also receive information from individuals and organisations about the conduct of businesses in compliance with the relevant standards and codes of conduct.[94] Business enterprises would be given an opportunity to respond to the information received.

The Sub-Commission's Working Group on the Working Methods and Activities of Transnational Corporations or a successor pre-sessional body could also monitor compliance with the Responsibilities by receiving information from NGOs or interested individuals and then by allowing businesses an opportunity to respond. The Working Group may also consider serving as the body to receive and respond to company requests for advisory opinions on proposed investments, decisions, and other company changes. If the Working Group is able to pursue such a role, it would require that the Group become an inter-sessional group so that it would have more time and resources to handle the additional responsibilities. Nonetheless, there is a question about the adequacy of the resources available for such a major task, as discussed above in regard to thematic procedures.

If the Responsibilities eventually become the basis for a treaty, the treaty will need an implementation procedure analogous to the six existing human rights treaty bodies but taking into account the particular concerns and attributes of business enterprises.

5. Conclusion

Transnational corporations and other large businesses have experienced a significant increase in power since the trends of globalization started emerging and developing. With this increase in power comes an increase in responsibility. Many have called on international bodies to focus attention on the human rights conduct of large companies whose activities fall outside the ambit of any one country. The call is also to strengthen international authority and national will to deal with transnational corporations which are often so strong they may overpower the influence of any one country within its own borders.

The Responsibilities help to clarify the human rights obligations of businesses. Clarifying the duties of businesses may actually benefit businesses. There is a growing body of evidence that complying with human

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[94] For an example of a website with an extensive amount of information on business and human rights, *see* Business & Human Rights: A Resource Website, *at* <http://www. business-humanrights.org> (visited August 13, 2001).

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rights standards is beneficial to a company's bottom line. Consumers are more willing to take human rights conduct of a business into account. Businesses are also more likely to be exposed to liability for conduct which violates human rights standards. Clarification would provide greater guidance to businesses as to whether they should pursue a proposed course of conduct that might expose them to liability, consumer backlash, investor flight, and/or loss of the best and brightest employees.

To achieve these objectives, the Working Group on the Working Methods and Activities of Transnational Corporations indicated at the fifty-fourth session of the Sub-Commission that it would adopt the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights at its fifty-fifth session in 2003 and send the document to the Sub-Commission for consideration. The Sub-Commission could also adopt the Responsibilities at that session as well as transmit the Draft Responsibilities to its parent body, the UN Commission on Human Rights for consideration in later years. Unlike the Sub-Commission, which is comprised of twenty-six independent experts from different nations, the Commission is constituted by fifty-three representatives of governments. The Commission ordinarily meets each year from mid-March until the end of April, so that the earliest that it could consider the Responsibilities would be March-April 2004. The Sub-Commission may submit the Responsibilities in such a way that the Commission would not be compelled to act immediately, but could await an initiative by one or more members to bring the matter before the body as a whole. In any case, if the Responsibilities are adopted and submitted by the Sub-Commission, it is extraordinarily unlikely that the Commission would act upon the Responsibilities without several years of consideration – before they are eventually submitted to the Economic and Social Council of the United Nations, and ultimately to the General Assembly for adoption. At the same time, however, any of these bodies could adopt the Responsibilities as their views – carrying some degree of United Nations and thus world support. Obviously, the higher the UN institution, the more authoritative the imprimatur the Responsibilities would obtain.[95]

Even in their present draft format, however, the Responsibilities have begun to be used as the basis for action. For example, some investment institutions – such as the Financial Times Stock Exchange – have considered using and could further apply the Responsibilities as a basis for their identification of socially responsible companies in the FTSE4GOOD.[96] The Responsi-

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[95] *See* Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963).

[96] For a discussion on the FTSE4Good stock indexes, *see supra*, note 30 and corresponding text. In January 2002 the Deputy Chair of FTSE4Good Advisory Committee approached

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bilities could be used by the United Nations and its specialized and associated agencies and institutions as the basis for procurement decisions. Some nongovernmental organisations, such as Christian Aid, have already been using this draft as the basis for their advocacy of corporate social responsibility. Some business and business groups, such as Novartis and the Prince of Wales International Business Leaders Forum, have expressed support for the Responsibilities as a way of understanding their commitment to the Universal Declaration of Human Rights.

If and when the Responsibilities are adopted by the Sub-Commission and/or its parent bodies of the United Nations, they will represent a significant step towards establishing the international human rights responsibilities of transnational corporations and other business enterprises. The Responsibilities will help fill a major gap in the international human rights system. They can strengthen the will of governments to insist that businesses avoid human rights abuses. The Responsibilities can also provide businesses with a level human rights playing field for global competition. Upon the establishment of such international standards, there still remains the issue of implementation. Implementation will be a key issue in the future development of these standards. While the Responsibilities contain rudimentary mechanisms for implementation, the next step for the United Nations, businesses, States, and others will be to build upon the intellectual work of Asbjørn Eide and continue to examine and develop effective methods of implementation.

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the Working Group with regard to using the Responsibilities as part of the benchmark standards for its FTSE4Good index.

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Part Three:

Minority and Related Rights

PURL: https://www.legal-tools.org/doc/5ecf1e/

XVII

The Greenlanders and their human rights choices

Gudmundur Alfredsson*

1. Introduction

With regard to a long list of human rights issues, Asbjørn Eide has done an excellent job as an expert member of the UN Sub-Commission on the Promotion and Protection of Human Rights (previously the Sub-Commission on Prevention of Discrimination and Protection of Minorities). This article celebrates Asbjørn's contribution as the first Chairman/Rapporteur of two working groups established under the auspices of the Sub-Commission, that is the Working Group on Indigenous Populations (WGIP) which was established in 1982 and the Working Group on Minorities (WGM), established in 1995. As Special Rapporteur of the Sub-Commission, Asbjørn also wrote a report on minority rights[1] that paved the way for the establishment of the WGM. These working groups under Asbjørn's initial leadership have been very successful in the setting of new standards for and in the monitoring of government behaviour as far as minority and indigenous rights are concerned. The protection of these rights would not interrupt the sovereignty and territorial integrity of States. Seeking to protect the groups and keeping them content within States also serves to prevent or reduce the risk of violent ethnic conflicts. To this end, in large part thanks to Asbjørn, the meetings of the two working groups are wide open to active participation by minority and indigenous representatives.

It comes as no surprise that many governments nervously keep a watchful eye on these gatherings. Other governments, one suspects, may be happy to try to make use of the two working groups in order to disguise colonialism or occupation by reducing the peoples concerned to minority or indigenous groups.

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1 Study on constructive national arrangements for minorities, in UN docs. E/CN.4/Sub.2/1993/34 and Add. 1-4.

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One such situation might affect the Inuit of Greenland. Denmark has been very keen on designating the Inuit as an indigenous people, facilitating their participation in the WGIP, supporting the setting up of a new Permanent Forum on Indigenous Peoples at the United Nations and otherwise promoting indigenous causes. A totally different argument, more frequently heard nowadays, would consider the Greenlanders as a people for the purposes of external self-determination.As a result of these two different approaches, the Greenlanders are for the first time faced with two types of international law issues, very different in scope and consequences. The choice is now on the agenda of political debate in Greenland. The Home Rule Government has set up a Self-Governance Commission, and a working group of this Commission is assigned to deal with international and constitutional questions.[2] Another working group with a similar mandate has been more recently established by the North Atlantic Group, which is made up of the two Greenlandic MPs and one of the Faroese MPs in the Danish Parliament.

As to the different approaches with which the Greenlanders are faced, questions may first arise about indigenous rights. Indigenous peoples are defined as groups within States on the basis of national or ethnic composition and original inhabitation of the land. Their rights are similar if somewhat more extensive than those available to minorities. Second, questions will arise concerning the right of peoples to external self-determination, with the consequent choices between at least the options of independence, free association and integration. "Peoples" in this context means the population of distinct territories, like colonies.

Making the determination whether to pursue the rights of indigenous peoples or of peoples carries major legal consequences for the future. Denmark clearly favours indigenous rights over the right of external self-determination, for the obvious purpose of avoiding an interruption of her sovereignty over Greenland.

2. The rights of indigenous peoples

As explained above, the rights of indigenous peoples are about protection within a State, without interrupting sovereignty. The Danish authorities want to look at the Greenlanders as an indigenous people within Denmark, hence multiple official references to them in the context of the WGIP and the ILO

[2] The Self-Governance Commission has an informative website at: <www.namminersorneq.gl>.

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Convention on Indigenous and Tribal Peoples in Independent Countries (Convention No. 169 from 1989).[3]

Indigenous rights are similar in kind but somewhat more extensive than those available to minorities, involving equal enjoyment of all human rights, non-discrimination and special measures extending, among other things, to the possession of land and benefits from natural resources. Indigenous peoples thus have lesser rights than peoples.

Under the international instruments and the practice of States, minorities and indigenous peoples do not have the right of external self-determination. Autonomy or self-government is sometimes referred to as internal self-determination, but such assertions are not backed up by the instruments.[4] In the Lund Recommendations on the Effective Participation of National Minorities in Public Life, the use of self-determination language in presenting standards on non-territorial and territorial autonomies is clearly and intentionally avoided.[5]

An argument relying on the supposed integration of Greenland into Denmark and the consequent Greenlandic acquiescence of Danish sovereignty cannot be taken seriously.[6] The Greenlandic people have never been given the choice between all the required options, including independence or free association, and they were not properly consulted on integration and the termination of non-self-governing status in 1953. They have never agreed, directly or indirectly, to give up their status as a people and to become underlings through incorporation into Denmark.

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3 For example, see the speech by Development Minister Poul Nielson in *Støtte til oprindelige folk. Seminar om erfaringer og perspektiver*, Copenhagen: Udenrigsministeriet and DANIDA, 1996, pp. 4-7.

4 One author concludes that the relevant developments "do not affect the established rules and practices with respect to self-determination and the territorial integrity of States", see James Crawford, "State Practice and International Law in Relation to Secession", *British Yearbook of International Law* 114 (1998). One reason for the non-adoption of the UN draft Declaration on the Rights of Indigenous Peoples has undoubtedly to do with ambiguous language on self-determination. For an attempt to sort out external and internal claims, see Gudmundur Alfredsson, "Different Forms of and Claims to the Right of Self-Determination", in Donald Clark and Robert Williamson (eds.), *Self-Determination, International Perspectives*, London: MacMillan Press (1996), pp. 58-86.

5 Adopted by an expert meeting convened in Lund in May 1999, published with Explanatory Notes by the Foundation on Inter-Ethnic Relations in The Hague and on the home page of the Organization for Security and Cooperation in Europe at <www.osce.org>.

6 For an elaboration of the many shortcomings of the integration process, see Gudmundur Alfredsson, "Greenland and the Law of Political Decolonization", 25 *German Yearbook of International Law*, 290-308 (1982).

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3. Peoples and the right of self-determination

The right of external self-determination is set forth in a series of international instruments. In addition to general references in the UN Charter, these include the International Covenants on Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, and the Vienna Declaration from the 1993 World Conference on Human Rights.

Peoples are entitled to exercise the right of self-determination.[7] A "people" in this context means the population of a distinct territorial or administrative entity with external or natural boundaries. The emphasis on a geographical (colony, occupied territory) rather than popular entity (nation, ethnic group) is repeated in many international law texts and confirmed in State practice, in particular in connection with the decolonization process, as evidenced by provisions in the UN Charter on non-self-governing territories (rather than non-self-governing peoples) and in the title of the Declaration on the Granting of Independence to Colonial Countries and Peoples (countries comes first).

The Greenlandic people meets as such all the possible criteria which have been laid down in the course of the decolonization process as conditions for the exercise of the right of self-determination:

- For a distinct overseas territory, the so-called salt-water theory of decolonization is applicable;[8]

- the subjective and objective identity of the Greenlanders, with distinct history, culture, language and other national characteristics, is clearly in place;

- long-standing colonial control was confirmed with the inclusion of Greenland on the list of non-self-governing territories under the UN Charter;[9]

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7 For recent literature, see Antonio Cassese, *Self-Determination of Peoples, A Legal Appraisal*, Cambridge: Cambridge University Press (1995); Thomas M. Franck, *Fairness in International Law and Institutions*, Oxford: Clarendon Press (1995), in particular the chapter "Fairness to 'Peoples' and their Right to Self-Determination", at pp. 140-169; and James Crawford, *op. cit.*, pp. 85-117.

8 The Greenlandic situation is thus quite different from that of groups that live within metropolitan boundaries. In a 1998 case, the Supreme Court of Canada found that Quebec does not meet the threshold of colonial or other criteria pertinent to the right of external self-determination. The case, "Reference re Secession of Quebec", is accessible at the website <www.lexum.umontreal.ca>.

9 The termination of this listing was significantly flawed in law and morals, also under contemporary standards, see Gudmundur Alfredsson, "Greenland and the Law of Political Decolonization", *op. cit.*; and "Greenland" in *Encyclopedia of Public International Law*,

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- the term "et særligt folkesamfund"[10] in article 1 of the Home Rule Legislation reflects international law terminology with regard to self-determination. In the Preamble to the same Law, reference is made to special national, cultural and geographical circumstances; and

- separate treatment of Greenland is common in Danish laws, administrative practices and foreign affairs, for example concerning non-membership in the European Union, membership in sub-regional organizations, etc.

This right of colonized peoples to self-determination is confirmed in the consistent practice of States and international organizations, including case law.[11] Separation by agreement between population groups within a State, as in the Soviet Union, Czechoslovakia and Ethiopia/Eritrea, constitutes of course a worthwhile consideration, but other possible self-determination scenarios, including liberation of recently occupied territories and the separation from a State with a non-representative government, are presumably not relevant to Greenland.

Through the exercise of the right of external self-determination, a people is able to determine its international juridical status. For decolonization purposes, under General Assembly resolution 1541 (XV) and subsequent texts that add selection criteria and procedural formulations to the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, the available options are independence, free association and integration. The choice belongs to the people concerned, and popular support for the outcome as expressed in a referendum or otherwise is essential.

The list of options is even longer, provided that the people concerned is given a free choice in the matter and that the State agrees. In addition to the listing below, some of the key options would include:

- Independent, sovereign State in charge of its internal and external matters, with full membership in international and regional organizations;

- sovereign State in personal union with the Danish Crown. Such a union existed between Iceland and the Danish monarch 1918-44. An arrangement of this kind can bring about membership in international organizations and competences in foreign affairs, but the broad strokes and details of the

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Amsterdam: North Holland, published with the Max Planck Institute Heidelberg, vol. 2 (1995), pp. 623-625.

10 This term has been translated as "self-governing community" in the Core Document forming Part of the Reports of the States Parties, see UN doc. HRI/CORE/1/Add.58 from 1995, paragraph 38. The phrase "Denmark proper" is used to distinguish Denmark from Greenland.

11 Most recently in the 1995 case between Australia and Portugal, the International Court of Justice stated that, as far as the two parties were concerned, East Timor remained a non-self-governing territory and that her people had the right of self-determination. The case is available on the Court's website at <www.icj-cij.org>.

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relationship, as well as means of amendment and termination, depend on the deal made by the parties;

- free association or commonwealth with Denmark. In the UN listing of minimum options that should be made available to colonial countries and peoples, free association is a middle station between independence and integration. It can lead to a variety of arrangements, including membership in selected international organizations, but the people concerned maintains the right of external self-determination. An example of such an arrangement is the relationship of Puerto Rico with the United States;[12]

- federation would mean the coming together of Denmark and Greenland for the creation of a federal State where federal institutions are shared and where a number of joint powers exist, while the parts maintain significant control over local affairs. Federation is between relative equals while self-government indicates that the province affected is subsidiary to a central government;

- self-government, even expanded self-government as compared with the current Home Rule, comes with any number of possible variations in terms of both additional institutions and delegated powers or functions, including the judiciary, police, natural resources, certain limited foreign dealings, etc. Nevertheless, such self-government is basically granted to minorities and indigenous peoples within and as part of independent States; and

- total integration or merger in a unitary State. Indigenous rights could, of course, still be protected in such a scenario.

The decolonization argument, no matter how mild and modern the colonization may be, is therefore an avenue that would seem to be open to the Greenlanders as a people. Relying on decolonization constitutes the strongest claim to external self-determination that is most likely to succeed with third States and in international fora. A people entitled to the right of external self-determination should also be able to level the playing field with the aim of equal footing in negotiations with the colonizing power.

As to policy considerations, for Denmark which likes to see herself as a model of democracy and an exporter of human rights, an outright denial of a possible Greenlandic claim to external self-determination is a potential source of embarrassment. Furthermore, relating to both human rights protection and conflict prevention, Denmark's ability to criticize other countries in relation to other human rights situations and self-determination claims would be seriously hampered.

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[12] W. Michael Reisman, *Puerto Rico and the International Process. New Roles in Association*, Washington D. C.: The American Society of International Law, Studies in Transnational Legal Policy, no. 6 (1975).

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4. Concluding observations

As an indigenous people, the Inuit could seek better status and enhanced protection within Denmark.[13] This may involve improved structures of and the delegation of additional powers to the Home Rule Government, including full control of and all the income from land and natural resources. Calls for constitutional amendments, for the anchoring of Home Rule or even for the establishment of a federation, could be entertained in this context.

Indigenous rights are relevant, however, only as long as Greenland continues to come under Danish jurisdiction. The Greenlanders as a people can of course also constitute an indigenous people, but they do not need protection as an indigenous group if and when they are the majority in a country of their own. As to providing assistance and showing solidarity with other indigenous peoples, if anything, the Greenlanders are in a better position to achieve that purpose as a fully-fledged people.

It is the conclusion of this article that, as a matter of international law, the Greenlanders can be viewed as a people. Denmark has actually in the past recognized them as a colonial people and never properly brought that status to an end. As a people, the Greenlanders are entitled to the right of external self-determination with all the available options that come with the exercise of that right.

If the Greenlanders are not ready for independence, the free association avenue carries the benefit that future generations would continue to have access to other and more far-reaching options, including for example full independence. Also with reference to future generations, nothing should be done which would finalize the choice and make integration into Denmark irreversible.

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[13] In this respect one should keep in mind that the Nordic countries do not have particularly good records when it comes to minority and indigenous rights. See Lauri Hannikainen, "The Status of Minorities, Indigenous Peoples and Immigrant and Refugee Groups in Four Nordic States", 65 *Nordic Journal of International Law* 1-71 (1996); and Gudmundur Alfredsson, "The Rights of Indigenous Peoples with a Focus on the National Performance and Foreign Policies of the Nordic Countries", 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 529-542 (1999).

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XVIII

Protection of kin-minorities: international standards and Russian practice

Stanislav V. Chernichenko*

1. Introduction

Any question concerning the protection of minorities is connected with the problem of the definition of minorities. It is well-known that there is no generally recognized, legally binding definition of minorities, including national minorities. To elaborate such a definition is probably not possible. There is no definition of minorities in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the General Assembly on 18 December 1992. The Framework Convention of the Council of Europe for the Protection of National Minorities does not contain a definition of national minorities either, leaving the solution of this question to the States-participants. It is necessary to stress that there is no definition of minorities in the legislation of Russia, which is a participant of the Convention. In the Russian legislation there is no list of minorities either.

It is natural that raising the question on the protection of kin-minorities without a definition of minorities is difficult. In 1997, the working group on minorities set up by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (from 1999, the Sub-Commission on the Promotion and Protection of Human Rights) took one definition into account as a matter of orientation, to avoid mixing the problem of the protection of minorities with that of the protection of indigenous peoples.[1] Additional problems can arise in cases where there are different definitions of minorities in the legislation of the States concerned.

2. The definition of minorities

On 21 October 1994, the Convention of the CIS Guaranteeing the Rights of Persons Belonging to National Minorities was signed. It embraces "persons-permanent residents in the territory of one Contracting Party and having its

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1 UN doc. E/CN.4/Sub.2/AC.5/1997/WP.1, 2 April 1997, Annex.

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citizenship whose ethnic origin, language, culture, religion or traditions are different from the main population of this Contracting Party".[2] This definition can hardly be recognized as successful. For example, persons having religious characteristics different from religious characteristics of the majority of the State population are not necessarily a national minority. The State Duma (the Lower Chamber of the Russian Parliament) negatively assessed the expression "main population" which could be interpreted as impairing the rights of minorities. The Convention was not ratified by Russia.

Nevertheless it is possible to give an approximate definition of a kin-minority. This is a group of persons numerically smaller than the rest of the population of a State, in principle permanently residing, and having national characteristics different from the rest of the population, but which are typical of most of the population of another State. In this other State persons having such characteristics form a titular nation. Sometimes such a State is called "maternal".

It is important to note that persons permanently residing, in principle, in the territory of a respective State should be regarded as minorities. In Latvia and Estonia most Russian-speaking persons who lived permanently within their territories were deprived of the status of permanent residents. Additionally, the authorities of these States refused to recognize them as their citizens in order not to consider them as a minority. This action violates human rights. The declaration contained in the instrument of ratification of the Framework Convention by Russia reads:

> In the opinion of the Russian Federation, attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of States Parties to the Framework Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the Protection of National Minorities.[3]

At the same time, nothing prevents a broad interpretation of the notion of minorities and the inclusion of persons who temporarily live in the territory of a State, but have some particular national characteristics. Observers of Cuba and Mexico emphasized this in the Sub-Commission. It can be done unilaterally or on the basis of a treaty.

It is quite obvious that the question of protection of kin-minorities can be raised only in relation to national minorities. The problem arises whether the notion "national minority" includes that of "ethnic minority". This problem is not solved yet. The Declaration of 1992 distinguishes between them.

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[2] Дипломатический вестник, 1994, № 21-22, с.43.

[3] Собрание законодательства Российской Федерации, 1999, № 11, с. 2284.

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Speaking of the Russians who live in the territories of other countries, the expression "ethnic Russians" is often used in Russia.

3. Protecting minorities at the international and national level: the Russian example

There is also a problem with the concept of minority protection. Preference is given to the concept of the protection of the *rights of persons* belonging to minorities, although there is a concept of the protection of the *minorities' rights*. The latter should not be ignored. It is reflected in Article 1 of the Declaration of 1992. Balance is required between these concepts to guarantee, on the one hand, the preservation of their identity as minorities and, on the other hand, to prevent their artificial isolation. Both concepts are of importance for the protection of kin-minorities.

At present it is recognized that a "maternal" State has to some extent the right to express its concern about the situation with "its" minorities in other countries, to raise this question in bilateral relations with States where the minorities live and at a multilateral level, in international organizations. However, there are no exact, generally recognized norms of international law that establish the limits of expressing the aforesaid concern. Mr. Eide, in his study on minorities, notes that there is no legal basis for a special protective role of the "maternal" State and that such a State must use established international mechanisms for the settlement of conflicts.[4]

Persons belonging to kin-minorities can be (a) citizens of a "maternal" State, (b) citizens of the State on the territory of which they live, and (c) stateless persons.

In the first case, if their rights are violated or impaired, diplomatic protection can be extended to them. This category of persons is not often related to national minorities.

In the second and third cases, diplomatic protection cannot be extended. States have no right to extend their diplomatic protection to foreign citizens or stateless persons living on the territory of another State. These provisions are norms of customary international law which are not contested. Exceptions are possible if they are laid down in international treaties.

Since the question of minorities is related to the area of human rights, a "maternal" State has the right to insist on discussing the problems concerning kin-minorities in international bodies dealing with human rights and to expect explanations from the State where these minorities live. Such action by a "maternal" State is normally not considered a breach of the non-intervention principle. Moreover, even if a "maternal" State raises the question of violations of human rights of individuals perpetrated (in its opinion)

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[4] UN doc. E/CN.4/Sub.2/AC.5/1992/37, 1 July 1992, para. 170PURL: https://www.legal-tools.org/doc/5ecf1e/

only because these persons belong to a kin-minority, such action will not be regarded as a breach of the non-intervention principle.

These general considerations are based on the interpretation of the principles of respect for human rights and non-intervention, as well as on analysis of customary international law. This interpretation is supported by the acts adopted by the Conference on the Human Dimension. Additional to such interpretation, however, specific norms of international treaties and monitoring and control systems created by treaties – in particular by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Framework Convention for the Protection of National Minorities – are of great practical significance.

There is, at first glance, no legislation in Russia concerning the protection of Russian minorities in other countries. But a final conclusion to that effect would be wrong. The problem which Russia is faced with in this context is broader than the problem of the protection of kin-minorities. From time to time it is necessary to protect Russians living abroad and having no Russian citizenship. About 25 million Russians live in territories which were formerly part of the Soviet Union. Some 12 million Russians live in the Ukraine alone. In Latvia they constitute about 38 per cent of the population. In a number of cases they are not considered as being part of a minority, under the pretext that they are not citizens of the pertinent States and deprived of status as permanent residents (for example, in Latvia and Estonia). In the Ukraine the majority of the Russians do not want to be considered as a national minority.

It should be taken into account that it is often difficult to see a difference between the Russians living in countries which were parts of the USSR and persons who are not ethnic Russians but who consider the Russian culture and the Russian language as their native ones (for example, Byelorussians or Jewish people). That is why the term "Russian-speaking population" was popular in Russia. So, the problem of the protection of Russian minorities abroad is only a part of the problem concerning the protection of the Russian-speaking population.

The term "Russian-speaking population" was criticized many times in Russia at official and unofficial levels. This criticism should be recognized as well-founded. The legal meaning of this term is completely unclear. In some situations it does not help to solve the question of the protection of the Russians, but makes it still more complicated. Probably one could speak of *de facto* Russian minorities, not *de jure*. But since in many cases Russians living in member-countries of the CIS react negatively to the word "minority", even the expression "*de facto* minority" should be recognized as not acceptable. The fact that in a State the Russians are numerically fewer than the population constituting the titular nation does not always justify the ap-

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plicability of the term "minority" to them. In Kazakhstan, for example, before the disintegration of the USSR, Russians and Ukrainians formed the majority in comparison with the Kazakhs. Now the Kazakhs are more in numbers, but insignificantly so. The arithmetical criterion in this case would not be convincing enough to relate Russians to the minority.

The term "compatriot" is now considered as more appropriate than "Russian-speaking population". Originally its meaning was a matter of discussion. It did not have a clear legal meaning either. The opinion was expressed that it was not a legal term, but more an emotional one. Discussions continue to take place.

The Federal Law "On the State policy of the Russian Federation in relation to the compatriots abroad" of 24 May 1999 makes the content of the term "compatriots" clearer. Some of the problems have not been resolved, but categories of persons are enumerated in it who fall within the notion of "compatriots". It means that the term "compatriots" has acquired a more or less precise legal content. The Law is the only legislative act of the highest level which is devoted, in particular, to the protection of Russians living abroad and consequently Russian minorities. Besides, the President and the Government of Russia have also adopted acts aimed at supporting the Russian diaspora.

The following categories of persons are related to compatriots in the Law:

(a) citizens of the Russian Federation permanently residing abroad;
(b) persons who previously were citizens of the USSR and now live in States which were part of the USSR, who acquired citizenship of these States or became stateless persons;
(c) emigrants from Russia, the RSFSR, the USSR and the Russian Federation who had respective citizenship and who became citizens of a foreign State or got a residence permit, or who became stateless persons;
(d) descendants of the aforesaid persons with the exeption of descendants of persons belonging to titular nations of foreign States.[5]

This is not a quotation. The aforementioned provisions of the Law are given with abbreviations and they are a bit simplified without the meaning being distorted.

The Law does not address the protection of compatriots, but their support, as not only citizens of the Russian Federation are related to them. As has already been pointed out, protection *strictu sensu* (diplomatic protection) can only be extended to citizens. The wording of the Law in this respect is in

[5] Собрание законодательства Российской Федерации, 1999, № 22, с. 4937-4938.

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accordance with international standards, although it has some editorial shortcomings.

Belonging to a diaspora cannot be imposed. That would contradict the main provisions of international law concerning human rights. As for Russian citizens there is no problem here: if a person is a citizen of Russia and permanently resides abroad, he (or she) *ipso jure* is a compatriot, belongs to the Russian diaspora and, in addition, has the right to protection on the part of Russia according to Article 61 of its Constitution. But for persons who are not citizens of Russia and who live abroad, belonging the category of "compatriots" depends first of all on the subjective factor – self-identification. In Article 3(2) of the Law it is stated that the recognition of persons who were citizens of the USSR, emigrants and descendants of compatriots as compatriots depends on an act of free choice.

The Law provides that the Russian Federation's policy in relation to compatriots is based on the recognition of human rights and the obligation of States to observe generally recognized principles and norms of international law. At the same time, it emphasises the necessity to observe the principle of non-intervention in the internal affairs of other States. It means that Russia, supporting its compatriots in the economic and social fields, in the fields of education, language and culture, is not pursuing the aim to interfere in the domestic jurisdiction of the States on whose territory its compatriots live. Article 15(1) of the Law concerns the protection of compatriots against discrimination on the grounds of sex, language, religion, political or other beliefs, national or social origin, belonging to compatriots, property or any other circumstance. But Article 15(2) points out that support of compatriots in the field of human and citizens' rights is exercised both in accordance with generally recognized principles and norms of international law, international treaties and the legislation of the Russian Federation, taking into account the legislation of foreign States.

According to the Law, Russia shall create necessary conditions for the transmission of information from Russia to compatriots through various channels (radio- and television broadcasting, distribution of the press, etc.). Financing Russian activities in the field of relations with compatriots is carried out from the federal budget of Russia. It provides for privileges for natural and legal persons rendering assistance to compatriots.

It should be noted that the provisions of the Law are mainly of a general character which makes their implementation more complicated. It is assumed that material and organizational measures to give effect to the Law must be laid down in federal and regional programs for the support of compatriots abroad. The first program of this kind was approved by the Government of the Russian Federation on 17 May 1996, before the adoption of the Law of 1999. Unfortunately it is also too general. In August 2002, the Con-

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cept for the support of compatriots was adopted. At the regional level, the Government of Moscow acts quite effectively. But on the whole the support for compatriots can be characterized as weak. Many provisions of the Law of 1999 have no direct relation to compatriots. In fact some of them are devoted to conditions for acquisition and loss of Russian citizenship, thus duplicating the Constitution and the Law of Citizenship of 1991 or even correcting the Law on Citizenship, which created problems in the application of the latter. These problems have to some extent been solved. On 31 May 2002, the new Federal Law on Citizenship of the Russian Federation was adopted.[6] It has replaced the Law on Citizenship of 1991 and the provisions of the Law of 1999 relating to the citizenship. Article 14 of the new Law contains a provision which is very important for compatriots: persons who were citizens of the USSR and now live in States which were part of the USSR and who did not acquire citizenship of these States, can be naturalized in the Russian Federation by a simplified order.

The new Law corresponds to the European standards in the field of human rights. It was prepared with due regard to the European Convention on Nationality of 6 November 1977, which was signed by Russia but has not yet been ratified. During its elaboration, Russian experts discussed the draft with experts from the Council of Europe and the Office of the UN High Commissioner for Refugees. The 2002 Law may not be perfect, but it is a step forward when compared with the Law of 1991. Amendments were made several times to the Law of 1991, but it is now obviously out of date.

The solution to problems relevant to compatriots – kin-minorities included – cannot be the same in all cases. Neither the Law of 1999 nor general international treaties on minorities can solve them. One way towards a more effective resolution of these problems is the conclusion of bilateral treaties. The Russian Federation has concluded such treaties with some member-States of the CIS.

On 20 January 1995, a treaty between Russia and Kazakhstan on the status of Russian citizens permanently residing on the territory of Kazakhstan and the citizens of Kazakhstan permanently residing on the territory of Russia was concluded.[7] On 18 May 1995, a similar treaty was concluded between Russia and Turkmenistan.[8] The treaties have much in common, being different in some details. For example, they envisage that a citizen of one Party permanently residing on the territory of the other enjoys the same rights and freedoms and has the same duties as the citizens of the Party on whose territory he (she) lives. Exceptions to this rule are identified.

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6 Собрание законодательства Российской Федерации, 2002, № 22, с. 5480-5496.

7 Бюллетень международных договоров, 1997, № 10, с. 73-77.

8 Бюллетень международных договоров, 1997, № 11, с. 53-37.

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On 7 September 1995, the treaty between Russia and Turkmenistan on cooperation for the guarantee of the rights of the Russian minority in Turkmenistan and the Turkmenistan minority in Russia was concluded.[9] Both concepts of minority protection are reflected in the treaty. Most of the articles of the treaty deal with the rights of persons belonging to minorities. The Parties recognise, *inter alia*, the right of such persons to use their own language and to establish associations of educational, religious and other character. At the same time, the Parties undertake to guarantee to the minorities the right to participate in public and State life, in particular with regard to the protection of their interests and regions where they live.

The agreement between Russia and Turkmenistan on the settlement of dual citizenship of 23 December 1993[10] and the treaty between Russia and Tajikistan on the settlement of the same questions of 7 September 1995 also relate to the protection of compatriots.[11] Their content is almost identical. The Parties recognize the right of their citizens to acquire the citizenship of the other Party without the loss of the previous one. The agreement and the treaty removed problems connected with compulsory military service of persons having the citizenship of both Parties. They say that persons having citizenship of both Parties can get protection of each of them. But nothing is said about how one of the Parties should react if the other Party is trying to protect a person who has citizenship in both Parties, permanently residing in the territory of the former. The question is still open.

There are no treaties with other States which are similar to the above-mentioned instruments. The existing practice shows that provisions concerning minorities, diaspora, etc., in bilateral treaties on co-operation of general character for the real protection of minorities are not effective enough. Even bilateral treaties which are fully devoted to these questions cannot radically change the situation for the better. The financial situation in Russia does not allow to exercise the protection of compatriots on a planned scale.

There are no models for how to protect compatriots in each country which was formerly a republic of the USSR. Such models could form a basis for a legal solution. One cannot say that these models do not exist at all. For example, there is an opinion that Finland's experience with regard to the Swedish people could be used in Latvia and Estonia. But in most cases there are no clear-cut orientations how to act. The question is often raised that in the Ukraine the Russian language is artificially forced out where people mainly speak this very language – in the Crimea, in Donbass, in Kharkov, in Odessa. These are vast territories and an attempt to consider their population as a minority, artificially separating Russians from Ukrainians who speak the

9 Бюллетень международных договоров, 1995, № 10, с. 66-69.
10 Бюллетень международных договоров, 1996, № 6, с. 11-13.
11 Дипломатический вестник, 1995, № 10, с. 24-26.

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Russian language, is at best fruitless. By the way, in Kiev, the capital of the Ukraine, not less that 50 per cent of the inhabitants speak Russian.

In this context it is relevant to refer to an opinion expressed by Mr. Eide:

> ... not all groups constituting less than half [of the population] are in need of particular minority rights. ... A large group may be entitled not only to use its own language, but also to have education in its own language and to use its language in relations with officials.[12]

Sometimes life itself pushes to change the attitude towards the Russian diaspora in States formerly part of the USSR. For example, in Kyrgyzstan recently the Russian language got the status of a State language. It is impossible to do everything by legal means. In the long run the demands of economic, scientific and technical cooperation will show which role will be played by the Russian language in the territory of the States which were formerly part of the USSR. But it is necessary to do everything possible to prevent further deterioration of the situation.

There are acute problems in Transdniestria, a part of the Republic of Moldova. Representatives of Transdniestria state that the population of this region has exercised its right to self-determination. The Russians and Ukrainians in Transdniestria are in the minority in Moldova. Minorities have no right to self-determination. They have the right to a special regime of protection. The question of self-determination of the population of Transdniestria can arise only if Russian, Ukrainian and Moldovan communities of this region, peacefully coexisting, begin to be considered as a people. International law has no norms which would allow to define whether a national minority compactly living on some territory has transformed into a people.

4. Conclusion

The establishment of bilateral bodies (commissions, committees) which would consider the alleged violations of the rights of persons belonging to a diaspora (taking into consideration the reciprocity principle) could promote the solution of problems of the Russian diaspora in the member-States of the CIS and Baltic States. First of all, it would be expedient to consider the alleged violations of the rights of those persons who belong to the Russian diaspora, but who are not the citizens of Russia irrespective of whether the State on whose territory they live at present considers them to belong to minorities. In this connection the German-Polish convention on the Upper Silesia of 15 May 1922 probaly deserves some attention. The state of international relations for the period between the two world wars affected its appli-

[12] UN doc. E/CN.4/Sub.2/AC.5/1996/WP.2, 6 March 1996, para. 33.

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cation. However, the approach to the problem of the protection of minorities reflected in it is interesting.

Two circumstances prevent the establishment of the above-mentioned bilateral bodies: (a) the need for new financial spending and (b) a negative position of Russian partners. In these conditions one can hope that multilateral international mechanisms in the field of human rights – set up through the OSCE, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms – can be used more intensively for the protection of the Russian diaspora.

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XIX

The contemporary protection of minorities

John Packer*

I first came to know of Asbjørn Eide through his writings in the early 1980s on the subject of peace and justice and their relation with human rights. His views partly inspired my own studies, research and writing at that time, including a (somewhat naïve) master's dissertation on the right to peace completed in 1986. It was a little while later that I first had the pleasure to meet Eide during some meetings in Geneva of the UN Sub-Commission. Our contacts became more numerous when I began working at the United Nations then Centre for Human Rights in 1991, and increased from 1995 when I joined the OSCE High Commissioner on National Minorities in The Hague. Through this period, Eide steadily gained recognition for his balanced views and substantial contribution to the literature including official UN reports.

As long as I have known Eide, he has distinguished himself through his dedication to the pursuit of peace and justice, conscious of the intimate relationship between law, morality and politics, especially in international relations. In this regard, Eide has acted with foresight and the courage of his convictions to challenge the status quo and existing powers in an effort to advance social development around the world based on justice through respect for human rights for everyone everywhere. His views have not always been popular. But over time, many have been adopted and refined by others and have moved from the margin during the Cold War to the mainstream in the post-Cold War world. Indeed, it may be said that the world has in some respects "caught up" with Eide.

Through the years, I have also grown to respect and otherwise appreciate Eide as a person who has always been available to help, prepared to adjust his own schedule to contribute to a wide variety of endeavours. On a more personal level, despite the many demands upon him, he always made time for students, young staff members and representatives of non-governmental organisations large or small. It has thus been my pleasure and honour to come to know and work with Eide. And I am delighted (and many are no doubt grateful) that he shows no sign of slowing down.

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1. The historical basis for the protection of minorities

Problems involving minorities are among the most vexing issues of contemporary international relations, and an important subject of international human rights law. Asbjørn Eide has been among the earliest and most consistent in addressing the subject in all its complexity, having contributed more than most to the conceptual and practical resolution of the minority *problématique*, in particular in terms of the progressive development of international human rights of which the catalogue of existing minority rights forms part. In such a collection as this book, it seems appropriate to recount briefly this development – from where we have come to where we are now, especially in Europe.

Until 1945 the treatment of the protection of minorities in international relations and law focused fundamentally on groups rather than individuals as the problem originally manifested itself in Europe largely along the lines of religious faiths and their classifications or the configuration of groups of persons into those faiths. That history, which predates the incorporation of human rights into international law, was not a peaceful one. Quite to the contrary, it was one of great conflict, including the commission of heinous crimes against individuals and groups. As we know from the Second World War (and prior to it) the idea of grouping persons in terms of nationality, "race" or similar categories including religious faith formed the basis of policies of exclusion which led to holocausts. It was, therefore, not surprising that after such a history the States of Europe – indeed the world community at large in the form of the United Nations – decided in 1945 to follow a different approach. That approach was to protect all individuals irrespective of their membership of national or ethnic, linguistic or religious groups. The fundamental notion of human rights is that all human beings are equal and their rights are to be enjoyed equally. That is to say irrespective of particular characteristics, interests, faith or other bases on which individuals distinguish themselves, or are distinguished and treated against their will. This is a fundamental conceptual point because it is the point of departure for the elaboration of the contemporary protection of persons belonging to minorities.

On the whole, one does not speak in contemporary international human rights law about minorities as such. Rather, we speak about "persons belonging to minorities" – either as individuals acting alone or "in community with the other members of their group".[1] That is to say that the focus and emphasis of protection is clearly on the *individual* – which is not to say that a group of indi-

[1] *See*, notably, Article 27 of the International Covenant on Civil and Political Rights; the full text of the Covenant, adopted on 16 December 1966, is available through the Internet at <http://193.194.138.190/html/menu3/b/a_ccpr.htm>.

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viduals, formed by the free will of the persons concerned, may not enjoy rights or protections.

It seems necessary for the contemporary treatment of the minority problem (particularly in Europe) to return for a moment to the situation prior to 1945. The idea leading up to the Treaty of Versailles, and ultimately entrenched in the Treaty of Versailles, was that what needed to be protected were "nationalities". This found expression in President Wilson's famous "Fourteen Points" and in the subsequent system of minorities protection treaties (*bilateral* treaties) based on the idea of the "nationalities principle".[2] This idea was founded on the premise that each "nation" should have its own "home" or State. But that, of course, proceeds from the exclusivist premise that there are in fact pure, discrete nations which may be, through the process of law or political accord, segregated and bound into discrete territorial units. It also imagined that each nation had, or would have, their own home in terms of a territorial unit – that each nation would have a State. The ideal, therefore, was that all ethnic Hungarians, for example, as a discrete group could be bound into a single State in a pure fashion – that all ethnic Romanians could be similarly bound into a different discrete State, and so forth. Of course, as a matter of practice, this was not possible and we do not have to reflect very long to know why it would not be possible. The premise is simply not true. Human beings are not exclusively defined by ethnic or similar criteria, nor are they susceptible as a matter of fact to such segregation. We know that people have varying and often multiple or overlapping identities resulting from different shared experiences, inter-marriages or simply inclinations. It is also evident that this results from and contributes to a constant dynamic of change across and among almost all societies and all States. Still, well-known projects (of more or less malign nature) have been and are being pursued to force people to accept and conform with policies and laws which follow the erroneous premise. We know now that such policies and laws are prejudiced and discriminatory because they assert conclusions about uniformity of views, tastes and behaviour which, on an individual basis, are not true. On the basis of this error have been prescribed differentiated treatment (either for the better or for the worse ... sometimes terribly worse) between all those who are ascribed membership of the targeted group and all others. Nonetheless, what was decided upon and what was attempted in the inter-war period following the Treaty of Versailles was a rough segregation of persons along and behind national lines and borders.

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[2] For a brief summary and analysis of the relevant parts of Wilson's speech of 6 January 1918, *see* Antonio Cassese, *Self-Determination of Peoples; A Legal Reappraisal*, Cambridge: Cambridge University Press (1995), pp. 14-23, especially at pp. 19-20. On the nationalities principle, its heritage and context, *see* Charles de Visscher, *The Stabilization of Europe*, Chicago: University of Chicago Press (1924).

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Following the above logic, the map of Europe was redrawn partly in an attempt to get most of each ethnic group (or purported "nation") into essentially discrete and homogenous States. Where this failed, there arose what became known as the "nationalities problem", that is, the group of the nation which found itself on the "wrong" side of the border. According to the theory, and as a result of its attempted implementation, there was developed a set of principles and interlocking bilateral treaties aimed at assuring protection for those (unfortunate) groups. This underlined that the fundamental interest was not necessarily the interest of the individuals concerned, but was somewhat a proprietary interest of the dominant community of the nation-forming State – the *mère patrie* – and its elite who arrogated to themselves the responsibility (and status) of protectors of the nation. As such, for example, it was the interest of Germany that "its" national minority be protected in its neighbouring State(s), and through the conclusion of bilateral treaties this German interest became a legal right. This was not a matter of human rights nor what I would submit to be a human rights-oriented presumption or result. Nonetheless, this was the status quo in the pre-Second World War period. It also contributed to the causes of the Second World War because, as may be recalled, one of the arguments advanced by the Third Reich to intervene in the Sudetenland and Silesia was that the German State had a valid moral and legal basis to protect the German nation – which led, in fact, to occupation and annexation. We know, of course, what followed. This is not to mention anything about the situations of the Jewish population or the Sinti and Roma populations who were obviously the victims of nationalist, exclusivist, and racist thinking and programmes.

In an effort to break with the past, the Charter of the United Nations begins in its preamble and in Article 1 with important statements about the principles of equality and non-discrimination with regard to (individual) human beings. It does not, however, refer expressly to "minorities" nor (perhaps surprisingly) does one find in the early instruments of the United Nations any direct reference to minorities. In fact, there was some confoundment on the part of the drafters about exactly how to respond to some of the clearly minority-oriented problems – other than by means of the principles of equality and non-discrimination. Soon after the formation of the United Nations this became the focus of some discussion in the Commission on Human Rights under the Economic and Social Council and, more particularly, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights). Thus, it was viewed as one of the pressing issues immediately to be addressed and hopefully resolved. Some sixty years later, the Sub-Commission continues to struggle with the problem of minorities. The most significant effort to treat the problem

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in a general and comprehensive fashion has been made by Eide.[3] It took the United Nations almost half a century before it managed to adopt any instrument specifically for the protection of minorities or persons belonging to minorities (see below), and still today there exists no dedicated body aimed at implementation of minority rights, notwithstanding the interesting work the Working Group on Minorities[4] has done under the Chairmanship of Eide in fostering a broad and inclusive discussion about minority-related issues. The story is somewhat different at the regional level in Europe, on which I will comment below after describing further the regime at the universal level.[5]

2. The protection of minorities at the universal level

At the universal level, that is, within the United Nations, the main protection of persons belonging to minorities is found in four instruments, aside from the Charter.[6] The first instrument in which there is considerable protection for persons belonging to minorities is the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted in 1965.[7] This instrument provides protection not only against discrimination on the basis of "race". According to Article 1(1) of the ICERD,

> the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and

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3 *See*, notably, Asbjørn Eide's report to the Sub-Commission on "Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities"; UN doc. E/CN.4/Sub.2/1993/34 of 10 August 1993, and Addenda 1, 2, 3 and 4. By comparison, a much earlier well-known and highly regarded report by Francesco Capotorti addresses the subject essentially in terms of only Article 27 of the International Covenant on Civil and Political Rights; *see* F. Capotorti, "Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities", UN doc. E/CN.4/Sub.2/384/Rev.1 of June 1977 (also published by the United Nations in its Human Rights Study Series, No. 5, 1991, Sales No. E.91.XIV.2).

4 The Working Group on Minorities was established, on recommendation from the Sub-Commission, by the Commission on Human Rights pursuant to resolution 1995/24 of 3 March 1995, as endorsed by ECOSOC resolution 1995/31 of 25 July 1995, and has worked since then on the basis of an annual meeting held usually in May at the United Nations in Geneva.

5 For a comparative analysis of the international protection of minority rights both at universal and European levels, *see* John Packer, "On the Content of Minority Rights" in Juha Räikkä (ed.), *Do We Need Minority Rights?; Conceptual Issues*, The Hague: Kluwer Law International (1996), pp. 121-178.

6 For a brief overview (preceding establishment of the Working Group on Minorities), *see* Gudmundur Alfredsson and Alfred de Zayas, "Minority Rights: Protection by the United Nations", 14 *Human Rights Law Journal* 1-9 (1993).

7 Adopted on 21 December 1965; the full text of the Convention is available through the Internet at <http://193.194.138.190/html/menu3/b/d_icerd.htm>.

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> fundamental freedoms in the political, economic, social, cultural or any other field of public life.[8]

The ICERD is, therefore, a quite important instrument for the protection of persons belonging to certain minorities. It offers an entire convention not only with its protective language in the sense of proscriptions, but also (according to Article 2(2)) the positive obligation to take "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms".

The second instrument, adopted in 1966, is the International Covenant on Civil and Political Rights (ICCPR) which stipulates in Article 27 explicit protection of persons belonging to minorities. That protection, however, is fashioned in negative language which states that persons belonging to minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". The provision does not prescribe positive rights.[9] Rather, it proscribes interference in what are to be free domains and, implicitly (and in conjunction with Article 2 of the Covenant), it proscribes discriminatory practises.

The third instrument which is significant is the Convention on the Rights of the Child (CRC) adopted in 1989.[10] Article 30 of this convention is virtually identical to Article 27 of the ICCPR. Of course, Article 27 of the ICCPR also applies to children and so one may query what added value Article 30 of the CRC brings to the catalogue of international human rights law. From a concep-

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8 From the biological and sociological perspectives, there are substantial doubts about the existence or validity of "race" which raise further serious questions about the utility of the notion from the perspective of the protection of human rights. The idea of race contradicts the fundamental premise of human rights philosophy and law which proceeds on the basis of the essential similarity of all human beings and their fundamental qualities, needs and experience. Races imply essential differences between human beings. By contrast, "ethnicity" seems a compatible notion with human rights philosophy since it turns more on elements of association/affiliation which may ultimately be matters of individual choice.

9 This is not to preclude a liberal interpretation reading into the provision certain positive undertakings requiring States Parties to take action. In this regard, *see, e.g.*: Maria Lundberg, *Special Measures for the Protection of Minorities*, Geneva: Graduate Institute of International Studies (doctoral thesis on file) (1996), pp. 129-140, especially at pp. 134-139; Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford: Clarendon Press (1991), pp. 178-186, especially at pp. 180-182 and 185-186; *cf.* Manfred Nowak, "Article 27" in *U.N. Covenant on Civil and Political Rights; CCPR Commentary*, Kehl am Rhein: N.P. Engel Verlag (1993), pp. 500-504, especially at p. 504 (para. 46); and Christian Tomuschat, "Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights" in *Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte, Festschrift für Hermann Mosler*, Berlin: Springer-Verlag (1983), p. 969.

10 Adopted on 20 November 1989; the full text of the Convention is available through the Internet at <http://193.194.138.190/html/menu2/6/crc/treaties/crc.htm>.

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tual point of view, it probably adds very little. But, from a legal and practical point of view, it adds at least two things. First, it creates the possibility that some States which are not yet party to the ICCPR may become party to the CRC, thus extending protection at least to persons belonging to minorities who are under the age of eighteen.[11] Second, for those States party to the CRC, Article 30 must be read and applied in conjunction with other relevant provisions of the Convention guaranteeing, *inter alia*, the best interests of the child (Article 3), the evolving capacities of the child (Article 5) and the educational rights of the child (Articles 28 and 29).

The fourth instrument elaborated under the auspices of the United Nations is the 1992 Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[12] The UN Declaration is, of course, not legally binding. It is also a fairly weak instrument with only a few articles of substance – although these certainly add to the catalogue at the universal level. Overall, the Declaration is an important step forward constituting the most specific treatment of the subject by the United Nations.[13] It may also be noted that the title of the Declaration incorporates the common reference to "national or ethnic, religious and linguistic minorities" which serves to circumscribe the protection to three or four types of minorities. This idea is also reflected at the European level where the particular notion of "national minority" has its roots and current meaning.

3. The protection of minorities in Europe

Turning, thus, to the regional level, I will restrict my comments to the two principal European regimes.[14] This is largely because there are no similar instru-

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[11] Indeed, this is the case. As of 1 January 2002, there were 147 States party to the ICCPR and 191 States party to the CRC – meaning that protection was extended to children belonging to minorities in 44 States where it was not extended to their parents; *see* Jean-Bernard Marie, "International Instruments Relating to Human Rights; Classification and status of ratifications as of 1 January 2002", 23 *Human Rights Law Journal* 111-130 (2002).

[12] Adopted on 18 December 1992; the full text of the Declaration is available through the Internet at <http://193.194.138.190/html/menu3/b/d_minori.htm>.

[13] For an extensive analysis of the Declaration, *see* Patrick Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update", in Alan Phillips and Allan Rosas (eds.), *Universal Minority Rights*, Åbo and London: Åbo Akademi University Institute for Human Rights and Minority Rights Group (International) (1995), pp. 13-76.

[14] It is to be noted that the protection of minorities has also been addressed at the sub-regional level in different parts of Europe both through specific instruments (such as the Commonwealth of Independent States' Convention on Guaranteeing the Rights of Persons Belonging to National Minorities, adopted in Moscow on 21 October 1994, and the Central European Initiative's Instrument for the Protection of Minority Rights, adopted in Turin on 19 November 1994) and by specifically mandated institutions such as the Commissioner of the Council of the Baltic Sea States on Democratic Development (formerly

Rule of Law Development Initiative http://www.ssrn.com/abstract=1005005

ments or expressed protections for minorities in the other regional systems, and also because the minorities problem to date has been more specifically articulated and actually dealt with on the European level. This is not at all to imply that the problem does not exist in other regions of the world: it most certainly does.

The Council of Europe has been the principal organisation for the promotion and protection of human rights in general within Europe. Until the 1990s, its main treatment of the minorities problem was through a single article of the European Convention for the Protection of Human Rights and Fundamental Freedoms[15] which in Article 14 proscribes discrimination in relation to the provisions of the Convention including expressly on the basis of "association with a national minority". Thus, to deny enjoyment of any of the rights elaborated in that instrument (or in general pursuant to Protocol No. 12) on the basis of membership of a national minority constitutes discrimination which is prohibited. But, there is no prescription of special rights for persons belonging to minorities under that regime. Such was the *status quo* until the end of the Cold War. Since then, the Council of Europe has developed a general regime for the protection of persons belonging to national minorities together with a specific regime for the protection of regional or minority languages. The general regime is provided by the Framework Convention for the Protection of National Minorities[16] which was elaborated pursuant to a decision of the Heads of State and Government of Council of Europe Member States meeting in Vienna in 1993; the expressed objective was to elaborate a legally binding instrument exactly in line with the Copenhagen Document of the Organization for Security and Cooperation in Europe (as discussed below). The Council of Europe also elaborated the European Charter for Regional or Minority Languages[17] which does not protect individuals as such. Rather, it protects *languages* – which is a quite unusual way to approach the problem insofar as languages (as opposed to human beings) are the subject of the protections. In addition, the Charter is somewhat problematical as a treaty because it is elaborated in a menu fashion whereby States may pick and choose the provisions to which they would care to bind themselves, giving rise to widely divergent obligations among the States Parties.

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titled the Commissioner of the CBSS on Democratic Institutions and Human Rights, including the Rights of Persons belonging to Minorities; *see* <www.cbss-commissioner.org>).

15 Adopted in Rome on 4 November 1950, for the full text and its twelve protocols, *see* <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>.

16 Adopted in Strasbourg on 10 November 1994, for the full text of the Convention *see* <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>.

17 Adopted in Strasbourg on 5 November 1992, for the full text of the Charter *see* <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>.

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The regimes which have developed since the Cold War were led by events in the Organisation for Security and Co-operation in Europe (OSCE) which, prior to 1995, was known as the Conference on Security and Cooperation in Europe (CSCE). The CSCE was an inter-governmental diplomatic conference better known to many as "the Helsinki process" which from 1972 to 1975 comprised a series of conferences held in Helsinki and Geneva concluding on 1 August 1975 with the adoption of the Helsinki Final Act signed by the Heads of State and Government of the then 35 participating States. Those 35 participating States included the States of the two opposed Cold War defence alliances (NATO and the Warsaw Pact) together with other interested States – that is, all States in Europe, including non-aligned and neutral States. I will not elaborate on the history or development of the OSCE[18] other than to say that one of the major issues which was addressed within the OSCE as of 1989 was the situation of minorities or, more correctly, persons belonging to national minorities, which led in 1990 at a moment of convergence of interests and a certain opening within the multilateral discussions to the adoption of the Document of the Copenhagen Meeting of the [then] CSCE Conference on the Human Dimension.[19] The "human dimension" is essentially OSCE-speak for human rights protection and humanitarian concerns. It was possible at that historical moment to reach a consensus among all participating States on the most detailed set of prescriptions and proscriptions for behaviour with regard to persons belonging to national minorities, as found in Chapter IV of the Copenhagen Document.

It should be underlined that the Copenhagen Document is a political instrument. It is not intended to be a legally binding instrument and it was not signed by plenipotentiaries; almost no document within the OSCE is a legally binding instrument and no State responsibility (in the legal sense) accrues in the case of an ostensible "breach". However, that is not to say that these are not important documents. To the contrary, they represent highly important so-called "politically binding" instruments. They engage States at a level of commitment which is quite serious for the conduct of their inter-State relations – upon which substantial interests of State may depend. Therefore, the OSCE Copenhagen Document was, and remains, a highly significant instrument. That Document – and I will not go into its contents other than to stress that it again

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[18] For a comprehensive record with informed commentary, *see* the two compilations edited by Arie Bloed: *The Conference on Security and Co-operation in Europe; Analysis and Basic Documents, 1972-1993*, Dordrecht: Martinus Nijhoff Publishers (1993); and *The Conference on Security and Co-operation in Europe; Basic Documents, 1993-1995*, The Hague: Kluwer Law International (1997). *See also* Victor-Yves Ghebali, *L'OSCE dans l'Europe post-communiste, 1990-1996. Vers une identité paneuropéenne de sécurité*, Bruxelles: Etablissements Emile Bruylant (1996).

[19] For the full text of the Copenhagen Document, *see* Arie Bloed (ed.), *op. cit.* (1993), pp. 439-465. The text is also reproduced in 11 *Human Rights Law Journal* 232-245 (1990).

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underlines the idea of protecting *persons* belonging to national minorities – inspired soon thereafter the elaboration within the Council of Europe of legally binding instruments along the same lines, in particular the Framework Convention for the Protection of National Minorities (as noted above). For OSCE participating States which are not party to the Council of Europe conventions, the Copenhagen Document continues to be the principal reference regarding the protection of persons belonging to national minorities.

4. Implementation

In view of the developing standards for the protection of persons belonging to minorities, perhaps the more important issue is that of implementation. At the end of the day, what matters to most persons who seek the protection of their human rights is accessibility to such protection in a way which is meaningful (that is, makes a difference) in their lives. At the United Nations level, the effects of particular rights of specific interest and application to persons belonging to minorities are quite limited because the provisions are limited in number, scope and content. Of course, conventional provisions depend in the first place on States being party and on the nature of any reservations they may make. Even then, the supervisory mechanisms of the UN conventions are relatively weak. They are composed simply of expert committees periodically and in a general way reviewing State reports. Existing individual recourse procedures are not publicly well-known, are time-consuming and ultimately rely on the good will of State authorities to follow expert views in specific cases. In truth, meaningful enjoyment of the stipulated rights may well remain at a substantial distance from the individuals concerned.

The Council of Europe offers a much more accessible and better known regime of basic human rights protection. Nonetheless, we know that it requires first the exhaustion of domestic remedies and then there is still a fairly lengthy procedure before the European Court of Human Rights. It was hoped that the situation would improve pursuant to Protocol No. 11 (*inter alia*, unifying the Commission and Court[20]), but the experience does not so far bear this out – indeed, the Court appears to be facing a crisis in the face of an overwhelming

[20] For a description and analysis of these changes, *see* Andrew Drzemczewski and Jens Meyer-Ladewig, "Principal characteristics of the new ECHR control mechanism, as established by Protocol No. 11, signed on 11 May 1994; A single European Court of Human Rights is to replace the existing Commission and Court in Strasbourg", 15 *Human Rights Law Journal* 81-86 (1994); the full text of Protocol No. 11 and its Explanatory Report, together with the texts of speeches on the occasion of the signing ceremony, are reproduced in *ibid.*, pp. 86-102.

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case-load and insufficient resources.[21] But, in terms of substance, we are here only speaking about the principle of non-discrimination in terms of Article 14 of the European Convention on Human Rights and Protocol No. 12 thereto – which may not be the most accessible route, or effective approach, in the protection of minorities. Unfortunately, the Framework Convention for the Protection of National Minorities does not offer a more accessible regime because it is without a formal complaint procedure and the supervisory body is the Committee of Ministers only (if ably) assisted by an Advisory Committee composed of independent experts. It is to be noted that the sensitivities surrounding this mechanism are such that the fairly weak regime under the Framework Convention was itself the result of a two year negotiating process even to get the States to accept independent experts rather than governmental experts on the (merely) Advisory Committee. Perhaps because of this last point, the experience so far (that is, *vis-à-vis* initial State reports) has been interesting, with the Advisory Committee and supporting Secretariat demonstrating considerable care in their work and imagination and persistence in developing a significant practice. Nonetheless, the Framework Convention regime remains essentially a system of State reports (which are to be submitted for review only every five years) ultimately evaluated by the States themselves through the *political* body of the Committee of Ministers.

The OSCE does not necessarily offer a much better regime. From the point of view of the protection of the individual, there is no direct recourse. But, that is partly because the OSCE regime is not a regime of law. In fact, within the OSCE the main emphasis is on security and, as the name of the organization implies, on security and co-operation *between* States. This is a somewhat unique approach where the protection of minorities has been conceived expressly as a security issue and the mechanisms that exist to ensure compliance by States with their commitments are principally political and security-oriented in nature. Other than the work of the High Commissioner on National Minorities, the principal recourse (for concerned States) is through diplomatic means at an inter-State or multilateral level including certain mechanisms on which I will not now elaborate.[22] These processes are confidential. The overall approach, however, merits further explanation.

The High Commissioner on National Minorities (HCNM) is a mechanism of the "security dimension". The OSCE divides its work conceptually and practically into three domains known as "baskets": the first is the "security basket" which is to say hard security including the Forum for Security Cooperation and

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[21] *See* the compelling argument, and suggestions for reform, put recently by the President of the Court, Luzius Wildhaber, "A Constitutional Future for the European Court of Human Rights?", 23 *Human Rights Law Journal* 161-165 (2002).

[22] For a summary, *see* Katherine Birmingham, *The OSCE and Minority Issues*, The Hague: Foundation on Inter-Ethnic Relations (1995).

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the elaboration and now supervision of the Conventional Forces in Europe Treaty; the second basket concerns economic and environmental matters; and the third basket is the "human dimension" (that is, human rights) including humanitarian concerns. Notwithstanding these divisions, the OSCE conceives all of them together in a notion of *comprehensive security*. Thus, it is a basic working premise of the OSCE that there is a fundamental inter-linkage and a symbiotic relationship between the three baskets/dimensions. From this perspective, respect for human dimension commitments is fundamental to achieving and maintaining peace and security in the region. It was actually a result of things going terribly wrong in the former Yugoslavia in 1991 that the OSCE found itself faced with the necessity to respond somehow with a practical mechanism addressing minority-related problems. At the Helsinki Summit in 1992, the participating States created the institution (or mechanism) called the HCNM. It is to be emphasised that the HCNM is an institution of the security basket focussing on problems involving national minorities which have an international character. The HCNM is not to function as a general advocate for minorities or as an ombudsman, nor is it an individual recourse mechanism for persons belonging to national minorities. The HCNM is charged with the responsibility of providing early warning in cases where he believes that minority-oriented problems might escalate to hot conflict and/or (and this is the principal part of his work) to address such problems with a view to de-escalating them within the notion of early action, that is, de-escalating those tensions in order to maintain peace and security. The mechanism functions in a confidential and a diplomatic fashion through direct contacts with a view to avoiding escalation. It is not, therefore, a general regime for the protection of minorities nor is it a very accessible recourse mechanism since it depends upon there being a "situation" of a certain character which the HCNM, in his own judgement, recognizes and acts upon.[23]

In the absence of a more general and effective mechanism, and notwithstanding the limits and peculiarities of his mandate, the HCNM has been the

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[23] For a comprehensive treatment of the HCNM and the work accomplished until early 2001, *see* Walter Kemp (ed.), *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities*, The Hague: Kluwer Law International (2001). For shorter overviews, *see*: Max van der Stoel, "The Role of the OSCE High Commissioner in Conflict Prevention" in Chester A. Crocker, Fen Osler Hampson, and Pamela Aall (eds.), *Herding Cats; Multiparty Mediation in a Complex World*, Washington: United States Institute of Peace Press (1999), pp. 67-83; and John Packer, "The OSCE High Commissioner on National Minorities" in Gudmundur Alfredsson, Jonas Grimheden, Bertram G. Ramcharan and Alfred de Zayas (eds.), *International Human Rights Monitoring Mechanisms; Essays in honour of Jakob Th. Möller*, The Hague: Martinus Nijhoff Publishers (2001), pp. 641-656. For a recent up-date on the HCNM's work, *see* Sally Holt, "The Activities of the OSCE High Commissioner on National Minorities; January 2001-May 2002" in European Centre for Minority Issues and EURAC Research (eds.), *European Yearbook of Minority Issues*, Volume 1 (2001/2), The Hague: Kluwer Law International (2003), pp. 563-589.

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most active instrument for the protection of minorities in Europe and, indeed, in the world.[24] As such, brief reflections on some of the issues he has been confronting seem in order. In this connection, it is to be noted that the HCNM takes a problem-solving approach aimed at the root causes of conflicts. He seeks to resolve (or at least contain and manage) them through references to whichever international standards might help in the matter. Thus, he invokes universal and regional instruments, bilateral treaties and domestic legislation and practice as it may be relevant. He does so with regard increasingly to a fairly limited number of issues which are re-occurring. These include the following:

- First, there is the always underlying issue of discrimination in the enjoyment of a host of rights within the State. This is mainly a matter of respecting the principle of equality – perhaps better qualified as the principle of non-arbitrariness in public administration and distribution of public goods;
- second, the HCNM regularly confronts issues of cultural identity, that is, the maintenance and development of the identity of persons belonging to national minorities in a free society. This involves the notions of pluralism and equality within the State;
- third, the HCNM addresses matters of education which, of course, are linked very much to the idea of maintenance and perpetuation of identity since it is through education that most communities transmit their culture;
- a fourth issue-area which the HCNM regularly confronts concerns cultural content and equality, such as the use of language both in public and in private and the freedom of (and possible subsidies for) community associations, for example with regard to theatre, music and all sorts of cultural activities; and
- fifth, the HCNM variously encounters issues concerning the participation of minorities in public decision-making processes, in terms of structures, practices and effective powers.

In addition to the above, the HCNM has often found himself dealing with matters of citizenship. Citizenship is problematical because in many States the notion of belonging to the State is linked to the idea of the nation-forming community or State-forming nation. In such States, the ideal basis for being a citizen is membership or association with that "founding" or "original" nation. There are usually specific requirements linked to this membership, such as language knowledge and use. Those who do not match this ideal are essentially considered to be outsiders and not entirely legitimate or ever full citizens. This gives rise to efforts to exclude those who do not match – either from becoming citizens or, should they manage to do so, relegating them to a second-class.

This leads to a subject which I will not address but which is increasingly problematical: the definition of minorities, that is, who belongs to a minority,

[24] It is to be noted that the Council of Europe's Framework Convention for the Protection of National Minorities only came into force in 1999.

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what is the nature of a minority, etc. This subject involves considerations of: insider/outsider relationships within a society; precise identification of holders of legally enforceable rights; foreseeability and reliability of rights; and so forth. Persons need to know – and the agencies responsible for elaboration, implementation and enforcement of laws need to know – who are the subjects of the prescribed rights and encouraged policies. In the OSCE, the issue is relatively easily addressed because we follow the principle that to belong to a national minority is a matter of individual choice. Through this simple assertion of a purely subjective nature, we have apparently solved the problem. Admittedly, this is inadequate for a general regime and so this problem will no doubt have to be addressed more precisely and fully in the future.[25]

Preferring to focus on the objects of protection for which largely visible and recognized minorities had need, the HCNM on three occasions invited groups of internationally recognized independent experts to elaborate general recommendations to guide policy- and law-makers. This resulted in three sets of recommendations, as follows: *The Hague Recommendations regarding the Educational Rights of National Minorities*;[26] *the Oslo Recommendations regarding the Linguistic Rights of National Minorities*;[27] and the *Lund Recommendations on the Effective Participation of National Minorities in Public Life.*[28] A leading expert contributing to the elaboration of each set of recom-

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[25] For detailed analysis of this problem, *see*: John Packer, "On the Definition of Minorities" in John Packer and Kristian Myntti (eds.), *The Protection of Ethnic and Linguistic Minorities in Europe*, Turku/Åbo: Åbo Akademi University Institute for Human Rights (1993), pp. 23-65; and John Packer, "Problems in Defining Minorities" in Deirdre Fottrell and Bill Bowring (eds.), *Minority and Group Rights In the New Millenium*, The Hague: Kluwer Law International (1999), pp. 223-273.

[26] The Hague Recommendations are available in a number of languages through the Internet at: <http://www.osce.org/hcnm/documents/recommendations/hague/index.php3>. A special issue of the *International Journal on Minority and Group Rights* (Volume 4, No. 2, 1996/97, pp. 105-213) is devoted to The Hague Recommendations, with a number of contributions by scholars including one by Asbjørn Eide.

[27] The Oslo Recommendations are available in a number of languages through the Internet at: <http://www.osce.org/hcnm/documents/recommendations/oslo/index.php3>. A special issue of the *International Journal on Minority and Group Rights* (Volume 6, No. 3, 1999, pp. 281-387) is devoted to the Oslo Recommendations, with a number of contributions by scholars including one by Asbjørn Eide.

[28] The Lund Recommendations are available in a number of languages through the Internet at: <http://www.osce.org/hcnm/documents/recommendations/lund/index.php3>. For the background and status of the Lund Recommendations, see John Packer, "The origin and nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life", 11 *Helsinki Monitor* 29-61 (2000). It is also to be noted that Kristian Myntti has written *A Commentary to the Lund Recommendations on the Effective Participation of National Minorities in Public Life*, Turku/Åbo: Institute for Human Rights, Åbo Akademi University (2001). Lund Recommendations Nos. 7 to 10, concerning elections, also inspired the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) to elaborate, in co-operation with the Office of the HCNM and the International Institute

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mendations was Eide.[29] Together with the HCNM's specific recommendations addressed to individual States concerning a variety of particular situations, the accumulation of interpretations, views and recommendations has been said to constitute a significant conceptual contribution[30] and to comprise a body of "soft jurisprudence".[31] Indeed, one scholar has characterized the HCNM as a "normative intermediary".[32]

One key point to be drawn from the experience of the OSCE HCNM is the continuing importance of the objective of achieving security and stability among States not only after the Second World War but in the 21st Century. Max van der Stoel, as the first HCNM, elaborated this clearly in a speech delivered towards the end of 1999 (in memory of a recently assassinated internationally recognized scholar who, as a Sri Lankan Parliamentarian, sought a peaceful solution to the conflict in his country).[33] The second HCNM, Rolf Ekéus, has continued the argument applying it directly to the challenge of terrorism in our post-9/11 reality.[34] From this perspective, the European experience in the protection of minorities is more than ever relevant and merits every effort to extend and transpose it for application in other parts of the world.[35]

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for Democracy and Electoral Assistance (IDEA), *Guidelines to Assist National Minority Participation in the Electoral Process* (Warsaw: ODIHR, March 2001).

29 For Asbjørn Eide's specific contributions, *see* Max van der Stoel's contribution to this collection (Chapter 20).

30 *See* Yeorgios I. Diacofotakis, *Expanding Conceptual Boundaries: The High Commissioner on National Minorities and the protection of minority rights in the OSCE*, Athens: Ant. N. Sakkoulas (2002).

31 *See* John Packer, "Making International Law Matter in Preventing Ethnic Conflict: A Practitioner's Perspective", 32 *New York University Journal of International Law and Politics*, 715-724 (2000), at 717.

32 *See* Steven R. Ratner, "Does International Law Matter in Preventing Ethnic Conflict?", 32 *New York University Journal of International Law and Politics*, 591-698 (2000) at 668 *et seq*.

33 *See* Max van der Stoel, "Human Rights, the Prevention of Conflict and the International Protection of Minorities: A Contemporary Paradigm for Contemporary Challenges", address in Memory of Dr. Neelan Tiruchelvam, the London School of Economics, 19 October 1999; full text available through the Internet at <http://www.osce.org/hcnm/documents/speeches/1999/index.php3>.

34 *See* Rolf Ekéus, "International Terrorism and Violent Extremism as Global Challenges", speech delivered in Bishkek, Kyrgyzstan, on 13 December 2001 at the International Conference on Enhancing Security and Stability in Central Asia: Strengthening Comprehensive Efforts to Counter Terrorism; full text available through the Internet at <http://www.osce.org/hcnm/documents/speeches/2001/index.php3>.

35 There have been a few published reflections on this subject: *see* the issue of the *International Journal on Minority and Group Rights*, Volume 8, No. 1, 2002, reproducing at pp. 1-77 the contributions to the "Max van der Stoel Symposium" organized by the Swedish Ministry for Foreign Affairs and held at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Lund in December 1999; for some considerations on how a conflict prevention mechanism addressing minority-related problems might work in Africa, *see also* John Packer, "Conflict Prevention by the OAU: The Relevance of the OSCE High

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5. Conclusion

Clearly, there is much still to be done in the field of the protection of minorities. It remains a problematical field, also in Europe. Facing both more and less immediate threats to security and stability, there appears a long list of complex and sensitive problems connected to processes of, for example, migration, immigration, and the social integration of so-called "new minorities". Whether in the context of transforming societies within existing States, or in the context of enlargement of Euro-Atlantic arrangements,[36] or simply as part of an increasingly open and connected global society, the accommodation of diversity poses a substantial challenge (which Eide has called, in part, "pluralism in togetherness"[37]). In an increasingly interdependent and integrated world we know that the failure to resolve these problems peacefully and justly constitutes a threat for all of us. This is fertile ground for much work in terms of research, analysis, standard-setting and practice. The foresight and good efforts of early thinkers in this regard continue to show the way forward, inviting others to seek further progress to the benefit of persons belonging to minorities and for peaceful international relations as a whole.

Commissioner on National Minorities", 4 *African Yearbook of International Law* 279-291 (1996). Among the existing efforts to realize for application elsewhere something similar to, or inspired by, the HCNM may be cited those of the International Peace Academy (*see* "Sharing Best Practices on Conflict Prevention: The UN, Regional and Subregional Organizations, National and Local Actors", report of a workshop held at the Swedish Institute in Alexandria, Egypt, on 8-10 April 2002), the Rockefeller Foundation (which organised an experts meeting in Bellagio, Italy, in October 2001), and Minority Rights Group International (*see* "Minorities and Conflict Prevention: The Case for a Special Representative", MRG Briefing, March 2002). These are in addition to the noted efforts of Asbjørn Eide (who also contributes to the cited efforts of others) at the universal level through the United Nations.

[36] On the protection of minorities within an enlarged European Union, *see* the speech of Rolf Ekéus delivered, at the invitation of the Danish EU Presidency, in Copenhagen on 5 November 2002 entitled "From the Copenhagen Criteria to the Copenhagen Summit: The Protection of National Minorities in an Enlarging Europe"; full text available through the Internet at <http://www.osce.org/hcnm/documents/speeches/2002/index.php3>.

[37] *See supra*, note 3, at section II.B.

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Minority rights: additional rights or added protection?

Martin Scheinin*

1. Introduction

This article presents and defends a *universalist* and *interdependence-based* position in respect of minority rights. The approach of the paper can be characterised as *strategic*: What line of argument and theory-construction is most likely to result in a solid foundation for the protection and promotion of minority rights within the general human rights discourse? This type of a strategic approach combines legal analysis of the existing normative framework with considerations *de lege ferenda* in respect of future standard-setting. Of course, the choice of strategy will depend on the author's assessment of the likelihood that current and future standard-setting activities will lead to the improvement and strengthening of the normative framework. On this level of strategy choices, the current author is sceptical about present-day preconditions for States' ability to reach agreement on genuinely progressive new human rights standards. Hence, the author prioritises the full use of the dynamic potentials of the already existing normative framework. In short, the recommended strategy can be formulated as follows: minority rights should not be reduced to the principles of equality and non-discrimination. However, they should not be seen as a separate or an additional category of human rights, either. Rather, minority rights as a sub-category of human rights should be seen as a form of added protection to universal human rights, deemed necessary in order to secure human rights to persons in a minority situation.

2. Critique of the "separate nature" of minority rights

According to a widely held view minority rights are separate from and additional to the rights enshrined in general human rights treaties. Under this approach minorities are seen as vulnerable groups whose situation requires specific minority rights not covered by a general duty of States to respect and ensure human rights. The omission of minority rights from the 1948

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Universal Declaration of Human Rights and from many human rights treaties, and the emphasis in these instruments on the universal nature of all human rights is seen as a deliberate departure from the earlier League of Nations approach to minority protection. However, one of the major human rights treaties, the 1966 Covenant on Civil and Political Rights, does include a specific clause on the rights of members of minorities,[1] and during the 1990s many standard-setting activities were concluded in the field of minority rights, illustrating a certain renaissance of the idea of minority rights.[2]

In particular within United Nations fora, Asbjørn Eide is one of the most persistent and successful proponents of minority rights. His contribution was essential in achieving the 1992 Declaration of the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities,[3] and he continues to be at the cutting edge of further developments, *inter alia*, in the capacity of chairperson-rapporteur of the working-group established by the UN Sub-Commission on the Promotion and Protection of Human Rights for the implementation of the Declaration.

In 1999, Asbjørn Eide and Erica-Irene A. Daes were requested, by the Sub-Commission on the Protection and Promotion of Human Rights, operating under the Commission on Human Rights, to draw up a working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples. The resulting document[4] came to include two separate parts, explicating two differing views in the issue. The current author shares the main conclusion of Eide's analysis, that is, the need to question a strict distinction between minority rights and indigenous peoples' rights, in particular in respect of minorities who live compactly together and possibly form the majority in a particular region.[5]

However, the current author takes the position that the distinctions between universal human rights, minority rights and indigenous rights should be questioned more generally than what Eide proposes in the working paper. He follows what could be called the mainstream by stating that "general human rights" in the Universal Declaration of Human Rights belong to everyone, whereas certain other instruments establish "additional rights" specific

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1 "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language" (CCPR article 27).

2 1992 Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, 1995 Framework Convention for the Protection of National Minorities, 1992 European Charter for Regional and Minority Languages.

3 UN General Assembly resolution 47/135 of 18 December 1992.

4 E/CN.4/Sub.2/2000/10.

5 *Ibid.*, para. 26.

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to persons belonging to minorities.[6] For Eide, indigenous peoples' rights are a second category of "special rights" that cannot be invoked by others.[7] In defence of the distinctions in question Eide refers, *inter alia*, to the "function" of general human rights to ensure social integration[8] and the tendency of indigenous rights to consolidate and strengthen the separateness of these peoples from other groups in society.[9] For Eide, the need to rethink the distinction between minority and indigenous rights flows from the fact that some minorities have a legitimate aspiration to differentiate themselves from mainstream society, whereas many indigenous persons have taken the path of integration within urban communities.[10]

There are at least four reasons why the current author is critical towards Eide's explication of one position that sees minority rights as "separate" or "additional" rights in respect of universal human rights. *Firstly*, it is problematic whether human rights should at all be seen as having a "function" or even a number of functions. Human rights should be seen as an end, not as means for achieving some other ends. Human rights are not about how people should live a good life. Rather, they are preconditions for a just social order and for people choosing their own way of life. Hence, human rights should get equal protection irrespective of the aspirations of the individuals concerned to integrate or not to integrate.

Secondly, the reference to the function of general human rights as ensuring social integration and to the function of indigenous rights as strengthening separateness is indicative of a more general problem. Addressing minority rights as something separate from general human rights easily leads to the subordination of minority rights to politics. The notion of "national minorities", often particularly in its European usage entailing an effort to grant minority rights to some but not certain other minorities, is one example of the problem. Seeing integration and separateness as constitutive features of general, minority or indigenous rights has the side-effect of unnecessary politization of the issue.

The *third* and main reason for criticism is one of principle: how can human rights be universal if members of minorities have "more human rights" than others, and members of indigenous peoples again additional human rights? One is reminded of George Orwell's *Animal Farm*:

> ALL ANIMALS ARE EQUAL
> BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS.

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6 *Ibid.*, para. 2.
7 *Ibid.*, paras. 2 and 6-9.
8 *Ibid.*, para. 3.
9 *Ibid.*, para. 23.
10 *Ibid.*, para. 26.

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From the perspective of the universality of human rights it is worth pursuing for a theory on minority and indigenous rights that would see them as a dimension or application of universal human rights, not as separate or additional rights. A parallel with women's rights can be drawn: Although there are separate instruments and provisions on women's human rights, including the Convention on the Elimination of All Forms of Discrimination against Women, they should be seen as one way to strive for full and equal enjoyment of universal human rights by women. This approach does not question or undermine the importance of the fact that human rights and human rights violations appear in gender-specific forms in the lives of women. On the contrary, the recognition of women's rights as a dimension of universal human rights only strengthens the need for a gender-sensitive reading of seemingly gender-neutral general human rights provisions.

Fourthly, thinking of minority rights as separate from universal human rights leads to problems of strategy. It may result in insufficient attention to the dynamic potential of existing human rights and in an over-emphasis on standard-setting activities. Binding treaty law on minority or indigenous rights is scarce.[11] An emphasis on the separate or additional nature of these provisions easily leads to a reasoning according to which human rights treaties that do *not* include specific provisions on minority rights cannot be interpreted in a way that would recognise the need to give attention to the specific need of protection and to positive measures when securing universal human rights to members of minorities. Emphasis on the separate nature of minority rights and on the need for further standard-setting in the area may hence result in the unintended consequence of a minority-insensitive reading of general human rights treaties. This is exactly the situation that has developed on the European scene. The omission of a specific provision on minority rights in the judicially supervised European Convention on Human Rights, together with standard-setting towards "softer" separate treaties on minority rights, has lead to a situation where the European Court of Human Rights usually applies the general provisions of the Convention in a minority-insensitive way, despite the potentials of the Convention to be applied as a standard that comprises minority rights as a dimension of each enumerated right.

3. Defence of interdependence

Let us take a closer look at minority-sensitive and minority-insensitive ways to interpret a human rights treaty that has been framed as rights belonging to

[11] Covenant on Civil and Political Rights, article 27; Convention on the Rights of the Child, article 30; ILO Convention No. 169 concerning Indigenous and Tribal Peoples; the two European treaties mentioned in footnote 2, *supra*.

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everyone. The key notion here is *interdependence*. If minority rights are seen as part and parcel of the international normative code of human rights, then they are not present only in separate treaties or separate provisions specifically addressing minority rights, but in all provisions of all human rights treaties. In another context the present author has applied the dichotomy between "a school of distinction" and "a school of interdependence" in describing two quite different approaches to the interpretation of human rights treaties.[12]

In order to demonstrate the differences between the two schools and the benefits of the interdependence school, a brief look at the practice of the Human Rights Committee in the field of minority rights is needed. The Committee, which is the treaty body established under the International Covenant on Civil and Political Rights, has not been fully consistent in its approach to minority rights. One can note a certain alteration between an approach emphasizing the distinct nature of minority rights, and a quite different interdependence-based approach.[13] One instance in which the Committee reasoned along the lines of the school of distinction is its General Comment No. 23 on article 27 (rights of members of minorities).[14] In its effort to explain the specific legal significance of article 27, the Committee ends up distinguishing the rights protected under this provision from the rights otherwise guaranteed in the CCPR, universally to everyone and not only to members of minorities.[15] It is the opinion of the current author that such a well-meaning approach easily leads to unintended negative consequences, namely the artificial separation of minority rights from universal human rights and to the denial of a minority-sensitive reading of other human rights provisions, in particular those enumerated in a human rights treaty that does not include a minority rights clause similar to CCPR article 27.

The different consequences of the two approaches are visible in the case of *Hopu and Bessert v. France*, decided by the Committee in 1997.[16] The authors of the communication, two indigenous Polynesians, claimed to be the lawful owners of a land tract in Nuuroa, Tahiti, on which the French Polynesian authorities had started the construction of a hotel. The hotel was

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[12] See, Martin Scheinin, "The Right of Self-Determination under the Covenant on Civil and Politcal Rights" in Pekka Aikio & Martin Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to Self-Determination*, Åbo Akademi University Institute for Human Rights 2000, p. 181.

[13] For a more detailed discussion, see *ibid.*, p. 181-186.

[14] General Comment No. 23(50) by the Human Rights Committee, included in UN doc. HRI /GEN/1/Rev.5.

[15] See, for instance, paragraphs 1, 3.1 and 5.3 of the General Comment.

[16] *Francis Hopu and Tepoaitu Bessert v. France* (Communication no. 549/1993), views of the Human Rights Committee, 29 July 1997, UN doc. CCPR/C/60/D/549/1993.

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being constructed on a traditional burial ground of the indigenous inhabitants of Tahiti and at a fishing lagoon still used by some 30 families for their subsistence. The earlier jurisprudence by the Committee would have spoken for the consideration of the merits of the case under the right of the authors, as members of the indigenous Polynesian community, to enjoy their own culture, *i.e.*, article 27, under which provision both the protection of traditional burial grounds and the future of culturally significant fishing activities could be incorporated. A problem for this approach, however, was posed by a declaration by France according to which article 27 is not applicable in relation to France. As this declaration had repeatedly been interpreted by the Committee as a valid reservation in earlier cases, the majority of the Committee maintained this stand.[17]

However, the case was not concluded with the inadmissibility decision in respect of the minority rights clause in article 27. Instead, the Committee applied an approach based on the interdependence of human rights, turned to the notions of "privacy" and "family" used in articles 17 and 23, and reasoned in the following way:

> It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors' history, culture and life.[18]

The conclusion was that the construction of the hotel on the traditional burial grounds constituted an interference with the authors' right to family and privacy. What remained was a test for the permissibility of such interference:

> The State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of

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[17] See the Committee's earlier decisions in *T. K. v. France* (Communication no. 220/1987) and *M. K. v. France* (Communication no. 222/1987), *Official Records of the Human Rights Committee 1989/90*, Vol. II (New York: United Nations, 1995), pp. 423–428, both accompanied by a dissenting opinion by Rosalyn Higgins. In *Hopu and Bessert* five members, namely Elizabeth Evatt, Cecilia Medina Quiroga, Fausto Pocar, Martin Scheinin and Maxwell Yalden, dissented and said: "Whatever the legal relevance of the declaration made by France in relation to the applicability of article 27 may be in relation to the territory of metropolitan France, we do not consider the justification given in said declaration to be of relevance in relation to overseas territories under French sovereignty". See also General Comment No. 24(52) of the Human Rights Committee, regarding reservations, paragraph 8 of which suggests that a general reservation to article 27 would not be acceptable. UN doc. HRI/GEN/1/Rev.5.

[18] *Hopu and Bessert*, *loc. cit.* (note 15), para. 10.3.

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> the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex. The Committee concludes that there has been an arbitrary interference with the authors' right to family and privacy, in violation of articles 17, paragraph 1, and 23, paragraph 1.[19]

The alternative line of interpretation, characterized above as a school of distinction, was represented by a dissenting opinion of four Committee members:

> The reference by the Committee to the authors' history, culture and life, is revealing. For it shows that the values that are being protected are not the family, or privacy, but cultural values. We share the concern of the Committee for these values. These values, however, are protected under article 27 of the Covenant and not the provisions relied on by the Committee. We regret that the Committee is prevented from applying article 27 in the instant case.[20]

In the view of the current author, the error of the dissenters is exactly in their persistent effort to distinguish: they see the minority rights provision in CCPR article 27 as protecting values that could be separated from the values underlying universal human rights. No such distinction should be made. The inclusion of a minority rights clause in the CCPR does not alter the value basis of the treaty but simply recognises that the very same values behind universal human rights require specific attention and protection in respect of members of minorities.

The text of CCPR article 27 makes reference to the "culture", "language" and "religion" of minorities. It is clear that "religion" is protected as a universal human right under CCPR article 18. Similarly, the "language" of individuals belonging to majorities or minorities receives at least some protection under freedom of expression, CCPR article 19.[21] And in the absence of a more general universal human rights provision on "culture", the Human Rights Committee was right in identifying articles 17 and 23 on private and family life as the universally applicable counterpart to this dimension of article 27.

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[19] *Ibid.*

[20] Dissenting opinion by Thomas Buergenthal, David Kretzmer, Nisuke Ando and Lord Colville, para. 5.

[21] In *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v. Canada* (Communications Nos. 359/1989 and 385/1989), the Human Rights Committee rejected under article 27 a communication brought by certain English-speakers in francophone Quebec, due to the fact that English-speakers do not constitute a minority in the State party (Canada). However, this finding did not bar the Committee from concluding in the same case that a ban on public advertising in English constituted a violation of article 19. See, UN doc. CCPR/C/47/D/359/1989, paras. 11.2 and 11.4. Even article 14 on the right to a fair trial has certain dimensions related to language, formulated as a universal right but of course most relevant when the person does not speak the language used by the court; see sub-paragraphs a) and f) in article 14, paragraph 3.

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One of the consequences of the *Hopu and Bessert* case is that it demonstrates how general human rights provisions, such as those on private and family life, can be made subject to a minority-sensitive reading. It is true that the provisions found violated by the Committee relate to universal human rights, applicable to members of majorities and minorities. However, even under a universal human rights provision the fact that the authorities are interfering with the private and family life of persons in a minority situation, may be relevant for determining whether an interference was acceptable or not. Hence, through a minority-sensitive reading of ECHR article 8 also that provision could be relied on in the protection of the way of life, identity and culture of minorities.

There are, of course, limits to the interdependence approach. In particular, article 1 of the CCPR on the right of self-determination, is specifically phrased as a right of "all peoples". This genuinely collective right is applicable in respect of indigenous peoples but not generally in relation to minorities. In its practice the Human Rights Committee has maintained the position that individuals, be they members of a majority, of a minority or of an indigenous people, cannot claim standing as victims of the right of self-determination.[22] Consequently, although both minority rights and indigenous rights should be seen as dimensions of universally applicable human rights rather than separate or additional rights, the right of self-determination forms an exception, to the extent a group qualifies as "an indigenous people" and the right of self-determination entails specific consequences in respect of that group.

In spite of what was just stated about the non-invocability of the right of self-determination in respect of individuals or groups that do not qualify as peoples, CCPR article 1 *can* be relied upon in the interdependence-based interpretation of other provisions of the CCPR. As confirmed by recent case law of the Human Rights Committee such indirect use of article 1 in the interpretation of other provisions of the Covenant is possible even when the group calling for attention to article 1 is not necessary "a people" in the meaning of CCPR article 1.[23] Self-determination as a *value* thus has relevance even in respect of "minorities", while as an independent *right* it has been proclaimed only to groups that qualify as "peoples". Also here the in-

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[22] As only individuals are entitled to submit communications under the Optional Protocol to the CCPR, this means that article 1 cannot be made subject to the complaints procedure established by that instrument. See, *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada* (Communication No. 167/1984), UN doc. CCPR/C/38/D/167/1984, paras. 13.3 and 32.1.

[23] See, *Apirana Mahuika* et al. *v. New Zealand*, Communication 547/1993, UN doc. CCPR/C/70/D/547/1993, para. 9.2, and *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community)* et al. *v. Namibia*, Communication 760/1997, UN doc. CCPR/C/69/D/760/1997, para 10.3.

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terdependence approach shows its potential in bridging the gap between minority rights and indigenous rights, an aspiration of Asbjørn Eide referred to above in the introduction to this article.

Another limit to the potentials of the interdependence approach can be sought by looking at the nature and extent of State obligations under generally applicable universal human rights provisions and the specific minority rights clause in CCPR article 27. If the latter is understood to provide not additional rights but, rather, additional protection for the enjoyment of universal human rights by members of minorities, this additional protection may materialize in the list and balance of various state obligations stemming from the rights in question. This applies even in the case of linguistic rights which are perhaps the strongest case for seeing minority rights as an additional or separate category compared to universal human rights. Despite the intuitive strength of this kind of an argument one may explain the tendency to look at linguistic minority rights as a category separate from generally protected human rights with a reference to the underdeveloped nature of human rights law in the field of linguistic rights. For instance, it is plausible to argue that the "negative" right to use one's own language in private communication without State interference is protected already under CCPR article 19 as an element of freedom of expression. However, more extensive State obligations in the field of linguistic rights are usually not derived from freedom of expression.[24] In contrast, it is quite clear that CCPR article 27 establishes for a State Party a positive duty to take effective measures so that the right of minority members to use their own language becomes a *practical* one even in a country where the members of the minority are few in number and geographically dispersed.[25]

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[24] However, a somewhat broader approach to linguistic rights is reflected in the case of in *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community)* et al. *v. Namibia* (Communication No. 760/1997). The Human Rights Committee found a violation of the CCPR when regional authorities had prohibited public officials from responding to the public, in writing or on the telephone, in the Afrikaans language. Interestingly, the finding was made under article 26 (non-discrimination) and not article 19 (expression) or article 27 (minority rights). Four Committee members, Elizabeth Evatt, Eckart Klein, David Kretzmer and Cecilia Medina Quiroga, however, held that also article 19 had been violated.

[25] General Comment No. 23, (footnote 14, *supra*): "Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required" (para. 6.1). Furthermore: "Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group" (para. 6.2).

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The degree of interdependence demonstrated by the case of *Hopu and Bessert* does not mean that other articles of the CCPR would necessarily be capable of affording an *identical* degree of protection for the rights of the members of a minority. This is in fact demonstrated by the case itself, as the Committee limited its findings to the issue of the burial grounds and did not, on its own initiative, address the question whether the consequences of the construction of the hotel for the fishing activities of the authors also amounted to arbitrary interference with the privacy and family life of the authors.[26]

Although there is no legal obstacle for giving other provisions of the CCPR an interpretation which would keep pace with the standard of and jurisprudence under article 27, such an approach of interdependence to the degree of *identity* appears unlikely. The Committee's jurisprudence developed under article 27 may constantly and in an evolutive way inform the understanding of other human rights provisions. Nevertheless, one may assume that the standard applied under other provisions will always fall somewhat short of the protection given under a specific clause on the rights of persons belonging to minorities. This difference is not a result of different rights but of somewhat expanded State obligations related to the protection of universal human rights in the case of members of minorities. As more emphasis is put on positive State obligations under general human rights provisions, such as those on freedom of expression, freedom of thought, conscience and religion and the right to education, the difference in question is likely to diminish but unlikely to disappear.

Turning now to the ECHR, the first point to be made is that although the Convention itself does not include a specific clause on minority rights, many of its provisions provide potentials for a minority-sensitive reading, in particular when the idea of the interdependent nature of human rights is extended beyond the framework of one single treaty. Various provisions of the ECHR could be interpreted in the light of the fact that the normative code of human rights comprises also minority rights. Two cases decided under the ECHR demonstrate the potentials of a minority-sensitive reading of article 8 on the right to respect for private and family life, home and correspondence.

In the case of *G. and E. v. Norway*[27] the European Commission of Human Rights was faced with a typical claim by an indigenous group to have their traditional and nature-based way of life protected against envisaged government-authorized interference. The Norwegian Government had decided on the construction of a water dam and a hydroelectric power station in

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[26] In light of the *Ominayak (Lubicon)* case (note 22, *supra*), the fishing issue would have been addressed under article 27 if that provision was applicable.

[27] Application Nos. 9278/81 and 9415/81, European Commission of Human Rights, Decisions and Reports, vol. 35 (1984) pp. 30–45.

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the Alta Valley. The applicants, two members of the Sami community that had traditionally used the lands in question for reindeer herding, fishing and hunting, filed a complaint with the European Commission of Human Rights. The case never reached the attention of the European Court of Human Rights because the Commission declared it inadmissible as manifestly ill-founded. Nevertheless, certain parts of the reasoning by the Commission demonstrate the potentials of article 8 of the ECHR:

> The applicants draw attention to the fact that by birth they belong to a minority group, the Lapps. For hundreds of years their kinsfolk have been working with reindeer, fishing and hunting. Every year they move their herd of deer around, and, therefore, there is a great demand for space. The Lapps have their own culture and language, far apart from the other Scandinavian languages ... [The applicants] maintain that they will not only lose the land, but also their identity ... The Commission is of the opinion that, *under Article 8, a minority group is, in principle, entitled to claim the right to respect for the particular life style it may lead as being "private life", "family life" or "home".*[28]

The case of *López Ostra v. Spain*, although not itself related to minorities,[29] demonstrates that the scope of article 8 may be extended to environmental issues and resource development. The complaint was based on the establishment and operation, in the immediate vicinity of the home of the applicant's family, of a plant for the treatment of liquid and solid waste from leather tanneries. The plant had released fumes, smells and contamination that caused health problems and nuisance to many people living nearby, and the applicant's family had been temporarily evacuated from their home. The plant had been built with a state subsidy and on municipal land, which raised the question whether Spain had complied with its duty to protect the applicant's right to respect for her home and for her private life.[30] The European Court of Human Rights answered:

> [D]espite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life. There has accordingly been a violation of Article 8.[31]

Despite the potentials just illustrated through the example of article 8 it can still be said that the *main feature* of existing ECHR case law related to

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28 *Ibid.*, pp. 32–33 and 35 (emphasis added).

29 *Case of López Ostra v. Spain*, Judgment of 9 December 1994, Publications of the European Court of Human Rights, Series A, no. 303–C.

30 *Ibid.*, paras. 7, 52 and 55.

31 *Ibid.*, para. 58.

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minority rights is characterized by insensitivity. The European Court of Human Rights tends to look at "mainstream" dimensions of human rights and to ignore the fact that the effective enjoyment of universal human rights by members of minorities would often require discussion of state obligations that go beyond what may perhaps be sufficient in respect of an "average citizen". For instance in the case of *G. and E. v. Norway* cited above, the European Commission of Human Rights, when declaring the case inadmissible as manifestly ill-founded first recognized that a specific life style of a minority falls under the ambit of article 8, but then used *majority* sentiment as an argument in rejecting any claim for protection to the minority culture:

> [A]n interference with the rights set out in Article 8, para. 1 is permissible if it is in accordance with the law and necessary in a democratic society for one of the purposes enumerated, *inter alia*, the economic well-being of the country. The Commission finds that, without ascertaining the exact extent and nature of the interference with the applicants' rights under Article 8, para. 1, after the careful consideration of the necessity of the *project by the national organs*, the interference could reasonably be considered as justified under Article 8, para. 2, as being ... in the interests of the economic well-being of the country.[32]

The series of "Gypsy", or "Travellers" cases against the United Kingdom represents another indication of the insensitivity of the European Court of Human Rights in respect of minority rights. In the case of *Buckley v. the United Kingdom* the Court relied on its doctrine of margin of appreciation in giving preference to local decision-making representing majority sentiment, even though to a reader it appears that the expressions of this sentiment were not free of prejudice or stereotyping in respect of the minority.[33] Mrs. June Buckley, a member of the Gypsy/Travellers community had been prohibited from living in a caravan on a piece of land she had lawfully bought. The denial of a required planning permit was based on a report by an inspector where it was stated:

> I consider it important to keep concentrations of sites for gypsies small, *because in this way they are more readily accepted by the local com-*

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[32] *G. and E. v. Norway* (footnote 27, *supra*), p. 36 (emphasis added). See, also p. 35 where the applicants' allegation of discrimination is rebutted by noting that the ECHR does not guarantee specific rights to minorities and that the authors had, "as other Norwegian citizens", the right to vote and to stand for election to the Norwegian Parliament. Also in the *López Ostra* case referred to above the rights of the applicant family under article 8 were weighed against the economic interest of a larger community (in this case, a town). From the case law by the Human Rights Committee it is quite clear that under article 27 of the CCPR the decisive criterion is the well-being of the minority, not that of the majority. See, *I. Länsman* et al. *v. Finland* (Communication 511/1992), paras. 9.4 and 9.8.

[33] *Buckley v. the United Kingdom*, Judgment of 25 September 1996, European Court of Human Rights, Reports of Judgments and Decisions 1996–IV.

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> *munity* ... [T]he concentration of gypsy sites in Willingham has reached the desirable maximum and I do not consider that the overall need for sites should, in this case, outweigh the planning objections.[34]

Although the European Court of Human Rights found the right to respect for the applicants "home" under article 8 applicable and interfered with, it came to the conclusion that the interference in question was "necessary in a democratic society":

> By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation ... The latter authorities arrived at the contested decision after weighing in the balance the various competing interests at issue.[35]

In a more recent case, *Chapman v. the United Kingdom*,[36] the European Court maintained its problematic approach to the issue of the right of Gypsy/Travellers to protection for their private and family life. What is remarkable in the case is the broad and relatively extensive discussion by the European Court of the substance and relevance of the Framework Convention for the Protection of National Minorities and of various other European standards[37] in the field of minority rights. In principle, this discussion is a sign of the potential willingness of the European Court to interpret the provisions of the ECHR as being informed by evolving European standards on minority rights. Hence, one can identify a potential of an interdependence-based approach that would look beyond the provisions of the ECHR itself in order to reach a minority-sensitive understanding of the Convention.

However, this kind of a new approach was not yet adopted in the *Chapman* case. By ten votes against seven a Grand Chamber of the European Court concluded that there was no violation of article 8. In respect of the applicant's invitation that the Court should take into account recent international developments, the response was:

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[34] *Ibid.*, para. 80.

[35] *Ibid.*, paras. 75 and 84. Three judges dissented, expressing their sensitivity for minority rights.

[36] Application no. 27238/95, European Court of Human Rights, Judgment of 18 January 2001.

[37] See, paras. 55-67 of the judgment were reference is made to the Framework Convention and to various recommendations by the Parliamentary Assembly of the Council of Europe, the European Commission against Racism and Intolerance and the European Parliament, to certain documents related to the role of minority rights in the EU enlargement process, and to OSCE standards on minority rights.

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The Court observes that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (see paragraphs 55-59 above, in particular the Framework Convention for the Protection of Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.

However, the Court is not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation. The Framework Convention, for example, sets out general principles and goals but signatory states were unable to agree on means of implementation. This reinforces the Court's view that the complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection and the interests of a minority with possibly conflicting requirements, renders the Court's role a strictly supervisory one.

Moreover, to accord to a gypsy who has unlawfully established a caravan site at a particular place different treatment from that accorded to non-gypsies who have established a caravan site at that place or from that accorded to any individual who has established a house in that particular place would raise substantial problems under Article 14 of the Convention.[38]

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[38] *Ibid.*, paras. 93-95. The cited arguments are contested in a joint dissenting opinion by seven judges where it is stated, *inter alia*:

> This consensus includes a recognition that the protection of the rights of minorities, such as gypsies, requires not only that Contracting States refrain from policies or practices which discriminate against them but that also, where necessary, they should take positive steps to improve their situation through, for example, legislation or specific programmes. We cannot therefore agree with the majority's assertion that the consensus is not sufficiently concrete or with their conclusion that the complexity of the competing interests renders the Court's role a strictly supervisory one (see paragraphs 93-94). This does not reflect in our view the clearly recognised need of gypsies to protection of their effective enjoyment of their rights and perpetuates their vulnerability as a minority with differing needs and values from the general community.

And:

> Finally, we cannot agree with the view expressed by the majority that to accord protection under Article 8 to a gypsy in unlawful residence in a caravan on her land would raise problems under Article 14 where planning laws continued to prevent individuals from setting up houses on their land in the same area (see paragraph 95). This approach ignores the factor, earlier acknowledged by the majority, that in this case the applicant's lifestyle as a gypsy gives a wider scope to Article 8, which would not necessarily be the case for a person who lives in conventional housing, the supply of which is subject to fewer constraints. The situations would not be likely to be analogous. On the contrary, discrimination may arise where States, without objective and reasonable justification, fail to treat differently persons whose situations are sig-

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Instead of using existing European standards for an interdependence-based interpretation of the ECHR, the fact that such standards exist was used by the majority of the judges to support a line of thinking typical for the school of distinction: *because* separate standards exist and *because* they are of a "softer" nature compared to the ECHR, minority rights *cannot* be protected under the ECHR. It is worth noting that in the *Chapman* judgment no reference is made to CCPR article 27 despite the fact that all parties to the ECHR except Turkey have ratified this "hard law" instrument, France though with a declaration excluding the applicability of article 27. Such a reference would have been useful for instance in discussing the breadth of State obligations in respect of the protection for the private and family life of members of minorities. Instead of making such a link, the Court stated:

> The Court does not, however, accept the argument that, because statistically the number of gypsies is greater than the number of places available in authorised gypsy sites, the decision not to allow the applicant gypsy family to occupy land where they wished in order to install their caravan in itself, and without more, constituted a violation of Article 8. This would be tantamount to imposing on the United Kingdom, as on all the other Contracting States, an obligation by virtue of Article 8 to make available to the gypsy community an adequate number of suitably equipped sites. The Court is not convinced, despite the undoubted evolution that has taken place in both international law, as evidenced by the Framework Convention, and domestic legislations in regard to protection of minorities, that Article 8 can be interpreted to involve such a far-reaching positive obligation of general social policy being imposed on States (see paragraphs 93-94 above).[39]

As this article is written from the perspective of strategy choices, it uses the example of ECHR jurisprudence under article 8 of the European Convention in order to demonstrate the following point. From this part of ECHR case law one can distill a prevailing view which is largely insensitive to minority rights, but also certain potentials for quite a different approach, despite the absence of an explicit minority rights clause in the ECHR. More examples and evidence could be presented from the application (or non-application) of other ECHR provisions, including article 9 on freedom of

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nificantly different (*Thlimmenos v. Greece*, Judgment of 6 April 2000, Appl. No. 34369/97, para. 44).

[39] *Ibid*, para. 98. Again, a different view is presented in the dissenting opinion by seven judges: "Our view that Article 8 of the Convention imposes a positive obligation on the authorities to ensure that gypsies have a practical and effective opportunity to enjoy their rights to home, private and family life, in accordance with their traditional lifestyle, is not a startling innovation".

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thought, conscience and religion, in cases initiated by members of various minorities.[40]

4. Does non-discrimination suffice?

If minority rights should be seen, as recommended in the current chapter, not as a separate or additional category of human rights but as recognition of and legal basis for specific forms and measures of protection to universal human rights, could minority rights, then, be reduced to a broadly understood norm of non-discrimination?

The question is not as simple or trivial as it seems. Of course, the danger in that kind of a *reductionist* approach would be in narrowing down the scope of minority rights into a simple norm of equal protection and non-discrimination. Especially in the light of the relatively underdeveloped nature of human rights law in the field of non-discrimination, this might result in a failure to look for positive state obligations to promote minority rights and in the often hopeless search for a relevant comparator in order to establish discrimination against members of minorities. From a strategic perspective of striving for effective minority rights protection, the answer must be negative.

However, the book of non-discrimination law is not closed. Notions like indirect, systemic and intersectional discrimination[41] indicate the considerable potential inherent in the provisions of human rights treaties on equality and non-discrimination. The denial of the reductionist approach should therefore not lead to neglect of this potential. It might be that such potential is of particular importance within a context such as the ECHR which does not include a minority rights clause. Perhaps the non-discrimination clause could in such a framework provide for a major point of entry for minority rights considerations and a minority-sensitive reading of other provisions of the treaty.

One more look at the *Chapman* case is appropriate. It is interesting to note that in their joint dissenting opinion seven judges of the European Court of Human Rights referred to the case of *Thlimmenos v. Greece*[42] in arguing

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40 For a broader mapping of ECHR jurisprudence related to minority rights, see Yvonne Donders, *Towards a Right to Cultural Identity?*, Intersentia 2002 (School of Human Rights Research series, Volume 15).

41 These and other related notions are under consideration in the research project Rethinking and Developing Strategies against Racism and Ethnic Intolerance, funded by the Academy of Finland (2001-2003). The current author, as project leader, is grateful to Asbjørn Eide for his support to the project as a member of its Steering Committee.

42 Application No. 34369/97, European Court of Human Rights, Judgment of 6 April 2000.

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that the applicant's particular minority lifestyle gives rise to "a wider scope to Article 8".[43]

The *Thlimmenos* case represents, indeed, a major breakthrough in the European Court's interpretation of the non-discrimination clause in ECHR article 14. If applied consistently, this approach enables a broad and minority-sensitive understanding of non-discrimination. Mr. Thlimmenos had been refused appointment as chartered accountant because of his criminal conviction resulting from him, a Jehova's Witness, refusing to wear a military uniform. In its reasoning why this constituted a violation of article 14 in conjunction with article 9, the Court stated:

> The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification ... However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention *is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.*[44]

Based on this line of reasoning, the European Court concluded that there existed no objective and reasonable justification for not treating the applicant, who had been convicted for his conscientious objection, differently from other convicted persons, and that article 14 had been violated, in conjunction with article 9.

In the light of the *Thlimmenos* case, it is quite clear that the assessment of the relationship between non-discrimination and minority rights, and the strategic consequences to be drawn, depend on the notion of discrimination applied within human rights law. If indirect, systemic and intersectional discrimination are effectively covered and if it is held as discrimination to treat different situations equally, then much of minority rights protection and promotion could be reached through full utilization of the norms on equality and non-discrimination.

However, this does not lead to an overall conclusion that a minority rights strategy could be built solely on non-discrimination as the single point of entry. Rather, what is recommended, from the strategic viewpoint of searching for a solid foundation for the protection and promotion of minority rights within the general human rights discourse, is a balanced emphasis on the interdependence of all human rights, on the potentials of a minority-

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[43] See, footnote 38, *supra*.

[44] *Thlimmenos v. Greece* (footnote 42, *supra*), para. 44 (emphasis added).

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sensitive reading of general human rights provisions and on the need to apply a broadly understood norm of non-discrimination.

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XXI

The Hague, Oslo and Lund Recommendations regarding minority questions

Max van der Stoel*

Asbjørn Eide is a busy man. But somehow he always managed to answer positively to my frequent requests for assistance in my work as OSCE High Commissioner on National Minorities between 1993 and 2001. I remember his help in working out a formula for the problem of Greek language schools in Albania and regarding various other issues like Hungarian language tertiary education in Romania as well as the rights of children of stateless parents born in Estonia and Latvia, after these countries regained independence, to receive citizenship simply at the request of their parents. Aware of his unique knowledge of minority rights and his always balanced judgement, my staff and I at all times attached great importance to his opinions.

Asbjørn Eide also played a central role in three groups of internationally recognized experts studying respectively the education rights of national minorities, their linguistic rights and their effective participation in public life.[1] The aim of these studies was not to create new norms and standards, but to interpret and elaborate the existing international rules regarding these subjects. They carry considerable weight because they reflect the unanimous views of prestigious groups of experts on a number of issues with which multi-ethnic states have to cope when defining the rights and obligations of majorities and minorities in their countries.

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1 The studies are known as The Hague Recommendations regarding the Educational Rights of National Minorities (1996), the Oslo Recommendations regarding the Linguistic Rights of National Minorities (1998), and the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999). The full texts of the three sets of recommendations are available in many languages through the Internet at <http://www.osce.org/hcnm/documents/recommendations/index.php3>.

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1. Language issues

Language issues often prove to be quite sensitive in many multi-ethnic states, especially because ethnic minorities usually have a language of their own and feel strongly that the preservation of their identity is closely related to their capability to keep their language alive. On the other hand, the majority has also specific concerns in this field. For instance, it might be concerned that the majority language might lose ground in those regions where the minority constitutes a majority. Or its willingness to grant language rights to a minority might be minimal in regions where a minority is small, because this could mean a considerable increase of financial burdens. Finally, the willingness of the majority to respect the linguistic rights of the minority often goes hand in hand with the insistence on the need for members of a minority to learn the majority language. If a considerable part of a minority refuses to do so, this stands in the way of the process of integration to which the majority usually attaches so much importance. It can only be hoped that persons belonging to a minority realise that it is also in *their* interest to acquire such knowledge. Many of them would be disadvantaged in their careers if they are unable to speak or read the majority language, especially those who after having left school are going to live in areas where the minority is not in the majority.

As High Commissioner on National Minorities, I was frequently confronted with tensions between minorities and majorities on language rights. In Estonia and Latvia,[2] the large influx of Russians during the Soviet occupation of these countries between 1940 and 1991 led to such an increase of the number of Russian speakers that the governments formed since independence have considered the strengthening of the Estonian and Latvian languages to be of primary importance. Apart from Russian speakers who already had lived in the Baltics before 1941 and persons who had especially distinguished themselves in the struggle for independence, all Russians living in Estonia and Latvia did not automatically acquire citizenship at the moment of independence. They had the choice of opting for Russian citizenship, to remain stateless or to submit to a naturalization procedure which included a language test. The fear of not passing such a test was a main (though not the only) reason for many Russians not to apply for naturalization. Even today, eleven years after acquiring independence, some 23% of the population of Latvia and 20% of that of Estonia is either stateless or has acquired Russian citizenship. It is not expected that the number of naturali-

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[2] For an account of the High Commissioner's work in Estonia and Latvia from 1993 through early 1999, see Rob Zaagman, *Conflict Prevention in the Baltic States: The OSCE High Commissioner on National Minorities in Estonia, Latvia and Lithuania*, ECMI Monograph #1, Flensburg: European Centre for Minority Issues, April 1999.

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zations will rise rapidly in the coming years. It is of course an unfortunate situation that such a large percentage of the population of these countries does not possess political rights and are formally aliens in countries where most of them have spent a large part of their lives if not been born.

In order to strengthen the position of the state languages, both Estonia and Latvia introduced language laws which not only required adequate knowledge of the official language for public officials, but also intruded in the private sphere. On my side I emphasized, mainly on the basis of article 10 of the European Convention on Human Rights, that such intrusions were only permissible in the interest of national security, integrity or public safety or for the protection of health and morals. After long discussions, the governments and parliaments of both countries agreed to adapt their language legislation accordingly.

While criticizing the original drafts of the language legislation of both countries, I did at the same time try to convince both governments to seek a strengthening of the position of the official language not by trying to restrict the use of the Russian language, but by stimulating the knowledge of the state language, both through special language courses and the school education system.

Another problem arose when Estonia and Latvia decided to introduce legislation requiring a certain amount of knowledge of the state language for candidates for municipal councils and parliament. I objected to this because this constituted discrimination on the ground of language, which is forbidden in the International Convenant on Civil and Political Rights (article 25) and under the European Convention on Human Rights (article 14 and article 3 of Protocol I). Moreover, I argued that in a democratic state it is up to the citizens to decide whether a candidate for a public office would be able to perform his task adequately if (s)he would have only limited or even no knowledge of the state language. After many discussions, Estonia has now withdrawn its legislation while stipulating that parliament would be free to determine that only the state language would be spoken in parliament. Latvia also finally revised its legislation, but only after considerable external pressure relating especially to its application to join NATO, and after losing cases on the question before the United Nations Human Rights Committee[3] and the European Court of Human Rights.[4]

Language issues were not restricted to the Baltic area. Romania decided only recently, after many years of debate, that a minority language could be used in official communications of a municipality if the minority would constitute at least 20% of the total population. In Slovakia, it was only after the

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[3] See Ignatane v. Latvia, Communication No. 884/1999, Decision of 25 July 2001.

[4] See Podkolzina v. Latvia (No. 46726/99), Judgment of 9 April 2002.

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Meciar government had been defeated that agreement was reached to introduce an identical formula.

In Macedonia, similar legislation was introduced after the so-called framework agreement reached in Ohrid in 2001 provided greater language rights for especially the Albanian minority. The Ohrid agreement also provided for the right of ethnic Albanian deputies to speak their native language in Parliament.

I quote just a few examples of problems regarding the implementation of language rights in various countries. I could mention many more. But in each case the recommendations of the experts, amongst whom Eide was one of the most active members, provided useful guidance.[5]

2. Educational issues

The same applies to The Hague Recommendations regarding the Educational Rights of National Minorities. In this field, the most difficult problems I encountered were those regarding the right of national minorities to create their own universities. The experts recognized that persons belonging to national minorities may seek ways and means to establish their own institutions at the tertiary level when they have demonstrated the need for it and when their numerical strength justifies it. But at the same time they make the point that it might not be necessary to create a *separate* institution:

> [M]inority language tertiary education can legitimately be made available for national minorities by establishing the required facilities within existing educational structures provided these can adequately serve the needs of the national minority in question.[6]

This clearly shows their preference. They also state in respect to higher education: "... the intellectual and cultural development of majorities and minorities should not take place in isolation".[7]

I was confronted with these problems in Romania, Macedonia and Slovakia. In Romania the setting up of a Hungarian language state university is theoretically possible, but it requires a law, and there is no doubt that in the foreseeable future such a law will not get the required majority in both houses of parliament. On the other hand, changes in the legislation on higher education made it possible for the Babes-Bolyai University in Cluj, which had already begun to give Hungarian and German language courses in a number of subjects, to expand these programmes.

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5 It should be noted that Asbjørn Eide chaired the group of experts who agreed upon the Oslo Recommendations regarding the Linguistic Rights of National Minorities.

6 Hague Recommendations regarding the Educational Rights of National Minorities, p. 8.

7 *Ibid.*, p. 16.

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In the light of this, I decided to engage the Rector and Senate of the Babes-Bolyai University in a dialogue about their willingness to transform the university into a truly multicultural and multilingual institution. After initial informative discussions, a number of international experts and myself suggested several changes which, apart from expanding the number of subjects taught in minority languages, would in effect assure full equality of rights of the Romanian, Hungarian and German lines of study. Most of these recommendations were accepted and put into practice.

It is my view that the positive attitude on the Romanian side regarding this proposal can be mainly attributed to the fact that the new formula would not undermine efforts to promote integration because students from the various ethnic groups would continue to study in one university. However, the UDMR, the party of Hungarians in Romania, though conceding that the new structures brought some improvement, continued to insist that the interests of the Hungarian language higher education could only be fully ensured if a separate university could be created. This is similar to the situation in Slovakia, where although it may be possible to ensure Hungarian language education at the tertiary level through a multilingual university in Nitra, Hungarian politicians (and not necessarily Hungarian professors) have successfully insisted on the creation of a separate institution.

In Macedonia, the problem of minority language tertiary education proved to be even more complicated. In effect the government, frustrating my efforts to convince it to be more generous, was only willing to provide Albanian language higher education for teacher training. Moreover, it refused to accept as a state institution an Albanian language university arguing that no effort had been made to consult the government. The university was allowed to function as a private institution, but its diplomas were not recognised.

As the issue of Albanian language higher education became increasingly a major source of tension between Macedonians and Albanians, I came forward with the concept of a private Institute of Higher Education, in which a number of subjects would be taught in Albanian. The government gave its blessing to this plan, on the condition that its financial contribution would be restricted to the donation of a piece of land on which the university would be built and that the rules regarding its accreditation would be strictly observed. Several states, with the United States as the biggest donor, together with the European Union and the Soros Foundation provided the necessary funds. In November 2001, the new University, named South East European University, opened its doors.

In Macedonia, the number of contacts between Macedonians and Albanians is unfortunately extremely small. Against this background, the new University has emphasized time and again that it wants to contribute to bet-

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ter inter-ethnic understanding. Though it does consider it as one of the main aims to contribute to the solving of problems of Albanian language higher education, it does not intend to be an exclusively ethnic Albanian University. Ethnic Macedonians and persons belonging to other ethnic groups in Macedonia are also welcome. The University wants to be multicultural and multilingual. A number of subjects are taught in the Macedonian language and there are not only Albanian but also Macedonian teachers. Efforts are being made to develop co-operation with the Macedonian state universities. By building bridges the University hopes to contribute to the process of reconciliation between Macedonians and Albanians which is so urgently needed in Macedonia.

3. Participation of minorities in public life

The Lund Recommendations on the Effective Participation of National Minorities in Public Life were intended to take a stand against the increasing scepticism about the chances of survival of multi-ethnic states since the dramatic dissolution of Yugoslavia.[8] Those who call for ethnically homogeneous states are apparently not sufficiently aware that in many parts of the world minorities do not live in a compact area, but dispersed amongst other ethnic groups. As a result it is usually only possible to give specific ethnic groups the option to create their own state by creating new ethnic minorities in such a state. The only way to avoid this would be mass migration of populations. But if such a migration were to be a forced one, this would constitute a very serious violation of fundamental human rights. Only very few people would probably be inclined voluntarily to leave their homes and their jobs in order to face an uncertain future somewhere else.

But there are other ways to solve inter-ethnic problems: trying to integrate diversity. Considering the extreme seriousness of these questions, it is amazing that relatively little attention has been paid to various methods to ensure the viability of multi-ethnic states. What is needed is to provide sufficient guarantees to the majority that the existing state will not fall apart as a result of efforts by the minority to gain greater control over their lives, while the minority has to be confident that its identity and vital interests will be adequately safeguarded.

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[8] For the full account and explanation to the Lund Recommendations, see John Packer, "The origin and nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life", Helsinki Monitor, Volume 11, No. 4 (2000), pp. 29-61 (including the Recommendations). Kristian Myntti subsequently wrote *A Commentary to the Lund Recommendations on the Effective Participation of National Minorities in Public Life* (Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 2001).

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There is sometimes a tendency to think that territorial autonomy for minorities within a state provides the best solution for this dilemma. And indeed there are a number of cases in which this formula proved to be rather effective, in particular where the minority is territorially concentrated. But there are solutions in which it will not prove to be possible. Especially in cases where the autonomous minority region would have to be created along the borders of what the minority considers its kin state, there is often a tendency amongst the majority to fear that granting territorial autonomy might be the first step towards secession of the minority and its unification with the kin state.

The Lund Recommendations try to show that there are other ways to find a mutually acceptable balance between the interests of majority and minority. Fears about territorial autonomy would probably be smaller if self-government were reduced to a more restricted field. But such a step, taken in isolation, would probably not satisfy many minorities. They will insist – and are fully entitled to do so – that they will be able to enjoy all minority rights formulated in various international treaties. They need also guarantees that their vital interests in the economic and social fields will be sufficiently safeguarded. This can be assured by their participation in the central government, which also would have an integrating effect

But a carefully balanced process of devolution can also be of great importance for them. And finally there is the element of consultation. Unfortunately, this sometimes amounts to little more than a periodical exchange of generalities. Consultations do have significance, however, if there are frequent exchanges of views at a high level on concrete subjects, like plans for new legislation affecting the interests of the minority. Even if such exchanges do not lead to agreement, they can help to reduce mutual distrust and to narrow differences.

Importantly, minorities do not only have rights – they also have obligations. They must not try to isolate themselves as much as possible from the rest of the population, but they must realise that even though minorities and majorities have sometimes conflicting interests, they have also important interests in common. To mention just a few examples: a well functioning democratic system, the rule of law, social justice and economic progress. A minority with adequate safeguards for the maintenance of its identity and its vital interests can afford to join with a majority in an integrated effort to ensure a better future. This is mutually beneficial.

The Lund Recommendations offer a number of concrete suggestions on how to harmonize the interests of minorities and majorities in multiethnic countries. I thank Asbjørn Eide for his as always thoughtful contribution to this work. In addition, I am pleased that the work we have done together in the European context has been given a wider exposure through Asbjørn

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Eide's Chairmanship of the United Nations Working Group on Minorities in which OSCE experience and specifically The Hague, Olso and Lund Recommendations have been discussed.

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XXII

The United Nations Sub-Commission Working Group on Minorities: what protection for minority rights?

Cecilia Thompson*

1. Introduction

This article provides an overview of the contribution the United Nations Sub-Commission Working Group on Minorities has made to taking the issue of minority protection forward within the international human rights system, and more specifically, to promoting a better understanding of the content and scope of minority rights. The article is divided into three parts: the first reviews the developments which have led to increased minority protection within the United Nations, in particular to the establishment of the Working Group on Minorities. The second part examines in greater detail the different means which the Working Group has adopted to effectively review the practical realization of minority rights, by focusing on the meaning and implications of the effective implementation of the articles contained in the 1992 United Nations Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The third part of the article attempts to evaluate the contribution the Working Group has made to minority protection.

2. The establishment of the Working Group

Almost all States have one or more minority groups within their national territories, characterized by their own ethnic, linguistic or religious identity which differs from that of the majority population. Meeting the aspirations of minorities and ensuring their rights acknowledges the dignity and equality of all individuals, furthers participatory development and thus contributes to the lessening of tensions within societies. However, the violations of minority rights are all too common today, with discrimination, inequality, poverty and repression of minorities having been identified as elements which fuel tensions, in turn leading to instability and conflict.

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States have, in the past, been reluctant to focus on the promotion and protection of minority rights in a serious and sustained manner for fear that recognising the identity and characteristics of minorities and granting them certain rights would undermine the territorial integrity of the State and encourage secessionist tendencies. It is only recently, over the past decade, that the international community has awakened to the urgent need to promote and protect the rights of minorities and meet the challenges to ensure non-discrimination, mutual understanding and tolerance, challenges which have increased dramatically since the tragic events of 11 September 2001.

The protection of minority rights within the United Nations reflects the gradual recognition by the international community that minority identity and characteristics should be protected. In 1947, the system for the protection of minorities, as groups, established under the League of Nations and considered by the United Nations to have outlived its political expediency, was replaced, in 1945, by the Charter of the United Nations and in 1948 by the Universal Declaration of Human Rights. When the Universal Declaration of Human Rights was being debated in the General Assembly, the United Nations was urged not to remain indifferent "to the fate of minorities". Despite this, the prevalent view at the time was that if the principles of non-discrimination and equality contained in these instruments were effectively implemented, special rights for minorities would not be necessary. It was only later, with the entry into force of human rights instruments such as the International Covenant on Civil and Political Rights in 1976, the International Convention on the Elimination of All Forms of Racial Discrimination in 1969, and the Convention on the Rights of the Child in 1990, that specific protection for persons belonging to minorities was included in the texts. This development testified to the realization that further special rights and measures were needed in order to better protect minorities from discrimination and other human rights abuses. Events in the late 1980s and early 1990s such as the end of the Cold War, the disintegration of Yugoslavia, the genocide in Rwanda, the rise of nationalist extremism, communal violence in many regions of the world, widespread practices of ethnic cleansing and systematic discrimination against particular population groups fuelled the impetus of the international community to seek more effective ways to protect minorities at the international level.

In 1990, the then United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities agreed to invite Mr. Asbjørn Eide, its Norwegian expert member, to undertake a study on "Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Prob-

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lems Involving Minorities".[1] Mr. Eide's three year study contained the results of a survey of the policies and practices of Governments towards minorities, and additional input by member States of the Commission on Human Rights and international NGOs. As the then Director of the Minority Rights Group, an international NGO working to secure rights for ethnic, linguistic and religious minorities worldwide, stated:

> These are probably the most comprehensive and valuable set of recommendations on the promotion of minority rights and inter-community cooperation being presented in international fora.[2]

In parallel to Mr. Eide's study, the United Nations Commission on Human Rights had established a working group, composed of Member States, to elaborate a Declaration of the rights of persons belonging to minorities. In 1992, after twelve years of negotiations, the General Assembly adopted the United Nations Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (hereafter refered to as the United Nations Declaration), the only United Nations instrument to date which addresses the special rights of minorities in a separate document. The text of the Declaration, while ensuring a balance between the rights of persons belonging to minorities to maintain and develop their own identity and characteristics and the corresponding obligations of States, ultimately safeguards the territorial integrity of States. In 1993, Mr. Eide held a major expert seminar convened by the then United Nations Centre for Human Rights, in Geneva, Switzerland, to discuss views and suggestions regarding effective ways in which problems involving minorities could be addressed and the United Nations Declaration effectively implemented.

The recommendations of the seminar were included in Mr. Eide's final study which was submitted to the Sub-Commission in 1993 and debated by Governments, NGOs and agencies during its session that year. One of the recommendations in Mr. Eide's study was that:

> The Commission on Human Rights should consider establishing a Working Group on minority issues, which should provide access to representatives of both governments and minorities. The mandate of the group might be to examine the situation in different parts of the world and to develop more specific guidelines for the implementation of the 1992 Declaration on Minorities. The Commission and its Working Group should thereby be made the focal point for all UN activities undertaken within respective mandates. By providing a voice for the

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1 *Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, Sub-Commission on the Promotion and Protection of Human Rights, UN doc. E/CN.4/Sub.2/1993/34 and Add 1-4.

2 Stated in *New Approaches to Minority Protection*, report of the Minority Rights Group International, by Asbjørn Eide, 1993, p. 6.

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> groups concerned, it would serve to facilitate communication between minorities and governments and to develop methods for conflict resolution or direction of the conflict into peaceful channels.[3]

In 1994, with a view to giving effect to this recommendation, the Sub-Commission requested the Commission on Human Rights to consider the establishment of a Sub-Commission Working Group on Minorities. In 1995, the Commission authorized the establishment of the Working Group,[4] a decision endorsed by the Economic and Social Council that same year.[5]

According to the Commission, the Working Group was to be established initially for a period of three years. It was to be composed of five members of the Sub-Commission drawn from each of the regions designated by the United Nations, and was to meet annually for five working days, between the sessions of the Sub-Commission, in order to promote the rights of persons belonging to national or ethnic, religious and linguistic minorities as set out in the Declaration. Its mandate was to a) review the promotion and practical realization of the United Nations Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; b) examine possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and governments; and c) recommend further measures, as appropriate for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities.[6] The Working Group prepares a formal report that is submitted to, and discussed by, the Sub-Commission on the Promotion and Protection of Human Rights when it meets annually in August, and the report is made available as a background document for the Commission on Human Rights which meets annually in March/April.

At its first session, the Working Group elected Mr. Asbjørn Eide as Chairman-Rapporteur for the initial three-year period of its mandate. After its initial three sessions, the Commission on Human Rights at its 1998 session decided "to extend the mandate of the Working Group with a view to its holding one session of five working days annually",[7] which was endorsed by the Economic and Social Council that same year.[8] At its fourth session, Mr.

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3 *New Approaches to Minority Protection*, report of the Minority Rights Group International, by Asbjørn Eide, 1993, recommendation 44, p. 5.

4 Commission on Human Rights resolution 1995/24.

5 ECOSOC resolution 1995/31.

6 Commission on Human Rights resolution 1995/24.

7 Commission on Human Rights resolution 1998/19.

8 ECOSOC decision 1998/246.

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Eide was re-elected as Chairman-Rapporteur for a further two-year term[9] and at its sixth session for a further term.[10]

3. Participation in, and working methods of, the Working Group

Pressure from NGOs, some Governments and experts such as Mr. Eide, shaped and influenced the participation in, and the working methods of, the Working Group at the time of lobbying for the resolution establishing the Working Group and later, during its initial first three sessions. The nature of these two crucial elements facilitated the work of the Working Group in contributing to the realization of the United Nations Declaration and to a better understanding of the principles contained therein.

At its first session in August/September 1995, the Working Group discussed the issue of participation. The five members of the Working Group constituted the core, the decision-makers, and it was agreed that Governments, agencies and NGOs in consultative status with the Economic and Social Council (ECOSOC) would participate in the deliberations of the sessions of the Working Group, as observers. The question was, however, whether participation should be limited to NGOs in consultative status with ECOSOC or whether participation should be opened to all NGOs, irrespective of status. Reference was made to the practice of the Sub-Commission Working Group on Indigenous Populations, established in 1984, which had opened the sessions to all NGOs thereby considerably enhancing the effectiveness of the Group. Discussions focused on the advantages of opening up the Working Group to all NGOs, which would enable minorities to have direct access to the United Nations, to channel their grievances to an international body, and above all to provide first-hand information on situations involving minorities at the grass-roots level. It was argued that it would be difficult for the Working Group to fulfill the mandate it had been entrusted with, without receiving the relevant information from NGOs and minority groups working at the field level.

It was thus decided by the members of the Working Group that participation would be open to all NGOs and minority representatives, irrespective of status, in order to encourage the exchange of views and the submission of useful and constructive information on the situation of minorities at the local level. It was further decided that participants would also include scholars, academics and researchers who were familiar with the problems faced by minorities and could provide an academic insight into some of the issues to

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[9] Report of the Working Group on Minorities on its fourth session, para. 4, E/CN.4/Sub.2/1998/18.

[10] Report of the Working Group on Minorities on its sixth session, para. 4, E/CN.4/Sub.2/2000/27.

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be discussed during the Working Group sessions. At its first session, the Chairman-Rapporteur, Mr. Eide, concluded that in order to meaningfully pursue its task, participation in the Working Group would include: first,

> ... Government observers who could provide the Working Group with information on steps taken to promote the principles of the Declaration as one function of the Group was to share experiences on such matters; second, ... United Nations and regional bodies and agencies which could provide the Working Group with information on their activities in the field; third, ... international and national non-governmental organisations which dealt with minority issues as part of their mandates; and finally, by scholars and professional researchers attached to academic institutions who carried out research in the field of minorities and group accommodation and who could provide the Working Group with scientific insight into the issues it was exploring.[11]

Once the categories of participants had been identified, the Working Group discussed its working methods. These were essentially discussed and elaborated during the deliberations of the Working Group throughout its first three sessions. The identification of working methods and thematic focus, already at its initial sessions, pointed, among others, towards the need to clarify the implication of the articles contained in the Declaration.

At its first session, discussions were held on ways by which the Working Group could best fulfill the tasks it has been entrusted with. One suggestion was that the Working Group study the experiences of different States in their accommodation of minority concerns, and that States and minority groups be encouraged to express their needs and facilitate the exchange of best practices in the area of minority protection. Others suggested that the Working Group focus more sharply on the principles contained in the United Nations Declaration and act as a quasi monitoring mechanism for the protection and promotion of the rights of persons belonging to minorities, thereby complementing other monitoring mechanisms established by relevant United Nations human rights instruments. The Chairman-Rapporteur, Mr. Eide, suggested that the Working Group be viewed as a forum for dialogue and mutual understanding, in accordance with article 7 of the United Nations Declaration which stipulates that "States should cooperate in order to promote respect for the rights set forth in the present Declaration".[12] Thus the Working Group decided that, in accordance with its mandate, it should act as a forum for dialogue and the exchange of information and experiences leading to proposals for constructive group accommodation and further measures

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[11] Report of the Working Group on Minorities on its first session, E/CN.4/Sub.2/1996/2, para. 19, p. 7.

[12] United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, article 7.

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to promote and protect the rights of persons belonging to minorities. It was stressed at its first session, and reiterated at later sessions, that the Working Group should not be a chamber for complaints but that it should act as a forum for discussions regarding ways to implement the United Nations Declaration by various actors concerned and improve relations among all groups within society.

At its second and third sessions, observers suggested that the Working Group should consider organising its work on a thematic basis and focus more specifically on the implementation of the United Nations Declaration. Extensive discussions were held on the type, source and format of the information to be provided to the Working Group. With regard to the sources of information on which the Working Group was to draw upon, observers were encouraged to submit written communications on the problems involving minorities and their possible resolution. The Chairman-Rapporteur stressed that for constructive dialogue to take place between minorities and Governments on the practical realization of the Declaration, possible solutions and further measures, all observers submit relevant, factual and objective information about concrete situations involving minorities. To this end, Governments could provide information on a voluntary basis, thereby complementing reporting procedures under other United Nations treaty bodies. Furthermore, information contained in the relevant reports of the Secretary-General, those submitted by States parties to the treaty bodies, and the reports of the special rapporteurs could also be of benefit to the Working Group. It was further suggested that Governments and NGOs be encouraged to periodically submit reports on the situation of minorities within their country or region in order to monitor the progress made in the implementation of the principles contained in the United Nations Declaration.

4. Promoting a better understanding of the United Nations Declaration

Since 1995, the Working Group has addressed a large number of issues of concern to minorities during the eight sessions it has held to date. These have ranged from the specific rights contained in the Declaration, citizenship and the minority rights of non-citizens, existence and recognition of minorities, and best practices in the area of minority protection to the role of bilaterial treaties, the jurisprudence of the European Court and Commission of Human Rights, autonomy and minority rights, the role of multiculturalism in minority protection, the situation of the minorities of African descent in the Americas, and minority rights and development. For the purposes of this article, however, emphasis will be placed on the discussions of the Working Group which have contributed to a better understanding of the content and scope of the articles contained in the United Nations Declaration.

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Since its inception, the members of the Working Group decided that the work of the Working Group should focus more sharply on developing a better understanding of the provisions contained in the United Nations Declaration. The first item of its mandate on the practical realization of the Declaration was therefore given much attention during its first six sessions. At its third session, it was suggested that the Working Group consider the scope and content of each of the articles of the United Nations Declaration, thereby arriving at concrete recommendations regarding its effective implementation. To this end, the Working Group should examine ways in which understanding of the Declaration could be further developed through interpretive studies of each article, with a particular focus on the right to existence, the right to identity, the rights of persons belonging to minorities to enjoy their own culture, speak their own language and profess and practice their own religion, and enjoy the right to education, participation, and association. It was proposed that such studies would enable the Working Group to adopt comments on specific articles, which could be included in, for example, a manual explaining the provisions of the Declaration.[13]

In order to give effect to the suggestion to improve the understanding and scope of the principles contained in the United Nations Declaration, the Working Group decided that this would be undertaken in three major ways. First, by encouraging members, Governments, NGOs and academics to draft thematic working papers in preparation of the sessions of the Working Group. These working papers would constitute official United Nations documents, and by identifying pertinent issues regarding content and practice, would contribute to the discussions during its sessions. Secondly, by urging observers to provide examples of ways by which the rights of minorities were being implemented and accommodated in various countries, including through the adoption of national legislation, measures to preserve their existence and characteristics, the establishment of advisory or ethnic councils, and co-operation and co-ordination with the international community. In this way, the Working Group could learn about good practices, and share information and experiences on ways by which the United Nations Declaration could be effectively implemented. Thirdly, by preparing a commentary to the United Nations Declaration which would provide an explanation and guidelines on what each of the articles contained in the Declaration implied, to provide a better understanding of the content of, and limits to, each of the rights.

The following section describes in greater detail the means by which the Working Group has contributed to increasing the understanding of the Declaration. These include the following: a) discussions during the Working

[13] Report of the Working Group on Minorities on its third session, E/CN.4/Sub.2/1997/18, paras. 177-179, p. 36.

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Group sessions, including of working papers drafted by members of the Working Group, many of them by Mr. Eide himself, as well as academics and NGOs, b) the expert seminars organised by the Working Group, c) the visits by the Working Group to States, and d) the Commentary to the Declaration.

4.1. Deliberations of the Working Group

The first means by which the Declaration was better understood was through the discussions of the Working Group. These concerned key articles of the Declaration, in particular, the protection of the existence and identity of minorities, the right of persons belonging to minorities to enjoy their own culture, to profess and practice their own religion, to use their own language, in private and in public, as well as the right of persons belonging to minorities to participation, to learn their mother tongue and have instruction in their mother tongue, and with regard to encouraging the knowledge of the history, traditions, language and culture of minorities.

4.1.1. Protection of the existence and identity of minorities

During its sessions, extensive information was provided to the Working Group on the constitutional and legal provisions safeguarding not only the identity and existence of minorities but also the maintainance and development of their characteristics, such as their language, culture and religion. More general discussions focused on the existence and recognition of minorities, and the fact that the recognition of a minority was a fundamental step both for the protection of minority rights and for preventing and reducing ethnic conflict.[14] The Working Group agreed that a major lacuna in both international legislation and conflict resolution mechanisms related to cases where a State did not accept the existence of a minority group.

4.1.2. The right of persons belonging to minorities to enjoy their own culture

The Working Group highlighted that culture referred, *inter alia*, to a given set of values, norms, ideas and modes of behaviour that might be associated with one or several social or national groups. Discussions during its sessions focused on the core elements which composed the right of minorities to enjoy their own culture, including linguistic rights, the rights to folklore and knowledge systems. However, there were also other considerations such as

[14] See also the Working Paper entitled *Existence and recognition of minorities*, submitted by Mr. Bengoa, on its sixth session, UN doc. E/CN.4/Sub.2/AC.5/2000/WP.2.

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the right to life, bodily integrity and health which sometimes conflicted with elements of minority culture. It was also stated that in some regions of the world, the cultural rights of minorities had given rise to several problems where such rights had been interpreted to relate primarily to religion, religious minorities and religious institutions[15] and that there were a number of factors which could erode the full enjoyment of the right of minorities to enjoy their own culture such as global processes including modes of production and the preservation of goods and services.[16]

4.1.3. The right of persons belonging to minorities to profess and practice their own religion

With regard to the right of minorities to profess and practice their own religion, it was suggested that article 2.1 of the United Nations Declaration could be read to imply that no State had the right to compel children belonging to minorities to participate in religious activities which were not their own or to receive religious instruction which conflicted with the religion or conviction of their parents. The right of religious minorities to establish denominational schools was a corollary of the right to practise and profess their own religion, taking into account the minimum standards set by the State. In addition, discussions focused on the need for the State not to discriminate against any religion or to deprive individuals the freedom of belief,[17] and to allow religious minorities to train teachers for religious education without interference from the State other than that required to ensure compliance with international standards relating to education.

4.1.4. The right of minorities to use their own language, in private and in public

The subject of how in practical terms the right of minorities to speak their own language in private and in public can be realized, in accordance with the Declaration, raised much interest during the sessions of the Working Group. To this end, the State should not interfere in a way which would deny the free private use of a minority language. One of the most effective ways of protecting a linguistic minority's identity and of encouraging conditions for minorities to be able to speak their own language in public was to have pub-

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[15] Report of the Working Group on Minorities on its third session, UN doc. E/CN.4/Sub.2/1997/18, paras. 26-28, pp. 5-6.

[16] Report of the Working Group on Minorities on its fourth session, UN doc. E/CN.4/Sub.2/1998/18, para. 14, p. 14.

[17] Conference room paper entitled *Treatment of religious minorities in educational systems throughout the world*, submitted by Mr. Kroke, on its third session, UN doc. E/CN.4/Sub.2/AC.5/1997/CRP.1.

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lic officials use a minority language where it was reasonable to do so. When authorities at the national, regional and/or local levels faced a sufficiently high number of individuals whose primary language was a minority language, States had come to accept that they must provide a level of service appropriate to the relative number of individuals involved.[18] The members and observers of the Working Group discussed in greater detail the factors which led to the survival or disappearance of languages, and the value of minority language instruction in schools to maintain the use of the minority language.

4.1.5. The right of persons belonging to minorities to participation

The right of persons belonging to minorities to participate effectively in cultural, religious, social, economic and public life and to participate in decisions that affect them was one of the subjects which has received most attention during the deliberations of the Working Group. At its third session, the subject of effective participation of members of minorities in all aspects of society was discussed at some length. Government observers, NGOs and scholars provided useful information on the modalities of such participation, which had not been specified in the Declaration, including information on the representation of minorities in national legislative bodies, less formal *ad hoc* bodies such as advisory committees or councils, and consultative procedures.[19] Information was also provided on the participation of minorities in decision-making at various levels of State administration, as well as on the establishment and functioning of minority associations and organisations. Proposals by members and observers were made for the effective participation of minorities, including the decentralisation of decision-making powers to local councils or municipalities and the establishment of advisory councils or round tables to enable minority views and interests to be heard, all of which required dialogue and partnership between minorities and Governments.

In later sessions, obstacles to effective participation and representation of minorities in public life were discussed, including exclusion of minorities from the political process through denial of citizenship, the free exercise of the right to vote, under-representation of minorities, and exclusion of citizens who were members of minorities from holding public office.[20] The

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[18] See also the Working paper entitled *To speak or not to speak*, submitted by Mr. de Varennes, on its third session, UN doc. E/CN.4/Sub.2/AC.5/1997/WP.6.

[19] *Report of the Working Group on Minorities* on its third session, UN doc. E/CN.4/Sub.2/1997/18, para. 44, p. 8.

[20] Working paper entitled *Towards effective political participation and representation of minorities*, submitted by Mr. de Varennes on its fourth session, UN doc. E/CN.4/Sub.2/AC.5/1998/WP.4.

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Working Group agreed that participation must also be effective to ensure that the interests of persons belonging to minorities could be heard, considered and respected as far as possible in a tolerant and inclusive environment.

More specifically, political participation of minorities was necessary to enable minorities to maintain and develop their identity and characteristics in the spirit of the United Nations Declaration. Members and observers provided some examples of possible mechanisms to ensure the effective participation of minorities such as federal systems, non-federal territorial autonomy arrangements, more effective legislative representation of minorities, parliamentary representation of minorities, representation of minority interests in government agencies, guaranteed minority seats, proportional representation in elections, a reduced vote threshold for minority participation in government, minority administrative bodies or independent advisory bodies, as well as informal channels of participation particularly in round tables or councils.[21]

Furthermore, the Lund Recommendations on the Effective Participation of National Minorities in Public Life were brought to the attention of the Working Group. These were elaborated at the request of the OSCE High Commissioner for National Minorities, and offered a range of solutions to problems affecting minorities in the field of participation. The Lund Recommendations contain policy guidelines in conformity with the provisions of relevant international and regional standards and include: basic principles; recommendations for granting persons belonging to minorities a say in matters affecting them and control over such matters; and guarantees for the entrenchment of such entitlements through judicial and other means. More specifically, the Recommendations give examples of forms of participation in decision-making including arrangements at the level of Central Government, elections, arrangements at the regional and local levels, advisory and consultative bodies, issues of self-governance, non-territorial and territorial arrangements, as well as guarantees of participation in decision-making through constitutional safeguards, and effective remedies.[22]

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[21] For more details see the Conference room paper entitled *The participation of minorities in decision-making*: expert study authored by J.A. Frowein and Roland Bank, of the Max Planck Institute Heidelberg, and submitted to the Working Group on its seventh session by Antti Korkeakivi, Secretariat of the Framework Convention on National Minorities, Council of Europe, UN doc. E/CN.4/Sub.2/AC.5/2001/CRP.6.

[22] Working paper entitled *Lund Recommendations on the Effective Participation of National Minorities in Public Life*, submitted by Mr. Packer, on its seventh session, Office of the High Commissioner for National Minorities, UN doc. E/CN.4/Sub.2/AC.5/2001/WP.7.

PSIL http://doi.org/10.1163/9789004167070_007 - http://www.brill.com/publications/online-resources - http://www.minorityrights.org/doc/5ecf1e/

4.1.6. The right of persons belonging to minorities to learn their mother tongue and have instruction in their mother tongue

The discussions during the Working Group sessions focused on the interpretation of the right of minorities to learn their mother tongue and have instruction in their mother tongue. It was suggested that it was possible to read into articles 1 and 4.4 of the Declaration a State obligation to adopt, as far as possible, measures such as using a minority language as the medium of public instruction to a degree appropriate under the circumstances, and support to private or public schools where instruction in, or of, a minority language was provided. In addition, minorities had traditionally been recognised the right to establish and maintain their own private educational activities, using their own language as the medium of instruction, if they so desired.

Information was also shared about recommendations drawn up by the Office of the High Commissioner on National Minorities of the OSCE known as the Hague Recommendations regarding the Educational Rights of national Minorities. These contain an overview of issues relating to language education policy as applied in States of Central and Eastern Europe in particular. The major thrusts of the Hague Recommendations include: the encouragement of persons belonging to minorities to learn the official language of the State and to be able to function as citizens of the State, while States were obliged to ensure the equality of everyone within the State: the principle of non-discrimination based on language; the participation of minorities in the educational system; the provision of alternative forms of education for children belonging to minorities; the need for minorities and majority populations to learn about each other; and the need for a language mix in the programme at primary and secondary school levels, which would open the way towards a multilingual society.[23]

Following the third session, the Working Group decided to send the Hague Recommendations to non-governmental organisations for comments. The objective was to reflect the issues of relevance to the rights of minorities to learn and be taught their own language from regional and local perspectives, with a view to arriving at proposals for States to provide for education of, and in, the minority language. Comments were received regarding the needs of particular minority groups, the lack of resources for ensuring, in practice, education in the mother tongue and bilingual educational opportunities, and the participation of minorities in the development of educational curricula.

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[23] Working paper entitled *Education rights and minorities: the Hague Recommendations*, submitted by Mr. Siemienski on its third session, UN doc. E/CN.4/Sub.2/AC.5/1997/WP.3.

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4.1.7. Knowledge of the history, traditions, language and culture of minorities

Under this particular subject, the deliberations of the Working Group centred largely on the issue of multicultural and intercultural education as an appropriate measure for States to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory as well as providing opportunities for minorities to gain knowledge of the society as a whole.[24]

Lengthy discussions were held during its second session on the need for the inclusion of knowledge about minorities in national educational curricula, and information was shared about the positive experiences in different regions of the world in furthering multicultural education.[25] With regard to the value and content of multicultural education in fostering reciprocal understanding and tolerance, the Working Group discussed the need for integrated, rather than assimilative educational policies, allowing members of minority groups to link up with the majority on the basis of respect and equality, thus making cultural coexistence possible in the long term with full respect for the rights of persons belonging to minorities.[26] Some suggestions were made that intercultural education must have two facets, namely, the preservation of collective identity accompanied by acceptance of diversity as an asset and the promotion of understanding and tolerance among all groups within society.[27]

To that end, the Working Group agreed that positive action should be taken by States to protect and promote the rights of minorities, allowing them to develop characteristics which differed from those of the majority. This included, for example, setting up schools providing education in a minority mother tongue, or the development of policies in the field of education and culture intended not only for minorities, but also for the majority and society as a whole. The Working Group stressed that the State had a role to play in ensuring that educational curricula reflected the culture of both minorities and majorities and that information about the culture, history and civilisation of minorities needed to be reflected in national educational curricula.

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[24] See Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, article 4.4.

[25] Report of the Working Group on Minorities on its second session, UN doc. E/CN.4/Sub.2/1996/28, paras. 36-53, pp. 10-13.

[26] Working paper entitled *Education and Minorities*, submitted by Mr. Bengoa on its second session, UN doc. E/CN.4/Sub.2/AC.5/1996/WP.3.

[27] Working paper entitled *Multicultural and Intercultural Education and Protection of Minorities*, submitted by Mr. Mehedi, on its fifth session, UN doc. E/CN.4/Sub.2/AC.5/1999/WP.5.

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4.2. Expert seminars of the Working Group

The second means by which a better understanding of the content and scope of the articles contained in the Declaration was arrived at was through the organisation of expert seminars on particular aspects of the Declaration. To date, nine expert seminars have been held within the framework of the Working Group. These include two on intercultural and multicultural education, one on the role of the media, one on participation, two on the situation of minorities of African descent in the Americas, two on multiculturalism in Africa and one on co-operation for the better protection of minority rights.

In view of the fact that the Working Group was already, at its initial sessions, examining key issues contained in the United Nations Declaration, it decided, at its second session, to organise expert seminars to study particular themes of relevance to the respect of minority rights in accordance with the Declaration in greater detail. These seminars are organised in between the sessions of the Working Group and provide an opportunity for members and various actors, including Governments, NGOs, academics and representatives of minority groups to discuss certain issues and make recommendations to be further discussed and adopted by the Working Group. The seminars generally bring together the members of the Working Group, experts, representatives of Governments, specialised agencies, human rights and academic institutions, non-governmental organisations and minority groups. Some of these have been organised by one or more members of the Working Group together with the Secretariat of the Working Group and NGOs or institutions in the host country, while others have been organised directly by NGOs or institutions in the host country.

Again here, this article will provide details only of those seminars which focused, particularly, on the content and scope of the articles contained in the Declaration. These cover the two seminars on intercultural and multicultural education, the one on participation and on improving effective implementation of minority rights.

4.2.1. Seminar on multicultural and intercultural education – Geneva 1997

The first seminar of the Working Group, as recommended at its second session, was on multicultural and intercultural education, organised, at the request of the Working Group, by the International Service for Human Rights, an international NGO, together with the then United Nations Centre for Human Rights, in May 1997 in Geneva. The objectives of the seminar were to share regional and national experiences in the area of intercultural education, establish a network for the exchange of information, clarify the content and

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scope of articles 4.3 and 4.4 of the United Nations Declaration regarding opportunities for minorities to learn their mother tongue and have instruction in their mother tongue, and measures to encourage knowledge of the history, traditions and customs of persons belonging to minorities.

The discussions at the seminar focused on various national situations which highlighted the importance of multicultural and intercultural education for the preservation and promotion of the identity of diverse groups while at the same time enabling those groups to be integrated in society as a whole. The participants of the seminar recommended that the Working Group invite States to submit information on positive measures aimed at promoting inter-group relations and measures furthering multicultural and intercultural education, highlight the need to increase the resources of specialised agencies of the United Nations targeted at multicultural and intercultural educational projects, encourage the United Nations treaty bodies to ensure that reporting States provide concrete data on multicultural and intercultural education policies, and in consultation with relevant experts from different parts of the world, review the Hague Recommendations regarding the Educational Rights of National Minorities with the aim of making them more universally applicable. The recommendations adopted at the seminar are contained in the report thereof, as submitted to the third session of the Working Group.[28]

4.2.2. Seminar on effective participation of minorities – Flensburg 1999

Further to a recommendation by the Working Group to hold regional seminars on themes of particular concern, and as a means to arrive at concrete proposals on ways by which Governments could give effect to, *inter alia*, articles 2.2 and 2.3 of the Declaration on the effective participation of persons belonging to minorities, the European Centre for Minority Issues organised a seminar on this subject. The seminar was held in Flensburg, Germany from 30 April to 2 May 1999 to discuss participation by persons belonging to minorities in public life, as well as in decisions that concern them, both at the national and regional levels. Discussions during the seminar focused on, firstly, the various mechanisms within States to enable political participation of minorities, and secondly, the non-institutional conditions which provide an enabling environment for minorities to participate effectively.

The participants adopted a series of proposals addressed to the Working Group regarding: representation in legislative, administrative and advisory bodies; citizenship issues and electoral rights; participation at decision-

[28] *Report of the seminar on multicultural and intercultural education*, submitted by the International Service for Human Rights, on its third session, UN doc. E/CN.4/Sub.2/AC.5/1997/WP.5.

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making levels; further conditions for participation; and the participation of the Roma minority in particular. These proposals are contained in the working paper submitted to the Working Group at its fifth session.[29]

4.2.3. International seminar on intercultural and multicultural education – Montreal 1999

At its fourth session, the Working Group recommended that a second seminar on intercultural and multicultural education be held. This seminar was organised by the "Centre d'études sur le droit international et la mondialisation" and the Office of the High Commissioner for Human Rights, and held in Montreal from 29 September to 2 October 1999. In his opening address, Mr. Eide stated that the Working Group had been concerned with the ways in which:

> ... education can improve or worsen group accommodation in plural societies ... education can be positive or negative, it can be a factor in aggravating or reducing conflicts, it can serve confrontation, neutral coexistence or cooperation, promotion of reciprocal tolerance and equal dignity and can be an important tool in the integration of all groups within society.[30]

The aim of the seminar was to discuss the issue of intercultural and multicultural education in the light of articles 4.3 and 4.4 of the United Nations Declaration, with the Canadian experience as a backdrop, and in particular the ways by which Canada has implemented the relevant articles of the Declaration at federal and provincial levels. The participants discussed the protection of the rights of minorities within the framework of the United Nations, the role of intercultural education in fostering social cohesion, education in the mother-tongue, the right to manage educational institutions and the principle of non-discrimination in the area of education. The conclusions and recommendations of the seminar highlighted the need to reflect, in educational curricula, the history and culture of all groups within society, the participation of all groups in educational policy and programmes, the teaching of the mother tongue, the need for recruitment of teachers from minority communities, the integration of intercultural education into mainstream programmes of initial and continuous education, as well as the establishment of government working groups in Canada to develop federal and provincial policies regarding educational programmes and practices.

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[29] Working paper entitled *Towards effective participation of minorities*, submitted by the European Centre for Minority Issues, on its fifth session, UN doc. E/CN.4/Sub.2/AC.5/1999/WP.4.

[30] Montreal international seminar on intercultural and multicultural education, E/CN.4/Sub.2/AC.5/1997/WP.5, para. 3, p. 2.

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4.2.4. Seminar for representatives of global and regional organs, treaty bodies and specialised agencies – Durban 2001

At its fifth session, the Working Group recommended that the Office of the High Commissioner for Human Rights organise a seminar for representatives of global and regional organisations, treaty bodies and specialised agencies to discuss issues connected with their respective work on the protection of minorities, improve co-ordination so as to reduce duplication and parallel activities, exchange information and seek ways of better protecting the rights of persons belonging to minorities. The request for such a seminar was endorsed by the Commission and ECOSOC[31] at the recommendation of the Working Group on Minorities. The International Seminar on Cooperation for the Better Protection of the Rights of Minorities was held in Durban, South Africa, on 1, 2 and 5 September 2001, and brought together members of the Working Group on Minorities and that of the working group on indigenous populations, members of United Nations Treaty bodies, Special Rapporteurs, representatives of the United Nations specialized agencies, international financial institutions, Governments, NGOs, and regional experts.

The discussions focused on the relationship between the prevention of racial discrimination and the protection of minorities, co-operation between international, regional and national bodies and human rights mechanisms for the better protection of the rights of minorities, and mainstreaming minority rights in development assistance and co-operation. Many suggestions were made as to how the implementation of minority rights could be enhanced by the treaty bodies and other relevant international actors, including the regional human rights mechanisms and national human rights institutions. The participants recommended, *inter alia*, that: the treaty bodies, financial institutions, regional mechanisms, specialised agencies, Governments, human rights institutions, and NGOs pay greater attention to minority rights and undertake training programmes; the Working Group disseminate the United Nations Declaration and make it accessible in the languages of minority communities; the Office of the High Commissioner for Human Rights convene a seminar in 2002 on further measures to effectively implement the Declaration; Governments recognise minorities in their countries, invite the Working Group on Minorities, consider drafting a United Nations Convention on the protection of the rights of minorities and the establishment of a United Nations special rapporteur on minority issues, and ensure the provision of effective national legal remedies to provide redress for violations of the rights of minorities. The full text of the conclusions and recommenda-

[31] ECOSOC decision 2000/269.

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tions of the seminar are contained in Commission on Human Rights document E/CN.4/2002/92.

4.3. Visits to States

The third means by which the Working Group has contributed to minority protection is through country visits, of which only one has been undertaken to date. The Working Group suggested it concentrate on theoretical reflection and practical implementation of the principles contained in the United Nations Declaration. In this regard, more concrete and practical issues should be addressed, as it was most important to enter into dialogue with States to discuss the status of minorities, challenges faced in ensuring the full respect of the rights of minorities, learn from measures adopted to accommodate minorities within society, and facilitate understanding between and among minorities and with the Government concerned. At its fourth session, the Working Group thus decided that its members would be available to undertake visits, at the invitation of the Government concerned and on condition that funding was available, to investigate positive and negative practices regarding minorities, in accordance with the United Nations Declaration. On that basis, the Working Group could make concrete proposals in order to better implement the principles contained in the Declaration. This decision was reiterated at its fifth session.[32]

At the invitation of the Government of Mauritius, the Working Group visited Mauritius from 7 to 10 September 2001. The objectives of the visit were to draw lessons from the experiences of Mauritius with regard to good practices of group accommodation in a multicultural society and explore the various measures adopted to ensure minority protection. During the visit, the Working Group discussed: constitutional provisions protecting minorities; the parliament and the electoral system which provides for guaranteed minority seats to achieve communal balance given the composition of the ethnic and linguistic groups of the country; the rights of minorities to use their language in private and in public, as well as to learn, and have instruction in, their mother tongue; and access of minorities to education, especially of the Creole community. The Working Group also enquired about integrative and autonomous approaches to minority protection, in particular in Rodrigues Island and the Chagos Archipelago.

On the basis of their findings, the Working Group made a series of recommendations to the Government of Mauritius with regard to the effective implementation of the United Nations Declaration, including through education, especially the inclusion of the history and culture of all communities in

[32] Report of the Working Group on Minorities on its fifth session, UN. doc. E/CN.4/Sub.2/1999/21, para. 91, p. 27.

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school curricula and textbooks, the monitoring of minority rights by the National Commission on Human Rights, and the provision of training in the area of minority rights. The conclusions and recommendations are included in the report on the visit to Mauritius.[33]

4.4. Commentary to the Declaration

The fourth means to clarify the content and scope of the principles of the Declaration was the elaboration of a Commentary to the Declaration. At its second and third sessions, the Working Group discussed the contribution which a commentary to the United Nations Declaration could make to the promotion and protection of the rights of minorities. It was suggested that the Working Group elaborate interpretative comments on individual articles contained in the United Nations Declaration, similar to those adopted by the Human Rights Committee regarding the articles in the International Covenant on Civil and Political Rights. Such explanatory statements and guidelines would provide a better understanding of the content of, and limits to, the rights of minorities. It was therefore decided at its third session that Mr. Eide prepare an initial draft of a Commentary detailing the elements which were understood to contribute to the effective implementation of each of the articles in the United Nations Declaration.

Further to the recommendation of the Working Group at its third session, Mr. Eide presented his working paper entitled "Commentary to the Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities"[34] at the fourth session. Comments and suggestions were made regarding the text of the Commentary and, in order to obtain a wider consensus and increase the legitimacy of the Commentary, the Working Group recommended that the text be submitted to Governments, agencies and non-governmental organisations for additional comments and suggestions as a means to continue the discussion, at its fifth session, on the content and scope of the principles contained in the Declaration.

At its fifth session, Mr. Eide presented observations to the Commentary, prepared by the Secretariat, on the basis of comments received from Governments, specialised agencies, non-governmental organisations and ex-

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[33] *Examining possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and Governments*, Report on the visit by the Working Group to Mauritius, UN doc. E/CN.4/Sub.2/AC.5/2002/2.

[34] *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, submitted by Mr. Eide on its third session, UN doc. E/CN.4/Sub.2/AC.5/1998/WP.1.

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perts.[35] The Working Group requested Mr. Eide to prepare a revised version of the Commentary, taking into account the working papers presented and the comments made, and annexing to the draft a compilation of the observations. The revised draft was submitted to the Working Group at its sixth session for discussion[36] and the final draft was presented at the seventh session of the Working Group.[37]

The Commentary to the Declaration, as prepared by Mr. Eide, is intended to be used as a guide to the understanding and application of the United Nations Declaration. It draws on working papers submitted to the Working Group, written and oral submissions during its sessions and additional comments and suggestions by Governments, international and non-governmental organisations and experts, and thereby reflects wide consensus. The text of the Commentary provides an overview of the purposes of the Declaration, including in advancing human rights and the principles of the Charter of the United Nations and a detailed interpretation of, and comments on, the title of the Declaration and the content and scope of each of the individual articles contained therein. The final text of the Commentary was published in the "United Nations Guide on Minorities" which was widely disseminated at the World Conference against Racism in 2001,[38] and sent to Governments, agencies and NGOs for use and reference.

5. Contribution of the Working Group to the protection of minority rights

It is difficult to provide a comprehensive evaluation of the contribution of the Working Group to the protection of minority rights as there are so many factors which influence Governments and the international community to effectively address issues of concern to minorities, provide redress for violations of minority rights, or make the necessary changes to remedy or improve situations involving minorities. All too often, changes and improvements are not fuelled by one factor alone, rather they result from a combination of factors of which the Working Group and its impact on the protection

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35 *Observations to the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN doc. E/CN.4/Sub.2/AC.5/1999/WP.1.

36 *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, submitted by Mr. Eide, on its sixth session, UN doc. E/CN.4/Sub.2/AC.5/2000/WP.1.

37 *Final text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, submitted by Mr. Eide, on its seventh session, UN doc. E/CN.4/Sub.2/AC.5/2001/WP.1.

38 *United Nations Guide for Minorities*, United Nations, Office of the High Commissioner for Human Rights, 2001.

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of minority rights is but one. Nevertheless, the following four factors have been identified as a contribution by the Working Group to the enhanced protection of minority rights.

Firstly, the very fact that the Working Group has been established, with a mandate to review the promotion and practical realization of the Declaration, has led to greater awareness raising, not only of the Declaration but also of a better understanding of the content and scope of minority rights, as contained in the Declaration and other international human rights instruments. This has generated discussions among the members and observers present during the Working Group sessions, and has created new links between institutions and academics as well as with representatives of minority groups. The wide participation at the Working Group which is gradually increasing from one year to the next is testimony to the interest generated by the Working Group as a forum for discussion and dialogue, at times between partners who would, in usual circumstances, not necessarily meet. To this end, the Working Group sessions have led to the development of networks between partners such as academics on the one hand and institutions and NGOs on the other, thereby reducing the barriers between disciplines and functions. Through the organisation of the expert seminars, the activities of various observers in their country in between the sessions of the Working Group, and the conclusions and recommendations adopted at each of its sessions, the Working Group has become a focal point on minority issues both within and beyond the United Nations human rights system. Its recommendations have called upon Governments, agencies, treaty bodies, the Special Rapporteurs, NGOs and academics to take the issue of minority protection forward, to promote a better understanding of minority rights, and to discuss the ways and means of effectively implementing these at national level. In sum, the Working Group has placed discussions of minority rights considerably higher on the international agenda, than they were before the adoption of the Declaration or the creation of the Working Group, in the early 1990s.

Secondly, the support provided by the Working Group to the activities and work of NGOs and minority representatives have encouraged them to take a much more active role in lobbying their own Governments on greater respect for minority rights. The Minority Rights Group for example has used the occasion of the Working Group to organise a training session, just prior to the session, for minority representatives especially from Latin America, Africa, Asia and Central and Eastern Europe to learn more about minority rights as contained in the Declaration and other human rights instruments as well as the mechanisms by which these could be implemented in their home country. One representative of an African NGO, on return in her own country, disseminated the Declaration among parliamentarians, many of whom were unaware of the existence of such a United Nations document. Other

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NGOs have organised further training sessions on minority rights targeted at NGOs working on human rights, as well as the general public, thereby increasing the awareness of minority rights and the need for their effective implementation. Other NGOs are using the Commentary to the Declaration as a basis for further training seminars on minority rights at national level.

Thirdly, the creation of the Working Group and the place it has provided, through its working methods and flexible approach to wide participation, including by representatives of minority groups working at the local level, has provided an opportunity for so many to address their grievances to an international body, and to provide first-hand information on situations which affect them directly. Indeed, the Working Group represents the only mechanism within the United Nations system which allows minorities to have direct access to such an international body and to discuss ways by which these situations could be addressed. Participation of minority representatives, in person, at the sessions of the Working Group has not only allowed them to meet other NGO and minority representatives, but also representatives of international organisations, specialised agencies and especially Government officials whom they would most probably never have the opportunity to meet in other circumstances.

An example can be provided regarding contacts made by a representative of the Dalit Women in India with the representative of the Indian Government, or a member of the Arab minority in Israel with the Israeli Government. There are thus many instances whereby informal contacts have been made between minorities and Governments concerning the respect of minority rights at country level, and proposals have been made by the Government concerned to improve the situation. In other instances, minorities have made direct contact with the representatives of specialised agencies in their country, including UNESCO, UNICEF and the WHO, further to initial contacts made during the sessions of the Working Group. In addition, the Working Group has enabled minorities from all over the world to meet, share experiences, discuss common interests and challenges, and seek support for their cause, thereby bringing home the fact that they are not alone and isolated.

Fourthly, the Working Group would not have made the impact it has had on the increased protection of minority rights had it not been for its Chairman-Rapporteur, Mr. Eide. He has pioneered work on minority rights and provided academic insight on issues of concern to minorities through his many publications and in his capacity as Chairman of the Working Group. His commitment to minority rights, his dedication to creating a more just legal and world order, and his tireless intellectual contributions to the Working Group have encouraged minority representatives to continue their struggle for the respect of minority rights, supported NGOs in implementing the

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recommendations of the Working Group in their countries, and have coaxed Governments to incite positive change. Mr. Eide's determination to promote plural societies, to seek ways to accommodate all groups within these societies, and to incite Governments to promote and protect minority rights as a means of ensuring peace and stability within and beyond State borders as well as their territorial integrity, has been untiring. We must all, individuals, academics, experts, representatives of minority groups, agencies, and Governments continue to build on the successes of the Working Group, and draw upon the perseverance and commitment of Mr. Eide to make this a better world.

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Part Four:

Other Human Rights Issues

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XXIII

"Political" and "legal" control mechanisms revisited

Theo van Boven*

1. Introduction

Over a long period of time, for some thirty years, I have the pleasure and the privilege of knowing Asbjørn Eide and being closely associated with him in various ways, in particular in the context of the United Nations. Asbjørn's deep understanding and commitment to the cause of human rights, his manifold contributions to human rights conceptualisation and implementation and his leadership role in such key areas as the rights of minorities, economic and social rights and the elimination of racial discrimination have made him a widely recognised and appreciated personality in the international human rights community. Many of Asbjørn's contributions were made in his capacity as a long-standing member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights (formerly called the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities). For the purpose of this publication in honour of Asbjørn, I chose to review and revisit a topic that I was invited to discuss at a symposium held on 21-23 June 1988 at Lysebu, near Oslo, under the auspices of the Norwegian Nobel Institute, to mark the fortieth anniversary of the Universal Declaration of Human Rights. The arrangements for the symposium were made by Asbjørn Eide as Director of the Norwegian Institute of Human Rights and Bernt Hagtvet who headed the Chr. Michelsen Institute in Bergen. The proceedings of the symposium were edited and published by Eide and Hagtvet under the title *Human Rights in Perspective; A Global Assessment.*[1] This publication includes a paper presented by me in 1988, entitled

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1 Asbjørn Eide and Bernt Hagtvet (eds.), *Human Rights in Perspective; A Global Assessment.*, Blackwell Publishers, Oxford (1992).

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"Political" and "Legal" Control Mechanisms: Their Competition and Coexistence.[2]

I was most fortunate that Torkel Opsahl, another outstanding Norwegian human rights personality who served for many years with great distinction, vision and conviction, as member of the European Commission on Human Rights and the UN Human Rights Committee, had agreed to be the commentator of my presentation. His comments are also included in the proceedings of the symposium.[3] Torkel Opsahl's untimely passing away in 1993 is still deeply regretted by many.

Some fifteen years have passed since the symposium was held. The perspectives of 1988 still provide an interesting framework for today's assessments. But at the same time views and expectations put forward in 1988 have been overtaken by developments. The thrust of this paper is to review and reappraise the issues discussed at the time by Torkel Opsahl and myself.

2. Realities and perspectives towards the end of the Cold War

The 1988 Nobel symposium was held in a period of the lessening of tensions between East and West. *Glasnost* and *perestroika* were proclaimed in the then USSR as ingredients of a more humane and human rights oriented society. Remarkable results were achieved in the Helsinki process of the Conference on Security and Cooperation in Europe (CSCE), in particular in the area of the rights of ethnic, cultural, linguistic, religious and national minorities; an area which bears Asbjørn Eide's imprint over a long period of time. Yet it could not be foreseen in 1988 that the political system prevailing in the USSR would collapse so soon and create a new situation between East and West. This development had a major impact on the international system for the promotion and protection of human rights.

An important forum that shapes this international human rights system is of course the United Nations. The process of standard-setting had gone a long way and, different from what happened in the framework of other important international organisations and institutions such as the International Labour Organisation and the Council of Europe bringing new human rights standards under one single supervisory system, United Nations human rights treaties created each their own separate supervisory body.[4] Thus, a multitude of treaty bodies, each having their own autonomous status but equally with

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2 *Ibid.*, pp. 36-60, reprinted in F. Coomans, C. Flinterman, F. Grünfeld, I. Westendorp, J. Willems (eds.), *Human Rights from Exclusion to Inclusion; Principles and Practice*, pp. 49-72, Kluwer, The Hague (2000).

3 *Human Rights in Perspective*, *supra*, note 1, pp. 60-65.

4 In this paper the terms "supervision", "control" and "monitoring" are used interchangeably, although it may be possible to make fine distinctions between these terms, see Opsahl in *op. cit.*, *supra*, note 1, p. 61.

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overlapping responsibilities, embarked upon the monitoring of: the elimination of racial discrimination (CERD), civil and political rights (HRC), economic, social and cultural rights (CESCR), discrimination against women (CEDAW), prohibition of torture (CAT), and as from 1990, the rights of the child (CRC).

A parallel development was the setting up by the UN Commission on Human Rights of special mechanisms to investigate into human rights situations that appeared to reveal a consistent pattern of gross violations of human rights, starting in 1967 with the apartheid system in South Africa and in later years covering situations in Chile, El Salvador, Guatemala, Bolivia, Poland, Equatorial Guinea, Afghanistan, Iran. This approach focussing on situations in countries, the "country" approach, was supplemented, as from 1980, by the "thematic" approach when the Commission set up a working group on forced disappearances so as to monitor on a world-wide basis serious human rights practices of widespread international concern. At the time of the Nobel symposium, mandates of this nature were in operation relating to forced disappearances; extra judicial, summary or arbitrary executions; torture; religious intolerance; and mercenaries.

When I discussed in 1988 the competition and coexistence of "political" and "legal" control mechanisms, I had particularly in mind the bodies set up under human rights treaties, as legal panels on the one hand, and the special "country" and "thematic" mechanisms established by the Commission on Human Rights, as political mechanisms on the other hand. In retrospect, it was somewhat unfortunate to have used in my presentation at that time the notions "legal" and "political", because while these terms may adequately qualify the source that created these respective control mechanisms, they are misleading to describe their functioning. It is correct to qualify the UN Commission on Human Rights, an organ consisting of State representatives as decision-makers, as a "political" body. But this does not imply that the mandates created by the Commission and entrusted to individual experts are also "political" in the same sense. On the contrary, the mandate holders are expected to carry out their work as independent experts.[5] Moreover, the treaty bodies established under legal instruments carry out monitoring functions that are not strictly "legal". Their recommendations are not so much adjudicative but rather policy-oriented. Therefore, the currently made distinction between "treaty-based" and "charter-based" mechanisms is less ambiguous.

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5 The legal status of experts carrying out UN human rights mandates is that of "experts on mission" in the meaning of the 1946 Convention on Privileges and Immunities of the United Nations. See Advisory Opinion of the International Court of Justice on Difference Relating to the Immunity From Legal Process of a Special Rapporteur of the UN Commission on Human Rights, issued on 29 April 1999.

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In 1988 I showed on my part a certain preference for charter-based mechanisms, while Torkel Opsahl pleaded the cause of treaty-based human rights organs. He suggested that our respective positions, which were not really divergent but revealed a different emphasis as regards long-term and short-term perspectives, might be attributed to the different roles each of us had been playing in the international human rights system. As stated above, Torkel served for many years as member of the European Commission on Human Rights and the Human Rights Committee. It was only natural that he identified himself, albeit not in a complacent manner, with the potentials and accomplishments of these treaty bodies. On my part, as a former Dutch representative on the UN Commission on Human Rights and a former Director of the UN Division of Human Rights, I had been closely associated with the creation and functioning of special charter-based mechanisms (both "country" and "thematic" mechanisms relating respectively to Chile and disappeared persons) which may explain my own identification with these methods of dealing with gross and systematic violations of human rights. Without any doubt, both Torkel and myself were in full agreement that the different methods of human rights monitoring do not contradict themselves but are complementary in nature.

3. Strengths and weaknesses of charter-based and treaty-based mechanisms

What were the respective strengths and weaknesses of the charter-based and the treaty-based mechanisms in the perception and experience of the discussants in 1988? All the arguments put forward at that time will not be reviewed in detail here – interested readers may consult the proceedings of the symposium[6] – they will only be referred to in the present context insofar as they serve the purpose for a current reassessment.

It should not be forgotten that UN treaty bodies, and notably the Human Rights Committee dealing with potentially sensitive East-West controversies, initially showed a great deal of caution and restraint. The membership of these bodies was highly attached to the wish to preserve a consensus. In retrospect this was a prudent course and a condition to keep the collegial character of these bodies intact. The price to be paid was, given the fact that Cold War tensions were also tangible in bodies composed of independent experts, a low common denominator approach. Under these conditions the examination of the periodic country reports did not go beyond an exchange of views between government representatives and individual experts and did not result in the adoption of concluding opinions by the monitoring body as such. This inconclusive *modus procedendi* was convenient to many States

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6 See *Human Rights in Perspective*, *op. cit.*, *supra*, note 1, pp. 36-60; 60-65.

Parties who saw themselves released from being subjected to stern opinions. Close observers wondered however, whether the whole procedure was not too much of a window-dressing exercise. Admittedly, the reporting procedure is not a means to condemn but a method to assess, to advise and, possibly, to correct. However, if the information to be examined stems mainly from official Government sources – as it used to be at the time – and the examination is not leading to any substantive conclusions, there is a risk that such supervisory procedures would lack any point and turn into a *farce*. On this score the participants in the Nobel symposium shared a common wish that the treaty bodies would strengthen their role and capacity.

A more favourable mark was given to the handling of individual complaints, received under the (first) Optional Protocol to the International Covenant on Civil and Political Rights. It was clear, however, that this procedure applied only to States – limited in number at that time – that had accepted this optional facility. But Torkel Opsahl was certainly correct when he emphasized certain positive characteristics of treaty-based control mechanisms: they are based on clearly defined obligations; they are by nature disposed to develop a consistent practice; they are suitable actors in a long-term human rights strategy and they are less afflicted with a double standard or selective attitude than political bodies. The lack of public attention for and of public appeal of "legal" mechanisms as distinct from "political" UN organs was remarkably demonstrated by Torkel's observation that "whoever sits inside the legal control mechanism feels like a prisoner in the basement of the political organisation, as the Human Rights Committee did in the UN Headquarters".[7]

In that period of time – I am still referring to the late 1980s – the perspectives of "charter-based" control mechanisms were, in my perception, novel and promising. It is true that circumstances leading to the creation of such mechanisms had in the past been very special; in fact, the situations in Southern Africa and in the territories occupied by Israel were determined by political UN organs as a threat to international peace and security and therefore as matters of international concern. But as from the mid 1970s and the early 1980s, other situations starting with the human rights situation in Chile under the military dictatorship led the Commission on Human Rights to progressively establish special fact-finding mechanisms under the inherent powers of the UN Charter and pertinent resolutions of the Commission's parent body, the Economic and Social Council. As stated above, these charter-based mechanisms, composed of individual experts and entrusted with investigative mandates to deal with situations revealing a consistent pattern of gross violations of human rights, focussed initially on country situations

[7] See *Human Rights in Perspective*, *op. cit.*, *supra*, note 1, at p. 63.

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but were gradually complemented by thematic mandates to deal with particularly disturbing practices occurring in many countries, notably forced disappearances, torture, summary and arbitrary executions.

Although decision-making resulting in the creation or, as the case may be, in the discontinuation of these special mandates, was and still is part of a political process with inherent shortcomings, these special tools of the Commission on Human Rights held new promises and potentials. The terms of reference allow the experts to use operational means and methods that bring them closer to realities, as reflected in reports to the Commission on Human Rights and to the UN General Assembly. They carry out country visits and receive and consider complaints from victims of human rights violations and intervene with Governments on their behalf, including the dispatch of urgent appeals in cases when life or integrity of the person is in serious and imminent danger. They act on the basis of information received from a variety of sources, including national and international non-governmental organisations with close and valid contacts with persons and institutions in the field.

The question arose whether, with the advancement of the work of treaty bodies, the need for charter-based mechanisms was decreasing. For instance, would the entry into force of and the wider adherence to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the ensuing development of monitoring responsibilities by the Committee against Torture (CAT) make the mandate of the Special Rapporteur on Torture of the Commission on Human Rights redundant? The first Special Rapporteur on Torture, Peter Kooijmans, argued convincingly that there remained good reasons for the coexistence of the two types of control mechanisms. The distinct role and the added value of the Special Rapporteur were in particular his competence to seek on an urgent basis clarification from Governments, in particular with respect to individual cases, to relate with non-governmental organisations, to visit countries (with the consent of Governments concerned), and to present policy-oriented conclusions and recommendations of a general nature to the Commission on Human Rights. Moreover, the charter-based procedures relate to the whole membership of the United Nations while the treaty bodies can only carry out their tasks in relation to the States Parties to the respective human rights treaties.[8]

At the end of the day there was no disagreement between Torkel Opsahl and myself that treaty-based and charter-based procedures and mechanisms, although different in nature, scope, methods of work and legal basis, were complementary rather than competitive. However, our appreciation of and attachment to the two types of control mechanisms were not fully identical.

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[8] See *Human Rights in Perspective, op. cit., supra*, note 1, at p. 55.

4. Time for reassessment

This book published in honour of Asbjørn Eide provides a welcome occasion to reassess, some fifteen years later, earlier views and perceptions. One factor remains unchanged, namely the yardstick by which we measure the utility of human rights policies and practices. A decisive criterion is always to what extent policies and procedures serve respect for human rights and human dignity and the well-being of people belonging to present and future generations. At the same time I cannot ignore some other factors and developments, subjective and objective ones, which influence my present views and perceptions. In fact, among the subjective factors are eight years of experience as a member of a treaty body, the Committee on the Elimination of Racial Discrimination (CERD), and a more recent experience as a charter-based mandate holder, Special Rapporteur on Torture of the UN Commission on Human Rights. Moreover, a series of developments took place in the post-Cold War era with important effects on the international human rights system. Some of these developments will be briefly recalled.

5. The post-Cold War climate and the Vienna Conference

In the euphoria that characterized the international climate after the collapse of the Berlin Wall and the ensuing relaxation of relations between East and West, the idea took shape of holding a second World Conference on Human Rights, twenty-five years after the first World Conference on Human Rights had met in Tehran. However, when the second World Conference actually took place in Vienna in June 1993, the international spectrum was not as bright anymore as it had appeared a few years earlier. Armed conflict had broken out in Yugoslavia entailing strong ethnic divisions and ethnic violence and resulting in "ethnic cleansing", massive violations of human rights and grave breaches of international humanitarian law. The Vienna Conference adopted a Declaration and Programme of Action which did not open up magnificent new vistas but which did have a considerable impact on the long-term development of the UN human rights programme.[9]

Thus, the Vienna Programme of Action gave a decisive impetus to the revival of the long-standing but controversial proposition of establishing a UN High Commissioner for Human Rights. The Vienna documents spoke in strong terms about violations of human rights during armed conflicts, such as the systematic rape of women, "ethnic cleansing", genocidal practices and the issue of the impunity of perpetrators. They contributed to the develop-

[9] Vienna Declaration and Programme of Action, adopted on 25 June 1993 (UN doc. A/CONF.15723).

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ment of an international political and moral climate favouring the creation in subsequent years of *ad hoc* criminal tribunals for the former Yugoslavia and for Rwanda and, at a later stage, of the permanent International Criminal Court. It was also thanks to the Vienna Conference, and a well-organised lobby, that the movement for the full participation of women in public and social life and against gender-based violence and all forms of sexual harassment and exploitation received much impetus. The movement resulted in a host of programmatic and organisational ventures, including the creation of a Special Rapporteur on violence against women. Vienna emphasized correctly the importance of national strategies for the promotion and protection of human rights, including the work of national institutions and national non-governmental organisations. And it was perhaps not already in Vienna but in later years at Durban, where in September 2001 the UN World Conference Against Racism was held, that the perspective of victims of discrimination received full attention: Africans and people of African descent, Asians and people of Asian descent, indigenous peoples, migrants, refugees and asylum seekers, minorities, Roma and Sinti, victims of trafficking, victims of racial and sexual violence, children and young people, and other victims of multiple forms of discrimination.

The World Conference in Vienna equally paid due attention – and this is particularly relevant for the purpose of our reassessment – to implementation and monitoring methods. It called for greater efficiency and effectiveness of human rights treaty bodies and the various thematic mechanisms and procedures in order to achieve better coordination of the various bodies, mechanisms and procedures. The World Conference underlined the importance of preserving and strengthening the system of (charter-based) special procedures, rapporteurs, representatives, experts and working groups, so as to enable them to carry out their mandates in all countries throughout the world and by providing them with the necessary human and financial resources. The World Conference further recommended that these procedures and mechanisms should harmonise and rationalise their work through periodic meetings. The Conference had no decision-making powers – these are in the hands of the UN policy organs – but it contributed to a process that led human rights policy organs and monitoring bodies to take bolder steps and to strengthen progressively their own procedures and working methods. This process is now about ten years underway and shows elements of progress but also signs of setbacks. Against this background it is opportune to appraise anew the effectiveness of "legal" and "political" control mechanisms.

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6. Human rights treaty monitoring in progress[10]

As a positive aspect of the reporting system, treaty bodies started in the early 1990s to introduce and to consolidate the practice to adopt, after the examination of a country report, concluding observations representing the collective opinion of the committee on the manner a State Party had implemented its obligations under the convention during the period covered by the report. This is major progress compared with the earlier practice which was at best a summing up of observations by individual expert members without having the status and the authority of an opinion of the committee as a whole. Each treaty body may organise and structure its concluding observations in the way it chooses, but all treaty bodies now follow a pattern of reviewing and listing positive developments and issues, mentioning issues of concern and making recommendations. These concluding observations intend to constitute effective homework for the State Party concerned. They are a valuable source of information for other monitoring bodies that deal with the same State Party, and serve as a basis for follow-up control by the treaty body itself. It is still a serious weakness that concluding observations do not receive enough publicity in most of the States Parties and therefore fail to arouse the active interest and attention of national constituents, such as parliaments, the judiciary, national human rights institutions and academic institutions. The role of these national constituents is essential for promoting a domestic dialogue and follow-up of the implications of international human rights instruments as standards of compliance and achievement.

Nevertheless, these domestic components of the treaty monitoring system may be encouraged in as much as treaty bodies are making use of information provided by national constituents. On this score another important point of progress should be noted in comparison with the functioning of the treaty reporting system in earlier days. In the past some expert members, in particular nationals of socialist countries of Eastern Europe, adamantly opposed that treaty bodies would make use, in the examination of country reports, of information originating from non-governmental sources. In fact, they argued that this was not provided for in the treaties themselves and that States Parties had accepted the terms of treaties but not what went beyond these terms. Other expert members felt that the whole exercise became futile if they had to rely exclusively on information submitted by governments who were naturally inclined not to mention anything that was unfavourable and critical. These members did make use of other sources of information, but in an indirect and covert manner which made the exercise shadowy and

[10] For a review of developments and challenges see Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press (2000).

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not transparent. Since the early 1990s all treaty bodies progressively lifted the ban on the use of non-governmental sources of information. Members now refer to them openly, mentioning their sources by name, which make sources verifiable and contribute to a more comprehensive and realistic assessment of the human rights conditions in States Parties.

It is also of considerable interest that treaty bodies are moving away from their splendid isolation – illustrated earlier by Torkel Opsahl's reference to the basement location – by following the examples of the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Rights of the Child (CRC) – to hold, with the participation of experts of other UN mechanisms, as well as non-governmental and academic experts, thematic discussions on issues of large public interest which are relevant to the respective human rights treaties. CESCR and CRC could do so under the consultative status arrangements of ECOSOC or under the terms of the Convention on the Rights of the Child (article 45), but other treaty bodies now start to follow suit even without explicit treaty provisions to that effect. Thus, the Committee on the Elimination of Racial Discrimination (CERD) organised in recent years widely attended thematic discussions, attracting broad public interest on the issue of persistent discrimination against Roma and on the question of descent-based discrimination which brought to light the inherently discriminatory nature of caste and analogous systems of inherited status.[11]

The consideration of communications (individual petitions) – an optional procedure provided for under most of the international human rights treaties or protocols attached thereto; more recently such a protocol also entered into force in relation to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) – has become an increasingly significant feature for rendering relief and redress to victims and for the development and interpretation of international human rights law. The Human Rights Committee's handling of communications under the first Optional Protocol was in the UN system a pioneering activity and continues to gain in strength and numbers, in particular since the Committee introduced in 1990 a procedure for monitoring the follow-up of its views. Equally, CAT and CERD are increasingly engaged in dealing with communications, notably CAT with respect to cases of imminent *refoulement* of persons to States where such persons would seriously be at risk of being subjected to torture. In urgent cases where irreparable damage to victims is threatening, such as in capital punishment cases or in extradition or expulsion cases, treaty bodies more frequently resort to indication of interim measures.

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[11] See respectively CERD General Recommendation XXVII on Discrimination against Roma and General Recommendation XXIX on Descent-Based Discrimination.

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All these developments, albeit still modest in their global impact on the human rights situation in the world, have made the treaty-based approach more meaningful and have strengthened the international human rights supervisory system, in particular if the long-term perspectives are taken into account. In the early aftermath of the Cold War, under the impression of the crisis and the armed conflict in the former Yugoslavia, some treaty bodies envisaged means and methods of how to cope on an urgent basis with massive and gross violations of human rights. Thus, CERD was deeply aware of the racial and ethnic dimensions of conflict situations in the world causing a high toll of human life and human suffering. In 1993 the Committee adopted a working document under the title *Prevention of racial discrimination, including early-warning and urgent procedures*, as a guide for its future work concerning possible measures to prevent and more effectively respond to violations of the Convention.[12] This new approach by CERD, in which the Committee invested much time and efforts, did have in some instances an impact, but gradually turned into desuetude. In recent years no action was taken under this agenda item anymore. It is not the place here to analyse the reasons for this retreat. It appears, however, that treaty bodies do not feel at ease to become part of a political process needed for coping with urgent situations. As Torkel Opsahl observed in 1988, criticisms of selectivity and of arbitrariness may harm the reputation and standing of "legal" bodies. Lack of resources and operational tools is also an obstacle for treaty bodies to further move in this direction. Therefore, other strategies and other means and methods are called for to tackle urgencies and emergencies. It is against this background that we have to look again into the role of the charter-based mandates. These charter-based mechanisms have indeed developed over the last fifteen years into a prominent part of the UN human rights programme.

7. The charter-based mechanisms; proliferation but also progress?

While in 1988 a limited number of charter-based mandates were in existence, at the time of this writing some thirty-five of these mandates are in operation, the large majority being thematic mechanisms. Their number has not only increased drastically but also their focus became broader. The initial focus, based on ECOSOC resolution 1235 (XLII) of 6 June 1967, granted the Commission on Human Rights and its Sub-Commission the authority "to examine information relevant to gross violations of human rights and fundamental freedoms" and to "make a thorough study of situations which re-

[12] See Theo van Boven, "Prevention, Early-warning and Urgent Procedures; a New Approach by the Committee on the Elimination of Racial Discrimination", in Erik Denters and Nico Schrijver (eds.), *Reflection on International Law from the Low Countries in Honour of Paul de Waart* (1998), pp. 165-182.

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veal a consistent pattern of gross violations of human rights". All the country mandates and the initial thematic mandates created by the Commission under the authority of the Economic and Social Council, were meant to cope with situations, policies and practices of gross violations of human rights. Their methods of work, as approved by the Commission, were geared towards responding to the needs of the violations approach, in particular by taking up allegations, making urgent appeals to Governments and rendering country visits. These methods of work continue to be applied by mandate holders and have been strengthened and consolidated. Thus, the creation of a quick response desk within the Office of the High Commissioner for Human Rights, servicing thematic mandates, significantly added to the effectiveness of the urgent appeals procedure. Also the practice of joint actions and joint missions by mandate holders has developed over the years and made the charter-based mechanisms more efficient.

As stated above, the creation of new mandates and the continuation or discontinuation of existing mandates are part of the political decision-making process in the Commission on Human Rights. The Commission is now less disposed to create country mandates than in earlier years. In fact, several of these mandates have recently been discontinued by the Commission, such as those relating to Rwanda, Equatorial Guinea and Iran, although it may be doubted whether the human rights situation in these countries warranted the bringing of these mandates to an end. A noteworthy development on the thematic side is the moving away from gross and consistent patterns of violations of human rights and the creation of new mandates which focus on structural issues. These issues certainly constitute actual and important human rights concerns but by their nature they lend themselves better for study and analysis than for investigation into facts and protection and relief of victims. For instance, new thematic mandates relating to such issues as the effects of structural adjustments policies and foreign debt, the right to development, extreme poverty, the highest standards of physical and mental health, should rather belong to the research and study domain of the Sub-Commission on the Promotion and Protection of Human Rights than to the work programme of the Commission itself. As a result the thematic approach to human rights violations risks to become diluted and the notion of the accountability of Governments, which is at the heart of human rights promotion and protection strategies, tends to lose its focus. These critical comments do not apply to all thematic mechanisms created in more recent times insofar as these are people-oriented and are meant to protect and assist of vulnerable persons. I am referring in particular to the mandates relating to violence against women and on human rights defenders.

Due to the proliferation of charter-based mechanisms, reaching the number of about thirty-five, the Commission on Human Rights is not in a

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position to give substantive attention to the large numbers of reports submitted by all the mandate holders who are functioning under its authority. Very little time is made available for the rapporteurs to orally present their reports and a structured discussion or dialogue is not taking place, leaving the mandate holders with little feedback. Moreover, as a result of the general wish to limit and control documentation, certain thematic rapporteurs, dealing with series of cases and allegations of violations of human rights, risk to see their work seriously impeded by administrative instructions. The overall picture is perhaps less gloomy than described here. Individual governments increasingly tend to be ready to cooperate with Special Rapporteurs.[13] Further, the list of countries having extended a standing invitation to the thematic special procedures of the UN Commission on Human Rights is growing. As of 30 July 2002, 39 countries have issued such standing invitation.[14]

8. Concluding remarks

This paper did not review the full spectrum of developments relating to "legal" and "political" human rights control mechanisms. Little or no attention was given to the interaction between these mechanisms in terms of mutual information and coordination which has definitely improved over the past years. Little or nothing has been said either about the limited availability of human and financial resources which frustrates the effectiveness of these mechanisms. The efforts of the High Commissioner for Human Rights and of the High Commissioner's Office in support of the control mechanisms should have been highlighted. The role of non-governmental organisations and groups would deserve more attention. Moreover, my own experience as a member of CERD and as a Special Rapporteur of the Commission on Human Rights on Torture have made me keenly aware of the limits of my knowledge of substantive activities of other treaty bodies and many other charter-based mechanisms. Therefore, my views are based on experiences which are partial but yet enable me to look afresh at the discussion between Torkel Opsahl and myself in 1988.

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[13] See Report of the Special Rapporteur on Torture, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62, UN doc. E/CN.4/2002/76, para. 10, containing information reviewed by the Special Rapporteur with respect to various countries.

[14] These countries are: Austria, Belgium, Brazil, Bulgaria, Canada, Costa Rica, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Georgia, Greece, Guatemala, Hungary, Iceland, Ireland, Islamic Republic of Iran, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, Norway, Peru, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland.

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It is not easy to assess the effectiveness of the international human rights supervisory system. Torkel referred at the time to the "choice between justice and efficiency" when he commented on the role of "legal" and "political" control mechanisms. He also asked to have an open eye for long-term effects of the human rights treaty system and said that we should not be too preoccupied with allegations of human rights violations only. On my part I was in particular motivated by the concern of how to cope with massive and gross violations, wherever they actually occur. This concern was in my view more effectively responded to by charter-based mechanisms than by the treaty bodies. Since then the overall picture has developed. Improvements in the functioning of the treaty bodies have made their supervisory role more effective and more meaningful. In a normative sense and in operational terms the treaty bodies have substantially strengthened the principles of the accountability of Governments and the responsibility of States. These principles belong to the core of the international human rights promotion and protection system. More efforts are, however, needed to monitor the follow-up of treaty bodies' views and recommendations at national levels. In this respect the holding in August 2002 of a first pilot workshop on follow-up to concluding observations of the Human Rights Committee in Ecuador was good news.[15] On the negative side of the balance sheet we cannot ignore the failure of a considerable number of States Parties to human rights treaties to fulfil their reporting obligations, thereby violating their treaty commitments. This structural deficiency is unacceptable and seriously undermines the duty of cooperation and the principle of accountability.

It remains true that the international treaty monitoring system by its nature and functioning lacks the capacity to deal effectively with massive and gross violations of human rights. No doubt, this problem is the most sensitive and difficult aspect of the national and international human rights protection system. International public opinion is inclined, and understandably so, to judge this system on its achievements or failures to cope with serious violations of human rights. Here the charter-based system, ranging from the Security Council, the General Assembly, the Secretary-General, the High Commissioner for Human Rights, the Commission on Human Rights and the Commission's Special Rapporteurs, has more potentials than the treaty system. But the impression is prevalent that, taken as a whole, failures and shortcomings are more visible than successes. In the present review and appraisal of charter bodies the essentially "political" organs of the United Nations remained outside the spotlight. The focus was on mandates established by the Commission on Human Rights and entrusted to independent experts such as special rapporteurs, working groups etc. Their capacity to deal with

[15] United Nations Press Release, Geneva, 22 August 2002.

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violations as well as with causes and effects, the sending of urgent appeals and visits to countries, can make a difference and sometimes do make a difference to domestic human rights defenders and to victims of violations. Their actions assume the accountability of Governments and the cooperation of national authorities. In this respect there is much room for improvement and the lack of adequate resources adversely affects their operations, in particular the follow-up of recommendations made. Moreover, proliferation of these mandates to unmanageable proportions and the absence of a focussed and well-structured debate in the Commission on Human Rights become increasingly problematic. Nevertheless, the charter-based mechanisms continue to be essential actors in the international human rights monitoring and protection system. What looked promising in earlier days to the human rights community has come to fruition, but realities still remain below projections and expectations.

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XXIV

Citizenship and human rights: some thoughts on a complex relationship

Nils A. Butenschøn*

1. Introduction

The central question that I shall discuss in this chapter – not least inspired by a recent work by Asbjørn Eide[1] – is the relationship between human rights and citizenship as codes of rights, with a view to the changing role of the state and state sovereignty that has been in focus since the end of the Cold War. The political and academic discourse on citizenship has intensified in this period[2] because some of the basic features of state authority and sovereignty have been challenged: the empirical nature of state sovereignty has been questioned because strong economic actors increasingly dominate world economic transactions (globalisation) and leave states to follow their lead in order to attract investments. The European Union, as the most advanced regional organisation globally, has taken over vital decision-making functions from individual member states and continues to develop new institutions that point towards a possible future European super-state. Furthermore, with the disintegration of the bi-polar structure of the international system, whereby rigorous security regimes (particularly in Eastern Europe) contributed to keep domestic opposition under control, ethno-political tensions and conflicts have resurfaced and threatened effective state sovereignty from within.

In addition, as a consequence of both globalisation and ethnic conflicts, migration has increased dramatically – mostly from the poor to the rich

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1 See Asbjørn Eide, "Citizenship and International Human Rights Law. Status, Evolution and Challenges" in Butenschøn, N.A., Davis, U. and Hassassian, M. (eds.), *Citizenship and the State in the Middle East. Approaches and Applications*, Syracuse, New York: Syracuse University Press (2000).

2 A typical sign that a new research interest is gaining ground is the launching of new specialised journals. In 1997 the Journal of Citizenship Studies emerged with the well-known sociologist Bryan S. Turner as chief editor. For a rich discussion of recent developments in the fields of social history and social sciences, see Charles Tilly (ed.), "Citizenship, Identity and Social History", 40 *International Review of Social History* (1995), Supplement 3.

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world. These movements of people have also challenged existing conceptions in Western Europe of what it means to be "French", "British" or "Danish" etc., and triggered anti-immigrant conservative-nationalistic responses and political instability. Even Norway, which is better off and less affected by many of the developments mentioned above (or maybe *because* of those factors), experiences intense debates on immigration and integration of immigrants, and strong electoral support for populist right-wing policies. Norway – this traditionally very homogenous society – is now in the process of being officially re-defined as a "multicultural society".[3] How will that affect socio-cultural and political identities in that country?

From the perspective of social science these recent developments have given some classical themes in the study of citizenship and political communities a new relevance. To mention but a few: what does it mean to belong to a state? Who are recognized as citizens, what are the criteria of membership in a community of citizens? What rights are citizens entitled to and what are their duties? How should fundamental rights and freedoms be articulated and protected at different levels of decision-making? What does the principle of sovereignty entail today, empirically and normatively? A particularly interesting aspect is how the development of an international human rights system will or should affect, if at all, the answers to these and related questions.

2. Citizenship and human rights treaties as "contractual relationships"

Both *citizenship* and *human rights* refer to the relationship between state authorities and those living under the jurisdiction of the state, and both define rights and obligations that characterise this relationship. But there are important differences in the way such rights and obligations are identified, justified and operationalised, depending on whether "human rights" or "citizenship" forms the conceptual point of departure. Whereas citizenship in the most general terms refers to a contractual relationship (in the broadest possible meaning of *contractual*) between the state and the individual members of the state society, human rights refer to a contractual relationship between states (as expressed in human rights treaties that form part of international law), whereby each State Party accepts certain limitations in its exercise of power and authority *vis-à-vis* those individuals living under its jurisdiction and that their performance in this regard is being monitored by multilateral institutions (*e.g.* the UN Commission on Human Rights). The human rights approach knows no state boundaries when it comes to identifying rights and

[3] The first move in that direction is likely to be a separation between state and church, a proposal which is now being studied by a governmental commission. This will be a significant reform considering the church's important role and symbolic standing in Norway's political history.

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freedoms, as reflected in the name of the *Universal* Declaration of Human Rights; human rights are ascribed to individuals *qua* human beings irrespective of state affiliation, to citizens as well as to non-citizens (with a few exceptions). To the individual state, however, the distinction between citizens and non-citizens is essential, as is normally the case for any membership organisation. This is why questions of citizenship traditionally have been considered to be part of the "internal affairs" of states and consequently outside the legitimate concerns of other states and international law.

But as will be discussed below, the two kinds of "contracts" mentioned here are connected in complex ways, both in theory and practice. As a general starting point we can say that human rights instruments have been introduced in order to establish certain minimum standards for acceptable exercise of state authority and to modify the uneven nature of the relationship between states and individual inhabitants, with a particular historical reference to the atrocities of the Second World War. The United Nations was established in the name of collective security to prevent aggression between states – but its purpose was also to protect fundamental human rights.[4] It is possible to argue that the UN has been more successful with regard to the latter purpose than with regard to the former. Whereas the implementation of a system of collective security as envisaged in the UN Charter (1945) is still in a sorrow state, a relatively broad system of human rights instruments has been set up since the adoption by the UN of the Universal Declaration of Human Rights in 1948. Whether or not this system is effective is naturally debated, particularly with a view to its weak implementing mechanisms. But if we consider that this system is constructed on the basis of consensus by sovereign states (albeit over a long period of time) – and with the explicit purpose of limiting their executive powers through commitments, even legally binding obligations – I think it is an impressive achievement.[5]

3. Conceptions of citizenship

According to Charles Tilly, "[n]o standard definition of citizenship has yet gained scholarly consensus".[6] But what are its core characteristics? Ralf

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4 The second paragraph of the Preamble to the Charter of the UN reads: "- 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".

5 For a thorough discussion of these achievements, see Gudmundur Alfredsson and Asbjørn Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, The Hague: Martinus Nijhoff Publishers (1999). For a study that seeks to explain the growing influence of human rights in the international society, see Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.), *The Power of Human Rights. International Norms and Domestic Change*, Cambridge: Cambridge University Press (1999).

6 Charles Tilly, *op. cit.*, *supra*, note 2, 8.

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Dahrendorf says that "exclusion is the enemy of citizenship"[7] and may be right in a limited sense: in the European tradition citizenship is normally given a normative and prescriptive explanation. Membership in the society of citizens means full and equal membership and active participation in public life for as many as possible, what is often called *democratic* citizenship. In another sense he is utterly wrong: as Rogers Brubaker puts it, "[w]e live in a world of bounded and exclusive citizenries".[8] Citizenship is a membership institution with a basic purpose of drawing the distinction between who should be recognized and who should not be recognized as members of a particular state society. The function of this institution to exclude people is just as important as the function to include. This "janus-faced" nature of citizenship is visible already in the Declaration of the Rights of Man and the Citizens from the French Revolution in 1789, probably the most important historical reference for the development of modern conceptions of both human rights and citizenship. The Declaration accorded everyone under French jurisdiction certain fundamental rights and freedoms ("Rights of Man"), but only the recognized citizens were considered full members of the political society with corresponding political rights ("Rights of Citizens"). Over the next two centuries, as the European societies underwent fundamental structural changes, the institution of citizenship was gradually extended to include more rights and new groups. This was a development towards the realisation of the modern concept of the nation-state, whereby everyone belonging to the nation should be fully integrated into the state; the rights of the citizens should (in principle) overlap with the rights of man (*i.e.*, including the entire population of the country).[9] This development, however, has not made citizenship as an institution qualitatively less exclusive, it only draws the line between excluded and included differently.

What is so special about the state as a membership organisation is that (i) it (theoretically) commands sovereignty both internally (monopoly of coercive power) and externally (non-interference by other states), and (ii) most members do not choose state membership, but acquire it automatically upon birth, either based on the fact that they are born within the jurisdiction of a state (*jus soli*) or automatically given the same citizenship as one or both of their parents (*jus sanguinis*). The wider *meaning* of citizenship, however, what it implies and entails as a "contract" in terms of rights and obligations, identity formation and "civic virtues" varies greatly from country to country,

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7 Ralf Dahrendorf, "The Changing Quality of Citizenship" in Steenbergen, B. v., *The Condition of Citizenship*, London: Sage Publications (1994).

8 Rogers Brubaker, *Citizenship and Nationhood in France and Germany*, Cambridge, Mass.: Harvard University Press (1992).

9 Two classical works that describe this process are T.H. Marshall, *Citizenship and Social Class and Other Essays*, Cambridge: Cambridge University Press (1950) and Reinhard Bendix, *Nation-Building and Citizenship*, Berkeley: University of California Press (1964).

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from region to region. The meaning of citizenship varies just as much as ideas of the *purpose* of state formation (what Richard Hartshorne called "the state idea"[10]) vary around the globe.

The most fundamental aspect of citizenship that can be identified, therefore, is its critical role in defining state communities in terms of who qualifies as members and who do not. This is a common denominator of citizenship despite all its different applications, be it in eighteenth-century Europe or contemporary Middle East. A number of distributing and system formation functions both on the inter-state and intra-state levels follow from this basic defining role. The first and obvious function of citizenship is to distribute people between state territories (thereby contributing in forming "peoples" or "nations"). Secondly, within state societies, citizenship regulates people's access to public resources and institutions, creating legal distinctions ("legal classes") according to a number of possible criteria (age, duration of residence, sex, language, family relations, nationality, ethnic affiliation, religion), some of which might be less acceptable from a human rights point of view. To the extent that such criteria are applied, hierarchies of citizenship statuses are created that may have an important impact on socio-cultural and political identity formation and patterns of group interaction, both co-operative and competitive.

Whereas the whole body of the contemporary international human rights system can be seen as building blocks which stand on one solid foundation (the UDHR), or as elements of a normative-legal order defined by the UDHR as its "constitution", the universal institution of citizenship has no such common normative denominator. Citizenship rights do not refer to any equivalent or unified code or system of rights that has been agreed upon informally or written down, debated and adopted by the international community.

In short, citizenship is a universal phenomenon but should not be understood, by definition, to imply a specific normative model of governance. I therefore argue for a strict "legal-realistic" definition of citizenship. One thing is to discuss the nature of citizenship as a universal phenomenon in the system formation of states. Every state, to the extent that it exercises jurisdiction over a territory with a population, must have certain laws and regulations that identify the status of the inhabitants towards the authorities. Citizenship is a necessary prerequisite for a state in order to exercise its right under international law to internal sovereignty. Another thing is to discuss the normative principles that should guide the *crafting* of citizenship as a contractual relationship, and this is where human rights come into the picture. If we include a specific normative model of citizenship as an element of

[10] Richard Hartshorne, "The Functional Approach in Political Geography" in 40 *Annals: Association of American Geographers* 95-130 (1950).

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its definition – for example that citizenship by definition implies rights and duties of equal and active participation in public life – we would easily have to conclude that the majority of the people in the world do not hold (legitimate) citizenship.

This is an important point because both public and academic discourses on citizenship tend to take for granted that citizenship by definition implies one or the other normative model of state-society relations. An illustration of this approach can be found in The European University Institute's European Forum Project 1995-96 on Citizenship that brought together leading experts on citizenship, both social scientists and legal experts. The first paragraph of the project description reads as follows:

> Citizenship is a social status conferring a set of rights upon individuals. It is also a set of obligations, formal and informal, requiring that individuals take an active interest, become involved and actively participate in the public affairs of some larger political unit, in modern times normally the State, of which they are members ... Citizens are supposed to adopt a point of view that is public and universal, contrasting both with the pursuit of private interests and with the expression of particular identities. Citizenship suggests a degree of impartiality and mutual recognition: that is, the consideration of how public policies and activities affect all other citizens. The status of citizen contrasts with that of subject, implying democracy – that is, some equality of power by citizens in the control of public affairs. And it requires a principle of inclusion and exclusion, specifying who possesses this status and who does not.

This ideal-typical conception of citizenship is quite demanding on the individual citizen: he or she should be interested and take active part in the public affairs of the democratic society from a point of view that take the common good into consideration, not private interests or particular identities. The European debate on citizenship usually takes such an approach, or a variation of this approach, as a point of departure. This must be understood within the context of a long tradition of European state- and nation-building, as mentioned before, and a public and academic debate that reflects this tradition.[11] Within this conceptual framework citizenship is seen as being formed by an evolutionary process where the gradual extension of citizenship rights has been a major mechanism in the democratisation of European societies.

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[11] Naturally, there are several trends within this tradition, reflecting country-specific experiences. The differences between the French and German approaches to nationhood and citizenship are particularly well known, where the French has been state-centered and assimilationist, the German *Volk*-centred and differentialist. See Brubaker, *op. cit. supra* note 8.

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4. Nation-building as extensions of citizenship rights in Europe

This idea of the gradual extension of citizenship can be seen as part of a more general modernisation paradigm that dominated Western social sciences from the 1950s through the 1970s, and that is still quite influential. The overriding aim of the many impressive works that were produced in this period was to identify underlying systemic conditions and qualities of a democratic state society.[12] More specifically the purpose was to examine historic and systemic conditions that produced democratic state formations in some parts of Europe, and why democracy had failed so catastrophically in other parts of the continent. T. H. Marshall's contribution was that he developed a threefold typology of citizenship rights, explained how these rights were linked to stages in the development of states and class structure in Europe and how they were institutionalised:

- civil rights such as liberty of person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice;
- political rights such as the franchise and the right to access to public office;
- social rights ranging from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society.

Four sets of public institutions correspond to these three types of rights:

- the *courts*, for the safeguarding of civil rights and, specifically, for the protection of all rights extended to the less articulate members of the national community;
- the local and national *representative bodies* as avenues of access to participation in public decision-making and legislation;
- the *social* services, to ensure some minimum protection against poverty, sickness and other misfortunes;
- the *schools*, to make it possible for all members of the community to receive at least the basic elements of an education.[13]

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[12] T. H. Marshall's and R. Bendix' books have already been mentioned (*supra*, note 9). A few other works: Talcott Parsons, *Societies: Comparative and Evolutionary Perspectives*, Englewood Cliffs, N.J.: Prentice Hall (1967); Berrington Moore, *Social Origin of Dictatorship and Democracy*, Boston: Beacon Press (1966); Albert Hirshman, *Exit, Voice and Loyalty*, Cambridge, Mass.: Harvard University Press (1970); S. M. Lipset and Stein Rokkan (eds.), *Party Systems and Voter Alignment*, New York: The Free Press (1967); Charles Tilly (ed.), *The Formation of National States in Western Europe*, Princeton: Princeton University Press (1975).

[13] This summarised version appears in the 1977 edition of R. Bendix's book *Nation-Building and Citizenship*, Berkeley: University of California Press, p. 92. For a thorough

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By and large, according to Marshall, the three rights were introduced in stages corresponding in time more or less with three separate centuries; the eighteenth (civil rights), the nineteenth (political rights) and the twentieth (social rights). Asbjørn Eide has the following comment to Marshall's chronology: "This chronology gave a fairly correct description of the British development, but does not quite correspond to the evolution in other countries, such as Germany or those farther to the east of Europe".[14] And Eide continues:

> What nevertheless makes T. H. Marshall particularly interesting and of particular relevance ... is that the three components he described – civil, political, and social – formed the main building blocks for the comprehensive system of rights contained in the UDHR of 1948. Civil, political, economic, social and cultural rights have been made into a package of international human rights, and the different rights are interdependent and therefore indivisible. This is a point repeatedly made by the United Nations, in particular at the World Conference on Human Rights held in Vienna under United Nations auspices in 1993.[15]

Furthermore, Marshall's analysis contributed to a *linear* perception of social integration and democratic nation-building so characteristic of the modernisation paradigm. According to this paradigm it is almost a law of nature that societies develop in certain stages and that these stages have to come in a certain order for the process to be successful. But what is the final outcome of this development? The nation-building theorists considered the fully integrated nation-state, characterised by social stability, democracy and a comprehensive welfare system, as the realisation of their vision of democracy. But would the democratic welfare state be the end of history? It was difficult from within the modernisation paradigm to envisage new and more advanced stages of state development. And when many welfare states – and indeed the nation-state as such – started to encounter problems of legitimacy in the late 1970s, the paradigm itself lost momentum. This opened up for a new generation of scholars who started to search for new approaches to citizenship to meet the challenges to democracy, equality and social integration as they appeared by the end of the twentieth century. With reference to European developments Veit Bader commented in 1995:

> European "unification" ... reminds of the enormous practical tensions and contradictions the reformulation of collective political, particularly national, identities bring with them in an age of democratic pluralism, multiculturalism, immigration, and the formation of inter-"national"

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discussion of Marshall's work on citizenship, see J. M. Barbalet, *Citizenship. Rights, Struggle and Class inequality*, Milton Keynes: Open University Press (1988).

14 Eide, *op. cit.*, *supra*, note 1, p. 99.

15 *Ibid.*

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> political units. Only extreme right-wing neo-nationalist and conservative philosophy and politics can openly avoid this dilemma. The hidden neo-nationalist ideology of conservative parties and governments, at least in Europe, is put under much stress, and liberal, democratic, and socialist positions have to come to terms with these tensions.[16]

So, the evolutionary optimism of modernisation theories that dominated the social sciences in the decades following World War II was difficult to sustain when confronted with complex developments in the real world that were hard to explain within the modernisation paradigm. It was not enough to explain mechanisms that transform societies into unified democratic welfare states; it was just as important to identify mechanisms that facilitate disintegration of states from within, on the one hand, and conditions for regional integration across state boundaries on the other.

5. Paradoxes of modern citizenship

According to Bader, there are a number of paradoxes of modern citizenship (with specific references to European developments) marked by simultaneous and contradictory processes of erosion and strengthening of univeralist identities and policies.[17] On the one hand, there is a continuous tendency towards universalist inclusion (legal and political equality) reaching out to minorities, the socially disadvantaged and immigrants. Citizenship is also developing into a multiple and multilayered concept: political citizenship is complemented by economic, social and cultural citizenship (many spheres of citizenship) and citizenship is gaining importance on different levels of political integration, including supra-state levels. On the other hand, as these developments increase the bureaucratic and economic burdens and obligations on states and challenge existing identities and loyalties, policies of systematic exclusion are also on the rise. This takes place both in terms of making it more difficult to qualify for benefits defined by different spheres of citizenship and of restricting immigration and strengthening border controls in order to prevent "unwanted aliens" from entering the country and qualify for such benefits.

On the basis of his analysis of contemporary complexities and paradoxes of citizenship in Europe, and on the normative premise that "the existing inequalities within and between states cannot be morally defended", Bader suggests to disentangle citizenship from all "ascriptive criteria and identities", particularly from decent, colour, sex, ethnicity and nationhood, but also from state membership. It is not only necessary to make a complete

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[16] Veit Bader, "Citizenship and Exclusion. Radical Democracy, Community, and Justice. Or, What is wrong with Communitarianism?", 23 *Political Theory*, No. 2, 211-246 (1995).

[17] *Ibid.*, 212.

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analytical separation of *ethnos* and *demos*, as suggested by Habermas and others, democratic citizenship ought to be disentangled from citizenship as state membership. This would open up, according to Bader, for a "multilayered concept of citizenship that allows one, at least in principle, to combine the moral requirements of universalist justice with the requirements of ... radical democracy and particular forms of life".[18] In the practical life it would, among other things imply "fairly open" borders.

The central point here, then, is that citizenship as state membership is not a prerequisite for the protection and fulfilment of universalistic rights. On the contrary, considering the complexities of interactions, structural changes, migrations etc. in the contemporary world, justice and equality can best be realised if the state is reduced to but one among several levels of institutional protection of citizenship rights. In this context Bader argues particularly against Michael Walzer and his communitarian position which implies solutions based on the fundamental purposes, as he sees it, of sovereign states: to "guarantee the physical and cultural survival and the welfare of their members".[19] Walzer, in his reply to Bader, is not against disentanglement of citizenship from state membership *per se,* but underlines that any alternative political formation must fulfil these fundamental purposes of state formation. He argues strongly in favour of the position that the state – not least under the conditions of globalisation – is a necessary agent for implementing distributive policies and for the protection of basic social rights. Secondly, Walzer asks, "what does it mean to "disentangle" citizenship and ethnicity?", and answers that this is quintessentially an American project, only possible under the unique conditions that created the American society ("a society of immigrants that is, with the exception of the remaining Native Americans, no one's homeland, and where all the ethnic – and religious and racial – groups are radically dispersed.").[20] In states where the political community is deeply rooted in the territory such disentanglement is much harder, according to Walzer, both morally and democratically. And he continues:

> Some concrete disentanglements are obviously desirable, above all, breaking the link, where it exists, between citizenship and race or "blood". But does Bader really mean to advocate a French state, say, entirely neutral with regard to the preservation and enhancement of French culture? How would he go about, democratically, persuading the French to accept such a neutrality? Of course, once neutrality was accepted, everything else that Bader advocates would follow – open border, most obviously, since it would no longer matter who the citi-

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18 *Ibid.*, 213.

19 Michael Walzer, "Response to Veit Bader", 23 *Political Theory*, No 2, 247–249 (1995).

20 *Ibid.*, 248.

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> zens of this new France were. But is the moral and political relation of the French to France the same as that of English immigrants to America? Is all the world America? It seems to me that Bader does not take sufficient account of the different kinds of states in the world today.[21]

Walzer concludes that his position does not commit him to accept the drastic inequalities of the international society, it only requires that "the fight against those inequalities begin within existing political communities and that it aims at the progressive expansion, but not the abolition, of existing solidarities".

I will not go further into this extensive debate. What I have wanted to illustrate, however, is that some of the most significant discourses in contemporary social sciences and political theory concern the *role of the state* in protecting and fulfilling basic rights and in achieving equality, justice and democracy confronted with the complexities of the contemporary international society. A most striking aspect of this debate, furthermore, is that the specific standards and institutions of the international human rights system is all but absent, except for a few references in passing. This is all the more surprising since, first, the existing human rights treaties and instruments express a level of formal consensus in the international society on important aspects of this debate and offer practical solutions, and, secondly, because the future of human rights protection is confronted basically with the same challenges as has been referred to above. This does not mean that introducing the human rights perspective more systematically would solve the theoretical questions under discussion, but it would add a dimension, both normatively and in terms of institutional options.

6. Human rights and citizenship: the "problem" of sovereignty

It is extremely important to remember that international human rights as a code of rights are part of public international law, arguably that part which has been extended most over the last thirty years, and that state sovereignty forms the constitutional principle of this legal tradition. The protection and implementation of human rights is just as dependent on effective state sovereignty as any other part of public international law. However, as an element in the contractual relationship between states, the relationship between the state and its resident population was basically considered to be within the exclusive jurisdiction of the state. The right of the state to set standards for citizenship arguably derives from the *jus cogens* rule in public international law regulating the sovereignty of states.[22] The question of whether or not

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[21] *Ibid.*, 248-249.

[22] Carmen Thiele, "The Criterion of Citizenship for Minorities: The Example of Estonia", *ECMI Working Paper*, No. 5, Flensburg: European Centre for Minority Issues (1999). See

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public international law covers questions of citizenship rights, therefore, relates to the *competence* of state authority as set out in law. If states freely agree, as they have to a certain extent, to modify the competence of state authority in relation to persons living within their jurisdiction, this does not in itself represent an infringement on state sovereignty. There are evidently many conflicts over specific interpretations of where the line should be drawn (*i.e.*, under what conditions other states collectively have the right to intervene in the internal affairs of a particular state, ultimately in the form of humanitarian intervention), especially in situations of massive human rights abuses, but this should not be seen as a conflict *between* human rights and state sovereignty as normative positions. It is rather conflicts *within* the still rather underdeveloped and imperfect body of public international law over rights and obligations in the contractual relationship between states.

7. The human rights approach

So, how far has the human rights system developed when it comes to modifying the exclusive rights of states to set standards and criteria for citizenship? This is the subject of Asbjørn Eide's work "Citizenship and International Human Rights Law. Status, Evolution, and Challenges".[23] It is worthwhile considering (from a non-legal point of view) some of his main observations and conclusions of relevance for our discussion. These can be summarised in seven main points:

(a) Allocation of citizenship is increasingly a matter for international law. Principles and rules have recently emerged in international law containing requirements for domestic legislation regarding the allocation of nationality and citizenship to individuals. The main cause of change is the dynamic development of international human rights law, which is redefining the basic character of international law. The most recent international document is the European Convention on Nationality adopted by the Council of Europe in 1997.

(b) The process of change started with the adoption of the UN Charter in 1945, followed by the UDHR in 1948. Human rights law now stands as the most dynamic part of international law, fundamentally different from other parts. Citizenship issues and the treatment of non-citizens are some of the best examples of this development. Article 21 of the UDHR insists on popular sovereignty ("the will of the people") and democracy ("universal suffrage").

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also Eide, *op. cit.*, *supra*, note 1, 88 and Ruth Donner, *The Regulation of Nationality in International Law*, New York: Transnational Publishers (1994).

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[23] Asbjørn Eide, *op. cit.*, *supra*, note 1.

(c) Under international human rights law the distinction between citizens and non-citizens is greatly reduced since the state has obligations irrespective of the legal status of persons living on its territory. But the UDHR (Article 21, paragraph 1) and the Covenant on Civil and Political Rights (CCPR, Article 25 c) have established a modification on political rights. These articles deal with the right to take part in the government of *one's country* – and also the right of everyone to equal access to public service in one's own country. This means that – although human rights law makes the citizen/non-citizen distinction less relevant, the state can still in very important ways discriminate between citizens and non-citizens without directly violating human rights law. Following the same logic, Article 13 of the UDHR and Article 12 of the CCPR on the right to freedom of movement limit the right to enter a country to "his own country". Although citizens have a privileged right to enter the country of which he or she is a citizen as a human right, non-citizens are not excluded from this right in all circumstances.

(d) There are ambiguities in international human rights law with regard to protection of minorities: are such rights limited to citizens only, or are they also given to resident non-citizens? Article 27 CCPR dealing with the rights of persons belonging to minorities does not have a restrictive language that can be interpreted to limit its application to citizens. The United Nations Human Rights Committee has consequently made it clear that Article 27 confers rights to citizens as well as non-citizens.

(e) In spite of certain ambiguities with regard to the term *nationality* and its relation to *citizenship*, it must be concluded that there is a human right to obtain citizenship. Article 15 of the UDHR reads: "Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality, nor the right to change his nationality". This article has not been followed up with the adoption of any legally binding conventions. But a number of provisions in more recent instruments strengthen the presumption that the right to citizenship is a human right.[24]

(f) Although everyone has the right to citizenship, Article 15 does not say citizenship in *which* country or which state is obliged to provide the person with its citizenship. The presumption must be, however, that the duty bearer is the state in which the person lives, unless special factors justify a denial of that right to particular persons.

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[24] Eide mentions Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women (1979); Article 1 of the Convention on the Nationality of Married Women; Article 7 of the Convention on the Right of the Child (1989); and Article 20 of the regional Inter-American Convention on Human Rights (1978), in addition to the European Convention on Nationality (1997) "which contains the most updated expression of legal opinion on the right to nationality at the regional level". Eide, *op. cit.*, *supra*, note 1, 107-108.

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(g) Although international human rights law contains significant rules applicable to the allocation, change, and withdrawal of citizenship, it is necessary also to recognize that the human rights part of international law suffers from serious weaknesses. Many states successfully resist international demands relevant to their regulation of matters that the states still consider falling within their internal jurisdiction.

Now, if we take these observations and conclusions into consideration, how should we from a human rights perspective relate to the debate between Veit Bader and Michael Walzer (which respectively can be taken to represent post-modern and communitarian conceptions of citizenship)? I will finally address this question very briefly.

Bader is basically critical of the ability of the state in the contemporary world to contribute sufficiently to the promotion and securing of fundamental justice and equality, and holds that citizenship should be disentangled from all ascriptive criteria and membership, including state membership. Walzer, on the other hand, believes that the state and state membership is and remains the best institutional framework to secure the physical and cultural survival and material well-being of members of political communities. Bader considers the connection between citizenship and ascriptive identities as historically constructed, and consequently suggests that they also can be deconstructed under certain historical conditions. Such conditions are now more and more characterising the international society, according to him. Walzer is more in line with A. D. Smith[25] and sees political communities typically as organic collectivities with a particular identity that cannot be reduced, at least not by democratic means, to something else, or deconstructed into separate parts as "multilayered" citizenship.

From a human rights perspective, as represented by Asbjørn Eide, it seems reasonable to suggest that both positions would be subject to some support and some critique. First of all, it is clear that within the human rights system today conceptions and practical-legal instruments have been developed that should be taken into consideration in any debate on how to meet the challenges and paradoxes of citizenship in the contemporary world.

Bader's contention that citizenship must be disentangled from ascriptive identities can find support in the development of human rights provisions that seek to reduce the distinction between citizens and non-citizens (see (c) above). This relates to the fundamental premise of the human rights system that states, as a general rule, should not discriminate between citizens and non-citizens. Bader could also, apparently at least, invoke the expanding human rights system to support his idea of a multilayered citizenship. Allocation of citizenship is increasingly accepted by states as a matter for inter-

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[25] Anthony D. Smith, *National Identity*, London: Penguin (1991).

national law, and monitoring instruments are gradually being introduced. But a very important difference remains between Bader's suggestion that citizenship should be disentangled from state membership in order to reduce exclusivist policies and the human rights approach to this problem. The human rights system is fundamentally constructed on the premise of state sovereignty and that states are the duty bearers of rights. States should therefore not be made less responsible for the protection of citizenship rights, on the contrary, they should accept a growing responsibility and be held responsible. The international community should contribute to this development by strengthening instruments for monitoring the implementation of human rights on the national level, but should not itself take over the responsibility as duty bearer.

In the discussion of the role of states in promoting and protecting fundamental rights of those living under their jurisdiction it seems that the human rights approach is closer to the position of Michael Walzer. However, Walzer's basic premise is the promotion and protection of collective identities and solidarities. According to him, a system of justice must rest on guarantees for the physical and cultural survival of existing political communities: "After survival is assured, after these people are safely possessed of a public forum for their politics and culture, then we can consider how to redistribute state power in better ways".[26]

The unavoidable problem with Walzer's position from a human rights point of view relates to the rights of those within states who do not belong to the culture "for whose sake [the state] was created". This indicates a view that states exists, first and foremost, for the sake of protecting organic communities, not for the sake of protecting the individual member of state societies, as is the fundamental purpose of states from the human rights perspective. Another problem connected to Walzer's position is the following: if the organising principle for distributing rights is the existing political communities, how do we identify these communities and who is in a position to decide the criteria that should be applied in such a definition? In his reply to Bader, Walzer mentions Jews, Armenians, Palestinians, Kurds, Estonians and Tibetans "and others like them" as "peoples", implying that they have a right to "win a state". But, as is well known, the question of who constitute a legitimate "people" or "nation" is a very contentious issue, and indeed, no secure ground for establishing a system for the protection of everyone's fundamental rights and freedoms. In my opinion it is not morally defensible to say or imply that the right of a person to basic security, cultural life and welfare should depend on whether or not he or she belongs to a group that incidentally is recognised as holding a right to self-determination and statehood.

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[26] Walzer, *op. cit.*, *supra*, note 19, 247.

8. Conclusion

What I here have called "the human rights approach", represented by Eide, has its strengths and weaknesses. A weakness is its lack of theoretical reasoning. It has no coherent moral theory or any specific social or political theory that explains the conditions under which human rights have the best chance of being realised. But arriving at unified theoretical positions is not the purpose of the human rights approach, and that is precisely its strength: on the normative level, the UDHR and subsequent treaties are catalogues of *a priori* statements about what constitute human rights, without any explanations or further justification. The enormous impact of these catalogues in international relations is due to the fact that they have been formally adopted as expressions of a universal consensus and consequently promoted by thousands of non-governmental organisations, individual academics (like Asbjørn Eide), as well as by politicians and bureaucrats who have influenced governments from within.[27] The human rights approach, therefore, does not represent an alternative *theoretical* approach to either Bader's idea of the disentanglement of citizenship or Walzer's communitarianism. But it represents an uncompromising position on behalf of the integrity and basic rights and freedoms of the individual under *any* conditions. This is why any debate on the future of citizenship and the contractual relations between states and those who live within their jurisdictions should take the human rights approach into consideration.

[27] For an excellent analysis, see Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds.), *The Power of Human Rights. International Norms and Domestic Change*, Cambridge: Cambridge University Press (1999).

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XXV

International human rights law, the environment and indigenous peoples

Erica-Irene A. Daes*

It is privilege and a particular pleasure to contribute this essay to the volume honouring Asbjørn Eide. His efforts for the promotion and effective protection of human rights as well as for the implementation of international and regional human rights and humanitarian law instruments amount to an outstanding contribution to the evolution of contemporary international human rights and humanitarian law. His creative and important work in the field of recognition and protection of the rights of indigenous peoples and minorities has been a source of knowledge and information for many students, researchers, lawyers and human rights activists. Asbjørn's integrity and dedication to human rights and democracy represent a lasting legacy for me, who has had the honour of working with him for more than two decades.

1. An overview

In the contemporary world human beings are in a position to influence the world ecological system as a whole in such a way as to endanger the long-term survival of all plant and animal species and even humankind itself. Hunger, poverty and disease – a cause and effect of global environmental degradation – constitute fundamental reasons why the international community has expressed serious concern at the importance of environmental protection and the creation of a new era of international co-operation, the new global partnership, for the survival of the human person. To this end many endeavors, activities and measures have been undertaken by the world community. Some of them are briefly presented in this paper.

The UN Conference on the Human Environment held in Stockholm in 1972 was the first occasion during which a united international community of States decided to consider international environmental issues more gener-

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ally and coherently. This Conference brought the industrialized and developing nations together to delineate the "rights" of the human family to a healthy and productive environment. A string of such meetings followed: on the rights of people to adequate food, to sound housing, to safe water, and to access to means for choosing the size of their families.[1]

The Conference adopted a comprehensive Action Plan with 109 recommendations and the Stockholm Declaration of the United Nations Conference on the Human Environment (hereinafter "Stockholm Declaration"), which contains 26 principles.[2] It also adopted a resolution on institutional and financial arrangements that led to the establishment of the United Nations Environment Programme (hereinafter "UNEP"), which is the first and the most important United Nations body with general, however limited, authority over environmental issues. UNEP, based in Nairobi, also serves as the secretariat for international negotiations and other activities, including the collection and distribution of global environmental information.

Nevertheless, the principles of the above-mentioned Stockholm Declaration are largely aspirational. Few of them provide for concrete responsibilities and duties of States. For example, principle 22 provides that,

> States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.[3]

Principle 1 of the Stockholm Declaration established a basis for linking human rights and environmental protection. It provides *expressis verbis* that,

> man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. ...[4]

The UN General Assembly adopted the World Charter for Nature, being aware that mankind is part of nature and life and depends on the uninterrupted functioning of natural systems, which ensure the supply of energy and nutrients and which are jeopardized through excessive exploitation and habi-

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1 Gro Harlem Brundtland, *Forward in Our Common Future, The World Commission on Environment and Development*, Oxford University Press (1987), p. xi.

2 See Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June 1972, UN doc. A/Conf.48/14.

3 The full text of the Stockholm Declaration is also contained in Burns H. Weston, Richard A. Falk, Hilary Charlesworth (eds.), *Supplement of Basic Documents to International Law and World Order*, 3rd edition, American Casebook Series, West Group, St. Paul, Minn. (1997), pp. 866-870.

4 *Op. cit.*, *supra*, note 3, p. 867.

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tat destruction by man.[5] In section III of this Charter entitled "Implementation", a reference is made to "all persons" who in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation. In the section with the requirements for implementation, the same principle is reaffirmed.[6] Furthermore, UN General Assembly resolution 45/94 reaffirms principle 1 of the Stockholm Declaration, providing that all individuals are entitled to live in an environment adequate for their health and well-being. The resolution called for enhanced efforts to ensure a better and healthier environment.

At the first European Conference on the Environment and Human Rights held in Strasbourg in 1979, it was stated that mankind needed to protect itself against its own threats to the environment, in particular when those threats had negative repercussions on the conditions of existence: life itself, physical and mental health, and the well-being of present and future generations. It was further emphasized, that it was the right to life itself, in its wide dimension, which entailed the necessary recognition of the right to a healthy environment.[7]

The historic United Nations Conference on Environment and Development (hereinafter "UNCED") in Rio de Janeiro in June 1992, adopted important international instruments, including the Rio Declaration on Environment and Development (hereinafter "Rio Declaration"). Principle 10 of this Declaration provides:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making in-

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5 UNGA resolution 37/7, 28 October 1982, UN GAOR Supp. (No. 51) 21, UN doc. A/37/L.4 and Add.1 (1982). See also L. Henkin, R. Crawford Pugh, O. Schachter and H. Smit (eds.), *Basic Documents Supplement to International Law, Cases and Materials*, 3rd edition, West Publishing Company, St. Paul , Minn. (1993), pp. 703-710.

6 Provision 23 of the requirements for implementation, *op. cit., supra*, note 5, pp. 706, 709 and 710.

7 See Antonio Augusto Cançado Trindade, "Human Rights and the Environment", in J. Symonides (ed.), *Human Rights: New Dimensions and Challenges*, UNESCO (1998), p. 131.

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> formation widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[8]

Thus, the Rio Declaration formulates the link between human rights and environmental protection mainly in procedural terms. It provides for rights to information and emphasizes the participation of all concerned citizens. It also contains provisions related to remedies with respect to environmental conditions.

One of the basic conditions for the achievement of sustainable development is broad public participation in decision-making. In the specific context of the environment and development, the need for new forms of participation has emerged. This includes the need for individuals, groups and organizations to participate in environmental impact assessment procedures, and to know about and take part in decisions, in particular those that potentially affect the communities in which they live. Individuals, groups and organizations should have access to information relevant to the environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment and information on environmental protection measures.[9]

Critical to the effective implementation of the objectives, policies and mechanisms agreed to by governments in all progamme areas of Agenda 21, is the commitment and genuine involvement of all social groups. Chapter 23 of Agenda 21 identifies major groups whose participation is needed, including women, youth, indigenous and local populations, non-governmental organizations, local authorities, workers, business and industry, scientists and farmers. Section 3 of Chapter 23 provides that any policies, definitions or rules affecting access to participation by non-governmental organizations in the work of UN institutions or agencies associated with the implementation of the Agenda 21, must apply equally to all major groups.[10]

Furthermore, Agenda 21 section 8 chapter B provides for the need for an effective legal and regulatory framework. It calls on governments and legislators to establish judicial and administrative procedures for legal redress and remedy for actions affecting the environment that may be unlawful or infringe on rights under the law, and to provide access to individuals, groups and organizations with a recognized legal interest.[11]

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8 Principle 10 of the Rio Declaration, in *Earth Summit, Agenda 21*, The United Nations Programme of Action from Rio, UN Publ. Sales No. E.93.I.11, ISBN 92-1-100509-4, p. 10.

9 In connection with the access to environmental information, see Stuart Bell and Donald McGillivray, *Environmental Law*, 5th edition, Blackstone Press Limited (2000), pp. 215-235.

10 Earth Summit, Agenda 21, The United Nations Programme of Action from Rio, UN Publication, Sales No. E 93I.11, ISBN92-1-100509-4, p. 219.

11 *Op. cit.*, *supra*, note 10, paragraph 8.18, pp. 68 and 69.

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On the basis of principle 10 of the Rio Declaration, many international and regional instruments have included provisions that specifically refer to basic human rights. Thus, principle 10 (on access to information, participation and effective remedies) has played an important role in fostering connections between human rights and environmental approaches. Multilateral agreements at the global and regional level have developed principle 10 of the Rio Declaration by establishing mechanisms for the exercise of procedural rights, in particular the right to environmental information and to public participation in decision-making. This was, for example, reflected in the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

The language used by different instruments is far from homogenous. In certain cases public participation is used in a broad sense to designate the recommended openness on the part of authorities towards individuals and groups of individuals, and includes the right to information rather than separately guaranteeing it.

Resolution 1997/102 of the Commission on Human Rights on human rights and the environment is noteworthy.[12] The Commission decided to invite the Secretary-General to bring all relevant reports and the Commission's own considerations to the attention of the General Assembly at its special session on Agenda 21, and to request him to prepare a consolidated report based on the deliberations of the General Assembly and those of other international bodies and organizations for its consideration of the question of human rights and the environment.

On 12 May 1999, the CESCR issued General Comment 12, acknowledging that "the human right to adequate food is recognized in several instruments under international law".[13] The Committee noted that this right is

> inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfillment of human rights for all. The right to food also encompasses food free from adverse substances and contamination through bad environmental hygiene.[14]

The Global Compact, a pilot initiative by UN Secretary General Kofi Annan at the Davos World Economic Forum in January 1999, calls upon the business community worldwide to work with the UN to implement universal values in the areas of human rights and environmental protection, among other things. The Compact sets forth the principles derived from the Univer-

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[12] Report of ECOSOC, Fifty-Third session of the Commission on Human Rights, E.CN.4/1997/L.11/Add.7, 17 April 1997, pp. 6 and 7.

[13] UN CESCR, General Comment 12, UN doc. E/C.12/1999/5, 1999.

[14] *Op. cit.*, *supra*, note 13.

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sal Declaration of Human Rights, the Rio Declaration and the 1997 World Economic and Social Summit in Copenhagen.[15] Introducing the initiative, the Secretary-General emphasized that he chose these areas because they represent core values and principles shared by people around the world. The Global Compact asks world business to "support and respect the protection of international human rights within their sphere of influence" (principle 1), "make sure their own corporations are not complicit in human rights abuses" (principle 2), "support a precautionary approach to environmental challenges" (principle 7), "undertake initiatives to promote greater environmental responsibility" (principle 8), and "encourage the development and diffusion of environmental friendly technologies" (principle 9).[16]

The Rome Statute of the International Criminal Court[17] (hereinafter "Rome Statute")[18] was adopted in July 1998 to establish a permanent International Criminal Court (hereinafter "ICC") to deal with the most "serious crimes of concern to the international community". The Rome Statute's preamble reaffirms the purposes and principles of the UN Charter, including the promotion of respect for human rights. The ICC has jurisdiction over, *inter alia,* war crimes,[19] which includes "intentionally launching an attack in the knowledge that such attack will cause ... widespread, long term, and severe damage to the natural environment, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".[20]

Reference should also be made to the UN Millennium Declaration,[21] Chapter IV of which is devoted to the protection of our common environment. It provides that the heads of state and government, who had gathered

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15 The Copenhagen Declaration and Programme of Action, World Summit for Social Development, 6-12 March 1995, UN Publ. DPI/1707-9515294, New York, August 1995.

16 The original text of the Global Compact is with the Office of the UN Secretary-General in New York.

17 In connection with the implementation of the Statute of the ICC, see Michael Reisman, "Scenarios of Implementation of the Statute of the International Criminal Court" in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court, A Challenge to Impunity* (2001), pp. 281-289.

18 The Rome Statute of the International Criminal Court, 17 July 1998, reprinted in 37 *International Legal Materials* 999 (1998), UN doc. A/CONF. 183/9, entered into force on 1 July 2002.

19 See Phani Dascalopoulou-Livada, "Crimes under the Jurisdiction of the International Criminal Court", *Revue Hellenique Droit International*, vol. II, 1998, pp. 430-448. *Id.*, "The International Criminal Court: Some Basic Questions on Jurisdiction", in Gudmundur Alfredsson and Maria Stavropoulou (eds.), *Justice Pending: Indigenous Peoples and Other Good Causes, Essays in Honour of Erica-Irene A. Daes*, Martinus Nijihoff Publishers (2002), pp. 192-194.

20 Article 8(2)(b)(iv) Rome Statute.

21 United Nations Millennium Declaration, adopted at the Millennium Summit, New York, 6-8 September 2000, published by UN Department of Public Information, DPI 2163, September 2000-10 M, pp. 2, 1-14.

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at UN Headquarters at the dawn of the new millennium, have reaffirmed their faith in the Organization and its Charter as indispensable foundations for a more peaceful, prosperous and just world. Paragraphs 21-23 of the Declaration contain certain principles of a general nature relevant to every individual or groups of individuals, every government or non-governmental organization. However, they do not include any specific mention of "indigenous peoples". For the purposes of this essay the following quotation from paragraph 21 of the Millennium Declaration suffices:

> We must spare no effort to free all humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs.[22]

Another important international instrument referring to environmental protection is the Malmö Ministerial Declaration (hereinafter "Malmö Declaration"), which emphasized that,

> [a]t the dawn of this new century, we have at our disposal the human and material resources to achieve sustainable development, not as an abstract concept but as a concrete reality. The unprecedented developments in production and information technologies, the emergence of a younger generation with a clear sense of optimism, solidarity and values, women increasingly aware and with an enhanced active role in society – all point to the emergence of a new consciousness. We can decrease poverty by half by 2015 without degrading the environment, we can ensure environmental security through early warning, we can better integrate environmental considerations in economic policy, we can better coordinate legal instruments and we can realize a vision of a world without slums. We commit ourselves to realizing this common vision.[23]

The Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights), acting within the framework of its mandate and taking into consideration the link between human rights and environmental protection, entrusted one of its former members, Mrs. Fatma Zora Ksentini, in her capacity as Special Rapporteur, to undertake a study on human rights and the environment. Her final report[24] reflects the views and great concern about environmental protection in general of all the member-experts of the Sub-

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[22] Paragraph 21 of the UN Millennium Declaration, *op. cit.*, *supra*, note 21, p. 9.

[23] United Nations Environment Programme, World Summit on Sustainable Development, UNEP VISION, 21 August 2002, p. 1. *Note that the present essay was prepared prior to the World Summit on Sustainable Development, Johannesburg, 26 August – 4 September 2002.*

[24] "Ksetini Report", UN doc. E/CN.4/Sub.2/1994/9, 6 July 1994. PURL: https://www.legal-tools.org/doc/5ecf1e/

Commission. In an annex the Special Rapporteur included a comprehensive set of Draft Principles on Human Rights and the Environment.[25]

Principle 14 refers specifically to indigenous peoples' right to control their lands, territories and natural resources and to maintain their traditional ways of life. Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife and other resources. Unfortunately, these Draft Principles are still with the Secretariat of the Commission on Human Rights, awaiting approval, like many important instruments and constructive proposals submitted by the Sub-Commission to its parent body, the Commission. The Commission on Human Rights is the political body of the UN dealing with human rights matters.

An indication of the strong support which the Commission on Human Rights has expressed relevant to the relationship between human rights and the environment is its decision 2001/111, on the basis of which the UN High Commissioner for Human Rights (hereinafter "HCHR") and the Executive Director of UNEP were invited to jointly organize a one-day Expert Seminar on Human Rights and the Environment on 16 January 2002, which was preceded by a two-day preparatory meeting of experts on 14-15 January 2002. The object of the seminar was to review and assess progress achieved since the 1992 UNCED in promoting and protecting human rights in relation to environmental questions and within the framework of Agenda 21.[26]

The constructive exchange of views during this Expert Seminar as well as the unanimously adopted conclusions indicate the close connection between the protection of human rights and environmental protection, in the context of sustainable development. They reflect the growing interrelationship between ensuring respect for human rights and protection of the environment, as well as the synergies that have developed between these previously distinct fields.[27]

At the second meeting of the first session of the Permanent Forum on Indigenous Issues (hereinafter "Permanent Forum"), the discussion on the environment opened with presentations from UNEP and the Secretariat of the Convention on Biological Diversity.[28] Reference was made to the Convention on Biological Diversity, in particular to the work relating to indigenous peoples within the context of the Convention: to participation, intellec-

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[25] See the text of these important and useful principles in the Annex of the Ksetini Report, *op. cit.*, *supra*, note 24.

[26] Decision of the Commission on Human Rights, 2001/111 on Science and the Environment, Commission on Human Rights Report on the 57th session (19 March – 27 April 2001).

[27] The relevant documents are on file with the Secretariat of the HCHR.

[28] Report of the Permanent Forum on Indigenous Issues, First session, New York, 13-24 May 2002, UN doc. E/CN.19/2002/CRP.2, 17 May 2002, pp. 4-5.

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tual property,[29] sustainable resource management and traditional knowledge systems; but also to the guidelines on the conduct of assessments of likely cultural, environmental and social impact of proposed activities on sacred sites, lands and waters traditionally occupied by indigenous peoples. Issues raised relevant to Agenda 21 included the need for the Permanent Forum to be engaged in the World Summit on Sustainable Development; the problems caused by desertification and deforestation; the extraction of indigenous medicinal plants for commercial purposes; the need for enhanced protection of traditional knowledge systems and the threat of bio-piracy; and the direct linkage between the loss of cultural diversity and the depletion of biodiversity. Concern was expressed over the absence of adequate compensation and rehabilitation provided to indigenous communities for environmental damage. The present author made, among others, a suggestion that the Permanent Forum should compile an annual report on the "state of the world's indigenous peoples".[30]

2. Inter-linkages between human rights and the environment

The right to life in its wide dimension and the right to health constitute the basis of the *ratio legis* of international human rights law.[31] Under international human rights instruments the assertion of the inherent right of life of every person is accompanied by an assertion of the legal protection of that basic human right and of the negative obligation that no one shall be arbitrarily deprived of his life.[32] However, this negative statement is supplemented by a positive obligation to take all appropriate measures to protect and preserve human life. In this respect, some members of the UN Human Rights Committee have expressed the view that Article 6 of the International Cove-

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29 Erica-Irene A. Daes, "Intellectual Property and Indigenous Peoples", reprinted from the Proceedings of the 95th Annual Meeting of the American Society of International Law, 4-7 April 2001, pp. 143-150.

30 See Erica-Irene A. Daes, "Opening remarks before the Permanent Forum", Report of the Permanent Forum, *op. cit., supra*, note 28, p. 5.

31 Rosalyn Higgins, "The special body of international law characterized as human-rights law is strikingly different from the rest of international law, in that it stipulates that obligations are owed directly to individuals (and not to the national government of an individual) and it provides, increasingly, for individuals to have access to tribunals and fora for the effective guarantee of those obligations", in *Problems and Process, International Law and How We Use It*, Clarendon Press, Oxford (1995), p. 95.

32 Article 6 (1) of the International Covenant on Civil and Political Rights, in *Human Rights, A Compilation of International Instruments*, UN Publ. Sales No. E.88.XIV.1, New York, p. 21.

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nant on Civil and Political Rights (hereinafter ICCPR) requires the State to take positive measures to ensure the right to life.[33]

It should be underlined that not only all the individuals but also all groups of peoples have the inherent basic right to life. A component of the right to life is the survival of vulnerable groups, in particular indigenous peoples and minorities.[34]

The right to a healthy environment should be considered as corollary to the right of life. Subsequently, in the view of the author, the obligations of States include not only to take effective legislative and administrative measures to protect the survival and life of all persons and groups of persons, but also to avoid serious environmental hazards or risks to life, and even to establish "monitoring and early warning systems" to detect such serious environmental hazards or risks to life and "urgent action systems" to deal with such threats.

The right to life establishes "a link" between the domains of international human rights law and environmental law. It has as corollaries the right to a healthy environment and the right to peace. It is also related to the right to development[35] as a human right. It constitutes the ultimate *ratio legis* of international human rights law and environmental law, providing for the protection and survival of human beings and humankind as a whole.

The Universal Declaration of Human Rights (hereinafter "UDHR"), the Stockholm Declaration, as well as the Rio Declaration have stressed the inextricable links between environment and human rights. A number of the basic rights enshrined in the UDHR have a significant environmental dimension, including in particular the rights to life,[36] health, to safe and healthy working conditions, and to adequate housing and food.[37] The UDHR provides *expressis verbis* that "every one is entitled to a social and international order in which the rights and freedoms set forth in this

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33 See Antonio Augusto Cançado Trindade, "Human Rights and the Environment", in J. Symonides (ed.), *Human Rights: New Dimensions and Challenges*, UNESCO, Asgate Dartmouth (1998), p. 130.

34 On the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples, see the relevant working paper prepared by Erica-Irene Daes and Asbjørn Eide, UN doc. E/CN.4/Sub.2/2000/10, 19 July 2000.

35 According to the views expressed by Judge Higgins, it is "unclear whether [the right to development] is compatible with emerging environmental norms. There is frequently an environmental price to pay for development", Rosalyn Higgins, in *Problems and Process*, *op. cit.*, *supra*, note 31, p. 104.

36 *Op. cit.*, *supra*, note 31.

37 In connection with the right to adequate food, see Asbjørn Eide, "Updated study on the right to food and to be free from hunger", UN doc. E/CN.4/Sub.2/1999/12, 28 June 1999, in particular pp. 9-23.

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order in which the rights and freedoms set forth in this Declaration can be fully realized".[38]

The Stockholm Declaration provides that, "[b]oth aspects of man's environment, the natural and the man made are essential to his well-being and to enjoyment of basic human rights – even the right to life itself". It also states that:

> Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.[39]

The Rio Declaration provides that human beings are at the center of concern for sustainable development. They are entitled to a healthy and productive life in harmony with nature (Principle 1). It states that, "the right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations".[40]

The environmental dimension of human rights includes not only protection such as the right to life, health, traditional livelihood and culture, but encompasses the right to access to information about the environment;[41] the right to express opinions about the environment; the right to environmental education; the right to associate peacefully with others for the purpose of protecting the environment; the right to participate in decisions affecting the environment and the right to administrative or judicial redress for violations of protected rights.

It should be emphasized that human rights cannot be realized in a degraded or polluted environment. The basic right to life is threatened, for example, by acute exposure to radioactivity[42] or contaminated drinking water. It can also be violated by exposure to toxic chemicals through careless hazardous waste disposal or certain industrial practices.

3. International human rights instruments

3.1. Universal Declaration of Human Rights

The UDHR was proclaimed on 10 December 1948. Its preamble states that the UDHR is "a common standard of achievement for all peoples". Thus, it

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38 Article 28 of UDHR. For the text of UDHR, see *Human Rights, A Compilation of International Instruments*, UN Publ. Sales No. E.88.XIV.1., June 1988, pp. 1-7.

39 Principle 1, *op. cit., supra*, note 3.

40 *Op. cit., supra*, note 8.

41 About a fundamental "right" to environmental information, see Stuart Bell and Donald McGillivray, *Environmental Law, The Law and Policy Relating to the Protection of the Environment*, 5th edition, Blackstone Press Limited (2000), pp. 217-235.

42 *Op. cit., supra*, note 41.

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does not purport to set out the law, but rather an ideal "towards which every individual and every organ of society ... shall strive".[43] The UDHR is mainly an interpretation of the UN Charter. It embodies customary international law or general principles of law. Its legal significance derives from the fact that it is binding on the organs and bodies of the UN. Its proclamation meant mainly that human rights were of international concern.[44] Many contemporary scholars agree that it is binding international law.[45]

It should be mentioned that the UDHR contains no direct reference to environmental law. Nevertheless, the concept of the right to life is fundamental to all contemporary human rights instruments. In this respect, it can be argued that the right to a clean environment falls within the scope of the right to mere physical existence.[46]

3.2. Global human rights treaties and other international instruments

Global treaties have generally not included specific reference to the environment or to environmental rights. The following conventions constitute exceptions: the Convention on the Rights of the Child,[47] Convention 169/1989 of ILO (hereinafter "Convention 169")[48] concerning Indigenous

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43 In this connection, see Erica-Irene A. Daes, *The Report on Promotion, Protection and Restoration of Human Rights at the National, Regional and International Levels, Draft Body of Principles and Guidelines on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Human Rights and Fundamental Freedoms*, UN doc. E/CN.2/1985/30 and Add.1 of 9 August 1985. Also, by the same author, *Status of the Individual in Contemporary International Law*, UN Publ. Study Series 4, Sales No. E.91.XIV.3, 1992, p. 22.

44 Erica-Irene A. Daes, *Freedom of the Individual under Law: An Analysis of Article 29 of the Universal Declaration of Human Rights*, UN Publ. Study Series 3, Sales No. E.89. XIV.5, Geneva, 1990, p. 5.

45 J. Greenberg, "Race, Sex and Religious Discrimination" in Th. Meron (ed.), *International Law, Legal and Policy Issues*, vol. II, Clarendon Press (1984), pp. 314-315, and the literature quoted therein.

46 M.S. Lehmann-Waldau, "Environmental Protection within the International Human Rights Framework, The Case of Global Warming", in *Thesaurus Acroasium*, Vol. XXIV, Peace and Human Rights, Institute of International Public Law and International Relations of Thessaloniki, 2000, p. 696.

47 See, for example, Articles 24 (e), 29 (e) and 39 of the Convention on the Rights of the Child, in *A Compilation of International Instruments*, Vol. 1 (First Part), UN Publ. Sales No. E.94.XIV1, pp. 183, 186, 188 and 189.

48 ILO Convention 169/1989 concerning Indigenous and Tribal Peoples in Independent Countries, for example, preambular paragraph 7 and Articles 4 (1) and 32, in Manuela Tomei and Lee Swepston, *Indigenous and Tribal Peoples: A Guide to ILO Convention 169*, ILO, Geneva (July 1996), pp. 35, 36 and 43.

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and Tribal Peoples in Independent Countries, and the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR").[49]

In this respect, the Convention on the Rights of the Child (which entered into force on 2 September 1990) refers to aspects of environmental protection concerning in particular the child's right to health. Article 24 (2.c) provides that States Parties shall take appropriate measures to combat disease and malnutrition "through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution". Article 24(2.e) states that information and education shall be provided to all segments of society on hygiene and environmental sanitation.[50] Article 29(1.e) provides that States Parties agree that the education of the child shall be directed to the development of respect for the natural environment.

Convention 169 contains many references to the land, resources and environment of indigenous peoples. Article 4 states, *inter alia*, that special measures are to be adopted for safeguarding the environment of such peoples. Article 6 provides that States Parties must consult indigenous peoples and provide for their participation in formulating national and regional plans that may affect them. Article 7(3) and (4) state that studies must be carried out, in co-operation with indigenous peoples concerned, to assess the environmental impact on them of planned development activities. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit. Article 12 provides for remedies. Part II of Convention 169 refers to land issues,[51] including the right of the peoples concerned to the natural resources[52] pertaining to their land.[53]

Article 12 of CESCR provides that "States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Paragraph 2 defines the steps to be taken by the States Parties to achieve the full realization of this right.

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[49] In connection with cultural rights and minorities, see Asbjørn Eide, "Cultural Rights and Minorities" in *op. cit.*, *supra*, note 19, pp. 83-97.

[50] *Op. cit.*, *supra*, note 47, p. 183.

[51] Erica-Irene A. Daes, *Final Working Paper on Indigenous Peoples and their Relationship to Land*, E/CN.4/Sub.2/2001 /21, pp. 9, 22 and in particular 25-26.

[52] Erica-Irene A. Daes, *Working Paper on Indigenous Peoples' Permanent Sovereignty over Natural Resources*, E/CN.4/Sub.2/2002/23, 30 July 2002.

[53] Environmental issues are also addressed in two other ILO Conventions: Convention concerning the Protection of Workers against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration (Convention No. 148, 1977), and Convention concerning Occupational Safety and Health and the Working Environment (Convention No. 1155, 1981).

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Among these steps is, according to Article 12(2)(b) of the ICESCR, the improvement of all aspects of the environment and industrial hygiene.[54] This provision has to be balanced against Article 25 of the same Covenant, which provides that, "[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources".[55]

It is also important to refer to Article 30 of the 1972 Charter of Economic Rights and Duties of States, which provides that,

> [t]he protection, preservation and the enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavor to establish their own environmental and developmental policies in conformity with such responsibility.

The specific reference to the concept of "responsibility of all States" to protect, preserve and enhance the environment for the present and future generations can be interpreted as an indirect recognition of a human right related to the environment.

In the final report of the 1990 Global Consultation on the Right to Development as a Human Right, the interrelationship between human rights and the environment is emphasized, and it was recommended that human rights considerations be placed before UNCED in 1992.

3.3. Regional human rights treaties

The African Charter on Human and Peoples' Rights (hereinafter "African Charter") contains several provisions related to environmental rights. In particular, Article 24 provides that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development".[56]

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights[57] states in its Article 11 (entitled "Right to a healthy environment") that,

> 1. [e]veryone shall have the right to live in a healthy environment and to have access to basic public services and 2. [t]he States Parties shall

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54 *Human Rights, A Compilation of International Instruments*, *op. cit.*, *supra*, note 38, p. 13.

55 *Op. cit.*, *supra*, note 38, p. 17.

56 The African Charter on Human and Peoples' Rights concluded at Banjul 26 June 1981, entered into force 21 October 1986; in Burns H. Weston, Richard A. Falk and Hilary Charlesworth (eds.), *Supplement of Basic Documents to International Law and World Order*, 3rd edition, American Casebook Series, West Group, St. Paul, Minn. (1997), pp. 787-795.

57 Additional Protocol of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, concluded at San Salvador, 17 November 1988, pp. 535-542.

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promote the protection, preservation and improvement of the environment.

The European Convention on the Exercise of Children's Rights defines its main purpose in Articles 1 and 3 as ensuring access of information and participation of children in decisions relevant to them and to provide appropriate remedies.[58]

The Charter of Fundamental Rights of the European Union refers to environmental protection.[59] Article 37 provides that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.[60]

The Treaty for the Establishment of the East African Community states in its Article 111 that a clean and healthy environment is a prerequisite for sustainable development.

The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted in 1998 and entered into force on 30 October 2001, developed under the auspices of the UN Commission for Europe. It codifies various environmental dimensions of the rights to information, to participation and to equal access to judicial and administrative remedies, because "adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself".[61] The Convention is based on three pillars: a) the first requires public authorities to make information on the environment available to the public upon request; b) authorities must provide for public participation when determining whether to permit certain proposed activities; and c), the Convention guarantees access to justice in environmental matters to all persons in signatory States, regardless of nationality or domicile. It also provides that each signatory must establish judicial or administrative proceedings that allow the public to challenge environmental decisions in a fair, equitable, timely and economically feasible manner.

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58 Reprinted in: *International Legal Materials* 1996, p. 651.

59 The Charter of Fundamental Rights of the European Union was adopted at the Nice Summit on 7 December 2000.

60 Article 37, Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, C 364/17, 18 December 2000.

61 Article 1 of the Aarhus Convention, which secures citizens' right, through access to information and public participation, to justice for a healthy environment. See *An Implementation Guide*, Economic Commission for Europe, UN Publ. Sales No. E.00.II.EE., 3 June 2000, pp. 27-157.

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4. Indigenous peoples and the environment

The first draft declaration on the rights of indigenous peoples emerged from the 1977 International Non-Governmental Organization Conference on Discrimination Against Indigenous Populations in the Americas.[62] It includes a provision in its Article 11 that calls for environmental protection:

> It shall be unlawful for any state to make or permit any action or course of conduct with respect to the territories of an indigenous nation or groups which will directly or indirectly result in the destruction or deterioration of an indigenous nation or groups through the effects of pollution of earth, air, water, or which in any way depletes, displaces or destroys any natural resource or other resources under the dominion of, or vital to the livelihood of an indigenous nation or group.

It is estimated by the competent UN entities as well as by the World Bank that there are about 350 million indigenous and tribal people in the world.[63] Ecosystems that have attracted the particular concern of the international community in recent years, such as deserts, Arctic tundra, and tropical forests, are occupied by indigenous peoples, and are necessary for their physical as well as cultural survival. It is almost impossible to separate the conservation of these important habitats from the protection of the basic human rights and the development of the economies of indigenous peoples.[64]

Moreover, as the World Conference on Environment and Development observed, indigenous peoples possess irreplaceable knowledge of the ecosystems in which they live, based on thousands of years of direct observations. This is especially valuable in regions already altered by settlers or by industry, where only the indigenous inhabitants can remember the previous character of the land and wildlife. Indigenous people can and should play a critical and constructive role "on the ground" in future efforts to understand, protect, and rationally utilize these places.

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62 Draft Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere, developed and circulated by indigenous participants at the Non-Governmental Organization Conference on Discrimination Against Indigenous Populations, Geneva, 1977, reprinted in S. James Anaya, *Indigenous Peoples in International Law*, Oxford University Press (1996), pp. 185-190 and in UN doc. E/CN.4/Sub.2/4376/Add.5, Annex 4 (1981).

63 According to the former UN Secretary-General Boutros Boutros-Ghali, the world's indigenous peoples were some 300 million in 1993; see Boutros Boutros-Ghali in the Prologue of Seeds of a New Partnership, published on the occasion of the International Year of the World's Indigenous Peoples and the United Nations 1994, Department of Public Information DPI/1434-93-93803, July 1994, p 1.

64 As regards the rights and status of indigenous peoples, see Siegfried Wiessner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis", 12 *Harvard Human Rights Journal*, 58-128 (1999).

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The link between human rights and the environment is drawn most sharply into focus when the rights of indigenous peoples are at issue. Thousands of indigenous peoples and their cultures are intertwined with the environment in which they live. Indigenous peoples frequently live in underdeveloped areas where there are valuable mineral and oil deposits. The movement into the "frontiers" in many countries, particularly for gold, oil, logging and agriculture, have placed many indigenous cultures directly in conflict with the dominant economy and culture. Thus, the destruction of the rain forests in recent years has caused serious concern in ecological circles, including indigenous peoples and non-governmental organizations concerned. As a general, though not universal rule, indigenous people of a particular area have developed strategies for living sustainably within that area over long periods of time. An important congruence of interests exists in certain cases between environmental protectors and advocates of indigenous peoples' rights, aiming at securing the territory of indigenous peoples from destructive encroachment.

In the opinion of the present writer, it is useful to consider the international law of human rights as it relates to indigenous peoples and in particular to their land when discussing the relationship between indigenous rights and environmental protection.[65] In this respect, it should be mentioned that although international human rights law provides some protection to indigenous peoples, it continues to be a controversial issue in some countries (and one with very significant implications within the field of international law) precisely who is an "indigenous person" or who constitute "indigenous peoples".

The world's indigenous peoples have long criticized the assumption that they are not entitled to the same rights as other "peoples". At the first meeting of the UN Working Group on Indigenous Populations (hereinafter the "WGIP")[66] in 1982, the representative of the Mik Maq Nation condemned the view that colonization is restricted to overseas exploits. Indigenous peoples lose none of their inherent rights or their identity, the above-mentioned representative argued, unless they have "freely and unambiguously chosen to incorporate themselves with other States or peoples by democratic means". Moreover, he pointed out, "States should bear the burden of proving consent, either at the time of foreign settlement or under some contemporary agreement".[67]

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[65] *Op. cit., supra*, note 51.

[66] Douglas Sanders, "The UN Working Group on Indigenous Populations", 11 *Human Rights Quarterly* 406-433 (1989).

[67] In connection with the criteria for a "people", see the comprehensive article by R-L. Barsh, in 7 *Harvard Human Rights Journal* 36-38 (1994).

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The UN has applied the right to self-determination to any territory that is geographically separate and is distinct ethnically and/or culturally from the administering State. Any disposition of such a territory must be based on the "free and voluntary choice" of the peoples concerned as "expressed through informed and democratic processes".

It is certain that indigenous peoples satisfy the criterion of cultural distinction. They have distinct languages and history, despite that in some cases they have incorporated some foreign elements as a result of their political subjection by colonial powers and economic integration with settlers over the past few centuries.

The UN General Assembly limited the exercise of peoples' right to self-determination in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (hereinafter "Declaration on Friendly Relations"). When this important international instrument was adopted in 1970, the Declaration on Decolonization was ten years old and the UN had shifted its concern from facilitating the emergence of new States to stabilizing the borders of newly independent States.

Building upon the compromise between States' interest in territorial integrity and indigenous peoples' demand for representation reflected in the Declaration on Friendly Relations, this author has compared the exercise of self-determination by indigenous peoples to the historic process of nation-building in democratic societies, underlining that, with few exceptions:

> indigenous peoples were never part of State-building. They did not have an opportunity to participate in designing the modern constitution of the States in which they live, or to share in any meaningful way, in national decision making.[68]

Since indigenous peoples in most countries have never been, and are not now, full partners in the political process, they retain their right to self-determination.[69] This means that the existing State has a duty to accommo-

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[68] Erica-Irene A. Daes, *Discrimination Against Indigenous Peoples: Explanatory Note Concerning the Draft United Nations Declaration on the Rights of Indigenous Peoples*, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th session, Agenda Item 14, UN doc. E/CN.4/Asub.2 /1993/26/Add.1 (1993).

[69] In connection with the right of indigenous peoples to self-determination, see Gudmundur Alfredsson, "The Right to Self-Determination and Indigenous Peoples", in Christinan Tomuschat (ed.), *Modern Law of Self-determination*, Martinus Nijhoff Publishers, Dordrecht (1993), pp. 41-54; see, also, Patrick Thornberry, "Self-Determination and Indigenous Peoples: Objections and Responses"; Martin Scheinin, "The Right to Self-Determination under the Covenant on Civil and Political Rights"; John B. Henriksen, "The Right of Self-Determination: Indigenous Peoples versus States and others", in Pekka Aikio and Martin Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to*

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date the aspirations of indigenous peoples through constitutional reforms designed to share power democratically. It also means that indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing State, and to exercise their right to self-determination by peaceful means to the extent possible.

The right to "negotiate freely their status and representation in the State in which they live" would constitute "a kind *of belated State-building*", aimed at reversing the political discrimination experienced by indigenous peoples in the past, and strengthening, rather than weakening, national unity. Secession should be considered only as a last resort.

Recent arguments that secession may not be an unqualified right or an objective of indigenous peoples have persuaded some governments to reassess their opposition to indigenous peoples' right to self-determination. During the debate at the Forty-seventh session of the General Assembly, Australia equated Indigenous peoples' self-determination with national "reconciliation". While "the application of the right to self-determination in the strict decolonization context is coming to an end", the world requires a new and more "dynamic" version that recognizes the "continuing right of all peoples and individuals within each nation state to participate fully in the political process by which they are governed".[70]

Likewise, the representative of the Government of Papua New Guinea advised the General Assembly's Sixth Committee that the right to self-determination need not necessarily end with secession or independence, but could involve a right to determine the group's own socio-political and socio-economic framework within a State "through a process of constitutional restructuring".[71]

Although there is no accepted definition of the term of "indigenous peoples" at international level, the following text proposed by a Special Rapporteur of the UN Sub-Commission, José Martinez Cobo, is often used by the WGIP and other UN organs and bodies for the purpose of international action:

> Indigenous communities, peoples and nations, are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non dominant sectors of society and are determined to preserve, develop and transmit to future generations their an-

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Self-Determination, Institute for Human Rights, Åbo Akademi, Åbo (2000), pp. 39-64, 179-199 and 131-141.

70 Australia's statement at the Opening of the International Year of Indigenous Peoples, General Assembly Ceremony, UN Press Release No GA 8447, 10 December 1992, at 18.

71 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, SR, 24th meeting, 49th session, at 2-3, UN doc. E/CN.2/1993/SR.24 (1993).

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cestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions and legal systems.[72]

The above-mentioned historical continuity may consist of the continuation for an extended period reaching into the present, of one or more of the following factors:

(a) occupation of ancestral lands, or at least of part of them;
(b) common ancestry with the original occupants of these lands;
(c) culture in general, or in specific manifestations (such as religion, living under the tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc.);
(d) language (whether used as the only language, as mother tongue, as the habitual means of communication at home or in the family, or as the main preferred, habitual, general or normal language);
(e) residence in certain parts of the country, or in certain regions of the world;
(f) other relevant factors.[73]

The above-mentioned brief presentation and analysis of the working definition of the term "indigenous peoples"[74] is useful because it helps to understand who should be recognized as indigenous persons, and why these persons are struggling for their physical and cultural survival and in particular for a better and more effective environmental protection.

Since 1989, a consensus has developed that indigenous peoples have distinct collective rights, such as rights to land[75] and natural resources, cultural integrity, environmental security, and control over their own development. This view breaks with the traditional conception of human rights as fundamentally individual in nature.

The rights of indigenous peoples have not been specifically addressed in any of the two major and legally binding human rights instruments of the UN, the ICCPR and ICESCR. Nevertheless, both Covenants recognize basic

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[72] This working definition of the term "indigenous peoples" is contained in the study of the *Problem of Discrimination against Indigenous Populations*, by Special Rapporteur of the Sub-Commission, Jose R. Martinez Cobo, Volume V, para. 379, p. 29, UN Publ., Geneva, 1987.

[73] See, *e.g.*, Ramy Bulan, "Indigenous Identity and the Law: Who is a Native?", in *Jurnal Undang-Undang, Journal of Malaysian and Comparative Law*, Vol. 25, Special Issue, pp. 127-167.

[74] For the concept of "indigenous people", see the working paper by Chairperson Rapporteur of the WGIP, Erica-Irene A. Daes, UN doc. E/CN.4/Sub.2/AAC.4/1996/2, pp.1-26; also Ramy Bulan, *op. cit.*, *supra*, note 73, pp. 130-143.

[75] Erica-Irene A. Daes, Special Rapporteur of the Sub-Commission, *Final Working Paper on Indigenous Peoples and their Relationship to Land*, UN doc. E/CN.4/Sub.2/2000/25, pp. 1-72.

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human rights and fundamental freedoms to which "all peoples" are entitled. The language recognizing these rights is identical in the two Covenants (*e.g.*, Articles 1, 27 and 47 of the ICCPR and Article 1 of the ICESCR).

The rights of indigenous peoples are addressed specifically in two legally binding international conventions adopted by the ILO: the 1957/107 ILO Convention on the Protection of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries, and the 1989/169 ILO Convention.[76] The latter Convention 169 partially supersedes Convention 107 and is viewed as one of the most far-reaching international instruments as regards indigenous peoples. In adopting Convention 169, particular attention was paid to the environmental threats facing indigenous peoples.[77] The preamble of Convention 169 refers to the distinct contributions of indigenous and tribal peoples to cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding.

Convention 169 recognizes indigenous peoples' collective rights to self-development (Article 7(1)), cultural and institutional integrity (Article 5(b)), and territory and environmental security (Articles 6(1)(a) and 6(1)(c)). It also refers to indigenous peoples' rights to the ownership and possession of the "total environment" that they occupy or use, as well as to be protected from environmental degradation, involuntary removal, and unwanted intrusion by outsiders (Article 16(1)), discouraging their removal from land. Article 16(2) provides that when their relocation is necessary, as an exceptional measure, it should take place only with their free and informed consent.

According to Article 7(4) of Convention 169, territory means the total indigenous environment, which governments should protect and preserve. Article 18 provides for penalties for intrusions upon indigenous lands.

It should also be mentioned that under this Convention, State action specifically aimed at indigenous peoples must not be "contrary to the freely expressed wishes of the parties concerned". Any State measures affecting indigenous peoples must be preceded by "good faith" consultations, with the objective of achieving their agreement or consent. Indigenous peoples remain distinct as territorial and political entities over which States have limited power.[78]

In addition to the above-mentioned conventions, the Convention on Biological Diversity[79] is an important part of contemporary international law

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[76] *Op. cit., supra*, note 48.

[77] *Op. cit., supra*, note 53.

[78] See "Convention No. 169: its nature and main provisions as well as its philosophy", in Manuela Tomei and Lee Swepston (eds.), *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169*, Montreal, July 1996, pp. 5-45.

[79] The full text of the Convention on Biological Diversity (concluded in Rio de Janeiro on 6 June 1992 and entered into force 29 December1993) is contained in Supplement of Basic

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related to indigenous peoples and the environment. According to preambular paragraph 12, the Parties recognize the close traditional dependence of many indigenous local communities embodying traditional lifestyles on biological resources, and the desirability of sharing the benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and its sustainable use.

One of the most important provisions of the Convention on Biological Diversity is contained in its Article 8(j), which provides that,

> [each Party,] [s]ubject to its national legislation, [shall: 1.] [R]espect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and [2.] [P]romote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices, and [3.] [E]ncourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Furthermore, Article 10(c) provides that parties must "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements".

Article 17(2) states that Parties must facilitate the exchange of information, including indigenous and traditional knowledge, and Article 18 (1 and 4) affirm that Parties must encourage and develop methods of technical and scientific co-operation for the development and use technologies, including indigenous and traditional technologies, in pursuance of the objectives of the Convention.

In connection with the implementation specifically of Article 18(4) and related provisions of the Convention on Biological Diversity concerning "national legislation", the following examples should be mentioned: existing treaties like the Treaty of Waitangi;[80] legislation in which indigenous peoples act as natural resource management partners; Alaska Eskimo Whaling Commission; joint management agreements in Australia and the U.S. regarding fisheries, habitat, forest management etc.; measures to respect and preserve traditional knowledge, for example, by protecting indigenous access to sacred sites; and indigenous involvement in the management of specific areas and species.

It should be further mentioned that an *ad hoc* open-ended inter-sessional working group was established at the fourth meeting of the Conference in

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Documents to International Law and World Order, *op. cit.*, pp. 1098-1111. For an analysis of Article 8 (j), see below.

[80] For the Maori claims under the Treaty of Waitangi, see the Direct Negotiations Process in Booklet produced by the Office of Treaty Settlements 1997, Wellington, 1997.

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1988, to address the implementation of Article 8(j) of the above-mentioned Convention. The Parties decided to extend the mandate of the working group indefinitely.

The International Indigenous Forum on Biodiversity, a coalition of indigenous representatives, has, since the third meeting of the Conference of the Parties, advised and contributed to the discussion surrounding Article 8(j) of the Convention on Biological Diversity during the working group meetings. The Parties to the Convention have taken positive steps to ensure the continued participation of indigenous peoples in the implementation of Article 8(j). Because of the language "subject to national legislation" the effective implementation of Article 8(j) depends to some extent on a larger body of international law regarding the rights of indigenous peoples and the environment.

Furthermore, reference should be made to the American Convention on Human Rights that entered into force in 1978 and has been ratified by 25 Member-States of the Organization of American States. The Convention protects the right to property and the right to freedom of movement and residence, as well as a broad range of other civil and political rights. The Convention established the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, and bestowed upon them "competence with respect to matters relating to the fulfillment of the commitments made by the States Parties" under the Convention.

5. Contemporary non-binding law

As regards non-binding law relevant to indigenous peoples and environmental protection,[81] brief reference should be made to a resolution adopted by the European Parliament on 9 February 1994, entitled Resolution on Action Required to Provide Effective Protection for Indigenous Peoples.[82] Article 7 recognizes the right to common ownership of traditional lands. Article 11 affirms the "essential role which they have played and which they must continue to play in the conservation of their natural environment".

Mention should be made of the important and constructive international instruments adopted at the Rio Summit on 13 June 1992.[83] The Summit adopted a Declaration on Environment and Development – the "Rio Declara-

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81 Eibe Riedel, "Change of Paradigm in International Environmental Law", 57 *Law and State* 22-48 (1998) (published by the Institute for Scientific Co-operation, Tübingen); also, Mario Kuhn, "Development Cooperation in the Light of Recent Trends in International Environmental Protection", *ibid.*, pp. 49-80.

82 Eur. Parl. Doc. PV 58 (II) (1994).

83 UN doc. A/Conf. 151/26 (vols. 1, 2 and 3), Annex 2 (1992) and *op. cit.*, pp. 26-28.

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tion"; a program for achieving sustainable development known as "Agenda 21";[84] and the Statement of Principles on Forests.[85]

Principle 22 of the Rio Declaration provides that indigenous people and their communities and other local communities have a vital role in environmental management, because of their knowledge and traditional practices. It recognizes indigenous peoples as distinct social partners in achieving sustainable development and emphasizes the unique value of indigenous cultures. It also stipulates that States should recognize and fully support their identity, culture and interests, and enable their effective participation in the achievement of sustainable development.

Agenda 21 is the program of action formally adopted by the States that participated in the 1992 UN Conference on the Environment and Development. Agenda 21 calls for recognition of the role of indigenous peoples in environmental protection, and for a better understanding of the knowledge and resource management experience of indigenous peoples:

> In view of the interrelationship between the natural environment and its sustainable development and the cultural, social economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous peoples and their communities.

In recognizing and strengthening the role of indigenous peoples and their communities, Chapter 26 of Agenda 21 contains a number of objectives.[86] According to the provisions of Chapter 26.3(a)(ii), Governments should establish a process to empower indigenous peoples that includes recognition that the land of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate, as well as recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development. It encourages the "active participation" of indigenous peoples in national legislation and development planning which may affect them; greater control over their land and self-management of their resources; the protection of indigenous intellectual property; and the right to preserve "customary and administrative systems and practices". It provides for the protection of indigenous peoples "from activities that are environmentally unsound or that the indigenous people consider to be socially and culturally inappropriate".

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[84] UN doc. A/CONF.151/26.1992, *op. cit.*, pp. 27 and 28.

[85] *Infra*, p. 600.

[86] *Earth Summit, Agenda 21*, United Nations Programme of Action from Rio, UN Publ., 1993, pp. 227-228.

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Meaningful references to the distinct status and rights of indigenous peoples appear in other chapters of Agenda 21.[87] Indigenous peoples won recognition of the value of their traditional fisheries, and the importance of incorporating traditional knowledge of marine living resources into national management systems.

The Statement of Principles on Forests was adopted as a separate document due to lack of consensus among States on its legal status. The subject of forests is related to the entire range of environmental and development issues and opportunities, including the right to socio-economic development on a sustainable basis. The guiding objective of these principles is to contribute to the management, conservation and sustainable development of forests and to provide for their multiple and complementary functions and uses.[88]

It should be underlined that as a whole the agreements adopted at Rio acknowledge a unique status for indigenous peoples that is justified by their traditional reliance on and sustainable management of renewable resources.

Among the most important contemporary international developments providing for the relationship of indigenous peoples and the environment, including their environmental protection, is the draft UN Declaration on the Rights of Indigenous Peoples[89] (hereinafter "draft declaration"). It constitutes the most significant instrument for the protection of the rights and fundamental freedoms of the world's indigenous peoples. This draft declaration, of which the present writer had the honor of being the principal drafter, is now being further elaborated by an open-ended inter-sessional working group of the Commission on Human Rights.[90] The sixth preambular paragraph of the draft declaration recognizes the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to land, territory and resources, which derive from their political, economic and social structures, and from their cultures, spiritual traditions and philosophies.

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87 See an analysis of the provisions of Agenda 21 in the valuable contribution made by Prof. Dr. jur. Siegfried Wiessner, 10 *Yearbook of International Environmental Law* (1999), The Year Review, I. General Developments, Indigenous Peoples.

88 Non-Legally Binding Authoritative Statement on Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, in Luis Henkin, Richard Crawford Pugh, Oscar Schachter, Hans Smit (eds.), *Basic Documents Supplement to International Law Cases and Materials*, 3rd edition, American Casebook Series, West Publishing Company, St. Paul, Minn. (1993), pp. 844-849.

89 UN ESCOR, Commission on Human Rights, 11th session, UN doc. E/CN.4/Sub.2/1993. See, also, Erica-Irene A. Daes, "Equality of Indigenous Peoples under the Auspices of the United Nations, Draft Declaration on the Rights of Indigenous Peoples", Symposium Tribal Sovereignty: Back to the Future?, in 7 *St. Thomas Law Review* 493-499 (1995).

90 See the most recent relevant report, E/CN.4/2002, 15 February 2002, pp. 1-38.

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Moreover, in its Part VI are included provisions according to which indigenous peoples have the right to own, develop, control and use land and territory, including "the total environment" (Article 26). Of great significance are also the provisions in Articles 27 and 28 of the draft declaration, which, *inter alia* and *expressis verbis*, affirm that indigenous people have the right to the conservation, restoration and protection of the *total environment* and the productive capacity of their land, territory and resources as well as the right to request assistance for this purpose from States and through international co-operation. The second sentence of this Article underlines that "[m]ilitary activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned".

Article 30 of the draft declaration provides that indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples just and fair compensation shall be provided for any such activities and measures taken, to mitigate adverse environmental, economic, social, cultural or spiritual effects.[91]

Although this draft declaration has not yet been adopted by the competent political bodies and organs of the UN, the above-mentioned Articles 26, 27, 28 and 30 have been frequently cited in cases before international bodies as indicative of an emerging international customary law discourse concerning the protection of the rights of indigenous peoples to environment.

The Proposed American Declaration on the Rights of Indigenous Peoples (hereinafter "American Declaration"), approved by the Inter-American Commission on Human Rights on 26 February 1997,[92] affirms the rights of indigenous peoples to own, develop, control and use the lands and resources they have traditional owned or otherwise occupied. Article XIII of the American Declaration is exclusively devoted to the right to environmental protection. The provisions of paragraph 1 of this Article, states that,

> [i]ndigenous peoples have the right to a safe and healthy environment, which is an essential condition for the enjoyment of the right to life and collective well-being.

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[91] See Erica-Irene A. Daes, "Equality of Indigenous Peoples under the Auspices of the United Nations", *op. cit.*, *supra*, note 89, pp. 493-499.

[92] See Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples, in OEA/Ser.L/V/II.110, Doc. 22, 1 March 2001, pp. 3-15.

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Paragraph 6 of the same Article provides that States shall prohibit and punish, and shall impede jointly with the indigenous peoples, the introduction, abandonment, or deposit of radioactive materials or residues, toxic substances and garbage in contravention of legal provisions; as well as the production, introduction, transportation, possession or use of chemical, biological and nuclear weapons in indigenous areas.[93]

Another important development related to indigenous peoples and the environment took place more recently, namely the adoption without a vote of resolution 2000/22 of the UN Economic and Social Council, establishing a Permanent Forum on Indigenous Issues.[94] The mandate of this historically important and modern UN institution provides that the Forum shall serve as an advisory body to the ECOSOC with a mandate to discuss indigenous issues relating to economic and social development, culture, the *environment*, education, health and human rights.[95] Thus, the international community has, once again, recognized the deep knowledge and experience of the world's indigenous peoples on matters related to the protection of the environment.

As an illustration of the issue of indigenous people and the environment in international law, the case of the Yanomami people is noteworthy. This case illustrates in particular the manner in which the protection of human rights of indigenous peoples and the protection of the environment intersect in international law. In the late 1980's, hundreds of miners (*garimperos*) rushed into the traditional territory of the Yanomami Indians of Brazil in search of gold. The miners brought with them disease, violence and environmental destruction on a massive scale. *About 1500 people, nearly one-fifth of the total Yanomami population, were killed during this time* due to disease, murder at the hands of miners, or poison from the contamination of rivers with mercury used in the mining process.

The Yanomami filed a human rights complaint with the Inter-American Commission on Human Rights, demanding legal demarcation of the Yanomami territory and the expulsion of the miners. The situation was also presented to the UN Commission on Human Rights, to the Sub-Commission and to the WGIP. The present author, in her capacity as Chairperson-Rapporteur of the aforesaid Working Group, received an official invitation

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93 For the full text of Article XIII on the Right to environmental protection, see the American Declaration, *op. cit.*, p. 9.

94 Establishment of a Permanent Forum on Indigenous Issues, Economic and Social Council Resolution 2000/22, E/RES/2000/22, 28 July 2000. Also, Erica-Irene Daes, "A United Nations Permanent Forum for the World's Indigenous Peoples, A Global Imperative", in Gudmundur Alfredsson, Jonas Grimheden and others (eds.), *International Human Rights Monitor Mechanisms, Essays in Honour of Jacob Th. Möller*, Martinus Nijhoff Publishers, The Raul Wallenberg Institute Human Rights Library, Volume 7, The Hague (2000), pp. 371-379.

95 Operative paragraph 2 of resolution 2000/22, *op. cit.*, *supra*, note 95.

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by the Government of Brazil and visited remote areas of the country, including the Yanomami territory, in 1990. On the basis of her Report,[96] the UN Secretary-General, Javier Pérez de Cuéllar, personally intervened on humanitarian grounds, urging the removal of the miners and the survival and protection of the Yanomami peoples. Enviromentalists and other national and international non-governmental organizations joined the Yanomami in their effort to demarcate their territory. In 1991 Brazilian President Fernando Collor de Mello, undertook a serious military effort to expel the miners, and in 1992 he signed a decree to demarcate 22.5 million acres of the Yanomami territory.

Since 1993 however, the miners have returned under Brazil's later President Fernando Henrique Cardoso, who has rolled back the demarcation decree. The Brazilian government has issued decree No. 1775, which gives private commercial interests and rights to formally contest the boundaries of indigenous territories that have not yet been demarcated. In this respect, I should like to recommend that national and international legal action may yet again be required.[97]

6. Conclusions

From the forgoing presentation of the global and regional instruments on human rights and environmental protection, the study and analysis of the relevant provisions, the assessment of activities of a number of competent bodies and organs of international and regional organizations and agencies and the consideration of certain developments that have occurred at global and regional levels, in particular through recommendations, decisions of treaties bodies and the judgments of regional and national courts, the following general conclusions may be drawn:

i) The 1993 World Conference on Human Rights affirmed that all human rights are universal, indivisible and interdependent.[98]

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[96] Report by Erica-Irene A. Daes on the Mission to Brazil regarding the situation of Human Rights of Indigenous Populations in particular the Yanomami People, 20 June 1991, on file with the Office of the High Commissioner for Human Rights, in Geneva. See, also, Elsa Stamatopoulou, "The Good Offices of the Secretary General in Human Rights Issues: Past Practice and Future Challenges", in *op. cit., supra*, note 19, pp. 182-183.

[97] See Armstrong Wiggins, "Indian Rights and the Environment", 18 *Yale Journal of International Law* 351 (1993); see, also, Siegfried Wiessner, "Rights and Status of Indigenous Peoples", 12 *Harvard Human Rights Journal* 57, 79 (1999).

[98] Mary Robinson, "Special Contribution, Universality and priorities", in Human Development Report 2000, UNDP, Oxford University Press (2000), p. 113. See the Vienna Declaration and Programme of Action 1993 with the Opening Statement of UN Secretary-General Boutros Boutros-Ghali in The World Conference on Human Rights, 1993, DPI 1394-39399-August 1993-20 M, pp. 1-71.

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ii) The right to life in its wide dimension and the right to health constitute the basis of the *ratio legis* of international human rights and environmental law, providing for the protection and survival of human beings, humankind as a whole and the environment.

iii) Human rights cannot be realized in a degraded or polluted environment. The right to life is threatened, *inter alia*, by acute exposure to radioactivity or contaminated drinking water.

iv) A linkage of human rights and environmental concerns, approaches and techniques, is reflected in developments relating to procedural and substantive rights and the activities of international organizations.

v) At the global level, some human rights treaties included the value of the environment in their systems of protection, such as the Convention on the Rights of the Child, the ICESCR and ILO Convention 169/1989.

vi) Principle 10 of the Rio Declaration (on access to information, participation and effective remedies) has played an important role in fostering connections between human rights law and environmental approaches. It contains provision related to remedies in respect to environmental conditions.

vii) Particular lessons should be learned from the knowledge and experiences of the world's indigenous peoples that are relevant to a broader understanding of the relationship between human rights and the environment. In this respect, reference should be made to the observance of the fundamental principles of self-determination and the basic rights associated with the ownership, possession and use of traditional lands, territories and natural resources.

vii) The distinctive contribution made by the world's indigenous peoples to cultural diversity and in particular to ecological harmony of humankind by respecting and protecting the environment, should constitute one of the foundations on which the survival of the peoples of the earth can be built.

7. Selected decisions and recommendations by international and regional treaty bodies

7.1. United Nations Human Rights Committee

The Committee is empowered to receive and hear complaints of alleged violations of human rights and fundamental freedoms and to make recommendations to the States. One of these cases is Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, Communication No. 167/1984.[99] In this case the Human Rights Committee found Canada to be in violation of Article 27

[99] Report of the Human Rights Committee, UNGAOR, 45 Sess. Supp. No. 40, Vol. 2, UN doc. A/45/40, Annex (A) (1990), adopted on 26 March 1990, at the 38th Session.

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of the International Covenant on Civil and Political Rights, stating that Canada's facilitation of oil drilling and logging on Lubicon Cree traditional lands constituted violation of the cultural rights of the Lubicon Cree. Cultural rights would thus seem to include the land use patterns of indigenous peoples and the protection of the environment.

7.2. Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights implements the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights, and is empowered to receive petitions, prepare reports and make recommendations to States. The Commission may submit cases to the Inter-American Court of Human Rights, which pronounces binding decisions regarding the Convention to States that have accepted its jurisdiction.[100] In one case the Commission found that Brazil had violated the rights to life, residence and health of the Yanomami Indians, of the American Declaration on the Rights and Duties of Man, as well as Article 27 of the International Covenant on Civil and Political Rights, which provides, *inter alia*, for the right to culture. The Commission recommended that Brazil demarcate Yanomami lands and take steps to expel the miners who violated the rights of the Yanomami peoples.[101]

Furthermore, the Commission Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaragua Population of Miskito Origin, are relevant.[102] On the basis of the provisions of Article 27 of the International Covenant on Civil and Political Rights, the Commission recommended that Nicaragua take steps to secure indigenous lands after Miskito peoples had been relocated from their traditional lands.

Commission Case No. 11.713 (Paraguay), Agreement between the Government of Paraguay and the Indigenous Communities of Lamaenxay and Riachito, of March 1998, should also be mentioned. This is the first agreement in the Inter-American human rights system that has restored land to an indigenous community. According to the agreement, a large land area in the Chaco region will be returned to the indigenous communities of Lamenxay and Riachito.[103]

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[100] Case 7615 (Brazil), IACHR Res. No.12/85 (5 March 1985), Annual Report of the IACHR, 1984-85, OAS Doc. OEAA/Ser.L/V/III.66, Doc. 10, rev. 1985.

[101] *Op. cit*, pp. 52 and 53.

[102] Case 7964 (Nicaragua), OAS Doc. OEA/Sser.L/V/II.62, Doc. 10, rev. 3 (1983), OEA/Ser.L/V/II.62, Doc.26 (1984).

[103] OAS IACHRR, Press Communiqué No. 04/98 (25 March 1998). PURL: https://www.legal-tools.org/doc/5ecf1e/

Other cases that have been heard by the Commission include the Guahibo Indians of Colombia, the Ache and Toba-Maskoy of Paraguay, the Miskito of Nicaragua, the Mayan of Guatemala, the Inuit and Athabascan of Alaska, and the Kanaka Maoli of Hawaii.

7.3. Committee on the Elimination of Racial Discrimination (CERD)

The CERD is empowered to hear human rights complaints relating to alleged violations of human rights and fundamental freedoms and specifically alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination, and to make recommendations to States regarding these violations. In 1997, CERD issued a General Recommendation calling upon States to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.[104]

Several cases before CERD have dealt specifically with indigenous peoples and the environment, for example, the following cases:

- Report of the CERD that examined the government programs in Ecuador concerning indigenous lands and the effects of the exploitation of natural resources taken from indigenous lands.[105]

- Report of CERD by which the Committee had considered the legal regime applicable to Saami land and hunting rights in Sweden and evaluated developments in Australia, concerning indigenous land rights.[106]

- The decision of CERD found several provisions of Australia's Native Title Amendment Act to be discriminatory. The Act does not protect indigenous lands in the same manner as non-indigenous lands, and provides for several discriminatory mechanisms for the extinguishment of native land title.[107]

8. Some relevant cases

There are some relevant cases that are noteworthy in this connection:

- A Case of Muonio Saami Village v. Sweden, European Court of Human Rights, Application No. 28222/95, First Section Judgment, Strasbourg, 9 January 2001;[108]

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[104] CERD General Recommendation XXIII concerning Indigenous Peoples, adopted at the Committee's meeting on 18 August 1997, CERD/D/51/Misc.13/Rev.4.

[105] CERD, UN GAOR 48th session , Supp. No. 18, UN doc. A/48/18, at 40-43 (1993).

[106] CERD UN doc. A/49/18, at 30 (1994).

[107] Decision (2) 54 on Australia, 18 March 1999, CERD /C/54/Misc. 40/Rev.2.

[108] This citation was added during the editing of the present work.

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- Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of 31 August 2001;[109]

- Earl Muldoe and others v. Her Majesty The Queen in Right of the Province of British Columbia and the Attorney General of Canada (respondent) and the First Nations Summit, and others (Interveners). On Appeal from the Court of Appeal for British Columbia, Indexed as: Delgamuukw v. British Columbia, File No.: 23799 1997: June 16, 17, 1997: December 11;

- Case Mabo and Others v. Queensland, High Court of Australia, No. 2 (1992) 175 CLRR 1 F.C. 92/014.

[109] This citation was added during the editing of the present work. PURL: https://www.legal-tools.org/doc/5ecf1e/

XXVI

Terrorism and human rights after 2001

Vojin Dimitrijević*

1. The "ordinary" meaning of the word "terrorism"

It is very difficult to define terrorism. We keep recognizing the phenomenon and find it repulsive but we fail to come closer to its satisfactory description. A "successful" act of terrorism includes an element recurring in all acts of terrorism with ever increasing intensity. It is its non-conventional (extra-normal) nature, its being unexpected, it is the fact that it violates all rules of fair political play. In this context, "fair play" denotes some elementary, most primitive rules of the game. It is neither legal norms, even if they pretend to govern deadly conflicts, such as the laws of warfare – international or internal – nor some "ethical" restraints present in dealings among criminals.

Terrorist acts have to break all rules all the time, as they have to be shocking and unpredictable. This is why the great terrorist outrages of the nineteenth century appear tame in comparison with the assassinations and destruction in the twentieth century: this in why the attack on the World Trade Center in New York, marking the beginning on the 21st century, has overshadowed all the previous ones. Not only were thousands of human beings killed, but hundreds of them were used as instruments to kill others, as some kind of gruesome ammunition or weight in the missiles directed against them! The world has become used to suicide attacks where individual attackers sacrifice their lives to harm their perceived enemies and to inspire awe.

What are the other ingredients of an act of violence, generally perceived as "terrorist"? If we put aside some very idiosyncratic views on terrorism, it appears that most observers agree that the following features are present in all such acts. A terrorist attack is essentially political: its message is political and its expected results are political. At least, the intention of the perpetrator is political. Determining whether the true intent was political could meet with difficulties in courts of law, but the term is clear enough in its ordinary meaning. National courts have yielded a rich jurisprudence on "political

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crimes" when dealing with extradition, which is generally not allowed for political offenders.[1]

Another element of a terrorist act is the nature of its target, in fact, its dual target. Unlike "pure" political assassination, where the victim has simply to be removed and political change effected thereby, in a typical act of terrorism the immediate object of the attack is more or less irrelevant: the true target is wider, it is all those who identify with the immediate victim and are expected to change their political behaviour. The agent linking the first and the wider target is fear ("terror" in its original sense). For that reason, the primary target is as a rule highly symbolical. Damaging a symbol implies a threat to everything associated with the former, to everyone identifying with it. Uniformed people have always been most susceptible to terrorist attacks because they symbolize the state, the government, the organization for which they work. The victim in uniform can remain nameless and faceless and this is how such persons are recorded in the media: "A soldier, twelve policemen, the crew of a helicopter, etc.". Thus inanimate objects, such as monuments and important buildings, have become targets of politically motivated terrorists. The attack on the twin towers of the World Trade Center and on the Pentagon were good examples. To be sure, there were massive casualties, but for the terrorists they were "collateral damage" in the most literal sense. The attackers were not interested in the people found in the buildings, they wanted to convincingly hit the centre of world capitalism, globalization, US supremacy, American militarism and what not. For the viewers of television reports it was conspicuous that most persons evacuated from the ruins in New York City and their bereft relatives were not "typical" Americans as depicted by those fond of generalizing the image of arrogant possessors of global power: they were certainly not WASPs, they looked decisively black or Hispanic.

The next element of a possible definition of terrorism has presented the greatest difficulties. Namely, an act of terrorism is to be condemned because it is somehow morally wrong. In other words, it affects "innocent" people, irrespective of whether they are deliberately targeted or are accepted as collateral victims. This means that they are not guilty, not necessarily in legal terms, but in the wider sense of not being personally responsible for the evil purportedly identified and assaulted by the terrorists. Unfortunately, people can be perceived guilty in many unexpected ways. Hanns Martin Schleyer, kidnapped and killed by the German Red Army Faction (*Rote Armee Fraktion*), was "guilty" because he was the chairman of the employers' association, that is, "the most important German capitalist". A group of tourists returning from their vacations in Majorca in a plane hijacked and brought to a desert air strip were considered guilty by their abductors: they were sure that

[1] See Ivan Shearer, *Extradition in International Law* (1971). PURL: https://www.legal-tools.org/doc/5ecf1e/

their hostages had been frivolously enjoying life while the people of Palestine were suffering under the Israeli yoke or that the tourists had been having a good time at the expense of the poorly paid migrant workers from developing countries. A French anarchist said that he would not hit an innocent if he killed the first bourgeois he would encounter.

The ambiguity regarding the innocence of the victims explains the permanent need to differentiate between "good" and "bad" terrorists. In fact, this explains the tendency not to apply the term "terrorist" to "good" terrorists at all. The latter become "guerrillas", "freedom fighters", "rebels", "members of resistance movements", etc.

The reactions abroad to the outrage of 11 September 2001 have been influenced by this ambiguity. In the eyes of fundamentalist Moslems all Americans are liable for the various misdeeds of their government and its allies. If we concentrate on the poorer part of the European continent, composed of countries formerly under communist rule, the reaction appears to have depended on the degree of the belief that the United States played a beneficial role in their liberation from Soviet dominance. However, if the United States is remembered as an enemy, or a powerful opponent, the feelings tend to be mixed. This accounts for some reactions in Yugoslavia and Macedonia. If not general approval of the acts of violence against the United States, there certainly was a subdued feeling of *Schadenfreude*, a perception of deserved and just revenge on Americans.

One can only guess what the expected effects of any terrorist act are in the mind of each and every terrorist. Terrorists are mostly irrational. However, many of them count on the overreaction of the system. Very often they have stated that their purpose was to "unmask" the state, to force it to show its true face. The main difference between the bulk of the terrorist acts in the past and the 11 September events is that the former had been spatially limited to a state, or to a group of states, and that this most recent action treated the world as a whole. In a way it proved most of the points of the advocates of globalization in an unexpected manner. Osama bin Laden's collaborators and followers (if we assume that he masterminded the attack) represent in fact a "movement of rage" purporting to represent everyone frustrated by the inevitability of the world becoming one and of it remaining captive of commercial and cultural patterns imposed by the United States, or at least symbolized by the latter.

On the other hand, US public and US opinion makers have perceived it as an assault on their homeland and its values. The reaction has become easily identifiable as good old patriotic rallying around the flag. The United States government was forced to act, to do something decisive, something strong. However, the United States is only a superpower *vis-à-vis* other states: in relation to non-state actors, including "private" terrorist organiza-

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tions of unknown size, a superpower is as strong as any other state. The huge American military machinery possesses not only necessary military hardware but also adequate experience, skills and training to prevail in a classical war situation. Pressed to act and unable to quickly adapt to fighting an elusive transnational enemy, US decision makers first chose to identify Afghanistan and its Taliban government as the real adversary.

If there is something that can be said about terrorism with a relative degree of certainty, it is that acts of terrorism do not prove anything. They do not indicate that the perpetrators are strong in numbers. A terrorist act, irrespective of the tremor it produces, does not show that its authors have many followers: it can as well indicate that there are rather too few adherents to support the cause by democratic, majoritarian means. Neither does a terrorist outrage testify that the cause of the terrorists is just, that they are right in the legal or moral sense. Acts of terrorism cannot generally be considered as a symptom of an intolerable state of affairs: there have been serious and deadly terrorist waves in the richest, as well as in the poorest, countries, in the most democratic states, as well as in those governed by tyrants. One can always recall the singular absence of terrorism in some of the worst totalitarian systems known to history, such as Hitler's Germany and Stalin's Soviet Union (in spite of so many "terrorists" tried and executed in the USSR).[2]

2. How to define terrorism in legal terms

"Terrorism" is a "bad" word in the same way "democracy" is a "good" word. In less hypocritical times, generally before World War I, politicians, popular leaders and writers were not afraid to admit that they considered terrorism as a legitimate and useful tactical weapon, or even that they were terrorists themselves.[3] Respectable people did not hesitate to express doubts about the merits of democracy, even to declare that they were opposed to democracy. A similar manifestation of new hypocrisy was that, since the 1928 Briand-Kellogg Treaty (making recourse to war illegal) came into force, no state has ever declared war; aggressive military attacks have been launched without announcement and warning, and references to war have been replaced by inventive euphemisms. As a result, almost all political parties are called democratic and many states find it necessary to officially style themselves as "democratic republics". The division between "good" and "bad" terrorists from the respective points of view is reflected in similar colourful terminology.

As a result the legal definition of terrorism has become almost impossible, especially in international law. The reader will note that, when referring

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2 See Vojin Dimitrijević, *Terorizam*, 2nd edition (2000), p. 139 *et seq.*

3 In the times of the French Revolution "un vrai homme de terreur" was a compliment.

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to the violation by terrorists of the accepted rules of political fair play and humanity, we had to use words as "non-conventional" or "extra-normal". The word "illegal", used in one of the first modern "anti-terrorist" international treaties,[4] has not been of great help, because in many cases the criterion is national, *i.e.*, whether an action is illegal in terms of the national law of a given state. States are free, in their legislation, to declare as terrorist any act (even an act not involving violence) or to decriminalise many acts usually regarded as "terrorist". Using such criteria the international community can become hostage of most repressive regimes.

In order to avoid value judgements and achieve timely results, international organisations have reacted to terrorist events essentially on a case-by-case basis. After the ultra-leftist and national liberation terrorist wave started in the 1960s, some of the most harmful and reprehensible deeds have been singled out and defined as criminal offences in separate treaties, such as the following:

- Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970;
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971;
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973;
- International Convention against the Taking of Hostages, New York, 17 December 1979;
- Convention on the Physical Protection of Nuclear Material, Vienna, 3 March 1980;
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 24 February 1988;
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988; and
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 10 March 1988.

These international instruments are generally designated as "anti-terrorist" but they never use the term "terrorist". They simply describe acts perceived as dangerous and condemn them irrespective of the intent and motive of the perpetrator. These definitions are both narrower and wider than the usual connotations of terrorism, as described above. They are narrower,

[4] Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970.

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because they refer only to a segment of the tools of modern terrorism, *e.g.*, aircraft hijacking, and they are broader because they encompass acts usually not regarded as terrorist, mostly because the intent and motives of the perpetrator are not political; thus an attack against an internationally protected person committed for very personal reasons is treated in the same manner as the kidnapping in Vienna of the ministers of countries – members of OPEC, the incident which inspired the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

The two most recent instruments of such nature refer to terrorism in their titles:

- International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997; and
- International Convention for the Suppression of the Financing of Terrorism, New York, 10 January 2000.

One could have expected these new treaties to define the phenomenon in a more generic way. However, the first of the conventions listed above remained in the old tradition. In its Article 2 it only defines as a criminal offence another method used by terrorists, that is, delivering, placing, discharging or detonating "an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility" with an intent to cause death or serious bodily injury or extensive destruction, "where such destruction results in or is likely to result in major economic loss". Again all acts corresponding to this definition need not be "terrorist" as this term is usually understood. In other words, it is not clear why the bombing described in Article 2 is "terrorist", as the title of the Convention suggests, and what the difference is between this act and "ordinary", non-terrorist destruction likely to result in major economic loss, resulting, say, from the rivalry of ruthless entrepreneurs or developers.

The International Convention for the Suppression of the Financing of Terrorism went a step further. According to its Article 2,

> 1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
>
> (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
>
> (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a gov-

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> ernment or an international organization to do or to abstain from doing any act.
>
> 2. (a) On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact ...

In fact, the first part of the definition remains in the old tradition, adding to it a circular and open-ended element. Because of the nature of the phenomenon addressed in the treaty, financing of terrorism is only an accessory offence linked to the activity financed, which is "terrorism". Consequently, "terrorism" is that which is defined in the preceding "anti-terrorist" treaties, quoted in the annex to the Convention.[5] The Annex is not static: according to Article 23, the parties to the Convention can declare "terrorist" any offence defined in another international treaty:

> 1. The annex may be amended by the addition of relevant treaties that:
>
> (a) Are open to the participation of all States;
>
> (b) Have entered into force;
>
> (c) Have been ratified, accepted, approved or acceded to by at least twenty-two States Parties to the present Convention.

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[5] The present (1 September 2002), wording of the Annex is:

1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.
3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
5. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.
7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.
8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.
9. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

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> 2. After the entry into force of this Convention, any State Party may propose such an amendment. Any proposal for an amendment shall be communicated to the depositary in written form. The depositary shall notify proposals that meet the requirements of paragraph 1 to all States Parties and seek their views on whether the proposed amendment should be adopted.
>
> 3. The proposed amendment shall be deemed adopted unless one third of the States Parties object to it by a written notification not later than 180 days after its circulation.
>
> 4. The adopted amendment to the annex shall enter into force 30 days after the deposit of the twenty-second instrument of ratification, acceptance or approval of such amendment for all those States Parties having deposited such an instrument ...

Conversely, a State Party can exclude from the Annex any treaty which it has not ratified for any reason, including its perception that the proscribed activity is not "terrorist".

On the other hand, and introducing a new definitional element, Article 2.1(b) is an attempt to broadly define a terrorist offence as

> any [...] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is *to intimidate* a population, or to compel a government or an international organization to do or to abstain from doing any act.[6]

A similar supplement is contained in Article 1 of the 1977 European Convention on the Suppression of Terrorism. In order to facilitate extradition of "terrorist" offenders, some criminal offences, listed in that article, were declared, "for the purposes of extradition between Contracting States", not to be political offences or offences connected with a political offence or offences inspired by political motives. The first part of the list of "depoliticised", *i.e.*, "terrorist" offences consists of the familiar referral to "anti-terrorist" treaties existing at the time of the adoption of the European Anti-Terrorist Convention,[7] or offences defined in treaties about to come into force at the time, such as "a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents or an offence involving kidnapping, the taking of a hostage or serious unlawful detention", later to be found in the 1973 Convention on the Prevention and Punishment of Crimes against Internationally

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[6] Italics added.

[7] "a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970; b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971."

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Protected Persons, including Diplomatic Agents, or "an offence involving kidnapping, the taking of a hostage or serious unlawful detention", later to be defined in the 1979 International Convention against the Taking of Hostages.

In anticipation of some treaties to be concluded much later, Article 1 of the European Anti-Terrorist Convention described as unworthy of the label of political offence for purposes of extradition also "an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons".

In the hectic period after the 11 September 2001 outrage, efforts to seek a generic legal definition of terrorism have become intense. In the United Nations, due to obvious reasons, agreement on a more general definition to be included into a legally binding instrument has not been easy to reach.[8] The important resolution 1373 (2001), adopted by the Security Council on 28 September 2001, and binding on UN members because of being adopted under Chapter VII of the UN Charter, refers only to "terrorist acts", "acts of international terrorism" and "terrorist attacks". This is repeated in the following resolution 1377 (2001) of 12 November 2001.

The Commission of the European Communities was much quicker to react. Only a week later it submitted to the EU Council of Ministers its Proposal for a Council Framework Decision on Combating Terrorism.[9] Its purpose is to "establish minimum rules relating to the constituent elements of criminal acts and to penalties for natural and legal persons who have committed or are liable for terrorist offences" (Article 1).

Although inspired by previous international efforts to define and suppress terrorist acts, the Proposal does not refer to them. Realising that most terrorist acts are technically identical to many common crimes and are punishable as such in all members of the European Union, the Commission quotes such offences but attempts to define the essential additional element that qualifies them as terrorist. According to Article 3(1) of the proposed Framework Decision serious candidates for terrorist offences are acts defined by the national laws of member states as murder; bodily injuries; kidnapping or hostage taking; extortion, theft or robbery: unlawful seizure of or damage to state or government facilities, means of public transport, infrastructure facilities, places of public use, and property; fabrication, possession, acquisition, transport or supply of weapons or explosives; releasing contaminating substances, or causing fires, explosions or floods, endangering people, property, animals or the environment; interfering with or disrupt-

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8 See *Comprehensive Convention Against International Terrorism*, joint letter of Amnesty International and Human Rights Watch, New York, 28 January 2002 <http://hrw.org/press/2002/01/terror012802-ltr.htm.>

9 COM (2001) 521 final of 19 September 2001.

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ing the supply of water, power, or other fundamental resources; attacks through interference with an information system and threatening to commit any of the offences listed above. These offences become terrorist only if they are "intentionally committed by an individual or a group against one or more countries, their institutions or people with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of a country".

The offences of "directing a terrorist group" and "promoting of, supporting of or participating in a terrorist group" can be understood by reference to the definitions of the latter contained in Article 3, paragraph (2), of the terrorist group as a "structured organisation established over a period of time, of more than two persons, acting in concert to commit terrorist offences referred to in paragraph (1)".

The Proposal has an article on penalties and sanctions (Article 5). The nature of a framework decision in the system of the European Union allows the organs of the Community to give instructions to member States regarding maximum penalties that are considered to be "effective, proportionate and dissuasive". The Proposal contains such detailed instructions.

It is interesting that in its Article 6 on aggravating circumstances the Commission, while completing its sentencing instructions, uses the language of some "old" attempts in national legislations and bilateral treaties to suppress terrorism by denying some criminal offences their political nature (*e.g.*, The Belgian *Attentat* clause). Namely,

> penalties and sanctions referred to in Article 5 may be increased if the terrorist offence: (a) is committed with particular ruthlessness; or (b) affects a large number of persons or is of a particular serious and persistent nature; or (c) is committed against Heads of State, Government Ministers, any other internationally protected person, elected members of parliamentary chambers, members of regional or local governments, judges, magistrates, judicial or prison civil servants and police forces.

With some exaggeration one may say that this is what was considered terrorism in the international sense until, maybe, some four decades ago. It appears that we are now faced with two degrees of terrorist offences: simple and aggravated terrorist acts.

As already indicated, national legislators have an easier task in defining terrorism for their purposes. They can afford to define acts of terrorism through the intention to "subvert the constitutional order or seriously endanger public peace"[10] or "democratic order".[11] It is the constitutional order of a given state, public peace and democracy as understood in a certain society or

[10] Article 571 of the Spanish Penal Code.

[11] Article 270*bis* of the Italian Penal Code.

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by the powers-to-be.[12] This presupposes a set of commonly shared and defined values, which is not present in the global community but may exist in a regional one, *e.g.*, in the European Union.[13]

The element of intimidation, entering recently in more abstract definitions of terrorist acts in international documents, has also been introduced in national criminal legislation, such as the French Criminal Code (Article 421-1), the Portuguese Criminal Code (Article 300) and the UK Terrorism Act of 2000. This is closer to a description of the terrorist *modus operandi*, implying the defence of moral values without favouring certain political preferences. However, intimidation is the ingredient of many "ordinary", non-terrorist crimes. In order to narrow the definition it has to be linked with political objectives, where again opinions and attitudes can diverge at the international level.

3. How do terrorism and anti-terrorism campaigns affect human rights?

It is notorious that acts of terrorism violate the rights of their immediate and secondary victims. There is hardly an internationally recognised human right that is not affected by an act belonging to the terrorist category. It is the right to life, the right to physical integrity (prohibition of torture, inhuman and degrading treatment), the right to liberty and security of person, the right to privacy, the right to freedom of thought, conscience and religion, the freedom of expression, the right of peaceful assembly, the freedom of association, the right to the peaceful enjoyment of property.

This is what makes terrorism morally reprehensible and justifies legal prosecution and punishment of perpetrators of terrorist acts. Terrorism reflects the moral callousness of persons resorting to it, based on their cynical belief that "innocence" does not exist in relation to their goals or that they are at war with mortal enemies, a war where all means are justified.

Terrorists have never achieved the major goals they have stated as the objectives of their action. Anarchists destroyed no state. Italy has not become what the *Brigate Rosse* wanted it to become. Germany has never experienced a socialist revolution in the sense the *Rote Armee Fraktion* imagined. Latin American urban *guerrilleros* failed to create communist societies in the region. The IRA has not separated Ulster from the United Kingdom. Etc. Etc. However, one stated goal of many terrorists has always material-

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[12] One should recall the famous definition of the former President of Argentina Videla, according to which a terrorist is "anyone who spreads ideas contrary to Western and Christian civilisation". See N. Chomsky – E.S. Herman, *The Washington Connection and Third World Fascism* (1979) p. 267.

[13] See Commission of the European Communities, Explanatory Memorandum accompanying the Proposal for a Council Framework Decision, 2001/0217 (CNS), p. 6 *et seq.*

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ised, at least partly and gradually. Many terrorists have claimed that they wanted to "expose" the state they attacked, to show its "ugly" face, especially if it alleged to be democratic. Since the advent of the large, internationalised terrorist waves in the 1960s life in many countries has become less comfortable and less free.

Feelings of panic following large scale terrorist acts or systematic terrorist campaigns have without exception resulted in strong demand on political decision makers to react with determination, to undertake effective measures to prevent terrorist acts through more efficient controls, and to try and punish alleged terrorists in order to deter would-be terrorists or, simply, to take revenge.

Eliminating terrorism would be sufficiently difficult if its causes were satisfactorily established. In this case the international community would be closer to the problems faced by any state wishing to tackle criminality not only by repressive but also by deeper, wider, more substantial measures which do not rely only on police work. However, the causes of any terrorism are very elusive, of international terrorism in particular. It has not been possible to convincingly link them to levels of development, political or economic grievances, to presence or lack of democracy or other similar factors. The terrorist sample is too small to warrant meaningful conclusions. As a result, there have not been any serious proposals for long-term concerted strategies, national and international, to eliminate the roots and causes of terrorism. One cannot take very seriously the plethora of immediate reactions after more conspicuous terrorist acts. They have tended to be superficial, moralist and sometimes sympathetic to terrorists because of closeness to their stated cause. Such comments have in many instances boiled down to recommendations to governments to satisfy terrorist demands: after that, it is claimed, there would be no more terrorism. However, terrorist demands may be quite difficult to comprehend or unacceptable in a democratic society, where they clash with the opinions and attitudes of the majority.

The terrorists score their minimal victory from the situation described above. If the removal of causes is not feasible, if the fulfilment of terrorist demands is unacceptable or impossible, then the only weapons that remain to a state and groups of states are in the area of narrower (police) prevention or repression through criminal sanctions.

The dangers to the enjoyment of human rights resulting therefrom belong to three categories. First, there is the tendency to restrict existing rights by formal legislative action. Laws are amended and new legislation introduced reducing rights and freedoms "abused" by terrorists in order to limit the terrorists' freedom of action and to facilitate their apprehension and punishment. Second, existing legislation is reinterpreted in a generally restrictive fashion, sometimes in a discriminatory manner, affecting both persons prone

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to terrorist violence and members of the general public. Third, the general climate of panic, fear and suspicion infects law enforcement agencies and influences their judgment and behaviour when exercising their discretionary powers. Similar to this is the reaction of the enraged citizenry with conspicuous tendencies towards vigilantism. The relatively short time after September 11 has provided numerous initiatives reminiscent of the similar tendencies in the past.[14]

At the international level, action has been directed toward redefining terrorism and broadening its definition in the sense described above. Hitherto non-terrorist offences have become terrorist, based on the intentions of the perpetrator, difficult to prove or disprove before courts of law.

In the UN General Assembly the *Ad Hoc* Committee established by its resolution 51/210 of 17 December 1996, has been working on a draft comprehensive convention against international terrorism. Its work has not been completed due to political, ideological and legal difficulties. It has been unable to define the crime of international terrorism and approach the issue of how to address the armed conflict governed by humanitarian law (articles 2 and 18 of the draft).[15] Even this unfinished draft raised serious concerns of some major international non-governmental organizations. They believe that provisions of the draft comprehensive convention could be interpreted in such a way as to undermine fundamental principles of international humanitarian law, human rights law and international refugee protection standards. Critics miss a provision stating that nothing in the Convention should be construed as impairing, contradicting, or restricting from the provisions of the Universal Declaration of Human Rights, the International Covenants on Human Rights, and other international instruments of human rights law, refugee law, and international humanitarian law applicable to the specific situations and circumstances dealt with by the Convention. They are worried that the existing text "could weaken accepted principles and practices of international humanitarian or human rights law". The provisions of the draft could be interpreted as transforming certain acts committed during non-international armed conflicts, which are not presently prohibited by international humanitarian law, into international crimes. They give the example of the rules of international law regulating non-international armed conflicts which do not prohibit members of rebel forces to use force against enemy government soldiers or property, provided the basic tenets governing such

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[14] See examples in "For whom the Liberty Bell tolls", *The Economist*, 31 August 2002, p. 18 *et seq*.

[15] See Second progress report to the Sub-Commission on the Promotion and Protection of Human Rights by Kalliopi K. Koufa, Special Rapporteur on terrorism and human rights, E/CN/4/Sub. 2/2002/37, p. 9 *et seq*.

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use of force are respected. Such use of force is not currently an international crime, although it could well be a criminal act under national laws.

A further point is impunity of government forces for excesses committed in "anti-terrorist" operations. Some serious human rights violations carried out by military personnel in times of peace – which are thus not covered by international humanitarian law – may not be covered either by the comprehensive convention.

The critics of the draft perceive in it serious threats to the exercise of freedom of expression. Overbroad language covering all sorts of "contributions" to terrorist violence could make it possible to penalize persons who peacefully approve of political purposes that also happen to be declared as aims of some armed group.

In the field of asylum and refugee regimes the tendency expressed in new drafts is to weaken the existing obligations of states not to return asylum seekers and refugees to territories where their "life and freedom would be threatened on account of ... race, religion, nationality, membership of a particular social group or political opinion" contained in Article 33, para. 1 of the Convention relating to the Status of Refugees of 28 July 1951 (non-refoulement). Refugees and asylum seekers are the most vulnerable groups facing new restrictions, based on the fear of terrorism and the need to prevent the latter by police measures.

In its Resolution 1373 the Security Council calls on states members of the United Nations, to, *inter alia*,

> (f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;
>
> (g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.

In the EU Commission's Working Document on the relationship between safeguarding internal security and complying with international protection obligations and instruments[16] the suggested restrictions would be based on a wider interpretation of the second paragraph of the quoted Article 33 of the 1951 Convention relating to the Status of Refugees, which provides that the benefits of Article 33, para. 1

> may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is,

[16] COM(2001) 743 final.

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> or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Any person suspected of "supporting" terrorist causes in the wider sense could thus be excluded easier than before and returned to territories where his or her life and liberty are endangered for discriminatory reasons. The fact that "reasonable grounds" suffice to exclude the fugitive makes it very difficult to challenge the decisions of administrative authorities regarding asylum and refugee status.

Along the same lines the Ministerial Council of the Organization for Security and Co-operation in Europe (OSCE), in its Bucharest Plan of Action for Combating Terrorism, proclaims that the OSCE Participating States will, "through the proper application of the exclusion clauses contained in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, ensure that asylum is not granted to persons who have participated in terrorist acts".[17]

The full practical effects of such international initiatives remain to be seen. They will depend on how states-members of international organizations interpret the meaning of the former and the hints they may contain. This is very important since restrictions of human rights, introduced as reactions to terrorism in national legislations, would affect not only and especially vulnerable groups, but many citizens and aliens.

The most conspicuous abridgment of the usual rights of persons suspected or accused of having committed criminal offences is contained in the United States President's Military Order On Detention, Treatment and Trial Of Certain Non-Citizens In The War Against Terrorism of 13 November 2001. According to its Section 2 it applies to (a) "any individual who is not a United States citizen" with respect to whom the President determines "from time to time in writing that:

> (1) there is reason to believe that such individual, at the relevant times,
>
> (i) is or was a member of the organization known as al Qaida;
>
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
>
> (2) it is in the interest of the United States that such individual be subject to this order.

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[17] MC(9).DEC/1 of 4 November 2001, Annex. Paragraph 26.

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According to Section 3, the US Secretary of Defense can detain any individual subject to this order at an appropriate location outside or within the United States. Section 4 provides that persons subject to this order shall be tried "by military commission for any and all offenses triable by military commission that such individual is alleged to have committed". The Secretary appoints members of military commissions. He will also decide on the "rules for the conduct of the proceedings of military commissions", which can "sit at any time and any place", are "triers of both fact and law", admit "such evidence as would, in the opinion of the presiding officer of the military commission ... have probative value to a reasonable person", and appoint both prosecution and defence attorneys. The commission can convict and sentence "upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present". Convictions and sentences are subject to review and final decision by the President or by the Secretary of Defense. Commissions can decide on "penalties provided under applicable law, including life imprisonment or death".[18]

Serious objections to the Order can be raised based on international standards, in particular those contained in the International Covenant on Civil and Political Rights, which was ratified by the United States.

"Individuals subject to this order" (Sec. 2 (a)) are to be tried and punished for the offence of "terrorism" which is defined in a circular, vague, and wide fashion and thus does not satisfy the criteria of Article 15 of the said Covenant. It is also arbitrary since it depends on the executive branch's determination that "it is in the interest of the United States that such individual be subject to this order" – a possible violation of Article 9.1 of the Covenant. By limiting the criminal responsibility in capital matters to non-US nationals, the Order seriously impinges on the principle of non-discrimination, contained in Articles 2.1 and 26 of the Covenant. The principle of *nulla poena sine lege* is put in doubt by referring to "penalties provided under applicable law", and express inclusion of life imprisonment and capital punishment, which results in an extremely wide sentencing margin.

The military commissions that shall try the detained persons do not fulfil the criteria for a court or tribunal capable of trying criminal charges, contained in Article 14 of the Covenant. They are neither "independent" nor "established by law". The accused have no free choice of counsel. Convicted persons have not the right to their "conviction and sentence being reviewed

[18] The text of the Order and a useful analysis of its precedents in US law are to be found in Jennifer Elsea, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions*, Congressional Research Service, Washington (2001). For a thorough discussion of the Order, see articles in the section "Agora: Military Commissions", 96 *American Journal of International Law* 320 *et seq.* (2002). PURL: https://www.legal-tools.org/doc/5ecf1e/

by a higher tribunal". The Order goes on to exclude not only national but international courts. Its Section 7 provides:

> b) With respect to any individual subject to this order –
>
> (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and
>
> (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

Some of the rights quoted are non-derogable, even "in times of public emergency which threatens the life of the nation" (Article 4.2 of the Covenant). As for other rights under the Covenant, derogable in such situations, the United States has failed to notify other States Parties of the "provisions from which it has derogated and the reasons by which it was actuated" (Article 4.3).

The Order also raises problems in relation to national law of the United States.[19]

While attention has been drawn to the United States there are reasons to believe that reactions in a number of other countries have been similar, including the attempts of unsavoury regimes to increase the level of repression against their political opponents or persons belonging to ethnic and religious minorities. Human Rights Watch quotes Australia, Belarus, China, Egypt, India, Israel, Jordan, Kyrgyzstan, Macedonia, Malaysia, Russia, Syria, Uzbekistan and Zimbabwe as "taking advantage" of the September 11 "to intensify their own crackdowns on political opponents, separatists and religious groups, or to suggest they should be immune from criticism of their human rights practices".[20]

Similar tendencies have been observed as reactions to previous waves of terrorism and to earlier shocking terrorist outrages. Some restrictions of human rights, introduced at the time in legislations, have remained in the books. They have always been coloured by prejudice. Towards the end of the 19th century, being a Russian frequently meant to be a potential terrorist. In the following decades, all anarchists, even the most peaceful ones, where hunted by the police and vigilante groups. In the 1960s and 1970s all radical leftists and Palestinians were suspected of terrorism in Europe and all Com-

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[19] See "Letter from Law Professors and Lawyers to the Honorable Patrick J. Leahy" of 5 December 2001, <http://www.yale.edu/lawweb/liman/letterleahy.pdf>.

[20] See <http://www.hrw.org/campaigns/september11/opportunismwatch.htm>. Charles Taylor (President of Liberia) followed closely the US Military Order by declaring three of his critics (one of them a journalist) to be "illegal combatants". *The Economist*, 31 August 2002, p. 20.

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munists regarded as such in many parts of Latin America. Now it is being a Moslem or Arab.[21]

Prejudice is a common vice. If laypersons believe that the state should react by reducing the legal rights of suspected terrorists, they can maybe be forgiven. However, if trained lawyers and academic jurists fail to realise that the highest standards of fair trial, presumption of innocence, judicial control and other relevant human rights gain extraordinary importance if a person is accused of a very grave crime and thus risks to receive a maximal sentence, this is to be deeply regretted. A human being is thus exposed to grave jeopardy just because an agent of the executive has labelled him or her as a "terrorist".

[21] In the United States "Arabs have come under close scrutiny over the past year. Despite denials of racial profiling, the authorities stand accused of going after Muslims and Arab-Americans indiscriminately through programmes like the FBI's systematic interviewing of 5,000 people of Arab descent", *The Economist*, 31 August 2002, p. 19.

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XXVII

La lutte contre l'impunité

Louis Joinet*

Le point de départ du processus, qui a conduit à l'élaboration de l'ensemble de principes pour la protection et la promotion des droits de l'Homme par la lutte contre l'impunité, se situe au Brésil au cours des années 1970. Je militais alors aux côtés du sénateur italien Lelio Basso, fondateur de la Ligue internationale pour le droit et la libération des peuples. L'organisation à Rome, en concertation avec l'opposition brésilienne, d'un colloque consacré à l'« Amnistie pour les prisonniers politiques au Brésil », constitue l'une de leurs premières initiatives. La demande était autant de nature juridique que politique. Ce thème, fortement porteur de consensus, a rapidement contribué à unifier une opposition en exil fort divisée. En effet, la quasi-totalité des partis et mouvements politiques a accepté de soutenir l'initiative et de participer au colloque. Dans ce contexte, j'ai été amené à présenter une communication relative aux rapports entre les processus d'amnistie et la promotion des droits de l'Homme, étant précisé qu'était alors demandée l'amnistie en faveur des opposants, opprimés et autres persécutés, à savoir en faveur des victimes de la dictature, et non encore l'auto-anmistie des dictateurs.

Cette rencontre a permis de jeter les bases d'un vaste mouvement favorable à l'amnistie au Brésil même, qui s'est développé avec la création d'une cinquantaine de comités de base plus ou moins clandestins implantés dans différentes villes et réunis à leur tour dans un séminaire - mouvementé - à Sao Paolo. En effet, les participants ont finalement dû se « réfugier » dans un théâtre dirigé par la célèbre actrice Ruth Escobar, ardente militante pour l'amnistie, qui a pris le risque de les accueillir. J'y ai présenté mon second rapport, ultérieurement repris en 1983 en Uruguay, que j'avais volontairement « technicisé », en raison du contexte politique, sous l'intitulé d'« Approche méthodologique des processus d'amnistie ».

En 1985, j'ai réalisé l'étude sur l'amnistie pour la Sous-Commission[1].

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A la fin du mois d'août 1991, au terme de la session annuelle de la Sous-Commission, un groupe d'ONG m'a approché et m'a sollicité pour entreprendre une étude sur l'impunité afin d'endiguer les dérapages constatés dans le domaine de l'amnistie qui, d'amnistie en faveur des opprimés était de plus en plus détournée vers l'auto-amnistie des oppresseurs. J'ai immédiatement accepté et rédigé UN doc. d'orientation, qui devait devenir la matrice du rapport. Convaincus par cette ébauche, les autres membres de la Sous-Commission m'ont désigné en qualité de rapporteur avant de se séparer.

Cette initiative a cristallisé les énergies en faveur d'une réflexion sur une stratégie d'union des forces dans la lutte contre l'impunité. A cette fin, la Commission nationale consultative des droits de l'Homme de France (ci-après la « CNCDH ») et la Commission internationale des juristes (ci-après la « CIJ ») ont organisé un séminaire à Genève sous les auspices de l'ONU sur le thème « Non à l'impunité, oui à la justice », qui a servi de terme de référence pour « cadrer » le rapport[2]. L'idée des ONG était initialement centrée sur une étude relative à l'impunité des auteurs de violations graves des droits civils et politiques. La Sous-Commission en a débattu et décidé d'une part d'inclure l'impunité des auteurs de violations graves des droits économiques sociaux et culturels et d'autre part de désigner à mes côtés un co-rapporteur en la personne de l'expert sénégalais El Hadji Guissé. Pour des raisons de méthodologie, il a été ultérieurement décidé que si, en raison du principe d'indivisibilité et d'interdépendance, la question devait être traitée stratégiquement dans son ensemble, il convenait tactiquement de la traiter de manière certes convergente, mais dans deux documents distincts. Tel fut le

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des Nations Unies, qui a décidé de le transmettre pour commentaires aux Etats, organisations internationales intergouvernementales et non gouvernementales (ci-après les « ONG ») et institutions spécialisées. L'ensemble de principes est d'ores et déjà devenu UN doc. de référence quasi normatif pour tous les acteurs impliqués dans des processus d'accords de paix, de transition ou de retour vers la démocratie. Le 25 mars 2002, Louis Joinet a été nommé expert indépendant sur la situation des droits de l'Homme en Haïti par le Secrétaire Général des Nations Unies.

Les opinions exprimées n'engagent que leur auteur à titre personnel et ne reflètent pas nécessairement celles de l'Organisation des Nations Unies (ci-après l'« ONU »).

Louis Joinet remercie tout particulièrement pour son étroite coopération Olivier de Frouville, Maître de conférences à l'Université de Paris X-Nanterre, auteur de « Les procédures thématiques : une contribution efficace des Nations Unies à la protection des droits de l'Homme », Pédone, 1996 ; « La typologie des procédures thématiques et l'originalité du groupe de travail sur la détention arbitraire », *L'ONU face à la détention arbitraire*, CEDIN, Actes & Documents, n° 2, 1997, pages 11 à 19.

Louis Joinet remercie également Xavier Tracol, Substitut du Procureur en appel auprès du Tribunal pénal international pour l'ex-Yougoslavie pour son aide technique.

1 Etude sur la législation d'amnistie et sur son rôle dans la protection et la promotion des droits de l'Homme, Rapport de Monsieur Louis Joinet, Rapporteur spécial, E/CN.4/Sub.2/1985/16/Rev.1.

2 CNCDH/CIJ, Non à l'impunité, oui à la justice, Genève, CIJ, 1993.

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cas, d'où l'existence de deux rapports. Les principes ont été conçus comme un outil juridique destiné à ceux, militants et victimes d'une part, responsables politiques d'autre part, déterminés à faire barrage à l'impunité.

1. Lutte contre l'impunité et distinction entre droits civils et politiques, et droits économiques et sociaux

La lutte contre les violations graves des droits économiques et sociaux, en raison de leur absence, en l'état, de « justicialisation », risque de détourner ou plutôt neutraliser, pendant une longue période, la lutte des personnes victimes de violations graves de leurs droits civils et politiques. Les magistrats savent bien qu'en raison de sa complexité, une affaire politico- ou économico-financière est trop souvent à « durée indéterminée ». Il convient de relever que, dans certains processus de transition - Suharto en Indonésie ou plus récemment Slobodan Milošević en République fédérale yougoslave avant son transfèrement au Tribunal pénal international - les nouvelles autorités sont attirées par la voie politiquement plus souple, qui consiste à tenter de poursuivre un ancien dictateur pour corruption ou appropriation « mafieuse » de biens publics, plutôt que pour crimes de guerre et crimes contre l'humanité.

Or, dans un tel processus, les victimes crient certes justice et réparation, mais demandent avant tout que soit établie la vérité, d'où l'importance dans cette phase de la mise en place de commissions de type « vérité et réconciliation ». Ces risques d'enlisement sont nettement apparus lors de l'établissement des commissions en Argentine, puis au Chili. L'extension de leur mandat aux violations graves des droits économiques et sociaux équivalait à un enterrement de première classe, ou du moins à une lenteur propice à un enlisement, voire à une impunité déguisée. Pendant de telles périodes - dans le cas d'un processus de paix par exemple - ce qui préoccupe au premier chef les responsables d'un gouvernement et de son opposition armée, c'est avant tout de trouver un accord politique stable pour mettre fin aux violences réciproques, qui seul permettra, si la volonté politique existe, la mise en œuvre, par exemple, d'une réforme agraire, plutôt que de juger tout de suite les responsables latifundiaires, auteurs de violations graves de droits économiques et sociaux, ou les responsables politiques de l'absence ou de la non-application d'une telle réforme. Tel fut le cas, au début des années 1980, de l'accord de paix négocié en Colombie entre le gouvernement du président Betancur d'une part, et les Forces armées révolutionnaires colombiennes d'autre part. La loi d'amnistie - pour la préparation de laquelle j'avais été consulté - était assortie d'une série de décrets concernant notamment la démocratisation du système éducatif et la réforme agraire, les crédits étant budgétairement prévus. Ce fut, hélas, un espoir sans lendemain !

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J'ai été personnellement confronté à la question de l'amnistie à deux occasions, à savoir :

1°/ L'accord de paix signé entre le gouvernement du Guatemala et l'Unidad Revolucionaria Nacional Guatemalteca : Je suis intervenu à titre d'*amicus curiae* auprès du modérateur désigné par le Secrétaire général de l'ONU. Le problème le plus délicat consistait à faire admettre que les dispositions de la loi qui excluaient de l'amnistie les infractions graves aux conventions de Genève sur le droit humanitaire - spécialement celles visées par leur article 3 commun – s'appliqueraient tant aux membres des forces armées qu'à ceux de la guérilla.

2°/ La Nouvelle-Calédonie : La négociation des accords de Matignon avait pratiquement abouti, sauf sur la question de l'amnistie. L'un des noyaux durs concernait le sort des auteurs dits de « crimes de sang » commis par des membres du FLNKS. La délégation du RPCR s'opposait à toute amnistie et, bien entendu, celle du FNLKS maintenait fermement la position contraire. Finalement, le FNLKS a accepté que les auteurs de ces infractions, incarcérés sous le régime de la détention provisoire, soient exclus de l'amnistie, à condition qu'ils soient remis en liberté, quitte à être jugés ultérieurement. Il a donc fallu inclure une disposition de la loi en ce sens, ce qui revenait à imposer aux juges saisis de libérer les inculpés. Je doutais de la régularité d'une telle disposition. Mais je ne pense pas qu'opposer un veto en brandissant la Constitution, voire la Convention européenne des droits de l'Homme, et briser le fragile consensus difficilement acquis au cours de la nuit aurait été préférable. Il convient d'ailleurs de relever qu'aucune des parties à l'accord, pas plus que les intéressés des deux bords n'ont saisi la Cour de Strasbourg. Il est important de souligner que la réussite de cet accord tient au fait que la question de l'amnistie n'a été posée qu'au terme du processus de paix, et non comme préalable à l'ouverture ou à la continuation des discussions.

2. Précisions ou compléments à apporter aux principes

Dans leur ensemble, les quarante-deux principes adoptés avec le rapport par la Sous-Commission en 1997 demeurent pertinents et opérationnels. Les deux précisions ou compléments suivants pourraient cependant leur être apportés, à savoir :

1°/ La compétence universelle et la clause qui oblige chaque Etat partie soit à extrader, soit à juger l'auteur des violations. J'avais souligné dans le rapport déposé que, dans les rares cas où une telle clause avait été prévue dans une convention, aucun Etat n'avait encore manifesté la volonté politique d'appliquer de telles clauses. Cette situation a considérablement évolué depuis 1997, notamment après la dynamique juridico-judiciaire provoquée

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dans plusieurs Etats par l'« effet Pinochet ». Maintenant que cette évolution paraît irréversible, il conviendrait de prendre le temps de la réflexion et de s'interroger sur certains risques de « dérapages » que comporte une certaine utilisation des clauses de compétence universelle, et surtout des dispositions de droit interne établissant - comme en Belgique - une règle de compétence extra-territoriale pour le jugement des auteurs de crimes graves selon le droit international[3]. Il faut bien avoir conscience que la mise en œuvre de telles clauses ou dispositions repose sur le postulat démocratique et suppose que les instances judiciaires d'un Etat alors compétentes jugent conformément aux critères et normes internationales caractérisant un Etat de droit. Vaste programme.

2°/ Ne devrait-on pas envisager, pendant de telles périodes transitoires - sous réserve de bien « baliser juridiquement » cette phase (recours à la théorie des « garanties équivalentes » ?) - une certaine flexibilité quant à l'application des standards internationaux de protection des droits de l'Homme ? Ou faut-il s'en tenir – en toutes circonstances – au strict respect de ces standards, alors que l'institution judiciaire est entièrement à reconstruire ou que les lois antérieures demeurent transitoirement applicables ? J'ai été confronté à ce type de situation au Timor oriental[4], après le retrait des troupes indonésiennes, lors d'une mission du Programme des Nations Unies pour le Développement, dont l'objet consistait notamment à reconstruire l'institution judiciaire. Pendant de telles périodes, les autorités de transition, ONUsiennes ou autres, doivent, par exemple, procéder à des arrestations, dans le cadre du droit commun ou de la lutte contre l'impunité. Le droit international, notamment l'article 4 du Pacte international relatif aux droits civils et politiques de 1966, admet la proclamation d'« états d'exception », en les assortissant de garanties contre une restriction trop grave des garanties de protection des droits de l'Homme. J'ai proposé que le droit international admette corollairement la reconnaissance des « états de transition », à savoir autorise à titre transitoire des dérogations provisoires sous contrôle, dès lors que celles-ci auraient pour finalité, par la mise en place, par exemple, de ga-

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[3] Voir la décision de la Cour internationale de justice *République démocratique du Congo/Belgique* du 11 avril 2000, aux termes de laquelle la Cour a refusé à la Belgique le droit de délivrer un mandat d'arrêt à l'encontre d'un ancien ministre des Affaires étrangères de la République démocratique du Congo. La Cour a considéré qu'un ministre ne pouvait être poursuivi devant un tribunal étranger pour des crimes commis lorsqu'il était en exercice. Elle a estimé que la Belgique a « méconnu l'immunité de juridiction pénale et l'inviolabilité dont le ministre des Affaires étrangères en exercice de la République démocratique du Congo jouissait en vertu du droit international ».

[4] Sur la situation au Timor oriental, voir Xavier Tracol, « Justice pour le Timor oriental », *Revue de science criminelle et de droit pénal comparé*, N° 2, Avril-juin 2001, pages 291 à 306.

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ranties équivalentes transitoires de rétablir, par un processus graduel, les garanties propres à un Etat de droit.

Depuis le rapport sur l'amnistie jusqu'au rapport sur l'impunité, j'ai toujours posé le principe selon lequel l'amnistie des crimes graves selon le droit international, tels les crimes contre l'humanité, ne peut pas être prononcée avant qu'il y ait eu un jugement et une peine exécutée[5]. Il reste que la mise en œuvre de ce principe est plus complexe - à la lumière de l'expérience - que sa formulation normative :

• A quelques exceptions près, par exemple la Grèce, après le régime des colonels, les processus de retour à la paix ou à la démocratie, ou de son établissement, passent, à un moment ou à un autre, à des degrés divers, sous les fourches caudines de mesures amnistiantes. Le principe ne doit pas pour autant être remis en cause, mais demeurer un objectif idéalement souhaitable, à

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[5] Ensemble de principes pour la protection et la promotion des droits de l'Homme par la lutte contre l'impunité, Annexe II du rapport final révisé établi par Louis Joinet, rapporteur spécial, E/CN.4/Sub.2/1997/20/Rev.1 :

PRINCIPE 18 - DEVOIRS DES ETATS DANS LE DOMAINE DE L'ADMINISTRATION DE LA JUSTICE

L'impunité constitue un manquement aux obligations qu'ont les Etats d'enquêter sur les violations, de prendre des mesures adéquates à l'égard de leurs auteurs, notamment dans le domaine de la justice, pour qu'ils soient poursuivis, jugés et condamnés à des peines appropriées, d'assurer aux victimes des voies de recours efficaces et la réparation du préjudice subi, et de prendre toutes mesures destinées à éviter le renouvellement de telles violations.

PRINCIPE 25 - RESTRICTIONS ET AUTRES MESURES RELATIVES A L'AMNISTIE

Y compris lorsqu'elles sont destinées à créer des conditions propices à un accord de paix ou à favoriser la réconciliation nationale, l'amnistie et les autres mesures de clémence doivent être contenues dans les limites suivantes :

a) Les auteurs des crimes graves selon le droit international ne peuvent bénéficier de telles mesures tant que l'Etat n'a pas satisfait aux obligations énumérées au principe 18;

b) Elles sont sans effet sur le droit à réparation des victimes prévu aux principes 33 à 36;

c) En tant qu'elle peut être interprétée comme un aveu de culpabilité, l'amnistie ne peut être imposée aux personnes poursuivies ou condamnées pour des faits survenus à l'occasion de l'exercice pacifique du droit à la liberté d'opinion et d'expression. Lorsqu'elles n'ont fait qu'exercer ce droit légitime, tel que garanti par les articles 18 à 20 de la Déclaration universelle des droits de l'homme, et 18, 19, 21 et 22 du Pacte international relatif aux droits civils et politiques, une loi doit réputer nulle et non avenue à leur égard toute décision de justice ou autre les concernant ; il est mis fin sans conditions ni délais à leur détention ;

d) Toute personne condamnée pour des infractions autres que celles qui sont prévues à l'alinéa c) du présent principe et entrant dans le champ d'application de l'amnistie peut la refuser et demander la révision de son procès si elle a été jugée sans bénéficier du droit à un procès équitable garanti par les articles 10 et 11 de la Déclaration universelle des droits de l'homme, ainsi que par les articles 9, 14 et 15 du Pacte international relatif aux droits civils et politiques, ou si elle a été soumise, en particulier sous la torture, à des interrogatoires inhumains ou dégradants.

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savoir un moteur de la lutte contre l'immunité, en permettant, dans un rapport de forces donné, de toujours aller au-delà de ce qui est présenté comme étant le maximum admissible. Cela correspond à l'esprit du principe 25 du rapport, intitulé « Restrictions et autres mesures relatives à l'amnistie ». Sa formulation ne prohibe pas l'amnistie de manière indérogeable, mais énonce que l'amnistie doit être maintenue dans certaines limites, même lorsqu'elle est destinée à créer des conditions propres à un accord de paix ou à favoriser la réconciliation nationale.

• Le droit international conventionnel est à dominante technocratique, dans la mesure où la procédure de rédaction des conventions est généralement a-démocratique. J'ai présidé le groupe d'experts, qui a élaboré la convention du Conseil de l'Europe sur la protection des données personnelles[6]. A cette occasion, j'ai constaté le poids considérable des experts et le rôle réduit des Parlements nationaux dans la plupart des Etats dans ce domaine. Dans ce contexte, qu'en est-il lorsque l'amnistie n'est pas conforme à une convention internationale, mais résulte d'un consensus entre les parties au conflit ? Tel a été, par exemple, le cas dans l'accord de paix précité appliqué en Nouvelle-Calédonie. A partir du moment où les deux grandes forces politiques concernées étaient convenues, au terme d'un acte politique majeur qui mettait fin à un conflit, l'Etat aurait-il dû, au nom du droit international, refuser de signer UN doc. qui, l'histoire l'a démontré, a permis la poursuite de la lutte par des voies démocratiques ? En d'autres termes, dans ce cas, la norme internationale doit-elle l'emporter sur la voix de la souveraineté populaire régulièrement et démocratiquement exprimée ?

• En Uruguay, par exemple, une proposition de référendum d'initiative populaire visait à abroger une loi amnistiant les militaires et les policiers pour des faits commis sous la dictature entre 1973 et 1985. Les centaines de milliers de signatures exigées par la Constitution pour que soit organisé un tel référendum avaient été recueillies au cours d'une campagne intense. Le référendum a eu lieu et la régularité du scrutin n'a pas été contestée. Le « non » l'a emporté et la loi d'amnistie a été maintenue, ce que je déplore. L'une des familles de disparus a saisi la Commission interaméricaine des droits de l'Homme, qui a condamné l'Uruguay, notamment pour violation du droit à procès équitable. Cette mise en échec de la volonté populaire par le droit international doit-elle être la règle ou l'exception ? Doit-elle être admise dans les seules hypothèses où le scrutin ne s'est pas démocratiquement déroulé ? Là encore, le débat reste ouvert.

• Quels que soient les moyens juridiques de clémence retenus pour créer les conditions propices à une transition vers la paix et/ou la démocratie, il

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6 Convention pour la protection des personnes à l'égard du traitement automatisé des données à caractère personnel de 1981 (STE n° 108).

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demeure un principe : quelles que soient les circonstances, l'oppresseur et l'opprimé ne peuvent être traités sur le même plan.

3. Les Commissions non judiciaires d'enquête[7]

Les commissions de type « vérité et réconciliation » ne constituent certainement pas des solutions alternatives satisfaisantes à la justice pénale en cas de crimes graves. Cela reviendrait à considérer - et la tentation est grande pour des Etats - la création de telles commissions pour escamoter le passage de la justice. Comme leur nom l'indique, ces commissions sont moins destinées à rendre la justice qu'à contribuer à l'établissement de la vérité en décryptant pourquoi et comment des crimes graves ont pu être commis. Leur but consiste d'abord à ce qu'un peuple prenne conscience de la réalité cachée qu'il n'a pas voulu voir. De ce point de vue, il est indispensable qu'elles soient composées de membres présentant des garanties d'indépendance et d'impartialité[8], et non compromis dans le passé, comme, par exemple, les membres de la commission créée par décret du Président de la République fédérale de Yougoslavie le 29 mars 2001[9].

Ces commissions peuvent faciliter ultérieurement l'œuvre de la justice, mais tel n'est pas leur but principal. Il s'agit plus de faire rapport pour la mémoire que pour la justice, au sens du principe 2 du rapport, selon lequel « [l]a connaissance par un peuple de l'histoire de son oppression appartient à son patrimoine et, comme telle, doit être préservée par des mesures appropriées au nom du devoir de mémoire qui incombe à l'Etat. Ces mesures ont pour but de préserver de l'oubli la mémoire collective, notamment pour se prémunir contre le développement de thèses révisionnistes et négationnistes. »

4. La compensation pour l'esclavage et la colonisation

Si cette question est posée dans le cadre d'une démarche politique, l'approche s'en tiendra aux grandes tendances, par référence au contexte oppresseur/opprimé. Si elle est posée dans le strict cadre juridique, l'analyse sera nécessairement plus fine et donc plus complexe, d'où les difficultés politiques induites par cette approche. Par exemple, s'agissant de l'esclavage, l'ensemble des problèmes devra être examiné et les différentes pratiques de

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7 Principes 5 et suivants du rapport.

8 Le principe 6 b) du rapport énonce que les commissions non judiciaires d'enquête « doivent être composées selon des critères rendant sensibles aux yeux de l'opinion la compétence dans le domaine des droits de l'homme et l'impartialité de leurs membres et selon des modalités assurant leur indépendance, notamment par leur inamovibilité pendant la durée de leur mandat ».

9 Voir le site Internet de cette Commission <http://www.komisija.org>.

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l'esclavage devront donc être étudiées juridiquement, en application du principe d'égalité devant la loi internationale. La question de la compensation est tout aussi complexe. Il peut être admis comme orientation générale qu'il ne peut s'agir d'une indemnisation financière directe, dont l'évaluation est *stricto sensu* techniquement impossible. Il ne peut s'agir - une fois les difficultés politiques surmontées - que d'un processus qui, au-delà des aspects matériels, doit avoir pour finalité le rapprochement des peuples concernés en vue de la réconciliation des générations futures.

Ce processus devrait d'abord commencer par des actes de portée symbolique, telle la reconnaissance historique - par exemple la loi française[10] qui reconnaît que l'esclavage constitue un crime contre l'humanité - suivie d'un acte solennel de repentance. Tournée à tort en dérision par certains, une telle démarche permet d'établir la vérité historique plus que ne saurait le faire un procès pénal, qui juge un responsable, et non la dimension collective d'une certaine complicité.

Les aspects matériels pourraient par exemple être résolus par le développement de nouvelles formes de coopération tenant compte de l'intensité des violations subies, un fonds d'indemnisation alimenté par une taxe de type Tobin ou l'annulation de la dette. Quelle que soit la solution éventuellement retenue, ces formes de compensation, compte tenu de l'importance des crédits qu'elles impliquent, devraient être assorties de procédures de contrôle rigoureuse et de mesures de lutte contre la corruption.

5. Adoption de l'ensemble de principes par l'Assemblée générale

L'ensemble de principes ne semble pas avoir beaucoup d'avenir aux Nations Unies, ce qui est regrettable. Son adoption par l'Assemblée générale pourrait même être inopportune, dans la mesure où celle-ci risque, à chaque étape, d'amendements en modifications, d'atténuer progressivement son impact. Or la force actuelle de l'ensemble de principes provient de son utilisation de plus en plus fréquente dans des situations concrètes, bien que n'ayant pas encore été adopté et qu'étant non officiel. La mise en œuvre effective sur le terrain sera peut-être la meilleure solution. En 1998, le Secrétariat des Nations Unies a organisé une réunion de travail à New York, à laquelle j'ai assisté avec toutes les personnes intervenues pour le compte de l'ONU dans des négociations de paix. L'idée était d'élaborer une sorte de *vade mecum* du médiateur-négociateur-conciliateur pour la corbeille des droits de l'Homme dans les accords de paix ou de transition. Le rapport, auquel l'ensemble de principes est annexé, a été l'un des documents de référence. Deux décisions

[10] Loi n° 2001-434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité, *Journal officiel de la République française* n° 119 du 23 mai 2001, page 8175.

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de la Commission interaméricaine des droits de l'Homme citent également les principes.

Si l'Assemblée générale avait adopté l'ensemble de principes, la création d'un rapporteur spécial de la Commission des droits de l'Homme sur l'impunité chargé de la promotion des principes pourrait certes être envisagée. Mais une telle nomination pourrait également être inopportune, dans la mesure où son mandat empiéterait inévitablement sur les activités de la plupart des autres rapporteurs de la Commission des droits de l'Homme, tous confrontés à des situations d'impunité. L'ensemble de principes doit faire leur chemin, ce qui ne doit surtout pas empêcher de lui porter un regard critique à la lumière de l'expérience acquise depuis sa rédaction et d'en débattre.

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XXVIII

National human rights institutions implementing human rights

Morten Kjærum*

1. Introduction

In 1990 there were eight national human rights institutions (NHRI) worldwide,[1] a number that had increased to 55 by 2002. The development has been global in the sense that all regions have seen an increase in the number of new institutions. Thus, it is no exaggeration to say that this is indeed a remarkable development.[2]

The end of the cold war provided new opportunities for strengthening human rights as a number of Communist countries and other totalitarian states began a democratization process. From 1990 to 1996 over 60 countries were democratized. This global wave brought about great changes at the domestic level, including democratic elections as well as the establishment of national parliaments and democratic institutions. In the initial phase, democracy and human rights were closely linked in the political rhetoric. Yet, human rights quickly came to play a secondary role, with the main focus being on creating multi-party elections and formal democracies.[3] The absence of a democratic culture or a culture of human rights was at this early stage not taken seriously into account or believed to change as transition went along.

However, as Asbjørn Eide wrote in 1991 on the protection of minority rights and self-determination: "probably the best avenue is to develop and strengthen the general system for the protection of individual rights, promot-

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1 Australia (1981), Canada (1962), Denmark (1987), France (1947), Guatemala (1984), Mexico (1990), New Zealand (1978) and Philippines (1987).

2 The UN Office of the High Commissioner for Human Rights has played a pivotal role in promoting the establishment of new institutions as well as assisting in the creation of these. This task has been recognized for a number of years in the annual Human Rights Commission Resolution on National Institutions for the Promotion and Protection of Human Rights.

3 Katarina Tomasevski, *Between Sanctions and Elections*, Pinter 1997, pp. 157-179.

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ing consolidation everywhere of non-discrimination, openness, rule of law and pluralist democracy".[4] This interrelated understanding eventually gained ground, and in the mid-1990s human rights were recognized as important building blocks in the new democracies. Out of this development grew the need for a new type of organization mandated to monitor and raise awareness and understanding of human rights, and to play a catalytic role in creating a culture of human rights. A role which human rights NGOs were not in a position to fulfill since their mandate and working methodology had been developing in a more partisan direction for decades. The few national human rights institutions, which existed at that time, came to play a model role in filling this gap.

The development took its outset in the new democracies in Africa, Asia and Eastern and Central Europe. However, there was also an important spill over into Western Europe where human rights came to play an increasingly important role in domestic politics and law. During the cold war, human rights were perceived to form part of the foreign policy of most Western European countries, whereas in the last decade they have to a larger extent become an integral part of the domestic legal body. The latter prompted the setting-up of a growing number of national human rights institutions in Western Europe during the late 1990s.

This article will look into the development of the doctrine of national institutions in implementing human rights at the national level. Potential stumbling blocks will be addressed, in particular in relation to how these institutions strike the balance between politics and their legitimate advisory and monitoring functions. Furthermore, their role in terms of bridging the gap between the local community and international treaty bodies will be discussed to illustrate the significance of the new comprehensive human rights machinery.

2. What is a national human rights institution?

In 1991 the First International Workshop on National Institutions for the Promotion and Protection of Human Rights[5] was held in Paris. The outcome of this workshop was a set of principles guiding the work and structure of national institutions. These guidelines were endorsed by the UN Commission on Human Rights the following year and adopted by the UN General Assembly in December 1993.[6] However, the idea of establishing national

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4 Asbjørn Eide, *National Movements, Protection of Minorities and the Prevention of Discrimination, in the Future of Human Rights Protection in a Changing World*, Universitetsforlaget, Oslo, 1991, p. 232.

5 In 2002 the 6th International Conference on National Institutions for the Promotion and Protection of Human Rights was held in Copenhagen.

6 General Assembly Resolution 48/134 (20 December 1993), Annex.

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institutions can be traced back to the second session of the UN Economic and Social Council in 1946 where it was decided to invite member states to "consider the desirability" of establishing local bodies in the form of "information groups or local human rights committees" to function as vehicles for collaboration with the UN Commission on Human Rights.[7]

In the period between 1946 and 1991 the issue of creating mechanisms to implement the increasing volume of new human rights instruments was raised at seminars, in UN bodies such as the Commission on Human Rights, and in the General Assembly. It is also recommended in legal texts such as, for example, in article 14 of the Convention on the Elimination of all Forms of Racial Discrimination (ICERD). During this period the profile of the institution was not clear as it ranged from being a service organ for the UN Commission on Human Rights in the ECOSOC resolution, to a specialized body dealing with complaints about racial discrimination under the ICERD. Moreover, some texts[8] even embrace institutions remotely concerned with human rights. Given the above circumstances, a clarification of the specific structure and mandate of these institutions was called for.

The clarification came with the formulation of the so-called Paris Principles in 1991. The Principles establish in particular the competence and responsibilities of a national institution as well as its composition and guarantees of independence and pluralism. According to the Principles the institution shall be given as *broad a mandate* as possible in order for it to be able to promote and protect human rights. This implies that institutions with a singular human rights mandate will normally not be categorized as a national institution but rather as a specialized institution,[9] *e.g.*, ombudsman against ethnic discrimination, institutions dealing with human rights issues related to disabled persons, children or other groups. However, the International Coordination Committee of National Institutions (ICC)[10] has recognized that a group of specialized institutions can collectively be recognized as a national institution since they jointly cover a broad range of key human rights issues.[11] Further to the scope of the mandate, nothing in the Paris Principles

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7 ECOSOC Resolution 2/9 of 21 June 1946. Birgit Lindsnaes and Lone Lindholt, "National Human Rights Institutions – Standard Setting and Achievements", in Lindsnaes *et al.* (eds.), *National Human Rights Institutions – Articles and Working Papers*, Danish Centre for Human Rights, Copenhagen (2001), pp. 5-9.

8 First and second reports from the UN Secretary General, A/36/440 of 9 October 1981 and A/38/416 of 24 October 1983.

9 The Declaration and Programme of Action, UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban 2001, clearly differentiate between national institutions and specialized institutions against racism.

10 See p. 651.

11 This is the case with the Swedish Ombudsman against Ethnic Discrimination, the Disability Ombudsman and the Ombudsman against Discrimination on Grounds of Sexual Orientation.

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rules out that a national institution can deal with human rights related international issues and the foreign policy of its respective country. However, without the domestic dimension the institution would not qualify as a national institution. This is relevant for many European institutions since they have traditionally mainly perceived their role as one of addressing human rights issues abroad, or in international bodies rather than domestically.

The Paris Principles list a number of responsibilities for national institutions, which fall under five headings. First, the institution shall *monitor* any situation of violation of human rights, which it decides to take up. In order to carry out this function the institution needs sufficient staff to follow developments in any part of the country, and it must furthermore not be limited in its access to any NGO, group or individual, which may be threatened or possess knowledge about violations.

Second, the institution shall be able to *advise* the Government, the Parliament and any other competent body on specific violations, on issues related to legislation and its compliance with international human rights instruments, and on the implementation of these instruments. Thus, some channels of communication should be established, formally or informally between the institution and the relevant state organs. It would hamper the work of the institution if the primary channel of communication would be via the media.

Third, the institution shall *relate to regional and international organizations*. The Government shall be encouraged by the national institution to ratify human rights instruments, and the institution shall contribute to the reports which States are required to submit to regional and international institutions or committees. The cooperation with regional and international bodies shall be broadly based and be without specific limitations.

Fourth, the institution shall have a mandate to *educate and inform* in the field of human rights. It shall assist[12] in the formulation of educational human rights programmes and in human rights research, and take part in their implementation at schools, universities and in professional circles. Finally, the institution shall be able to prepare and publicize reports on any human rights matter and make use of all press organs. The Paris Principles underscore in particular the important role that national institutions can play in relation to combating all forms of discrimination, in particular racial discrimination, by raising public awareness.

Fifth, some institutions are given a *quasi-judicial competence*. Whereas an institution can hardly be recognized as fulfilling the Paris Principles if one of the first four elements is left out of its mandate, it is facultative to

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12 *National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, United Nations (1995), paras. 78 and 79.

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give it the mandate to hear and consider individual complaints and petitions. Notwithstanding the latter, the development in this area is moving towards more institutions having this mandate as well.[13]

The key elements of the composition of a national institution are its independence and pluralism. In relation to the *independence* the only guidance in the Paris Principles is that the appointment of commissioners or other kinds of key personnel shall be given effect by an official Act, establishing the specific duration of the mandate, which may be renewable. In the UN Handbook on National Human Rights Institutions[14] these criteria are further elaborated to contain elements such as nationality, profession and qualifications, which persons are entitled to dismiss members and for what reasons, privileges and immunities. Furthermore, a principle of continuation is developing in practice, stipulating that there shall be a continuation of the individuals manning the institution, aimed at situations where the law governing an institution is changed without bringing about any obvious improvements. This serves to prevent a government from being able to silence an institution by changing the law and then manning the institution with individuals with more pro-government views. Looking at the existing institutions there are a variety of ways to ensure the independence of the institution, often following local legal traditions for that kind of administrative bodies or courts.[15]

An often-neglected element in relation to the independence of national institutions is the regional and international networks and structures. These networks may help mobilize an international reaction and thereby provide a *de facto* safety net against unfriendly governmental attacks on an institution. Viewed in this way these regional and international networks should be perceived as an element in establishing the independence of a national institution.

One of the ways in which national institutions differ from traditional ombudsman institutions is in relation to the *pluralist representation* in the

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[13] The UN Commission on Human Rights in Resolution 2002/83 took note "with satisfaction of the efforts of those States that have provided their national institutions with more autonomy and independence, including through giving them an investigative role or enhancing such a role, and encourages other Governments to consider taking similar steps". In the *Declaration and Programme of Action, UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, Durban (2001), para. 90, States are urged to establish national institutions with the competence and capacity for "investigation, research, education ...". It is noteworthy that investigation is mentioned as the first element.

[14] *Supra*, note 12.

[15] Kristine Yigen, "Guarantees of Independence of National Human Rights Institutions: Appointment and Dismissal Procedures of Leading Members" in Lindsnaes *et al.* (eds.), *National Human Rights Institutions – Standard Setting and Achievements, in National Human Rights Institutions – Articles and Working Papers*, Danish Centre for Human Rights, Copenhagen (2001), pp. 59-81.

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governing structures. The appointment procedures shall ensure pluralist representation of the social forces involved in the promotion and protection of human rights. The Paris Principles specifically point to the representation of NGOs, trends in philosophical or religious thought, universities and qualified experts, parliament and government departments. If government departments are represented they should participate in the deliberations in an advisory capacity only. The pluralist representation ensures input from different sectors in society and thus offers an opportunity for the institution to detect possible human rights violations as well as different perspectives offer an opportunity to broaden the inventiveness in responding to the violations. Furthermore, it provides channels for information and education to specific target groups. If the pluralist composition is not taken seriously, a national institution runs the risk of being self-contained in a narrow circle of like-minded persons from the urban and academic elite, thus neglecting issues related to, for example, rural areas, minority groups or certain sectors.

These basic principles for national institutions constitute the international normative platform for a variety of institutions. The diversity in the composition and mandate of the institutions underlines the different legal traditions in the world.[16] Nonetheless, the existing recognized institutions can be categorized in five different groups.[17] The French Human Rights Commission, which is the oldest from 1948, is a good example of a *consultative commission*. It is a broad-based commission with a membership consisting of key NGOs, the academia, representatives from different religious communities and others – all together 119 institutions and individuals. The members take an active part in the decisions of the Commission. The Commission does not deal with individual complaints. This type of institution is found in Greece and in a number of francophone African countries, including Morocco.

Commissions with judicial competence are seen in a number of common law countries, for example, India, Ireland as well as in South Africa. However, the model has also been a source of inspiration in countries such as Latvia and Nepal. These institutions have a number of full-time or part-time

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[16] The UN Commission on Human Rights in Resolution 2002/83 recognized "that it is the prerogative of each State to choose, for the establishment of a national institution, the legal framework that is best suited to its particular needs and circumstances to ensure that human rights are promoted and protected at the national level in accordance with international human rights standards". The wording is an elaboration of the Vienna Declaration and Programme of Action, World Conference on Human Rights, 1993, I:36.

[17] The constitution of most national human rights institutions can be found on <www.nhri.net>, a specialized Website for national institutions, jointly made by the UN Office of the High Commissioner for Human Rights and the Danish Centre for Human Rights in 2001. For a somewhat different typology, see *Performance and legitimacy: national human rights institutions*, International Council on Human Rights Policy, Versoix, Switzerland (2000), pp. 3-4.

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commissioners appointed according to different criteria. An important function is the handling of individual complaints about human rights violations. In some countries the mandate of this type of institution is expanded to cover the mandate of a traditional ombudsman as well and it thereby becomes a *commission with judicial and ombudsman competence.* This is the case in Ghana, Mexico, Mongolia and Tanzania.

National human rights centres have developed in Northern Europe, *e.g.*, Denmark, Germany and Norway, the oldest of which is the Danish Centre for Human Rights established in 1987. In many ways this type of institution resembles the consultative commission with the broad membership base. However, the work of the institutions is research-based, and the members play a less active role in the specific work of the institutions as they mainly serve to give policy directions to the management. In general, institutions of this nature do not deal with individual complaints.[18]

Finally, in the gray zone a number of *human rights ombudsmen* have obtained formal status as national institutions. As mentioned above this has, *e.g.*, been the case in Sweden where specialized ombudsmen have been recognized collectively. Moreover, ombudsman institutions in Latin America and in some Eastern and Central European countries often have such a strong human rights mandate that they have been recognized as national institutions. This is the case despite the fact that these institutions often fall short of the formal institutional input from civil society. Nonetheless many of them have a very dynamic interaction with civil society groups.

With the adoption of the Paris Principles, the profile of the national human rights institutions became more distinct. Occasionally, the issue is raised whether to adjust the Principles following a decade of experience. However, since they have so far proven to serve their purpose as a common frame of reference in establishing these institutions, such a process of revision may be premature and only serve to open Pandora's box.[19] In an historical perspective national institutions are still young and before opening the box it might be advisable to gain more experience on strengths and weaknesses, opportunities and threats.

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[18] From 2003 the Danish Centre for Human Rights will, as the first national human rights centre, get an expanded mandate to offer individual advice to victims of racial discrimination as well as the option to carry out mediation between conflicting parties.

[19] Emmanuel Decaux, "Evolution and Perspectives for National Institutions for the Promotion and Protection of Human Rights: Their Contribution to the Prevention of Human Rights Violations" in L. A. Sicilianos (ed.), *The Prevention of Human Rights Violations*, Kluwer Law International (2001), p. 236.

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3. Monitoring and advising – law or politics?

Why would it be like opening Pandora's box to look at a revision of the Paris Principles? Human rights regulate the relation between the State and the citizens within its jurisdiction, and human rights put limitations on how far the Government can intervene in the integrity and autonomy of the individual. In this way human rights are a living reality for politicians and civil servants, and sometimes they are perceived as a severe limitation in the law-making process or in the administration of laws. With the increased attention on the implementation of human rights during the last decade at all levels of the state administration, this feeling of being limited in the art of making politics has increased among some politicians. In this regard a national institution will be an obvious target, since the institution will often be the messenger of the information that a specific law or an administrative decision is not in conformity with the international human rights obligations of the State. Thus, some States could be inclined in a process of revision to narrow the mandate of the Paris Principles and even try to hamper the independence of these institutions.[20]

An element in this potential conflict between organs of the State and a national institution is to define the borderline between carrying out the mandate according to the Paris Principles on the one hand, and politicizing on the other. In the chapter on competence and responsibilities (paragraph 3 (a)) of the Paris Principles it is said that a national institution shall submit

> to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; …

In paragraph 3 (a) (i) it is noted that the institution "shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures". It is further mentioned in paragraph 3(g), particularly in relation to combating all forms of discrimination, that the institution shall make use of "all press organs".

Thus, the Paris Principles give a mandate to national institutions that is broader than just applying human rights law to a specific piece of legislation or a particular case. The institutions are mandated to make recommendations and proposals, and in this way the mandate is much wider than that of traditional courts or other parts of the established judicial system. Furthermore,

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[20] *Performance and legitimacy*, *supra*, note 17, pp. 66-67.

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the national institutions have the option to recommend new legislation or amendments to existing laws, which is a wider mandate than that of most traditional ombudsmen. An ombudsman will normally be excluded from intervening in the legislative process unless the specific intervention is related to laws directly affecting the ombudsman institution itself. These differences in the mandates of ombudsmen and national human rights institutions follow logically from the fact that parliamentary ombudsmen are appointed by the Parliament to monitor, on their behalf, the executive, while the national institution is called upon directly to address the responsibility of the State to fulfill its human rights obligations. Since an important part of the implementation of human rights concerns the legislation of the country, a national institution cannot be excluded from this area.

Furthermore, as mentioned in paragraph 3(g), a national human rights institution is mandated to take part in the public debate as it unfolds in the public media and elsewhere. This is an important part of raising public awareness in relation to human rights in general as well as in relation to specific human rights issues. To develop a human rights based democratic society, an open debate on human rights related issues is a precondition for creating understanding and respect for these standards. Human rights are often protecting those individuals or groups in society who are perceived as outcasts, criminals or just generally disliked. If a national institution remains silent in relation to such unpopular cases, it does not fulfill its mandate in relation to the victims, nor does it take its mandate seriously by underscoring that human rights are for everyone.

Nonetheless, it is often in the midst of fulfilling their mandate by taking part in the public debate or addressing problems in relation to new laws or existing legislation, or specifically proposing changes, that national institutions are being criticized for politicizing. The more controversial the issue is, the more the institution runs the risk of being caught in middle of a political struggle between opposing parties. This has been the experience in many countries in relation to issues dealing with different minority groups, in particular ethnic minorities, indigenous groups or refugees and asylum seekers.[21]

When national human rights institutions take a position on a particular issue, or in a particular case, they do so on the basis of internationally agreed norms, ratified by the State in which the specific institution operates and its constitutional and legislative provisions. In short, it is based upon the institutional wisdom in the human rights field. However, human rights norms are

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[21] See reports: The Work and Practice of Ombudsmen and National Human Rights Institutions (articles and studies), the Danish Centre for Human, Copenhagen, 2002; and the Sixth International Conference for National Human Rights Institutions, Copenhagen and Lund 10-13 April 2002, the Danish Centre for Human Rights, Copenhagen, 2002.

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often open to interpretation, as is the case with any legal text, and when there is no case law interpreting the norm, or the case law is open for different interpretations, the national institution is obliged to table all the uncertainties in relation to the specific issue.

An example from Denmark serves to illustrate this point. A discussion has been going on for a number of years in relation the extensive use of solitary confinement during pre-trail detention. Several studies have been made which document the severe psychological effects of solitary confinement. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has criticized the Danish Government on this issue.[22] However, the European Court of Human Rights has in several decisions found that solitary confinement does not constitute a violation of article 3 of the European Convention on Human Rights (ECHR). Thus, in the work of the Danish Centre for Human Rights the views of the CPT and the ECHR are described for the politicians to make the relevant decisions on whether to use solitary confinement or not – and if so – to what extent.

Where there is no case law and only a vague human rights norm to take into consideration, the national institution can still contribute to defining the scope of legal obligations as, according to the Paris Principles, it has a legitimate role to play in recommending ways to solve a particular problem by law or by administrative decisions. In its approach to finding a solution, the institution uses general human rights values, human rights methods of interpretation, and soft law that may have been developed in that particular area.[23] In Denmark, for instance, a law was passed which permitted the police to keep DNA profiles of not only people who have been sentenced for certain crimes, but also people who have been acquitted. This is an issue of the right to privacy in article 8 of the ECHR. However, this norm and the case law from the European Court of Human Rights do not offer sufficient guidance in relation to this issue. In 1992 the Committee of Ministers made a recommendation,[24] stipulating that DNA profiles should only be stored in cases relating to persons who were eventually convicted. Denmark had however made a reservation to that specific paragraph of the recommendation. Nonetheless, the Danish Centre for Human Rights in its advisory opinion to the Government (outlining the legal basis, privacy aspects, and the Danish reservation to the recommendation) came to the conclusion that it would best

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22 CPT/Inf (97) 4.

23 Alain Bacquet, *Les Actions de Promotion et de Sensibilisation des Institutions Nationales*, Sixth International Conference for National Human Rights Institutions, Copenhagen and Lund 10-13 April 2002, Danish Centre for Human Rights, Copenhagen (2002).

24 Recommendation 1992.1 on the use of analysis of deoxyribonucleic (DNA) within the framework of the criminal justice system.

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conform with the right to privacy to register only persons who had been convicted.[25] In other cases it would be possible to indicate a number of different avenues that would result in a higher level of conformity with human rights.

Another issue that should be kept in mind is that a national institution will always be under some sort of economic constraint, and like any other institution it is forced to prioritise the use of its resources. When doing so it should not select issues of primary interest to one or another political party or grouping, but bring up issues which are of general interest to a broad range of people or an area which may be seen as neglected. Furthermore, when outlining solutions to problems, the suggestions should as much as possible be non-biased in relation to party politics. The institution should avoid direct criticism of political parties or persons, but relate directly to the issue itself. When operating in the political sphere, these three guidelines are not always easy to uphold, in particular if one issue dominates the political discourse for a longer period of time or if one or more parties have greater human rights sensitivity than others.

The pluralism of national institutions is one of the elements that may prevent the institution from becoming politically biased in its work. Though the purpose of the pluralist representation in the governing structures of the institution is primarily to ensure independence from government, it ensures similar independence from any other political, religious or other groups with special interests.[26] A transparent and learning institution, which openly tables all its advice, recommendations and opinions, will adjust along the way if it is willingly or unconsciously leaning in a particular political direction. Thus, there is a large gray zone between law and politics in the human rights area, and a national institution which takes its mandate seriously will hardly be able to avoid being blamed for politicizing by those who disagree with the human rights solutions to a particular problem. Nonetheless, the institution should always be aware of the pitfalls and adjust its approaches accordingly.

4. National institutions and ESCR?

For decades economic, social and cultural rights have caused many controversies both of an ideological and technical nature. Are they in fact rights or mere political statements? And in case of the former, are they justiciable or non-enforceable aims?[27] This discussion has been going on despite the fact that the indivisibility and interdependence of civil and political rights and

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[25] Human Rights in Denmark, Status 2000, Danish Centre for Human Rights, 2000.

[26] Alain Bacquet, *supra*, note 23.

[27] Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights", in Asbjørn Eide *et al.* (eds.), *Economic, Social and Cultural Rights, a textbook*, 2nd revised edition, Martinus Nijhoff Publishers (2001), pp. 9-29.

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economic, social and cultural rights has, since the adoption of the Universal Declaration on Human Rights in 1948, been the principled starting point for human rights work. This was reiterated once again at the World Conference on Human Rights in 1993.[28]

National institutions may be instrumental in taking the discussion further by concretising economic, social and cultural rights, especially because they face specific problems related to economic and social issues in their daily work. The question remains however, whether they do have a mandate in this regard in national legislation or in international principles and law. National institutions have for the most part been occupied with issues related to civil and political rights.[29] The Paris Principles do not contain explicit references to neither civil and political rights nor economic, social or cultural rights, but merely state "a national human rights institution shall be vested with competence to promote and protect human rights". Furthermore, the institution shall be given "as broad a mandate as possible". In reality, institutions are to a still larger extent addressing economic and social issues from a rights perspective. A few examples can serve to illustrate how national human rights institutions address the issues of economic, social and cultural rights[30] in concrete terms.

The South African Human Rights Commission is explicitly mandated to monitor economic, social and cultural rights, such as rights to access to education, housing, health care, food, water, social security and a clean environment. In reinforcing the protection of these rights, the Commission must investigate, report and carry out research on the observance of economic and social rights, take steps to secure appropriate redress where these rights have been violated, and educate state organs and members of the public on the need for the protection and promotion of these rights. Every year the Commission must request relevant state organs to provide it with information on the measures taken towards the realization of socio-economic rights. On the basis of this input a report on the State's realization of economic and social rights in South Africa is published. The Commission has also conducted a survey on the public perception of social and economic rights in South Africa and held public "poverty hearings" in many parts of the country, as well as several consultative and educational workshops for government officials and civil society organizations.

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28 Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 1993, I:5.

29 Birgit Lindsnaes and Lone Lindholt, *supra*, note 7, pp. 39-42, and p. 47. General Comment No. 10 (1998), The role of national human rights institutions in the protection of economic, social and cultural rights, adopted by the Committee on Economic, Social and Cultural Rights, Official Records of the Economic and Social Council, 1999, Supplement no. 2 (E/1999/22), annex V.

30 <www.nhri.net/national>; *Performance and legitimacy*, *supra*, note 17, pp. 74-77.

PURL: https://www.legal-tools.org/doc/5ecf1e/

In the Asia-Pacific region, the *National Human Rights Commission of India* probably has the most extensive experience. It has addressed various aspects, including the linking of the issue of child labour with the right to compulsory education free of charge. The basis of such actions is various Supreme Court decisions making the right to education justiciable. The Commission used these decisions, in conjunction with reports on government officials employing child labourers as domestic servants, to issue a set of recommendations for prohibiting such employment in the rules of conduct of government servants. This illustrates the choice of a national human rights institution in terms of adopting a seemingly effective strategic combination of reaction as well as prevention.

Finally, the *Danish Centre for Human Rights* has taken up several issues related to economic, social and cultural rights. The right to education was addressed in relation to children of asylum seekers in Denmark. These young boys and girls did not receive appropriate primary school education while waiting for the authorities to make a decision in their asylum cases. Often these children would be outside the formal education system for 2-3 years. This was addressed with reference to the right to education in the International Covenant on Economic, Social and Cultural Rights, and the situation was subsequently improved. Other economic and social rights issues brought up by the Danish Centre for Human Rights have been targeting problems affecting, *inter alia*, prisoners and elderly people.

The Paris Principles are vague in relation to economic, social and cultural rights. The most important statement in this area is the General Comment 10 (1998) adopted by the UN Committee on Economic, Social and Cultural Rights.[31] Sparked by the finding of the Committee that one of the means whereby States can fulfill their obligation according to article 2, paragraph 1, of the Covenant "to take steps ... with a view to achieving progressively the full realization of the [Covenant] rights ... by all appropriate means", is through the work of national human rights institutions. The Committee further noted that, "national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights", and that "it is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions". It finally called on States parties "to ensure that the mandates accorded to all national human rights institutions include appropriate attention to economic, social and cultural rights".

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[31] General Comment No. 10 (1998), *supra*, note 29. In 2002 the Committee on the Rights of the Child tabled a draft General Comment on the Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child, which contains several references to economic, social and cultural rights. PURL: https://www.legal-tools.org/doc/5ecf1e/

The Comment mentions some of the activities already set forth in the Paris Principles. In addition, a number of activities are listed, including:

- the promotion of educational and information programmes designed to enhance awareness and understanding of economic, social and cultural rights. Such programmes should target the general population as well as particular groups such as the public service, the judiciary, the private sector and the labour movement;
- providing technical advice or undertaking surveys in relation to economic, social and cultural rights;
- identifying national-level benchmarks for measuring compliance with the Convention; and
- conducting research and inquiries in order to assess the extent to which economic, social and cultural rights are being realized, either within society as a whole, in particular areas, or in relation to particular vulnerable groups.

Since 1999 the *UN Commission for Human Rights* has endorsed the crucial role of national institutions in promoting and ensuring the indivisibility and interdependence of all human rights, and called upon States to ensure that all human rights are appropriately reflected in the mandate of their national human rights institutions when established.[32]

Other organisations than the United Nations have also addressed the issue of national human rights institutions and economic, social and cultural rights. For example, in 2001, the *Commonwealth Secretariat* issued a book on best practices for national human rights institutions[33] on the basis of an extensive process of discussions and consultations with institutions from all over the world. In relation to economic, social and cultural rights, it stated that:

- a NHRI should employ all available means to respond to inquiries related to the advancement of economic, social and cultural rights, whether or not its enabling statute or national constitution recognizes economic, social and cultural rights as justiciable;
- a NHRI should advise the government on the development and implementation of economic policies to ensure that the economic, social and cultural rights of people are not adversely affected by economic policies, *e.g.*, structural adjustment programmes and other aspects of economic management; and
- a NHRI should work towards facilitating public awareness of government policies relating to economic, social and cultural rights and

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[32] UN Commission on Human Rights Resolutions 1999/72 and 2002/83.

[33] National Human Rights Institutions, Best Practice, Commonwealth Secretariat, 2001, pp. 33-34.

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encourage the involvement of various sectors of society in the formulation, implementation and review of relevant policies.

The Commonwealth Secretariat moves somewhat further by underscoring that notwithstanding a country's formal recognition of economic, social and cultural rights, national institutions should be well versed in those rights. Finally, it stated that, with respect to general complaints procedures, the enabling legislation of a NHRI, specifying the subject matter of admissible complaints, should include civil, political, economic, social and cultural rights in addition to various vulnerable groups.[34]

National institutions have also addressed the issue of economic, social and cultural rights, most comprehensively in regional meetings.[35] Apart from exchanging best practices, one of the conclusions is that a way of fulfilling the responsibility to protect and promote economic, social and cultural rights would be to encourage Governments as well as non-state actors to adopt a rights-based rather than a needs- or welfare-based approach in dealing with these issues.

The doctrine of national institutions has developed throughout the last decade on a general basis[36] as well as specifically in relation to the promotion and protection of economic and social rights. Reverting to the examples mentioned in the introduction to this part, it is clear that national human rights institutions are slowly beginning to incorporate a particular focus on economic, social and cultural rights in their work, using different approaches. Most importantly, the discussions as well as the examples given above indicate that as more and more governments struggle to provide their citizens with basic health, education, housing and sanitation, national human rights institution can be a particularly useful partner for their Government in the process of strengthening the fulfillment of these rights. Such cooperation can span from general advisory, monitoring and consultative activities, to concrete assistance in the form of education and awareness-raising among the general public as well as professional groups, surveys and hearings and other initiatives that can help bridging the gap between the Government and civil society. Finally, the refinement of economic, social and cultural rights by national institutions through their handling of individual cases influences the courts and gives them greater confidence in applying these rules. In all parts of the world case law on these issues is increasing.

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34 *Ibid.*, p. 20.

35 In 2000 the European institutions discussed their role in promoting and protecting economic, social and cultural rights at the third European Meeting of National Institutions, and the Asia Pacific Forum of National Human Rights Institutions hosted a regional Workshop on the same issue in 2001. The reports from these meetings can be found at <www.nhri.net> under "regional" and "Europe" or "Asia-Pacific".

36 Emmanuel Decaux, *supra*, note 19, p. 239.

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5. The role of national institutions in relation to regional and international human rights mechanisms

As previously illustrated, national institutions at the domestic level are working both with strictly legal issues as well as fulfilling their obligation to promote human rights in general. This dual mandate is also reflected in the work of national institutions in relation to regional and intergovernmental organizations.

In the preamble to the Universal Declaration on Human Rights the States proclaim that they will ensure respect for the rights and freedoms in the declaration by "progressive measures, national and international, to secure their universal and effective recognition and observance ...". At the World Conference on Human Rights it was recalled that, "the promotion and protection of human rights is a legitimate concern of the international community".[37] To give substance to these declarations, organs and specialized agencies have been developed since 1948 at the regional and international levels with the sole purpose of monitoring and advising states in relation to their human rights obligations. With the recent development of stronger independent national institutions, ties are developing between the international human rights machinery and the national institutions. The collaboration is developing in relation to the general promotion of human rights as well as in relation to treaty bodies. It is developing both in bilateral relations between individual national and international bodies as well as with the representative bodies of national institutions and international bodies.

In 1993 the national institutions present at the Second International Workshop in Tunis decided to establish the *International Coordination Committee of National Institutions* (ICC). The Committee has subsequently been endorsed by the UN Commission on Human Rights[38] as the principal representative of national institutions at the global level. It is not an independent organization with policies and programmes of its own, but rather a loose mechanism for coordination of and liaison among national institutions. The ICC has 16 members; four from each of the four regions,[39] and the Of-

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[37] Vienna Declaration and Programme of Action, UN World Conference on Human Rights, Vienna, 1993, I:4

[38] The Commission on Human Rights Resolution 1994/54 OP7 and subsequent resolutions.

[39] The Rules of Procedure endorsed by the Fifth International Workshop in 2000. The Asia-Pacific Forum established in 1996 in Australia is the oldest and most developed regional network. The African Coordination Committee of National Institutions was established by the Yaounde Declaration in 1996, and the European Coordination Group was established shortly after by the Copenhagen Declaration – For the Future – in 1997. Finally, the Americas established the Network of National Institutions in Mexico in 2000. All the declarations can be found on <www.nhri.net> "regional". The regional members of the ICC are as of April 2002: Africa: Malawi, Morocco (chair), Togo, Uganda; the Americas:

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fice of the High Commissioner for Human Rights assists in its work.[40] The ICC has three areas of responsibility: (1) liaison among institutions at the global level and with the UN; (2) accreditation of national institutions that comply with the Paris Principles; and (3) organization of the international conference every second year. Until recently the ICC has not had the role or capacity to develop common policy positions for national institutions beyond advocating for their recognition in UN fora. It did, however, play a significant role in relation to the World Conference against Racism held in Durban, 2001 and in developing the Copenhagen Declaration on the Role of National Institutions in Combating Racism and Xenophobia, which was the outcome of the Sixth International Conference for National Institutions in 2002.[41]

The international and regional networks play an important role in the exchange of information on best practices and new developments.[42] Furthermore, the accreditation of new institutions is crucial in terms of securing their trustworthiness when they are represented in international and regional fora. Right from the beginning of the 1990s the issue of which status national institutions should be accorded at UN meetings and conferences was discussed. Should they represent their country and speak from that seat, should they be recognized as NGOs according to the ECOSOC rules of procedure, or should they be recognized as a third category of institutions in the international arena?[43] At the UN World Conference on Human Rights in 1993 national institutions were for the first time allocated time to speak in their own capacity. It took until 1998 before the same right was granted in the UN Commission on Human Rights as an interim practice.[44] At its 56th session the Commission decided that the arrangement "which allows national institutions to address the Commission from a special section of the floor set aside specifically for this purpose, behind the nameplate "National Institutions", should be continued",[45] however only in relation to item 18 (b) on the agenda addressing the issue of national institutions. At the World Conference Against Racism, Xenophobia and Related Intolerance in Durban (2001) national institutions were again entitled to address the conference.

In relation to the world conferences, the possibility of addressing the conference is discussed as part of the preparation of the conferences and fi-

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Canada, Colombia, Costa Rica, Mexico (vice-chair); Asia-Pacific: Australia, Fiji, India, the Philippines; Europe: Denmark, France, Poland, Sweden.

40 UN Commission on Human Rights Resolution 2002/83 OP 12 and 16.

41 The Declaration can be found at <www.nhri.net>.

42 An example of exchange of best practices is the report from the 6th International Conference, *supra*, note 21.

43 Report by the UN Secretary General concerning the participation of national institutions in United Nations meetings dealing with human rights, E/CN.4/1998/47.

44 Commission on Human Rights Resolution 1998/55 OP13.

45 Commission on Human Rights Resolution 1999/72 OP15.

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nally written into the conference rules of procedure. As regards the Commission, the right to speak is based on the resolutions of the Commission itself and not established by the ECOSOC rules of procedure. A majority in the Commission may decide to alter this practice. At the 58th session in 2002 such an attempt was made, explained by general time constraint, but the possibility to address the Commission was maintained albeit with severe limitations on the time allocated.

Some observers have criticized the possibility of national institutions addressing the Commission since it has in practice carved into the time available for NGOs.[46] The practice seems however, to be broadly recognized.[47] A more complicated issue is whether national institutions also in the future will be limited to speak only under the agenda item on national institutions and not be mandated to address other substantive items. Time constraints speak against opening up the agenda for national institutions, which would add a number of new speakers to the list. Furthermore, it could be argued that as States and NGOs present a wide spectrum of views already, there is no need for a third perspective from national institutions. On the other hand, the unique position of national institutions gives them an in-depth insight into specific human rights problems which neither States nor NGOs possess or are willing to table. With the special status of national institutions, their positions are more difficult to sideline than those of NGOs. An active presence of national institutions may help to create a more open and less defensive dialogue on specific human rights issues than what is often currently the case in the Commission. The time issue is merely of a technical and organizational nature, which can be dealt with if there is a willingness to listen to contributions from national institutions.

Finally, there is the issue of which institutions should be permitted to speak. Here there seems to be divergent views between the Commission and the ICC. The Commission is inclined to let anyone speak who wants to enlist as a national institution, whereas the ICC would like to limit the speakers to those institutions that are fully accredited as national institutions according to the Paris Principles. The Commission may have a problem by not having its own accreditation system, only relying on the accreditation made by the ICC as an external partner. This could however, be solved by formalizing the participation in the ECOSOC Rules of Procedure whereby the accreditation could formally be carried out in collaboration with the ICC or delegated entirely to the ICC. This would demand a careful scrutiny of all national insti-

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46 *Performance and Legitimacy*, *supra*, note 17, pp. 100-101

47 See, *e.g.*, Commission on Human Rights Resolution 2002/83 OP8, which welcomes the practice of national institutions participating in an appropriate manner in their own right in meetings of the Commission and its subsidiary bodies.

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tutions not only in relation to their formal mandate, but also their performance.

It is not only at the international level that national institutions have a formal representation. It is also the case at the regional level. In 1997 a formal roundtable between the Council of Europe and the European national institutions was established to institute regular meetings to exchange views and experiences on the promotion and protection of human rights.[48] The first roundtable was held in 2000. As a follow-up to this closer dialogue, the European Coordinating Group was in 2001 granted observer status to the Council of Europe Steering Committee for Human Rights (CDDH). In Africa, the African Commission on Human and Peoples' Rights passed a resolution in 1998 on granting observer status to national human rights institutions.[49] None of the other regions have similar arrangements.

It is noteworthy that according to the resolution of the African Commission national institutions can participate, without voting rights, in deliberations on issues that are of interest to them, and can submit proposals that may be put to vote at the request of any member of the Commission. In the CDDH the European institutions may as well address any issue of interest. Thus, at the regional level the dialogue between States and national institutions has moved further than on the international level. If States are gaining confidence in the dialogue at the regional levels, this may in time influence the arrangement in the UN Commission on Human Rights. These developments in the human rights work of the UN and regionally may slowly lead to an acceptance of national institutions as a third party besides governments and NGOs.

As described above national institutions are creating a platform to promote human rights at the regional and international levels. A parallel development is taking place in relation to the less political and more legal human rights mechanisms. In relation to the work of the *UN* and *regional treaty bodies* national institutions can contribute in four areas: (1) provide information on the situation in the country; (2) monitor the implementation of recommendations; (3) engage in dissemination of information and education on the work of the treaty bodies; and (4) assist in submitting individual complaints to treaty bodies.

In the Paris Principles it is foreseen that national institutions have a role to play in relation to *providing information to treaty bodies*. It is stated that national institutions have the responsibility to contribute to the reports which States are required to submit to United Nations bodies and committees, and

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[48] Council of Europe, Committee of Ministers Resolution (97) 11.

[49] Resolution of the African Commission on Human and Peoples' Rights, Banjul, 31 October 1998. See also *Protectors or Pretenders? Government Human Rights Commissions in Africa*, Human Rights Watch, 2001, pp. 67-72.

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to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect to their independence. The UN Committee on the Elimination of all Forms of Racial Discrimination has in its general recommendation 28 (2002)[50] recommended that national human rights institutions assist their respective States in complying with their reporting obligations. There are two approaches to the fulfillment of this obligation. One approach is that the Government mandates the national institution to write the entire state report, or otherwise contribute to the official report. Another approach is for the national institution to make a separate supplementary report or to collaborate with specialized institutions or NGOs in reporting. For the members of the treaty body it is often more beneficial to receive a supplementary report, highlighting the problems as perceived by the national institution. When national institutions are submitting their input to the official report, valuable information is often filtered out in the process of editing the final State report.[51] However, there are examples of State reports that in a frank and open way include highly critical elements received from national institutions. The main issue is not the format of the reporting, but rather whether the relevant information reaches the experts in the treaty body, which is what the national institution has to ensure. Finally, referring to the discussion above about the borderline between politics and law it is noteworthy that the Paris Principles open up for national institutions to "express an opinion on the subject". Thus, it is legitimate to go beyond the mere statement of facts and make an informed analysis of the particular area of concern.

The concluding observations and recommendations from treaty bodies relate to how the State fulfils its obligations under the relevant convention. Thus, in the general *monitoring function* of a national institution the observations and recommendations become useful tools in ensuring compliance.[52] The national institution can use the authoritative status of the treaty body in its endeavors to make the Government comply with its obligations. A cooperative relationship with the international treaty machinery will facilitate the work of national institutions, thus a more dynamic and structured flow of information both ways is needed. The secretariats of the treaty bodies should keep national institutions informed about dates for examination and automatically forward concluding observations and recommendations to national

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50 General Recommendation 28, 2002 Follow-up on the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Committee on the Elimination of all Forms of Racial Discrimination OP13.

51 *Performance and Legitimacy*, *supra*, note 17, p. 100.

52 Paris Principles, Competence and responsibilities, 3(b) and General Recommendation 28, 2002 Follow-up on the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Committee on the Elimination of all Forms of Racial Discrimination OP13.

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institutions. This is also a precondition for national institutions to carry out general *information campaigns* on the work of treaty bodies as well as more targeted information and education. In some cases treaty body members participate in public meetings with national institutions on their specific concluding observations and recommendations, which is a way to create a better understanding of the role and function of the treaty body as well as an understanding of the concerns of the body.

Finally, a national institution can become the *focal point for submitting individual complaints to treaty bodies* with this particular mandate, like the UN Human Rights Committee and the UN Committee on the Elimination of all Forms of Racial Discrimination. This function can be carried out irrespective of whether the institution itself has the competence to deal with individual complaints. The establishment of such a focal point is foreseen in article 14(2) of the UN Convention on the Elimination of all Forms of Racial Discrimination. The advantage is that the specialized human rights knowledge built-up in the institution may help the victim to address the competent body in the right manner. Furthermore, the institution may look into whether the formal criteria, such as the exhaustion of local remedies, have been fulfilled.

The new Optional Protocol to the UN Convention against Torture reflects the development of a closer interaction between treaty bodies and national institutions. The draft text suggests that national institutions or a specialized body can carry out on-site inspections on behalf of a sub-committee on the prevention of torture established under the UN Committee against Torture. It is realized that the sub-committee itself will not be able to visit all countries for financial and practical reasons. Therefore it is suggested that national institutions can do the inspection with the same mandate as the sub-committee and with the possibility to report to the Committee. However, the national institution should not been seen as an alternative to the creation and functioning of an independent international mechanism. Rather, effective national institutions established according to the Paris Principles should be seen as useful complementary mechanisms to an international mechanism.

6. Concluding remarks

The 10th anniversary of the Paris Principles is celebrated in December 2003. At that time the question will undoubtedly be raised whether or not they should be subject to amendments. Some will claim that we have now gained experience within the legal framework of national institutions, and that the principles should be adjusted and be given greater clarity according to practical experience. Others again will caution because they will fear that the standards may be lowered. As illustrated, the Paris Principles are flexible to

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the extent that they can accommodate a heterogeneous group of institutions shaped according to local legal traditions. At the same time, they are so distinct that a family of institutions has been created with a fairly uniform identity.

Additional to the Paris Principles, a body of doctrine is substantiating the work of national institutions and is giving guidance to their work. At the domestic level national institutions are demarcating their particular area of competence outside of the jurisdiction of the classical ombudsman institution, thereby supplementing his or her work rather than duplicating. In some countries the two institutions are merging into one body. The combined functions of the national institution and the ombudsman offer a strong protection of the individual when the institutions perform according to their mandate and do not shy away from the thorny issues and cases. And when Governments are willing to listen to their advice. If this is not the case, the more cumbersome and costly procedures in courts will have to take over and perform their particular role in safeguarding the rights of the people.

With the increased globalization in the post-1990 era, interaction between the local and international institutions has intensified. This is also the case between national institutions and treaty bodies. At the national and international/regional levels these mechanisms are continuing their efforts to create a comprehensive human rights monitoring system. One is dependent on the other, and jointly they represent a stronger protection and promotion regime than we have previously had. This comprehensive system underlines that the concern for human rights protection does not stop at the frontier, but is a universal commitment.

In the aftermath of the cold war, human rights have had a strong tailwind and democratization processes have been dynamic in all regions of the world. National institutions were fostered in this particular period, and human rights moved from being part of the foreign policy to becoming an integral part of domestic politics and law. The question is how far will human rights in the time to come be allowed to influence domestic policies? Or phrased in another way: how strong will governments permit monitoring systems to become? The post-9/11 anti-terrorism legislation in many Western countries and the still more restrictive laws and practices in relation to immigrants and refugees[53] may be indicative of diminishing support for human rights. National institutions may become a target because they will often be the messengers of the unpopular analysis or be defending the case of a marginalized individual or minority. In light of the above-mentioned developments, it is imperative to recall the validity of what Asbjørn Eide wrote in

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[53] Morten Kjaerum, "Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?", 24 *Human Rights Quarterly* 513-536 (2002).

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1991 about the relationship between human rights and democracy – and that national institutions are part of this general system.

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XXIX

Some reflections on the rules and practices followed by the Sub-Commission on the Promotion and Protection of Human Rights

Guennadi Lebakine*

1. Introduction

The conclusion that the Sub-Commission "has repeatedly shown more independence than expected by its parent bodies"[1] is manifested, *inter alia*, by the existence of a plethora of rules and practices governing the work of the Sub-Commission that are not merely complementary to the official rules of procedure established by the Economic and Social Council (ECOSOC), but in many instances go well beyond those rules. To illustrate, for example, a somewhat disadvantaged position in which observer Governments find themselves at the meetings of the Sub-Commission, reference could be made to such striking features of the Sub-Commission's rules as the unquestionable priority given to non-governmental organizations (NGOs) in the order of statements during the general debate: they always speak before Governments. The Governments do not have the right to raise points of order *vis-à-vis* statements by NGOs or experts. They may only resort to rights of reply which they can exercise not at any meeting but only at a strictly prescribed timing. Moreover, in their general statements, Governments are not authorized to refer to human rights situation in countries other than their own. Furthermore, in order to avoid excessive politicization of the Sub-Commission, its Chairperson was authorized to discourage Governments from criticizing each other, and that authority has occasionally been exercised.[2]

2. Procedural framework of the Sub-Commission

Generally, the proceedings of the Sub-Commission are governed by the document entitled "Rules of procedure of the functional commissions of the

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1 Asbjørn Eide, "The Sub-Commission on Prevention of Discrimination and Protection of Minorities" in Philip Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal*, Clarendon Press, Oxford (1992), p. 211.

2 See E/CN.4/2002/99, para. 6.

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Economic and Social Council",[3] with an important precision stating, in rule 24, that they apply to subsidiary organs – such as the Sub-Commission – "in so far as they are applicable". It is quite normal for the Sub-Commission – as for any other United Nations body – to have supplementary, more detailed rules of its own relating to the organization of work and the conduct of business. Any lacunae in the official regulation of organizational and procedural matters are normally filled by any such body through establishing supplementary rules which are in most cases based on the relevant practice accumulated.

The same rules of procedure (E/5975/Rev.1) apply both to the Sub-Commission and to the Commission on Human Rights – parent body of the Sub-Commission. Since recently, the Commission has before it a document which includes all the main rulings of the Chairpersons of the Commission and recommendations of its Bureau endorsed by the plenary of the Commission, relating to the organization of work and conduct of business, as well as the pertinent rules and practices followed by the secretariat.[4]

Most of Sub-Commission's rules and practices are compiled in what has become known at its 2001 and 2002 sessions as the "yellow book". This is a brochure entitled "Guidelines for the application by the Sub-Commission on the Promotion and Protection of Human Rights of the rules of procedure of the functional commissions of the Economic and Social Council and other decisions and practices relating thereto".[5] This document has been published and disseminated by the Secretariat pursuant to the request contained in Sub-Commission decision 1999/114.

The guidelines directly resulted from the work of the sessional working group on methods of work of the Sub-Commission set up at its forty-ninth (1997)[6] and fifty-first (1999)[7] sessions which considered the working papers on that subject prepared by Mr. Ribot Hatano, expert from Japan.[8] However, the history of Sub-Commission's deliberations on its status, activities and working methods is much longer.[9]

Already in 1974, at its 27th session, the Sub-Commission had before it a set of guidelines concerning its methods of work.[10] In 1990 and 1991, ses-

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3 E/5975/Rev. 1.

4 See the latest version in document E/CN.4/2002/16, entitled "Main rules and practices followed by the Commission on Human Rights in the organization of its work and the conduct of business".

5 Issued under technical number HR/NONE/2001/126.

6 See report in E/CN.4/Sub.2/1997/40.

7 See report in E/CN.4/Sub.2/1999/22.

8 Documents E/CN.4/Sub.2/1997/3, E/CN.4/Sub.2/1998/3 and E/CN.4/Sub.2/1999/2.

9 See, for example, an overview in the Note by the Secretariat on the role and competence of the Sub-Commission (E/CN.4/Sub.2/1982/3, annex I).

10 E/CN.4/1160, pp. 11-13.

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sional working groups were established by the Sub-Commission pursuant to its decision1989/104 "to prepare an overview and an analysis of the suggestions and proposals which have been made in order to enable the Sub-Commission to better discharge its responsibilities in dealing with violations of human rights".[11] Working papers on various aspects of the Sub-Commission's work and competence were prepared during that period and later on by several experts[12] and by the Secretariat.[13] In 1992, upon the recommendation of its inter-sessional working group on methods of work,[14] the Sub-Commission adopted resolution 1992/8 which contained in the annex the document entitled "Guidelines which the Sub-Commission adopted at its forty-fourth session concerning its methods of work, pursuant to paragraphs 6 and 7 of Commission on Human Rights resolution 1992/66". A sessional working group on the methods of work of the Sub-Commission was again convened in 1994, when it adopted a supplementary guideline on methods of work regarding Sub-Commission's agenda item dealing with violations of human rights.[15] All those guidelines were subsequently included, with a number of additions and modifications, in the Guidelines annexed to Sub-Commission's decision 1999/114 ("yellow book").

It is important to bear in mind that besides various existing guidelines, decisions, practices and rulings by the Chairpersons, the 1999 compilation also included a number of entirely new proposals formulated by R. Hatano or suggested by members of the sessional working group of the Sub-Commission. There was a general understanding in the working group that, while it was not within the purview of the Sub-Commission to amend unilaterally the rules of procedure established by the ECOSOC, the application of certain rules could be clarified without affecting their substance.[16]

Inevitably, a question was raised in the working group regarding the nature of the exercise undertaken. Some experts felt that compilation of rules should remain a document intended only for the internal use of the Sub-Commission, and that no approval or endorsement of that document should be sought from the Commission on Human Rights and the Economic and Social Council. It was stated that that exercise was undertaken exactly in line with rule 24 of the rules of procedure in order to apply, *mutatis mutandis*, the

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[11] Reports of working groups are contained in documents E/CN.4/Sub.2/1990/14 and E/CN.4/Sub.2/1991/16.

[12] T. van Boven and A. Eide (E/CN.4/Sub.2/1988/43 and E/CN.4/Sub.2/1989/47); S. Chernichenko (E/CN.4/Sub.2/1989/55 and E/CN.4/Sub.2/1990/56); S. Chernichenko and W. Treat (E/CN.4/Sub.2/1989/51); R. Hatano (E/CN.4/Sub.2/1991/WP.2); L. Joinet (E/CN.4/Sub.2/1992/WG.6/WP.2).

[13] E/CN.4/Sub.2/1982/3; E/CN.4/Sub.2/1994/17 and Add. 1; E/CN.4/Sub.2/1997/2.

[14] E/CN.4/Sub.2/1992/3 and Add. 1.

[15] E/CN.4/Sub.2/1994/3.

[16] E/CN.4/Sub.2/1997/40, para. 9; E/CN.4/Sub.2/1999/22, para. 17.

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rules established by ECOSOC to the work of the Sub-Commission. Other participants were, however, of the view that the document should be submitted to the Commission on Human Rights, and eventually to the Council, for information and possible comments or reaction. A view was also expressed that it would be wise to seek an opinion of the Legal Counsel.[17] In the final analysis, the Sub-Commission decided to transmit the 1999 Guidelines to the Commission of Human Rights "for information" (see decision 1999/114).

The guidelines reproduce practically all the rules of procedure established by ECOSOC, except for those which are obviously not applicable. Whenever appropriate, technical changes are made to the wording of ECOSOC rules. Most rules are followed by additional provisions describing the Sub-Commission's own decisions, guidelines or practices. All such provisions appear in the "yellow book" in smaller print. Most important supplementary rules relate to such issues as rights of alternates, geographical rotation of offices, order and regulation of statements, including speaking time, secret ballot, preparation of and follow-up to studies, appointment of special rapporteurs and commentators, submission of draft resolutions or decisions, special arrangements for the agenda item on human rights situations, etc.

Surprisingly, there was no specific reaction of the Commission on Human Rights to the guidelines. The Commission simply referred to them in the preambular parts of its resolutions 2001/60 and 2002/66 using the wording "Bearing in mind...".

3. The relationship between the guidelines and the ECOSOC rules

Even though the legality of the 1999 exercise of the Sub-Commission has not been challenged by its parent organs, the question may arise as to what extend the provisions of the "yellow book" could differ from the rules of procedure established by ECOSOC for its functional commissions and their subsidiary bodies.

Ribot Hatano, the author of the "Draft compilation of the rules of procedure, guidelines, decisions and practices applicable to the Sub-Commission",[18] stated at the outset of his working paper that the Sub-Commission was fully aware of the necessity of submitting to ECOSOC, through the Commission on Human Rights, of (a) any change in the wording of the rules of procedure of the functional commissions of the Council; and (b) any provision of the guidelines, decisions, practices, etc. *which might substantially alter the gist of the rules of procedure.*[19]

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[17] E/CN.4/Sub.2/1999/22, para. 23.
[18] E/CN.4/Sub.2/1999/2, annex.
[19] E/CN.4/Sub.2/1999/2, para. 4.

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R. Hatano further explained that he had prepared his working paper on the understanding that the guidelines, decisions, practices, etc. that are of a purely supplementary character, not in contradiction with the rules of procedure, would be *ipso facto* applicable to the Sub-Commission, without seeking the approval of the Economic and Social Council.[20]

However, it may be (and it was) argued that some provisions of the compilation, which later became the 1999 Guidelines ("yellow book"), do alter the gist of certain rules of procedure or other relevant rules established by ECOSOC, or might even be viewed as contradicting them.

Before referring to some examples, it should be noted that the body of rules and practices used by the Sub-Commission in its proceedings is not limited to 1999 Guidelines. Taking them into account as well as other practices, current needs or instructions of parent organs, the Sub-Commission adopts, upon the recommendation of its Bureau at the beginning of each annual session, a set of main rules relating to the organization of its work and the conduct of business.[21] Some of such rules further develop and modify the Guidelines or may eventually be entirely new.

One of the additional provisions to rule 43 (Speeches) under the heading "Limitations on statements" provides that an NGO observer may not speak twice under the same agenda item, even if he represents more than one NGO. This provision seems to be in obvious contradiction with the principle of "multiple accreditation" when several NGOs are represented by the same person. A rule accepted by the Commission on Human Rights clearly states that "there is nothing in ECOSOC resolution 1996/31[22] incompatible with one person representing two or more NGOs, as long as it is clear on behalf of which NGO or NGOs that person acts and speaks in each instance".[23] It should however be pointed out that the Sub-Commission has never enforced the application of this rule.

Another example of divergence between the rules established by ECOSOC and the rules and practices of the Sub-Commission may be found in the provisions relating to the timing for the exercise of the right of reply by observer Governments. Nowadays the rights of reply are restricted, with no flexibility, to the "end of the general debate on any particular item(s)",[24] while ECOSOC rules provide that such statements should preferably be delivered "at the end of the meeting at which this right is requested" (rule 45).

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[20] *Ibid.* See also E/CN.4/Sub.2/1998/3, para. 3.

[21] See, for example, paragraphs 18 to 26 of Sub-Commission's report on its 53rd session, document E/CN.4/2002/2-E/CN.4/Sub.2/2001/40.

[22] ECOSOC resolution 1996/31, entitled "Consultative relationship between the United Nations and non-governmental organizations".

[23] E/CN.4/2002/16, para. 48.

[24] E/CN.4/2001/2 - E/CN.4/Sub.2/2000/46, para. 20; E/CN.4/2002/2 - E/CN.4/Sub.2/2001/40, para. 22.

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The Commission on Human Rights has recently recommended that the Sub-Commission further improve its methods of work in such areas as selection of studies, avoiding duplication of work with other competent bodies and mechanisms, facilitating participation of NGOs etc.[25] Those are, however, policy recommendations that would hardly have an immediate effect on Sub-Commission's rules.

At the same time, there are few areas in the work of the Sub-Commission where the absence of clear guidance from the Commission on Human Rights regarding the competence and procedures of the Sub-Commission has resulted in certain difficulties of both legal and practical character.

Thus, in its resolution 17 (XXXVII) of 10 March 1981, the Commission on Human Rights instructed the Sub-Commission, in drawing up its annual reports to the Commission, to present and indicate clearly in an introductory chapter "all matters requiring the approval of the Commission". The Commission specified that such matters would include resolutions and decisions of the Sub-Commission "other than those bearing on internal procedural questions or those which follow up previously approved or specifically mandated courses of action" (para. 3). However, on several occasions the Secretariat was faced with uneasy questions concerning the extent to which decisions of the Sub-Commission might be implemented without awaiting their consideration and approval by the Commission on Human Rights.

The UN Office of Legal Affairs, in an internal memorandum produced in 1978 which dealt with a similar issue pertaining to the work of the Commission on Human Rights, stated the following principle:

> In general, whether a subsidiary organ may implement its own decisions depends on its terms of reference. If, under its terms of reference, a subsidiary organ may take certain decisions without the prior authorization or subsequent approval of its parent organ, then it may itself implement such decisions. ... In the event that the decision taken is questioned in the parent body, the decision of the latter would be final.[26]

Those provisions of resolutions and decisions which Sub-Commission's experts explicitly want to place before the Commission on Human Rights for approval are normally formulated by them in the form of separate draft decisions annexed to resolutions or decisions. But there have been instances when important provisions requesting specific action by the Secretariat have been "hidden" in the text of Sub-Commission's resolutions without asking

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[25] Resolution 2002/66, para. 10.

[26] Reproduced in: Note by the Secretariat regarding the role and competence of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1982/3, annex I, para. 8).

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for their approval by the Commission of Human Rights. Thus, quite often Sub-Commission's resolutions and decisions contain proposals or requests for the organization of workshops, seminars and other meetings or for carrying out various new activities which are addressed to the Secretary-General or the High Commissioner but do not include requests for their approval by the Commission.[27]

When such requests and proposals are not formulated in the form of draft decisions recommended for approval by the Commission, they are, in accordance with the existing practice of the Secretariat, merely referred to in one of the annexes to the annual report of the Sub-Commission under the heading "Sub-Commission's resolutions and decisions referring to matters which are drawn to the attention of the Commission on Human Rights".

To avoid the legal ambiguity of situations when the Secretariat is required to implement Sub-Commission's requests before the report of the Sub-Commission has been formally considered by the Commission, clear instructions are needed from the Commission on Human Rights. In fact, the Secretariat has already brought this to the attention of the Expanded Bureau of the Commission. At the same time, a most recent decision of the Commission stating that "all requests for concrete measures" must first be approved by the Commission[28] may be interpreted as applicable to the situations referred to above.

On the question of the Sub-Commission's capacity to seek information from Governments, the Office of Legal Affairs, in an opinion made available to the Sub-Commission at its 33rd session in 1980, stated that such capacity "would seem to be inherent in the general mandate to undertake studies and make recommendations on matters within its competence. The capacity to collect information is a prerequisite for the effective accomplishment of the Sub-Commission's task".[29] However, the Commission on Human Rights, in its recent instructions on this matter, requested the Secretariat to assist the Sub-Commission with regard to requests for information from Governments, inter-governmental and non-governmental organizations, "but to consider such requests only after they have been approved by the Commission".[30]

In practical terms, the implementation of this instruction by the Secretariat would mean that in many instances the requests for information made by the Sub-Commission in August would be forwarded to Governments only in April/May of next year, thus making it practically impossible to obtain the

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27 See, for example, Sub-Commission resolutions 2001/5, para. 8; 2001/10, para. 13; 2001/12, para. 13; 2001/14, para. 25; 2001/21, para. 13; decision 2001/111.

28 Commission on Human Rights resolution 2002/66, para. 12.

29 E/CN.4/1413, para. 31.

30 Commission on Human Rights resolutions 2001/60, para. 9; 1998/28, para. 8.

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required information or comments on time in order to process them and submit for the next session of the Sub-Commission.

The on-going process of review of mechanisms of the Commission on Human Rights has already affected the Sub-Commission[31] and, as a consequence, it will have to revise its rules and practices in view of such new developments as the shortening of the duration of its annual sessions to three weeks; the reform of the 1503 procedure in which the Sub-Commission now ceased to have a role to play; the instructions of the Commission on Human Rights to the effect that the Sub-Commission should not adopt country-specific resolutions, refrain from including references to countries in its thematic resolutions and debate only those country situations which are not being dealt with by the Commission.

A recent successful procedural innovation which has been *de facto* added to the Sub-Commission's rules and practices is a new way of organizing its general debate: instead of mechanically following the list of speakers, debates on each agenda item are now restructured around reports, working papers and substantive issues, so that there is some cohesiveness to the deliberations.[32] Other new procedural developments include the use of interactive discussions and a "question and answer" format; advance consideration of draft resolutions in closed meetings; powers given to the Chair to prevent personal attacks against any participant and to discourage criticism by Governments of other Governments.

A new development which will also necessitate the revision of the rules of the Sub-Commission is the appearance of new actors whose participation in the work of the Sub-Commission is not envisaged by the rules established by ECOSOC: representatives of treaty bodies, national institutions, newly established bodies (such as the Permanent Forum on Indigenous Issues), panelists invited for particular debates, members of the Expanded Bureau of the Commission on Human Rights, special rapporteurs of the Commission and so forth.

The Sub-Commission will also have to revise its rules regarding the appointment of special rapporteurs as contained in chapter XV of the "yellow book" if the recent Sub-Commission's decision to appoint as a special rapporteur a person who is no longer member of the Sub-Commission[33] is approved by the Commission on Human Rights and ECOSOC.

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31 See Commission decision 2000/109, annex, chapter four.

32 E/CN.4/2002/99, para. 5.

33 Sub-Commission resolution 2002/15.

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4. Conclusion

As a way to conclude, it may simply be noted that the Sub-Commission undergoes changes and developments, which is a normal process for any UN body. As a result of this process, the Sub-Commission establishes new rules, procedures and practices and modifies the existing ones, taking into account new events and developments, as well as instructions from the parent organs, or it does so at its own discretion. A prominent human rights scholar and colleague concluded that,

> there is a *prima facie* presumption of the validity of decisions of a subsidiary organ unless the illegality is quite apparent or glaring. If action is taken in accordance with the subsidiary organ's interpretation of its jurisdiction, those actions will remain valid until such time as the parent organ may decide otherwise.[34]

Speaking at the closure of the fifty-fourth session of the Sub-Commission, on 16 August 2002, Asbjørn Eide stated that,

> it has been possible for this Sub-Commission to be continuously in the forefront. As independent experts, we learn and benefit from each other in expanding the understanding, the needs and the modalities of human rights implementation.

[34] Bertrand G. Ramcharan, "Lacunae in the law of international organizations: The relations between subsidiary and parent organs with particular reference to the Commission and Sub-Commission on Human Rights" in *Progress in the Spirit of Human Rights – Festschrift für Felix Ermacora*, N.P. Engel Verlag, Kehl am Rhein, Strasbourg, Arlington Va. (1988), p. 48.

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XXX

Treatment of persons deprived of liberty: analysis of the Human Rights Committee's case law under Article 10 of the International Covenant on Civil and Political Rights (ICCPR)

Jakob Th. Möller*

1. Article 10: the right of all persons in custody to be treated humanely

Article 10 of the International Covenant of Civil and Political Rights places special obligations on States Parties in respect of the treatment of persons deprived of liberty. Paragraph 1 lays down basic principles concerning the treatment that persons in custody have the right to expect; paragraph 2 concerns the obligation to segregate accused persons from convicted offenders and accused juveniles from adults; paragraph 3 stresses the social rehabilitation aim of the penitentiary system and the special treatment to be accorded to juvenile offenders in that respect. All provisions thus place positive obligations on the authorities in respect of persons deprived of their liberty.[1]

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1 The Human Rights Committee first adopted general comments on Article 10 at its sixteenth session in 1982 (General Comment No. 9 [16], HRC 1982 Report, Annex V). These were replaced by fuller general comments adopted at the forty-fourth session in 1992 (General Comment No. 21 [44], HRC 1992 Report, Annex VI B). In respect of Article 10 (1), the salient parts of the latter (paragraphs 2 to 4) read as follows:

Article 10, paragraph 1, of the International Covenant on Civil and Political Rights applies to any one deprived of liberty under the laws and authority of the State who is held in prisons, hospitals – particularly psychiatric hospitals – detention camps or correctional institutions or elsewhere. States parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held.

Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.

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2. Article 10(1)

Article 10, paragraph 1, prescribes that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. In a sense, this is an extension of Article 7 (outlawing torture or cruel, inhuman or degrading treatment or punishment in all circumstances) and aims at guaranteeing humane treatment for the particularly vulnerable group of persons in custody (including police custody during investigation, pre-trial detention and imprisonment following conviction).

The case law of the United Nations Human Rights Committee bears out that detained persons are indeed in a vulnerable position and are frequently the victims of abuse by persons acting in an official capacity. From August 1979 (time of adoption of the Committee's first Views under Article 5(4) of the Optional Protocol to the ICCPR) to the end of 1999, violations of Article 10(1) have been found in some 118 cases relating to over 20 States Parties. In 74 of these 118 cases, the Committee found violations of Article 7 also (sometimes together with a violation of Article 10(1), sometimes as a separate violation apart from the violation of Article 10(1)). This time of a little over 20 years can roughly be divided into two halfs, the Uruguay years, followed by the Jamaica years, but just about 75% of all violations found of Article 10(1) (the same statistics would apply to Article 7) relate to these two States Parties (in respect of Uruguay in 33 cases, with violations of Article 7 found also in 21 of these; in respect of Jamaica in 53 cases, with violations of Article 7 found also in 34 of these). It has proven difficult, however, for the Committee to be consistent in determining what constitutes violations of Article 7, what constitutes violations of Article 10(1) and what constitutes violations of both Article 7 as well as Article 10(1). The case law appears to reveal a blurred borderline between the two Articles, or no borderline at all. The same circumstances lead one day to a finding of a violation of Article 7, the following day to a violation of Article 10(1), and the third day to a violation of both Articles together. It does not present a problem that torture is torture in violation of Article 7, but to draw the line between "cruel, inhuman or degrading treatment or punishment" on the one hand, and prison conditions that fail to secure that inmates are "treated with humanity and with respect for the inherent dignity of the human person" on the other hand seems to be a problem. Thus, inhuman prison conditions have often led to a finding

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Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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of violations of Articles 7 and 10(1) together (in particular during the Uruguay years), but also often to a finding of a violation of Article 10(1) only, without any mention of Article 7 (in particular during the Jamaica years). Deprivation of food for five days has amounted to a violation of Article 10(1) in one case, but deprivation of food and drink for four days to a violation of Article 7 in another case. Beatings by prison warders in addition to appalling prison conditions normally lead to a finding of violation of Articles 7 and 10(1) together, but occasionally to a finding of violation of Article 10(1) only.

In spite of apparent inconsistencies, the following basic approach appears to be emerging: bad prison conditions, such as over-crowded, infested cells, lack of light, ventilation or bedding, lack of hygienic or sanitation facilities, insufficient or poor quality food, lack of medical care, unduly harsh prison regime and lack of recreation (these deficiencies/conditions are sometimes referred to by the Committee as "inhuman", sometimes "appalling", sometimes "deplorable", etc.) lead to a finding of a violation of Article 10(1). Added cruelty or brutality by the police, guards or warders, such as beatings, will normally, but not always, lead to a finding of a violation of Article 7 as well. A consistent case law established during the Uruguay years is that detention incommunicado violates Article 10(1).

We will first refer to some examples of Article 10(1) case law from the Uruguay years, followed by some examples from the Jamaica years. Reference will also be made to cases relating to some other countries where the Human Rights Committee has found a violation of Article 10(1), either in isolation or together with violations of Article 7 (or other Articles).

3. The Uruguay years

The first Views of the Committee were adopted on 15 August 1979 in case No. 5/1977 (Bassano/Valentini/Massera v. Uruguay) and started the case law under Articles 7 and 10(1). It was established that incommunicado detention for months together with denial of family visits was in violation of Article 10(1), that torture during detention amounted to violations of Articles 7 and 10(1), and that detention in conditions seriously detrimental to the health of the detainee amounted to a violation of Articles 7 and 10(1).[2]

The following year (April 1980), the Committee confirmed in its Views in case No. 8/1977 (Beatriz Weismann/Lanza Perdomo v. Uruguay) that tor-

[2] HRC 1979 Report, Annex VII, para. 10. References in this paper to the annual reports of the Human Rights Committee to the General Assembly are made in a simplified manner, *i.e.*, "HRC 1979 Report", insead of Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 40 (A/34/40); "HRC 1980 Report", instead of Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40 (A/35/40), etc.

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ture and cruel prison conditions (detention incommunicado, lack of food and clothing, deplorable hygienic condition and keeping prisoners blindfolded and tied) amounted to violations of Articles 7 and 10(1).[3] The same case law was confirmed in October 1980 in the Views in case No. 28/1978 (Weinberger Weisz v. Uruguay; violations of Articles 7 and 10(1) on account of torture and severe treatment under a cruel prison regime).[4]

On 26 July 1982, the Committee found in case No. 25/1978 (Carmen Améndola Massiotti *et al.* v. Uruguay) that harsh prison conditions amounted to inhuman treatment in violation both of Article 7 and Article 10(1).[5] The same applied in a number of cases concluded at the following sessions, including Nos. 49/1979 (Dave Marais v. Madagascar), 80/1980 (Elena Beatriz Vasilskis v. Uruguay) and 88/1981 (G.R. Larrosa Bequio v. Uruguay).[6] At the same time, however, a number of Views were adopted where "inhuman prison conditions" were considered as being in violation of Article 10(1) only.[7] Detention incommunicado continued to be considered in violation of Article 10(1), as for example in the Views adopted in July 1983 in case No. 43/1979 (Adolfo Drescher Caldas v. Uruguay) where detention incommunicado had lasted for six weeks.[8] The shortest detention incommunicado considered by the Committee had lasted for 15 days, but had been followed by 14 months of inhuman prison conditions (in case No. 147/1983, Lucia Arzuaga Gilboa v. Uruguay). The Committee found a violation of Article 10(1).[9]

The Committee's reasoning for finding a violation of Article 10(1) in case No. 105/1981 (Luis Alberto Estradet Cabreira v. Uruguay) is somewhat unusual:

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3 HRC 1980 Report, Annex VI, paras. 14 and 16. In the same Report for combined violations of Articles 7 and 10(1), see also the Committee's Views in cases Nos. 4/1977 (Torres Ramirez v. Uruguay), Annex VIII, and 11/1977 (Grille Motta v. Uruguay), Annex X.

4 HRC 1981 Report, Annex IX, paras. 12 and 16. For other Article 7 and Article 10(1) cases in the same report, see the Committee's Views in cases Nos. 33/1978 (Buffo Carballal v. Uruguay), Annex XI; 37/1978 (Esther Soriano de Boutan v. Uruguay), Annex XIV.

5 HRC 1982 Report, Annex XVIII, paras. 1.2, 1.3, 11 and 13. Other Article 7 and Article 10(1) cases annexed to the same report are Nos. 63/1979 (Raúl Sendic) and 73/1980 (Mario A. Teti), both against Uruguay.

6 HRC 1983 Report, Annexes XI, XV and XVI, respectively.

7 See in HRC 1983 Report cases Nos. 66/1980 (Campora Schweizer v. Uruguay), Annex VIII; 74/1980 (Miguel Angel Estrella v. Uruguay), Annex XII (finding also a separate violation of Article 7 for torture during the first days of detention); 90/1981 (ex-Philibert v. Zaire), Annex XIX; and 92/1981 (Juan Almirati Nieto v. Uruguay), Annex XX.

8 HRC 1983 Report, Annex XVIII.

9 HRC 1986 Report, Annex VIII, Sect. B. (For other cases of detention incommunicado, see cases Nos. 44/1979 and 56/1979 (both in HRC 1981 Report); 10/1977 and 70/1980 (both in HRC 1982 Report); 83/1981, 85/1981 and 124/1982 (all in HRC 1984 Report); 139/1983 (in HRC 1985 Report); 147/1983 (in HRC 1986 Report); and 176/1984 (in HRC 1988 Report).

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> In this connection the Committee recalls its findings in other cases that a practice of inhuman treatment existed at Libertad prison during the period to which the present communication relates. [...] The Committee concludes that, in the present case also, Luis Alberto Estradet has not been treated with humanity and with respect for the inherent dignity of the human person as required by Article 10 (1) of the Covenant.[10]

In other words, since it had already been established in other cases that inmates at Libertad prison were victims of violations of Article 10(1), Luis Alberto Estradet was also a victim.

In case No. 109/1981 (Teresa Gomez de Voituret v. Uruguay) the Committee limited itself to finding a violation of Article 10(1). Teresa had been kept in solitary confinement for several months in conditions that failed to respect the inherent dignity of the human person and had not been allowed to leave her cell for over half a year.[11] On a better day, the Committee might have found a violation of Article 7 also in these circumstances. A violation of Article 10(1) only was also found in case No. 123/1982 (Jorge Manera Lluberas v. Uruguay) for harsh prison conditions.[12] At the same time, the Committee found violations of both Articles 7 and 10(1) in case No. 110/1981 (Antonio Viana Acosta v. Uruguay) on account of inhuman treatment in detention.[13]

In the following year, 1985, inhuman prison conditions in case No. 115/1982 (John Wight v. Madagascar) were considered to be in violation of both Articles, while severe ill-treatment and harsh and degrading conditions of detention were considered to be in violation of Article 7 in case No. 139/1983 (Hiber Conteris v. Uruguay). In that case violation of Article 10(1) was found in respect of incommunicado detention only.[14]

A year later, in 1986, severe beatings, causing injuries to the head and other parts of the body and other ill-treatment suffered during detention that lasted for over seven years solicited a finding of violation of Article 10(1) only, with no mention of Article 7, in case No. 156/1983 (Luis Alberto Solórzano v. Venezuela).[15] The Committee was somewhat more generous in its findings in case No. 188/1984 (Ramón B. Martínez Portorreal v. the Dominican Republic). The victim, a practicing attorney, law professor and human rights leader in his country, had been arbitrarily arrested and detained for 50 hours in an overcrowded, extremely dirty cell where the heat was un-

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10 HRC 1983 Report, Annex XXI, para. 10.2.

11 HRC 1984 Report, Annex X, para. 13.

12 HRC 1984 Report, Annex XII, paras. 9.2 and 10.1.

13 HRC 1984 Report, Annex XI, paras. 13.2, 14 and 15.

14 HRC 1985 Report, Annex VIII, paras. 15.2 and 17 and Annex XI, paras. 9.2 and 10, respectively.

15 HRC 1986 Report, Annex VIII, Sect. C, paras. 10.2, 11 and 12.

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bearable and had not been given food and water until the day after his arrest. The Committee found violations of Articles 7 and 10(1),

> because Ramón Martínez Portorreal was subjected to inhuman and degrading treatment and to lack of respect for his inherent human dignity during his detention.[16]

The first ten years of case law in respect of Articles 7 and 10(1), which the present author has chosen to refer to as the Uruguay years, may be said to have ended with the adoption of the Committee's Views, in October 1988, in case No. 162/1983 (Omar Berterreche Acosta v. Uruguay). As the remaining political prisoners, Mr. Berterreche Acosta was released in March 1985 by the democratic Government that came to power that month. He had been in detention for a number of years, including in the infamous Libertad prison from July 1979. In its Views, the Committee found violations of Articles 7 and 10(1), as follows:

> Article 7, because Omar Berterreche Acosta was subjected to torture and to cruel, inhuman and degrading treatment and punishment, and
>
> Article 10, paragraph 1, because he was not treated with humanity and with respect for the inherent dignity of the human person during his detention at Libertad prison until he was released on 1 March 1985.[17]

In spite of this unmitigated wording (basically lifting the wording of the provisions in question) it is noteworthy that the facts were not entirely clear, *e.g.*, whether the torture had continued after the entry into force of the Covenant and the Optional Protocol on 23 March 1976.[18]

4. The Jamaica years

The period of torture and other ill-treatment of political prisoners in Uruguay had come to an end when the first Jamaican cases were submitted in 1986 and 1987. The first Views in a Jamaican death-row case (jointly concerning cases Nos. 210/1986, Earl Pratt, and 225/1987, Ivan Morgan) were adopted on 6 April 1989. The Committee found a violation of Article 7 (not Article 10(1)) because Pratt and Morgan had not been notified of a stay of execution granted to them at noon on 23 February 1987 until 45 minutes before their scheduled execution on 24 February 1987. The finding is clearly motivated by the reasoning that the delay in informing them of the stay was cruel and inhuman.[19]

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[16] HRC 1988 Report, Annex VII, Sect. D, paras. 2.2, 9.2 and 11.
[17] HRC 1989 Report, Annex X, Sect. A, para. 11.
[18] *Ibid.*, paras. 10.2 to 10.4.
[19] HRC 1989 Report, Annex X, Sect. F, para. 13.7.

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In the joint Views adopted in November 1989 in cases Nos. 241 and 242/1987 (Birindwa/Tshisekedi v. Zaire), the Committee found a violation of Article 10(1) because Mr. Tshisekedi "was not treated with humanity during his detention [...]", and of Article 7 because "he was subjected to inhuman treatment, in that he was deprived of food and drink for four days after his arrest and was subsequently kept interned under unacceptable sanitary conditions.[20]

Still, the borderline, if it exists, between Article 7 violations and Article 10(1) violations may not have been established. The Committee had not yet attempted to define what the rights under Article 10(1) actually entailed.

In case No. 253/1987 (Paul Kelly v. Jamaica) the author had, *inter alia*, complained that he had developed health problems in detention because of lack of basic medical care and that he had only been allowed out of his cell for 30 minutes each day. The State Party did not refute these allegations. In finding a violation of Article 10(1), the Committee for the first time elucidated what the right to be treated with humanity and with respect for the inherent dignity of the human person entails for a detained person. Without trying to be exhaustive, the Committee set out the following requirements for compliance with Article 10(1): the provision of adequate food, the provision of adequate medical care, the provision of basic sanitary facilities and, save in exceptional circumstances, the provision of some recreational facilities.[21] It is obvious from the case law that compliance with Article 10(1) has other aspects as well. Thus, appalling conditions of the prison cells, lack of bedding, lack of clothing, detention incommunicado, denial of family visits and unduly harsh prison regime, all constitute violations of Article 10(1).

In case No. 240/1987 (Willard Collins v. Jamaica) the Committee found violations of both Articles 7 and 10(1) because the victim had been beaten on death row on two occasions. The same findings were made in case No. 271/1988 (Sutcliffe v. Jamaica) where the victim had been beaten unconscious on death row, sustained a fractured arm and other injuries and was left for days without medical attention. Violations of Articles 7 and 10(1) were also found in case No. 277/1988 (Terán Jijón v. Ecuador) on account of torture and other ill-treatment in detention, including keeping the victim blindfolded for five days.[22]

In case No. 289/1988 (Dieter Wolf v. Panama) the Committee limited its finding to a violation of Article 10(1), where the victim had been subjected to ill-treatment (unspecified) during detention and had been deprived of food for five days. The fact that the victim had been detained, pending

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[20] HRC 1990 Report, Vol. II, Annex IX, Sect. I, para, 13.

[21] HRC 1991 Report, Annex XI, Sect. D, para. 5.7.

[22] See HRC 1992 Report, Annex IX, Sect. C, paras. 8.6 and 8.7, Sect. F, para. 8.6 and Sect. I, para. 5.2, respectively.

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trial, in a cell together with an insane convicted killer, who had allegedly killed several inmates, only solicited a finding of a violation of Article 10(2).[23]

In case No. 410/1990 (Párkányi v. Hungary) the Committee found a violation of Article 10(1). The State Party had not disputed the author's allegation that he had only been allowed five minutes per day for personal hygiene and five minutes for exercise in the open air. This the Committee found incompatible with Article 10(1).[24]

In case No. 255/1987 (Carlton Linton v. Jamaica) the Committee found violations of both Articles 7 and 10(1). The victim had been beaten unconscious in prison, subjected to mock execution and denied adequate medical care for a gunshot wound sustained during an escape attempt.[25] In contrast, a violation was found in respect of Article 10(1) only in case No. 326/1988 (Kalenga v. Zambia). Mr. Kalenga claimed that he had frequently been deprived of food during his detention, that he had been denied medical assistance despite the continuing deterioration of his health and that he had been denied access to recreational activities. While accepting these facts as established, they did not, in the Committee's view, reach the gravity of a violation of Article 7.[26]

The case law finding violations of Article 10(1), more often than not in conjunction with Article 7, has continued to grow unabated through the years. Thus, the Committee's annual report adopted in July 1994 contains no less than eight cases where violations of Articles 7 and 10(1) were found together.[27] The 1995 annual report contains two more such cases and one case of violation of Articles 10(1) and 10(2) together.[28]

In the 1996 annual report five cases are reported with violations of Articles 7 and 10(1) together[29] and four more with findings of violations of Arti-

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[23] HRC 1992 Report, Annex IX, Sect. K, paras. 2.8, 3.3, 6.7 and 6.8.

[24] HRC 1992 Report, Annex IX, Sect. Q, para. 8.3. See also para. 8.2 and individual opinion in appendix concerning a *ratione temporis* issue that arose.

[25] HRC 1993 Report (Part II), Annex XII, Sect. B, paras. 2.5-2.7, 8.5 and 9. For other cases contained in the same Report where inmates had been brutalized and severely beaten in violation of Articles 7 and 10(1), see Sect. K (case No. 320/1988), Sect. M (case No. 334/1988) and Sect. Q (case No. 362/1989).

[26] HRC 1993 Report (Part II), Annex XII, Sect. L, paras. 3.3 and 6.5.

[27] See HRC 1994 Report, Vol. II, Annex IX, Sections A (case No. 321/1988), C (case No. 328/1988), D (case No. 330/1988), J (case No. 366/1989), M (case No. 407/1990), O (case No. 414/1990), S (case No. 428/1990) and T (case No. 440/1990).

[28] See HRC 1995 Report, Vol. II, Annex X, Sections E (case No. 464/1991) and N (case No. 606/1994) in respect of combined violations of Articles 7 and 10 (1); and Sect. G (case No. 493/1991) in respect of violations of Articles 10 (1) and 10 (2) together.

[29] See HRC 1996 Report, Vol. II, Annex VIII, Sections A (case No. 373/1989), H (case No. 480/1991), U (case No. 571/1994), AA (case No. 598/1994) and BB (case No. 599/1994).

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cle 10(1) only.[30] Two cases in the latter group deserve particular mention. The first one is case No. 512/1992 (Daniel Pinto v. Trinidad and Tobago), where the Committee stated as follows:

> The author has complained about appalling conditions of detention and harassment at the Carrera Convict Prison. The State party has only refuted that allegation in general terms; on the other hand, the author has failed to provide details on the treatment he was subjected to, other than by reference to conditions of detention that affected all inmates equally. On the basis of the material before it, the Committee concludes that there has been no violation of article 7. However, to convey to the author that the prerogative of mercy would not be exercised and his early release denied because of his human rights complaints reveals lack of humanity and amounts to treatment that fails to respect the author's dignity, in violation of article 10, paragraph 1.[31]

In the latter case, No. 596/1994 (Dennie Chaplin v. Jamaica), the author had claimed that the conditions at St. Catherine District Prison amounted to a violation of his rights protected under Articles 7 and 10(1) and, in addition, that he had been beaten by a warder on 6 September 1992.[32] Evidently, the beating did not suffice to find a violation of Article 7 (*i.e.*, some brutality by warders may still come within the ambit of Article 10(1) only). The Committee stated as follows:

> With regard to the author's allegation that he was subjected to ill-treatment on 6 September 1992 by prison warders, the Committee notes that the author has made very precise allegations, including to the parliamentary ombudsman and to the Jamaica Council for Human Rights. The State party has not submitted any medical evidence or information concerning any official investigation of the alleged events. In these circumstances, the Committee must rely on the author's submissions and finds that article 10, paragraph 1, of the Covenant, has been violated.[33]

The 1997 annual report covers four cases where the Committee found violations of Articles 7 and 10(1) together[34] and six cases where the treatment of inmates resulted in findings of violations of Article 10(1) only. In the latter group four of the findings were made on account of appalling

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30 See HRC 1996 Report, Vol. II, Annex VIII, Sections J (case No. 512/1992), M (case No. 523/1992), N (case No. 527/1993) and Y (case No. 596/1994).

31 HRC 1996 Report, Vol. II, Annex VIII, Sect. J, para. 8.3.

32 The warder was, in fact, dismissed from his job following a complaint made by Dennie Chaplin to the Parliamentary Ombudsman.

33 HRC 1996 Report, Vol. II, Annex VIII, Sect. Y, para. 8.2.

34 See HRC 1997 Report, Vol. II, Annex VI, Sections A (case No. 481/1991), D (case No. 529/1993), O (case No. 587/1994) and P (case No. 607/1994).

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prison conditions,[35] one on account of deprivation of food and one on account of injuries sustained from beatings during a prison riot. We will mention specifically the last two.

In case No. 526/1993 (Michael and Brian Hill v. Spain) the authors, *inter alia*, complained that they had not been given any food for five days while in police custody. As in the case of Dieter Wolf against Panama (referred to above) this treatment was considered to amount to a violation of Article 10(1) only. The Committee stated as follows:

> [...] the Committee notes that the information and documents submitted by the State party do not refute the authors' claim that they were not given any food during the first five days of police detention. The Committee concludes that such treatment amounts to a violation of Article 10 of the Covenant.[36]

So far, the case law does not explain for how many days deliberate infliction of starving has to go on before the treatment moves into the ambit of Article 7. It is noteworthy, however, that deprivation of food and drink for four days in case No. 242/1987, Tshisekedi v. Zaire (referred to above), sufficed for a finding of a violation of Article 7.

Case No. 639/1995 (Richards and Walker v. Jamaica) concerned mostly Article 14 issues, as most of the Jamaican cases. The authors, on death row, also complained of the appalling conditions at St. Catherine District Prison, which, they claimed, violated their rights under Article 7. In addition, Mr. Walker complained that he had been beaten and injured by prison warders on 29 May 1990 and subjected to other ill-treatment and Mr. Richard complained that his radio had been deliberately destroyed by the warders for the sole purpose of intimidating and humiliating him. The State Party acknowledged that Mr. Walker suffered an injury during a prison riot in May 1990 and undertook to investigate the matter and to inform the Committee accordingly. No such information was received. While the appalling prison conditions at St. Catherine District Prison almost routinely lead to a finding of a violation of Article 10(1), the Committee did not address this issue in its Views in the present case. Neither did it say anything about Mr. Richard's radio. It limited itself to finding a violation of Article 10(1) because of the injury (requiring five stitches) suffered by Mr. Walker during the prison riot. It may be difficult to imagine prison guards quelling a prison riot and restoring order without resorting to some force causing some injuries to the inmates. The State Party, however, failed to explain the situation.[37]

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[35] See HRC 1997 Report, Vol II, Annex VI, Sections E (case No. 533/1993), U (case No. 696/1995), W (case No. 707/1996) and X (case No. 708/1996).

[36] HRC 1997 Report, Vol. II, Annex VI, Sect. B, para. 13.

[37] HRC 1997 Report, Vol. II, Annex VI, Sect. R, paras. 3.6, 3.7 and 8.

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The annual report adopted in July 1998 contains the text of 12 Views finding violations of Articles 7 and 10(1) (ten of them relating to St. Catherine District Prison in Jamaica) and six further Views finding violations of Article 10(1) on account of appalling prison conditions.[38] In addition, the conditions of detention at St. Catherine District Prison were in one case considered to be outright in violation of Article 7, without any mention of Article 10(1). In that case (No. 615/1995 (Young v. Jamaica)), counsel for the petitioner had claimed a violation of Article 7, in that his client was only allowed few visitors, that he was not permitted to work or to educate himself, that his cell only measured 2 m^2 and that he suffered ill-treatment at the hands of the prison warders, including theft of personal effects, assaults and repeated soaking of his bedding. In its Views, adopted at the autumn session in 1997, the Committee concluded that the ill-treatment by prison warders, including assault and repeated soaking of Mr. Young's bedding, made him a victim of degrading treatment in violation of Article 7.[39] Based on existing case law, one would have expected a finding of a violation of Article 10(1), not Article 7.

At the following session, in the spring of 1998, there was a flurry of activities in respect of the prison conditions at St. Catherine District Prison. Violations of Article 10(1) were found in cases Nos. 733/1997 (Perkins v. Jamaica), 734/1997 (McLeod v. Jamaica), 704/1996 (Shaw v. Jamaica) and 705/1996 (Taylor v. Jamaica), decided between 19 March and 2 April 1998.[40] One week later, on 9 April 1998, exactly the same prison conditions solicited a finding of violations both of Article 7 and Article 10(1) in case No. 619/1995 (Deidrick v. Jamaica). The Committee observed as follows:

> With regard to the deplorable conditions of detention at St. Catherine's District Prison, the Committee notes that author's counsel has made precise allegations, related thereto, i.e. that the author is locked-up in his cell 23 hours a day, no mattress or bedding are provided, that there is lack of artificial light and no integral sanitation, inadequate medical services, deplorable food and no recreational facilities etc. All of this has not been contested by the State party, except in a general manner saying that these conditions affect all prisoners. In the Committee's opinion, the conditions described above, which affect the author directly are such as to violate his right to be treated with humanity and

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38 See HRC 1998 Report, Vol. II, Annex XI. The cases finding violations of Articles 7 and 10(1) are to be found in Sections D (No. 564/1993), F (577/1994), H (591/1994), I (609/1995), K (617/1995), L (619/1995), M (623, 624, 626 and 627/1995), N (635/1995), S (704/1996), V (732/1997), Y (749/1997) and Z (750/1997). The cases finding violations of Article 10 (1) are to be found in Sections E (569/1993), G (585/1994), R (676/1996), T (705/1996), W (737/1997) and X (734/1997).

39 HRC 1998 Report, Vol. II, Annex XI, Sect. J, paras. 3.6 and 5.2.

40 HRC 1998 Report, Vol. II, Annex XI, Sections W, X, S and T, respectively.

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> with respect for the inherent dignity of the human person, and are therefore contrary to the Covenant. It finds that holding a prisoner in such conditions of detention constitutes inhuman treatment in violation of article 10, paragraph 1, and of article 7.[41]

At the following session, in July 1998, the Committee appears to have reverted to the previous pattern of requiring some serious beatings to be added to deplorable prison conditions for a finding of a violation of both Article 7 and Article 10(1), as for example in case No. 750/1997 (Daley v. Jamaica), where beatings and deplorable pre-trial conditions amounted to a violation of Articles 7 and 10(1), but the conditions on death row in St. Catherine's District Prison amounted to a violation of Article 10(1) only.[42]

The finding of a violation of both Article 7 and Article 10(1) in case No. 635/1995 (Morrison v. Jamaica) is, however, somewhat unconvincing. Initially, Morrison had alleged that he had been beaten by the police at the time of arrest. This claim was found unsubstantiated. He had further alleged that the police had threatened to kill him if he did not confess to the murder of a second person. This claim was found unsubstantiated. Thirdly, he had claimed that, due to the prison conditions and the limited medical attention that he received for his asthma, he was a victim of a violation of Article 10. No violation was found in this respect either. No further claims that could possibly come within the ambit of Article 10(1) had been made when the communication was declared admissible on 17 October 1996 in respect of the above claims. Almost one year later (in September 1997) new allegations were made with regard to Morrison's conditions of detention. He now stated that he had been beaten on 5 March 1997, that his "possessions" has been burned, that a warder had taken $ 1600 away from him and that he had not received any food or water on 12 August 1997. The new allegations, which no doubt were transmitted to the State Party for information, were made in the context of counsel's comments on the State Party's submissions on the merits. As the State Party did not react to these new allegations received at the end of the written proceedings, the Committee concluded that Morrison had been subjected to treatment in violation of Articles 7 and 10(1).[43]

There appears to be considerably more consistency in the Article 7/Article 10(1) case law found in the Committee's 1999 annual report. By and large, this body of case law, covering some 18 cases, finds a violation of Article 10(1) in respect of deplorable prison conditions and Articles 7 and

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41 HRC 1998 Report, Vol. II, Annex XI, Sect. L, para. 9.3.

42 HRC 1998 Report, Vol. II, Annex XI, Sect. Z, paras. 7.2 and 7.6.

43 HRC 1998 Report, Vol. II, Annex XI, Sect. N, paras. 19.1, 19.2, 21.1, 22.1, 23.1, 23.2 and 23.3.

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10(1) if beatings or other cruelty is added.[44] There is however one notable exception. In case No. 709/1996 (Bailey v. Jamaica) the author claimed that the appalling conditions at St. Catherine District Prison had made him a victim of cruel, inhuman and degrading treatment in violation of Articles 7 and 10(1). The State Party did not even attempt to refute these allegations, probably assuming that it would be useless to do so in view of the consistent jurisprudence about the conditions in the prison concerned. Nevertheless, the Committee concluded that the petitioner had failed to substantiate the claim (he had not given particular details) and declared it inadmissible on that ground. Five Committee members did not suffer any memory loss about the well established deplorable prison conditions at St. Catherine (reflected already in over 50 Views) and appended dissenting opinions stating their view that the claim should have been declared admissible and that it was sufficiently substantiated to support a finding of a violation of Article 10(1), taking also into account the Committee's earlier case law and the failure of the State Party to respond to the allegations.[45]

In the text above, case samples have been cited to illustrate how the Committee has attempted to distinguish between violations of Article 7 and violations of Article 10(1). This has been a bumpy road at times, but at the end one must draw the conclusion that, notwithstanding some inconsistencies, bad prison conditions lead to violations of Article 10(1), *i.e.*, the State Party has failed to honour its positive obligation to ensure prison conditions and prison regime that is compatible with the requirements of Article 10(1), and that added cruelty deliberately inflicted on the inmates on top of deplorable conditions leads to a violation of Article 7 also.

When finding a violation of Article 10(1), the Human Rights Committee invariably employs the language "inhuman treatment", or "inhuman conditions", which in fact and in law would point to a violation of Article 7. To the reader of the case law it may be difficult to understand that "inhuman treatment" sometimes amounts to a violation of Articles 7, sometimes of Articles 7 and 10(1) together and sometimes of Article 10(1) only. Perhaps a different choice of words for a finding of a violation of Article 10(1), such as "inhumane treatment" would be less confusing. Similarly, it may be difficult to understand that beatings of inmates sometimes amount to a violation of Article 7, sometimes of Articles 7 and 10(1) together, while beatings of inmates, even severe beatings, sometimes amount to a violation of Article

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[44] See HRC 1999 Report, Vol. II, Annex XI, Sections B (590/1994), D (594/1994), F (610/1995), G (613/1995), I (616/1995), J (618/1995), N (647/1995), O (649/1995), P (653/1995), R (663/1995), T (668/1995), U (680/1996), Z (719/1996), AA (720/1996), CC (730/1996), DD (752/1997), GG (775/1997).

[45] HRC 1999 Report, Vol. II, Annex XI, Sect. W, paras. 3.9 and 6.5 and Appendix.

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10(1) only. Further light can only be shed on these issues in the Committee's future case law.

We will finally note that General Comment No. 21 draws particular attention to a number of United Nations bylaws relevant to the treatment of prisoners. Paragraph 5 of the General Comment reads as follows:

> States parties are invited to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).

5. Article 10(2)

As indicated above, Article 10(2) concerns (a) the obligation to segregate accused persons from convicted persons and to treat them accordingly as unconvicted persons (*cf.* the principle of presumption of innocence), and (b) the obligation to segregate accused juveniles from adults and to accord them a speedy trial.[46]

Compared with the considerable case law on Article 10(1), the case law under Article 10(2) is very modest. Perhaps it would be of interest to cite first a case where daily contacts between accused persons awaiting trial and convicted persons serving prison sentences were not considered to be inconsistent with Article 10(2)(a). In case No. 27/1978 (L. Pinkney v. Canada) the Committee noted:

> that the requirement of Article 10 (2) of the Covenant that "accused persons shall, save in exceptional circumstances, be segregated from convicted persons" means that they shall be kept in separate quarters (but not necessarily in separate buildings). The Committee would not regard the arrangements described by the State party whereby convicted persons work as food servers and cleaners in the remand area of the prison as being incompatible with Article 10 (2) (a), provided that

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[46] General Comment No. 21 does not provide much elucidation. It reads in relevant part as follows (see paras. 9 and 13):

> Article 10, paragraph 2 (a), provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones. Such segregation is required in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in Article 14, paragraph 2

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> contacts between the two classes of prisoners are kept strictly to a minimum necessary for the performance of those tasks.[47]

In the section on Article 10(1), we had occasion to refer to case No. 289/1988 (Dieter Wolf v. Panama) where the Committee found a violation of Article 10(1) on account of ill-treatment and a violation of Article 10(2) because during the pre-trial detention Mr. Wolf was at one time forced to share a cell with a mentally disturbed convicted killer (who allegedly had killed several other inmates) and thereafter was transferred to an island penitentiary for inmates serving hard labour sentences.[48] There can be no dispute that the non-segregation violated Article 10(2)(a), but would not confinement with an insane killer by itself amount to a violation of Article 10(1) also, if not Article 7?

In case No. 330/1988 (Albert Berry v. Jamaica) a violation of Article 10(2)(a) was found because Mr. Berry had not been segregated from convicted prisoners during ten months of pre-trial detention.[49] Similarly, non-segregation at the stage of pre-trial detention resulted in findings of Article 10(2)(a) violations in cases Nos. 493/1991 (Griffin v. Spain),[50] 708/1996 (Lewis v. Jamaica)[51] and 663/1995 (Morrison v. Jamaica).[52]

So far, there is no clear case law about violations of Article 10(2)(b). (See, however, the only case cited under Article 10(3) below, Damian Thomas v. Jamaica.)

6. Article 10(3)

Article 10(3) *in fine* provides that juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.[53] It is true that neither Article 10(2)(b) nor Article 10(3) define who should be considered a juvenile. In its General Comment No. 21, the Committee has made an interesting attempt to remedy this omission. At paragraph 13, the text reads in relevant part as follows:

> Article 10 does not indicate any limits of juvenile age. While this is to be determined by each State party in the light of relevant social, cul-

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47 HRC 1982 Report, Annex VII, para. 30.

48 *Supra*, at footnote 23.

49 HRC 1994 Report, Vol. II, Annex IX, Sect. D, para. 11.2.

50 HRC 1995 Report, Vol. II, Annex X, Sect. G, paras. 3.3 and 9.4.

51 HRC 1997 Report, Vol. II, Annex VI, Sect. X, paras. 3.1 and 8.5.

52 HRC 1999 Report, Vol. II, Annex XI, Sect. R, paras. 3.3 and 8.3.

53 Paragraph 13 of General Comment No. 21 reads in relevant part as follows:

> Lastly, under Article 10, paragraph 3, juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned, such as shorter working hours and contact with relatives with the aim of furthering their reformation and rehabilitation.

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> tural and other conditions, the Committee is of the opinion that Article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice.

In the same paragraph, the Committee also draws attention to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules (1985) (which, in fact, leave the age limit for juveniles wide open). In the meantime, however, another set of rules had been adopted by the General Assembly, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), which rules explicitly define a juvenile as a person under the age of 18.[54]

The only case where this part of Article 10(3) has been at issue is case No. 800/1998 (Damian Thomas v. Jamaica). Damian was born on 21 November 1980. He was arrested on 9 May 1995, when he was 14 ½ years old (not 15, as twice stated in the Committee's Views), brought to trial and convicted for two murders on 3 May 1996 and sentenced to be detained during her Majesty's pleasure. He started to serve his prison sentence on 5 May 1996 in the General Penitentiary, Kingston, a little less than 15 ½ years old. After he complained to the Commissioner for Prisons about serving his sentence with adults and requested to be moved to a juvenile institution he was transferred to St. Catherine District Prison where he continued to be imprisoned with adults. There is no indication in the Committee's Views that Damian was kept with adults prior to his conviction. Nevertheless, the Committee was of the view that the facts before it disclosed violations both of Article 10(2), which must mean 10(2)(b), as well as 10(3), in that Damian "has been kept among adult prisoners when still a minor".[55] The reader will have no difficulty agreeing that there was a breach of Article 10(3). However, the finding of a violation of Article 10(2), which must mean 10(2)(b), has no support in the text of the Views.

There is another aspect of the case of Damian Thomas against Jamaica that is of considerable interest. At the time the case was transmitted to the State Party for observations on admissibility and merits, the only claim made concerned the failure of the State Party to segregate Damian from adults in prison. The State Party responded that the circumstances of his detention were not clear, but undertook to investigate the matter if he provided more details. As suggested by the State Party, Damian Thomas did provide more details about the conditions of his detention with adult prisoners, including a detailed narrative, with names, dates and places, describing how he had been

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[54] United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by GA resolution 45/113 of 14 December 1990 upon the recommendation of the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990. See para. 11 (a) for definition.

[55] HRC 1999 Report, Vol. II, Annex XI, Sect. II, paras. 2.1, 2.2, 3, 6.5 and 7.

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systematically beaten by the prison warders, both at the General Penitentiary and at St. Catherine District Prison. In the meantime, however, Jamaica's withdrawal from the Optional Protocol had become effective. As it was entitled to do under Article 12(2) of the Optional Protocol, the Committee continued to deal with the case, but only in so far as it related to the claim of non-segregation in prison. The new claims, about the systematic ill-treatment, which had been transmitted to the State Party after the effective date of withdrawal, were declared inadmissible under Article 1 of the Optional Protocol. One Committee member, Mr. Hipólito Solari Yrigoyen, filed a dissenting opinion. In his opinion, the claims about the ill-treatment, which allegedly took place while Jamaica was a State Party to the Optional Protocol, should have been declared admissible and violations of Articles 7 and 10(1) should have been found on that account.[56]

The remaining part of Article 10(3) provides that the penitentiary system of a State Party shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.[57]

The case law under the Optional Protocol does not, so far, shed any light on the contents of this provision. Although a number of the victims of ill-treatment in violation of Article 10(1) have also claimed that the penitentiary system did not provide for reformation and social rehabilitation, such claims have either been ignored or declared inadmissible for non-substantiation. Suffice it to mention two examples from recently cited cases.

In case No. 493/1991 (Griffin v. Spain) in which the Committee had found violations of Article 10(1) and (2), the author had specifically claimed that the Spanish penitentiary system did not provide facilities for reformation

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[56] *Ibid.*, paras. 4.1, 4.2, 5.1, 5.2, 5.3, 6.3 and Appendix.

[57] General Comment No. 21 is somewhat more detailed on this aspect of Article 10(3). It states in relevant part as follows (paras. 10 to 12):

> As to article 10, paragraph 3, which concerns convicted persons, the Committee wishes to have detailed information on the operation of the penitentiary system of the State party. No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prison. [...]
>
> In a number of cases, the information furnished by the State party contains no specific reference either to legislative or administrative provisions or to practical measures to ensure the re-education of convicted persons. The Committee requests specific information concerning the measures taken to provide teaching, education and re-education, vocational guidance and training and also concerning work programmes for prisoners inside the penitentiary establishment as well as outside.
>
> In order to determine whether the principle set forth in article 10, paragraph 3, is being fully respected, the Committee also requests information on the specific measures applied during detention, *e.g.*, how convicted persons are dealt with individually and how they are categorized, the disciplinary system, solitary confinement and high-security detention and the conditions under which contacts are ensured with the outside world (family, lawyer, social and medical services, non-governmental organizations).

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and social rehabilitation. In that context he submitted that he, together with another inmate at Melilla prison, had tried to teach reading and writing to some other prisoners, but that the prison director did not allow them to do so. Moreover, the prison authorities had ignored all his requests for Spanish grammar books and a dictionary. It appears that the author invoked Article 10 collectively (without specifying paragraphs) for being subjected to inhuman prison conditions, not having been segregated from convicted persons during pre-trial detention and for the failure of the Spanish penitentiary system to provide for reformation and social rehabilitation. The communication was declared admissible, *inter alia*, "in so far as it appeared to raise issues" under Article 10 (without specifying paragraphs). In its examination of the merits of the claims the Committee addressed the issues under Article 10(1) and (2) and found violations of both provisions, but there is no mention at all of the issue that clearly arose under Article 10(3).[58]

In case No. 708/1996 (Neville Lewis v. Jamaica) in which the Committee had also found violations of Article 10(1) and (2)(a), the author had specifically claimed a violation of Article 10(3), because the Jamaican penitentiary system did not in practice aim to achieve the social rehabilitation and reformation of prisoners. This part of the communication was, however, declared inadmissible for lack of substantiation.[59] It is true that sweeping allegations, without substantiation, do not in principle suffice for a finding of a violation. However, for the avid reader of the Committee's case law, including over 50 Views describing the prison conditions at St. Catherine District Prison during a time span of over ten years, it may be difficult to imagine how the conditions and the treatment of the inmates in that prison could conceivably be conducive to or aim at their reformation and social rehabilitation as required by Article 10(3).

Only the future will show whether Article 10(3) will be given meaning and life in the Committee's case law.

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[58] HRC 1995 Report, Vol. II, Annex X, Sect. G, paras. 3.3, 6.4 and 9.1 *et seq.*

[59] HRC 1997 Report, Vol. II, Annex VI, Sect. X, paras. 3.7 and 6.7.

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XXXI

Struggling against racism in the aftermath of 11 September 2001

Paulo Sérgio Pinheiro*

1. Introduction

We are living in perhaps the most crucial time since the adoption of the Universal Declaration of Human Rights and the consolidation of the architecture of international human rights law. All of us who work for the protection of human rights are challenged to reflect on what is a particularly important international phenomenon which will have profound effects on human rights.

I will deal with three aspects of the present situation that I consider of utmost relevance due to the consequences they may have on the promotion and protection of human rights. The first one refers to terrorism and the forms taken by efforts to combat it; the second, to racism and racial discrimination; and the third, to globalization.

2. The combat against terrorism

Since the barbaric attacks against the American society, we appear to be entering an era of Neo Cold War, in which the prevailing tendency seems to be a dangerous return to polarities, this time defined around the notions of terrorism and the methods of combating it. The threats to individual and collective freedoms are now becoming clearer, as are the challenges to the observance of the international human rights instruments. As Mrs. Irene Khan, Secretary-General of Amnesty International, pointed out in a recent interview (and I quote), "there is a schism between the security and human rights obligations of states". At the State level, the debate has also taken shape.

From the State perspective, we may understand that the right of self-defense of States is recognized in the United Nations Charter. Nevertheless, we consider it important to understand that success in the fight against terrorism cannot depend only on the effectiveness of acts of self-defense or on the use of military force by each country acting outside the framework of the United Nations. The crimes against humanity committed on 11 September

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cannot be justified or tolerated. Nonetheless, we must see to it that the combating of terror should be undertaken in full respect for human rights and the rule of law. Detention without trial will not end terrorism: its potential for injustice will nurture more terrorism.

There is a worrisome tendency to neglect the basic foundations of the rule of law when combating terrorism. The essential freedoms of the rule of law must be maintained intact when facing the terrorist threat. As President Fernando Henrique Cardoso of Brazil recently proclaimed in Madrid at the Conference on Transitions and Democratic Consolidation:

> If we have to abandon individual liberties, guarantees of civil rights and the prohibition of the use of torture in order to defeat terrorism, our victory will be meaningless ... Terrorism must not kill reason!

In the struggle against terrorism we must demonstrate that we operate on a different scale of values, those values being affirmed by international human rights law and international humanitarian law.

Many countries have reiterated their rejection of terrorism and their disposition to join forces with the international community to make effective the defense against crimes against humanity perpetrated in the course of terrorist attacks. Many societies in the world have made clear their total and active solidarity with the American society on 11 September 2001. Supporting the Security Council resolution on terrorism, we believe it should be implemented by renewed efforts to arrive at political solutions for the problems that in one way or another have to do with this question.

Peace must be the responsibility of all and the result of solutions which involve all interested parties. It is imperative to find a solution to the conflict between Israelis and Palestinians in territories occupied by Israel. We hope that the recent resolution of the Security Council, recognizing, *inter alia*, the need for a Palestinian state will contribute to stop the ongoing carnage.

We must at all costs avoid unilateralism, the consequences of which are, all too often, borne by vulnerable groups or are to the detriment of less powerful countries. A year after 11 September one sees threats from one single super-power to attack another State member, Iraq, on justifications that are not shared by other nations, even if they are its allies. We must never lose sight of the need to maintain the moral high ground of ethical standards and a human rights perspective when engaging in the war against terrorism. Otherwise, we risk facing a world far distant from the ideals that we at the Commission on Human Rights have sought to achieve.

In the present conjuncture, it must be clearly stated that terrorism is just one of the issues on the international agenda. The struggle against terrorism must not prevail over the agenda of co-operation among countries or over the consideration of other issues of global concern. It is necessary to consolidate peace based on a common effort on behalf of a just international

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order. The countries in the South sincerely wish to join the legitimate efforts which must be undertaken in this sense so that solutions with a wider meaning for the crisis of our time are searched for immediately. The Commission on Human Rights has the credentials to engage in a process of reflection in this respect.

3. Racism and racial discrimination

The second matter to which I attribute great importance in the present conjuncture refers to racism and racial discrimination. In 2001, more specifically in August-September, the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance took place in Durban, South Africa. A Declaration and a Program of Action were adopted and finally approved by the United Nations General Assembly. It is necessary to deepen the discussions on effective ways of implementing the Declaration and Plan of Action approved in that World Conference. Despite the outstanding results reached in Durban last year, the world community is still a long way from achieving one component of the basic message of human rights – that of equal dignity of all human beings. Racism, racial discrimination and xenophobia constitute but one manifestation of the denial of equality. Discrimination based on gender and sexual orientation feeds violence against women and homosexuals in different parts of the world.

The combat against racism and discrimination is a task whose importance has increased even further because of the struggle against terrorism. It requires incessant efforts by the State, by the organizations of civil society, by all men and women. According to René Cassin, the struggle for human rights is a struggle of those without power. I would like to add that recognizing, rather than denying, social inequality and structural racism, as well as proposing public policies with aspects of affirmative action, seems to us to be an essential step in the struggle for equality and in the fight against discrimination.

The slavery practiced for nearly four centuries in Brazil and many other states constitutes, in the parameters of the present, a crime against humanity and has urged the State to seek to redress such injustice through affirmative action policies for promoting the rights of people of African descent. Some countries have made considerable progress in the struggle against discrimination but much remains to be done. There is a pressing need for restating the incompatibility between racism and democracy. The rule of law does not permit racist and discriminatory political platforms.

Given the considerable difficulty in building up a consensual agreement on this important issue during the last session of the Commission on Human Rights, I would like to stress the historical role played by Asbjørn Eide and

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the Sub-Commission on the Promotion and Protection of Human Rights in the development of international human rights law on equality and non-discrimination. I am quite confident that further studies to be undertaken by the Sub-Commission could provide a solid basis for future deliberations by the Commission on Human Rights about the prevention and protection against discrimination.

Among those countries that make efforts to promote the rights of minorities, may I indicate that the Brazilian government recognizes the 230 native populations as indigenous peoples. They are entitled to roughly 12 per cent of the national territory, corresponding to more than 80 million hectares. Brazil is committed to supporting training of indigenous lawyers, sociologists and teachers for the effective promotion of their rights and cultural identity. In the national preparatory process for Durban, a coalition between people of African descent and indigenous peoples was established for the first time in Brazilian society. This initiative was a most valuable feature of the Brazilian participation in the Durban Conference. I would like to commend the United Nations for the establishment of a Permanent Forum on Indigenous Issues, whose work Brazil intends to support.

4. Globalisation

I now turn to globalization, the third and final aspect I would like to address in referring to those elements present on the international scene whose impact on human rights should be carefully analyzed by this Commission.

There is an undisguised malaise in the process of globalization. There is a lack of governance on the international level, and this derives from a lack of democracy. Globalization will only be sustainable if it incorporates the dimension of justice. There is a need, as so many world leaders are reminding us, for "globalization with solidarity" (this expression is used by President Cardoso of Brazil but also by the World Social Forum in Porto Alegre) in distinction to the present asymmetrical globalization. As far as trade relations are concerned, it is time that multinational negotiations result in greater access of the products of the developing countries to the markets of the more prosperous.

Within this concept of "globalization with solidarity" or "ethical globalization", as the High Commissioner Mary Robinson has termed it, let me indicate, *inter alia*, the following elements to which I attribute great importance: to guarantee greater access to markets and better humanitarian conditions for the combat of diseases; to reform the Bretton Woods institutions, so as to prepare them for the challenges of the twenty-first century; to provide the IMF with more resources and the capacity to be a lender of last resort; to attribute to the World Bank and the regional banks the role of more active

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promoters of development; to reduce the volatility in international capital flows and assure a more predictable financial system, less subject to crises; to establish practical forms of co-operation to lessen the drama of AIDS, which falls in a particularly grave manner on developing countries and, among these, on the very poorest. Poverty is as flagrant a violation of human rights as torture.

All human rights should be treated equally. Governments may establish priorities for the use of their resources but they cannot choose to respect some rights to the detriment of others. As the High Commissioner of Human Rights has said, "we must not be selective, given that these rights are interrelated and interdependent". It is necessary to rethink the sums of financial resources presently destined to international aid. It is of utmost importance for the well-being of billions of people, to the question of development and to its realization within the framework of the observance of human rights.

I believe that those elements may constitute the fundamental elements to form the background against which a frank and transparent dialogue could take place within the international institutions dedicated to the promotion and protection of human rights and to the struggle against racism.

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XXXII

Leadership in human rights

Bertrand G. Ramcharan*

1. Introduction

One of the most universal cravings of our time, James MacGregor Burns wrote in his treatise on leadership, is a hunger for compelling and creative leadership:

> The crisis of leadership today is the mediocrity or irresponsibility of so many of the men and women in power, but leadership rarely rises to the full need for it. The fundamental crisis underlying mediocrity is intellectual. If we know all too much about our leaders, we know far too little about leadership. We fail to grasp the essence of leadership that is relevant to the modern age and hence we cannot agree on the standards by which to measure, recruit, and reject it. Is leadership simply innovation – cultural or political? Is it essentially inspiration? Mobilization of followers? Goal setting? Goal fulfilment? Is a leader the definer of values? Satisfier of needs? If leaders require followers, who leads whom from where to where, and why? How do leaders lead followers without being wholly led by followers? Leadership is one of the most observed and least understood phenomena on earth.[1]

In penning this essay in honour of Asbjørn Eide, it is appropriate to explore the issue of leadership in human rights. It is a topic that has been little touched upon in the literature on human rights and I have felt the need for some time to explore the topic and to invite further scholarship about it. The human rights movement has come a long way. It is important to know how it has reached its present position. More important, it is essential to know where it is going. Leadership will be decisive. This essay is dedicated to Asbjørn Eide and to the future generation of human rights leaders. Its focus will be on human rights leadership in the United Nations. There have been great human rights leaders outside the United Nations and we must look forward to other studies on them.

Asbjørn Eide has been an intellectual, conceptual, policy-oriented and advocacy leader for three and a half decades. In 1968 he co-edited the book

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1 James MacGregor Burns, *Leadership* (1978), pp. 1-2.

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that resulted from the Nobel Symposium held on the occasion of the International Conference on Human Rights. That volume, *The International Protection of Human Rights*, has been a foundation work ever since. As Director of the Oslo Peace Research Institute, Asbjørn wrote extensively on international humanitarian law and his essays contained important insights into this branch of law. When he turned his attention to international human rights law, it was he who advanced the concepts of the duty of the state to respect, ensure, and protect human rights. Again, his writings are full of such conceptual clarifications.

He joined the Sub-Commission on Prevention of Discrimination and the Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights) in 1982 and has been with the Sub-Commission over the past twenty years. His contributions in the Sub-Commission have been of the first order, both strategically and conceptually. In 1982 he steered the resolution that established the Working Group on Indigenous Populations. He and the author worked closely on that initiative. Since then he has written authoritative reports on: the right to food, the rights of minorities, equality and non-discrimination, and on other topics. Asbjørn along with his wife and professional partner, Wenche Barth Eide, have led efforts to make the right to food operational and they have been the intellectual and operational power-houses behind a series of meetings and initiatives on this topic. Without a doubt, Asbjørn Eide has been a foremost leader in the international human rights movement running for four decades now. We must be grateful for that leadership, for the road leading up to where we are now has not been easy as we shall see in the sections that follow.

2. Pre-League of Nations

F.H. Hinsley, in *Power and the Pursuit of Peace*,[2] traced the efforts of internationalists during the second millennium to develop the norms of international law, to promote the role of international organizations, and to advance the rule of law in international affairs. The international rule of law and the international protection of human rights are closely related, and we must be grateful to all those who championed this cause over the past millennium.

We owe a particular debt of gratitude to Henri Dunant who advocated the principle of humanity in warfare as from the Battle of Solferino in 1862. Building on this foundation principle, the International Committee of the Red Cross has spearheaded the development and application of international humanitarian law and the ICRC must be accorded pride of place among those who have given leadership in humanitarian law and human rights for nearly a century and a half.

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[2] Cambridge University Press (1963).

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To the extent that he championed the principle of self-determination in theory, if not consistently in practice, we owe a debt of gratitude to Woodrow Wilson and those who helped establish the League of Nations. The Covenant of the League of Nations contained no general provision on human rights. A proposal by the Government of Japan to include a provision on non-discrimination on the grounds of race was rejected by the major powers of the day. However, the Covenant did provide for a system for the protection of minority rights which would provide a pioneering stock of experience in the operation of international procedures for the protection of human rights.

The head of the minorities division of the secretariat of the League of Nations, Pablo Azcarate, has written about this experience and for leading this first ever human rights effort in an international organization, tribute must be paid to Azcarate among the human rights leaders of the twentieth century. Julius Stone wrote a magisterial work on the League of Nations and the international protection of minorities.[3] Alas, the League would falter, the Second World War would come, the holocaust and other atrocities would be inflicted upon humankind, and war-time thinkers would seek to place the future world order on the foundations of human rights.

3. Inter-war leaders

The story of scholars, leaders of non-governmental organizations and government officials, who sought to build the future peace on the foundations of human rights, is too long to be related here. The post-war peace blueprints of the United Kingdom, the United States of America, other powers, and of some non-governmental organizations, accorded a central role to the protection of human rights. However, by the time of the San Francisco Conference, the cold war had already dampened the spirits of the leading powers of the day and it would take a determined effort by non-governmental organizations to obtain the human rights provisions of the United Nations Charter. The non-governmental leaders at San Francisco who fought for the human rights provisions of the Charter gave us leadership of an exceptional kind. Without them, who knows whether the United Nations would have developed the way it did, with the centrality of human rights in the blueprint of the United Nations Charter. The story of these NGO leaders has been told by one of them, F. Nolde, in *Free and Equal*.[4]

From the perspective of the United Nations, two organizations, and two scholars, must be accorded particular attention. The International Law Association commissioned a study from Hersch Lauterpacht on the human rights

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[3] J. Stone, *The League of Nations and the Protection of Minorities* (1932).

[4] Published by the Commission on International Affairs of the World Council of Churches.

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foundations of the future world order and he wrote a monograph, *The International Bill of Human Rights*, which would exercise great influence on the fledgling United Nations. In fact, the International Bill of Human Rights would become the flagship cause of the United Nations – and remains so to this day. The Institute of International Law also entrusted a study to one of the leading international lawyers of the day, Charles de Visscher. He wrote an important report on the *Fundamental Rights of Man as the Basis for the Restoration of International Law* which led to a resolution of the Institute at its Lausanne session in 1947 bearing the same name. The message was a simple one: the future international legal order must be based on the foundations of respect for human rights.

Professor de Visscher pleaded in his report:

> the battle which has ... been joined over the issue of human freedoms is intimately connected with the establishment of an international order. In making human values the final meeting point of all law and constituting them an autonomous province beyond the reach of political action by the state, the proposed declaration has in view the regeneration of international law on a moral and legal basis acceptable to all civilized states. Put in this way the problem assumes an absolutely fundamental character ...

In its resolution the Institute of International Law declared that recognition and respect of the inherent rights of human beings are closely bound up with the development of international law, and that an effective system of international law is inseparably intertwined with respect for the individual within the state.[5]

Among the leaders of this period, mention must also be made of the delegates of Chile, Cuba and Panama at the San Francisco Conference in 1945. They tabled proposals for an international bill of human rights to be included in the Charter of the United Nations. Due to shortage of time, it was decided that the idea of an International Bill of Human Rights would be entrusted to the future Commission on Human Rights envisaged in Article 68 of the Charter of the United Nations.

4. The Nuclear Commission on Human Rights

The Nuclear Commission on Human Rights met in 1946-1947 pending the formal establishment of the Commission. It was chaired by Mrs. Eleanor Roosevelt. The blueprint they crafted remains the framework for the human rights activities of the United Nations to this day. They foresaw an International Bill of Human Rights with three parts: A declaration, one or more conventions, and measures of implementation. The first two parts have

[5] See UN doc. E/CN.4/40, p. 4.

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largely been realised. The Declaration was adopted in 1948. Numerous conventions have since been adopted and the laws are on the books. As to the third part, there have been some steps to advance implementation. But implementation, for the most part, remains illusory.

Nevertheless, the vision of the members of the Nuclear Commission remains a beacon for the international human rights movement. We owe much to them.

5. The Commission on Human Rights

The Commission on Human Rights is the subject of much controversy these days. It must be recognized, however, that the leadership of the Commission on Human Rights has been crucial in the development of norms, the establishment of special rapporteurs, and the provision of a forum for human rights non-governmental organizations. Important leaders on the Commission were Mrs. Roosevelt, René Cassin and Charles Malik. We have traced the leadership role of the Commission elsewhere.[6]

6. The Sub-Commission

The leadership role of the Sub-Commission in preparing pioneering global studies and generating international norms has been stellar but unheralded. Asbjørn Eide has served on the Sub-Commission since 1982. The early studies of the Sub-Commission on racial discrimination, the rights of minorities, the rights of indigenous populations, equality before the law, and other topics laid the foundations for international human rights law in these areas. The Sub-Commission is the subject of much controversy these days, but its intellectual leadership, historically, is beyond question.

7. The Secretaries-General

We turn now to the Secretaries-General of the United Nations.

7.1. Lie

It cannot be said that, historically, Secretaries-General of the United Nations before Kofi Annan gave much leadership on the issue of human rights. To be fair, the cold war environment until the end of the 1980s required much caution on this politically sensitive subject. Trygve Lie was much occupied with placing the United Nations and its Secretariat on sound foundations and he

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[6] See B.G. Ramcharan, *Human Rights and Human Security* (2002).

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left the running of the human rights programme to Henri Laugier and John Humphrey.

Secretary-General Lie provided the first broad insights into his thinking in his Annual Report for the period 1948-49. His view was that the main reason for the existence of the United Nations was to prevent a new world war from breaking out, but he recognized that other developments were adding to the importance of the United Nations. He referred in this regard to the rise of many peoples in Asia and Africa from a position of dependency towards one of equality and the growing strength of the movement to extend the observance of human rights everywhere in the world. "I believe", he said, "that the rise of dependent peoples and the human rights movement will, in the long run, have far more significance and give rise to greater events in the second half of the twentieth century ... ."[7]

7.2. Hammarskjöld

In his first Annual Report, submitted on 15 July 1953, Dag Hammarskjöld pointed out that the efforts of governments to control and moderate conflicts that constituted an immediate danger to world peace must command first attention in day-to-day decisions of the Organization. However, side by side with those conflicts, or underlying them, he detected two fundamental trends in human society which must determine the long-term direction of its efforts. One trend was directed towards wider social justice and equality for individuals. The other was directed towards equality and justice between nations, not only politically but also in the economic and social sense. Of human rights, Hammarskjöld stated:

> The development of social justice is closely connected with the problem of human rights. Such international legal instruments as the proposed covenants on human rights are parts of a concerted effort that is, in fact, proceeding on a much wider basis. Fundamentally, the rate of progress will be determined by the degree to which the developing social conscience of the peoples of the world is able to find expression not only in national legislation and in international treaties, but in the climate of opinion in the various regions of the world. The Universal Declaration of Human Rights should set a standard of achievement that will guide opinion in this field, which is so essential to the ultimate success of the United Nations.[8]

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7 UN doc. A/930, p. XII.

8 UN doc. A/2404, pp. xi, xv.

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7.3. U Thant

U Thant did much to activate the humanitarian conscience of the United Nations. He pleaded for attention to alleviate the plight of the victims of man-made and natural disasters and sought to develop the humanitarian good offices of the Secretary-General. He reported on 15 September 1969 that:

> There is now a general realization that concern for the "human factor" should inspire and penetrate all activities of our Organization whether they deal with political disputes affecting large populations or with the economic and social development of all mankind. Very properly, the Commission on Human Rights and the Economic and Social Council have recalled that, in the United Nations conception, the final objective of development is to ensure the dignity of all human beings, the simultaneous and joint enjoyment of all civil, political, economic, social and cultural rights.[9]

As he left office, U Thant made the finest statement of his philosophy:

> I feel more strongly than ever the worth of the individual human being is the most unique and precious of all our assets and must be the beginning and the end of all our efforts. Governments, systems, ideologies and institutions come and go, but humanity remains. The nature and value of this most precious asset is increasingly appreciated as we see how empty organized life becomes when we remove or suppress the infinite variety and vitality of life of the individual.[10]

7.4. Waldheim

Secretary-General Kurt Waldheim paid scant attention to human rights. On one occasion, in 1976, the writer put this to him at a meeting Waldheim held with staff representatives of the United Nations Office at Geneva and he was visibly rattled on that occasion. The record does not indicate any leadership role on his part in the human rights area although he did, in his public statements, stress the importance of human rights. Thus, in his Human Rights Day message on 10 December 1973, he stated that

> Among the global problems which beset us, a profound and constant concern for the individual human rights and freedoms of all humanity should have the highest priority. If we fail in our approach to this absolutely basic challenge, our successes in other fields will be hollow indeed.[11]

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9 UN doc. A/7601/Add.1, pp.17.
10 UN doc. A/8401/Add.1.
11 Press release SG/SM/232, 3 December 1973.

PURL: https://www.legal-tools.org/doc/5ecf1e/

7.5. Pérez de Cuéllar

Secretary-General Javier Pérez de Cuéllar began his term of office firing the most courageous and substantive human rights Director the United Nations has ever had, Theo van Boven. He spent the next ten years on a rather cautious note when it came to human rights issues. However, as he was leaving office, he made a cogent appeal for human rights in an address at Florence. He did not, however, leave any lasting legacy in the human rights area.

7.6. Boutros-Ghali

Secretary-General Boutros Boutros-Ghali went on public record against the establishment of the post of High Commissioner for Human Rights. The post was nevertheless established despite his views. None of his foundation reports, Agenda for Peace, Supplement to Agenda for Peace, Agenda for Development, or Agenda for Democracy provided any significant leadership on human rights issues. The last document was published in his final days in office and received little attention in the United Nations.

7.7. Annan

Secretary-General Kofi Annan was the first Secretary-General to accord a central place to human rights in his policies. He provided leadership on the right to intervene although he received stiff opposition from some Member States on this initiative. His first appointee as High Commissioner for Human Rights was a high-ranking former Head of State and he has issued far-sighted reports on the protection of civilians in armed conflicts. He made the Office of the High Commissioner a member of all four of his Executive Committees as part of a policy of integrating human rights throughout the activities of the United Nations system. In his budget proposals he has sought to add resources to the Office of the High Commissioner for Human Rights.

We turn now to the heads of the human rights programme.

8. The heads of the United Nations human rights programme

8.1. Humphrey

John P. Humphrey, a Professor and former Dean of the Law School at McGill University, Canada, was the first Director of the United Nations Division of Human Rights.[12] He served in that capacity from the summer of

[12] Prior to Humphrey, there was an interim Director, Mr. Petrus Schmidt of the Netherlands.

PDRL https://www.pdrl.org/doc/5ecf1e/

1946 to the spring of 1966. It was under Humphrey's leadership that the Division of Human Rights assembled the research materials for the Commission on Human Rights in its consideration of the Universal Declaration of Human Rights. The Secretariat framework document of a Universal Declaration was prepared by Humphrey and he must be credited with having shaped the eventual outcome of the Universal Declaration. Humphrey deserves great appreciation for his role as one of the drafters of the Universal Declaration.

During his period in office the United Nations adopted, in addition to the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and completed a series of other instruments dealing with various aspects of human rights. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were adopted a few months after he left office. In addition to such *standard-setting* activities, the United Nations also set about the task of *promoting* human rights through a programme of periodic reports, global studies and international seminars which proved to be quite valuable to the human rights programme in the long term.

The first seeds of *implementation* activities were planted during this time. Early on, Humphrey thought that the real test of the United Nations as an international organization dedicated to the promotion of respect for human rights and fundamental freedoms would be its ability to agree on effective measures of implementation. He was, however, to be disappointed in this, for almost throughout the entire period that he was Director of the Division of Human Rights, the United Nations hardly dealt with violations of human rights. He explains this himself as follows:

> The truth was ... that in those years there wasn't very much the Secretariat could do to further the human rights programme apart from preparing 'studies' and organizing seminars.

The story which Humphrey tells in his memoirs is fascinating.[13] He wrote that none of the Secretaries-General under whom he served had any real interest in human rights. This was the case of Lie, Hammarskjöld, and U Thant. Hammarskjöld, according to Humphrey, even wanted to abolish the Division of Human Rights entirely and drastically reduced its personnel at one stage. Hammarskjöld told Humphrey:

> There is a flying speed below which an airplane will not remain in the air. I want you to keep the programme at that speed and no greater.

Not only was there little interest on the part of the Secretaries-General, but there were greater difficulties with their principal aides, with those who

[13] See J.P. Humphrey, *Human Rights and the United Nations: A Great Adventure*, Transnational Publishers (1984).

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were the powerbrokers. Humphrey recounts at some length his difficulties with people such as Andrew Cordier and Philippe de Seynes. With the exception of Henri Laugier, the first Assistant Secretary-General under whom Humphrey served, he said he got practically no assistance whatsoever from the Assistant or Under-Secretary-General in charge of the human rights programme. Henri Laugier was fully supportive and wanted to move faster than even the United Nations organs were prepared to go. At one stage he courageously expressed his views publicly and was scolded by members of the Commission on Human Rights. Laugier's feeling for human rights is well brought out in a remark which he made to Humphrey, commenting on an invitation to the annual Human Rights Day concert which had specified "Black tie". "Les droits de l'homme en «Black tie», c'est une honte". After Laugier's departure from the Secretariat, he was succeeded first by Georges Picot who had little interest in human rights, according to Humphrey, then by Philippe de Seynes whom he considered distinctly unhelpful. Then there was C.V. Narasiman who was supportive at first but became bureaucratic finally.

Humphrey not only had to fight to keep his Division and his programme and to stave off cuts in his personnel, but he had to deal with repeated threats to transfer his Division to Geneva and he had to fight constantly to obtain grudging recognition that the human rights programme was worth anything at all. He recounts his "in-fighting with the Bureaus of personnel and finance over the needs of the Division" and relates that "there was a disposition in the Secretariat to treat the human rights programme as something of minor importance and, even exotic, in an international organization".

On the transfer of the Division of Human Rights to Geneva, something that was eventually accomplished in 1974, Humphrey had this to say:

> I realized right away that to move the Division away from the political centre of human rights would not be a good thing for the human rights programme.

Humphrey also had to face practical difficulties. When he sought to appoint the devoted Egon Schwelb as his deputy, he encountered the following difficulties:

> When it became known that a Jew with a social democratic background would be the Assistant Director of the Division of Human Rights, some of the Czechoslovak members of the Secretariat raised a great outcry; even the Czech Delegation became involved.

Nevertheless, with the support of his immediate superior, Laugier, Humphrey stuck to his guns and Schwelb was appointed to the post where he stayed on to render sterling service to the United Nations. Egon Schwelb was one of the great leaders of human rights at the United Nations.

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Under Humphrey's leadership the Secretariat played a dynamic role. Humphrey writes that had it not been for the preparedness of the Secretariat or for its willingness to come up with thoughts and ideas, the human rights programme would not have had the results it obtained during this period and, indeed, would have been lacking a sense of direction. We can see the Secretariat contributing to the drafting of the International Bill of Human Rights, something of which Humphrey himself is very proud; seeking over and over again, in a difficult political climate, to "keeping the human rights flag flying".

The politics of the human rights programme which Humphrey relates is quite revealing. Great powers such as the United Kingdom demonstrated very little interest in the effective implementation of human rights. The United States turned its back on the covenants, declaring publicly that it would never sign or ratify them and proposed an alternative programme of reports, studies and seminars. The United States sought to influence Humphrey against the participation of Communist invitees to the United Nations seminars. The Covenants were bogged down because western countries would not accept the right to self-determination; this gave the Communist countries, which were opposed to measures of implementation, the opportunity to pose as champions of the Covenants. And – this is worth emphasizing – it was the developing countries which were to save the Covenants and to enable the United Nations to move on to deal with gross violations of human rights. Writing about events in the year 1959, for example, Humphrey reports that at that stage the "main support for the human rights programme was now coming from the developing countries ...".

8.2. Schreiber

Marc Schreiber was a Belgian national who, after the occupation of Belgium in May 1940, escaped to London. In 1940-41 he was Assistant Belgian Organizer at *Radio Belgique*, the BBC programme which gained a wide audience in occupied Belgium. From 1941 to 1943, as an executive assistant to the Foreign Minister in the Belgian Government in exile, Schreiber was in charge of information affairs and undertook various special assignments. In 1943-45, Schreiber was Assistant Legal Adviser and *Chargé de Mission* of the Belgian Ministry of Foreign Affairs. In this capacity he specialized in post-war international organization affairs. In 1945, Schreiber was seconded by the Belgian Government to the United Nations Preparatory Commission in London as Chief of the drafting and Co-ordination Section and Associate Chief of the Legal Section.

His career as a United Nations official started in 1946 in the post of Legal Adviser to the United Nations Secretariat. In 1948, Schreiber became a

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Senior Legal Adviser and in 1953 he became Deputy Director of the United Nations General Legal Division. He remained in this post until his appointment as Director of the Division of Human Rights, except for the period 1960-61 when he was Director of the United Nations Information Centre in Paris.

As the Director of the Division of Human Rights, Schreiber represented the Secretary-General in the Third Committee of the General Assembly at the time of the adoption of the United Nations Covenants on Human Rights and of other international instruments in the field of human rights. In 1968 he was responsible for the activities connected with the observance of the International Year of Human Rights and was the Executive Secretary of the International Conference on Human Rights held during that year in Teheran.

Schreiber considered that the hallmark of his period as Director was the shift in United Nations activities from standard-setting to implementation. In lectures he delivered at The Hague Academy of International Law in 1976 – which were researched by the author – he traced the development of implementation activities over this decade. Schreiber would lead the United Nations Secretariat in one of the early fact-finding exercises, namely the Ad Hoc Working Group on Chile, and took a leading part in the preparation of its landmark report to the General Assembly in 1975. The author worked closely with him in the preparation of that report. In the concluding comments of the report, which Schreiber personally drafted for the Group, he took a strong stance against the violations of human rights being perpetrated in Chile at that time. The Group had not been able to visit Chile and when, at his request, the author prepared the draft conclusions and recommendations to the report, the author was more tentative in his approach to finding facts. However, Schreiber took the view that the situation on the ground was so serious that there was no time to be tentative. One had to be firm because the protection of those at risk on the ground required firmness. Schreiber's leadership on that occasion was firm.

8.3. Van Boven

In 1977, a principled man, a man of humility but nevertheless a man of courage and conviction, took charge of the Division of the United Nations Secretariat and began talking straight to United Nations organs about the problems faced by the world's peoples and the measures necessary to secure their rights.

Theo van Boven, a Dutchman, served the Ministry of Foreign Affairs of his country for several years and was a lecturer in human rights at the University of Amsterdam. He was a member of the Commission on Human Rights between 1971 and 1975 and a member of its expert Sub-Commission

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in 1975 and 1976. In one way or another, his entire professional life was wrapped up in the human rights cause. For many years he was the assistant to the Dutch Representative on the Social and Humanitarian Affairs Committee of the United Nations, Father Beaufort. For his doctoral thesis at the University of Leiden he wrote on the international protection of religious freedoms, a work which was subsequently published in Dutch. He had also been associated for many years with the activities of non-governmental organizations such as the World Council of Churches and participated in infusing a human rights content into the work of that organization.

On taking over as Director of the Division of Human Rights, van Boven, in his first statement to the Commission on Human Rights in 1978, cautioned the Commission that there was much public anxiety about the way in which it was handling allegations of violations of human rights. He pointed out that while the Commission did examine some situations occasionally, it nevertheless ignored many others involving large numbers of people who were victims of killings, starvation, arrest, detention, torture or disappearances. He pleaded:

> The hopes and the support of the people are, in the final analysis the main sources of strength that the Commission possesses. Work for an international and social order in which human rights will prevail can only succeed if the efforts of the international community are supported by the minds and hearts of all the people and by their active participation and commitment.

Subsequently, van Boven courageously pursued before the United Nations General Assembly, the Commission on Human Rights and other human rights organs, clear positions of principle on many human rights matters. On questions of world order, van Boven remarked to the Commission on Human Rights in 1981, "the way human beings are treated is at the heart of any notion of world order" and that "violations of human rights in any part of the world scandalize any idea of a functioning world order".

Van Boven had a broad conception of human rights and he saw freedom from fear and freedom from want as being inseparably related. He saw violations of human rights not only in terms of their symptoms but also in terms of their root causes. He believed that one could not protect human rights in the long term unless one was prepared to work to correct the structures of injustices which gave rise to violations of human rights. He was quite mindful of the relationship between economic factors and human rights and therefore called for human rights to become a core element of development strategies at all levels of society. It was also indispensable in his view to establish alongside the New International Economic Order, new human and social orders at the national as well as the international levels. He enunciated before United Nations organs the thesis that all policies and strategies at the

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international level should be inspired by human rights concerns and that human rights approaches and strategies should be applied to all major international problems. He was thus far ahead of his time in advocating the integration and mainstreaming of human rights.

Van Boven saw the United Nations realistically. Addressing the Commission on Human Rights in 1978, he recognized that

> there exists sometimes a misconception that the Commission should deal with violations by either condemning a government or by initiating an investigation. This may be one source of the Commission's difficulties in handling allegations of human rights.

With such realistic perceptions of the possibilities open to the United Nations, he urged that the United Nations utilize its potential to the maximum. He therefore advanced, over the years, a number of approaches and methods, which demonstrably led to successful initiatives within the United Nations human rights programme. Prior to 1978, the Commission on Human Rights was in the habit of dealing with situations of serious violations of human rights through the cumbersome method of appointing working groups to examine such situations. Why, van Boven asked, could not the Commission resort to the simpler method of appointing expert rapporteurs to carry out such investigations? "The experience of other international bodies has indicated", he pointed out, "that it is sometimes a useful method to appoint a single member of an organ to study a situation and to offer good offices, advice or assistance". Since that time, the Commission has adopted the method of designating special rapporteurs to deal with many situations.

Why, van Boven also asked the Commission in 1979, could it not utilize the method of establishing direct contacts with governments experiencing difficulties in the field of human rights? This method, which had hitherto not been used in the Commission, has since become one of its principal methods of work.

Is the United Nations, van Boven asked the Sub-Commission in 1979, to be concerned only with violations of human rights or, after a situation had altered, was the organization going to concern itself with rendering assistance to the country concerned with a view to enhancing the promotion and protection of human rights in the future and improving its laws and institutions for this purpose? This was to lead the Commission on Human Rights, during the period 1980-1981, to request that the United Nations provide assistance to the Governments of the Central African Republic, Equatorial Guinea and Uganda which had all undergone nightmare periods of violations of human rights.

These are just some examples of the dynamic approach van Boven pursued in United Nations human rights organs, but there were many others. addressing the Human Rights Committee, a body established under the In-

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ternational Covenant on Civil and Political Rights to examine the compliance of States with obligations undertaken under that Covenant, van Boven asked the Committee in 1979,

> [h]ow far should the Committee go in its supervisory task? Should it go beyond legalisms in its supervision of compliance with the Covenant? In other words, should it also examine the *de facto* situation and the extent to which progress is being made in the enjoyment of the Covenant?

This statement of the Director, which was widely praised by objective members of the Committee, including from third world countries such as Senegal and Tunisia, elicited outbursts from the members of the Committee from the German Democratic Republic and the USSR. Nevertheless, outside observers and scholars felt that in his statement van Boven had posited tests against which the activities of the Human Rights Committee would be judged well into the future.

Van Boven was concerned at the failure of the United Nations to react to situations of gross violations of human rights. In a series of statements to different human rights organs he underlined this above any other problem. Speaking to the Commission on Human Rights in 1981 he stated, "I could point to many situations of gross violations of human rights which found little or no place in the work of the Commission or of other United Nations organs, or, if they did, took many months – if not years – to reach there". "I am convinced", he added, "that the United Nations must devise appropriate ways and means of responding as urgently as possible to situations of gross violations of human rights which arise". Notwithstanding his insistent pleas on this subject as well as deliberations thereon at the Commission on Human Rights for several years, this is one area where the United Nations still has a long way to go yet. Perhaps the idea that van Boven advanced to the Commission on Human Rights in 1980 might catch on some day:

> How do we identify situations of violations for the attention of the Commission? Is this left too much to political convenience? Is there a case for the Commission to request annually a world report on human rights to form the basis of its consideration of the item on violations of human rights? Such a report, based on the international standards, would be in line with the global approach to human rights.

Van Boven also complained that sometimes the consideration of allegations of violations of human rights was hidden behind a screen of confidentiality:

> Is it satisfactory to place so much emphasis on the consideration of situations in confidential procedures, thereby shutting out the international community and oppressed peoples? Are certain procedures in danger of becoming, in fact, screens of confidentiality, to prevent cases

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> discussed thereunder from being aired in public? How can we deal with governments which do not act in good faith or abuse the procedures of the Commission by pretending to co-operate while in fact violations of human rights continue to take place?

Questions such as these were hard to answer within the United Nations but van Boven displayed singular courage by his willingness to pose them – and in no uncertain terms.

The examples which were cited above attest to the boldness, the dynamism, the courage and conviction of one man in his crusade for human rights. He undoubtedly discharged in personal terms a test which he posed to the Commission on Human Rights in 1980:

> In our labours we need to bear in mind constantly the needs and the aspirations of the people and to try to respond to them rather than restrict ourselves in the confines of procedures or in the constraints of diplomacy.

When van Boven left office after five years, his staff paid him the following tribute:

> For bringing to the United Nations honesty, freshness and candour so necessary for the success of the Organization
>
> For trying to inject vigour and vitality into the humanitarian principles of the United Nations Charter
>
> For giving to the oppressed and the downtrodden a voice in the halls of the world
>
> For pleading for the vulnerable, the weak, the disadvantaged, the deprived, the dispossessed, the murdered, the tortured, the imprisoned, the disappeared and the victims of other violations of human rights
>
> For giving the virtues of honesty and truthfulness deeper meaning in the United Nations
>
> For unflinching courage and conviction in the pursuit of the noble humanitarian ideals of the Charter
>
> For policies bold and dynamic in search of human freedom and liberty
>
> For whom the human factor transcends all others
>
> For whom governments and institutions exist for the welfare of the people rather than to enslave them
>
> For having the courage to "tell it as it is" to governments, as well as to others
>
> For renewing and transcending the spirit of Hammarskjöld
>
> For personifying, promoting and defending the International Bill of Human Rights
>
> For fiercely defending the right of everyone to life
>
> For being a truly rare and wonderful human being
>
> For being a voice of conscience in the United Nations

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IN OUR NAMES AND IN THE NAMES OF THE PEOPLES FOR WHOM HE FOUGHT SO TIRELESSLY AND SO SELFLESSLY.

8.4. Herndl

Kurt Herndl was born in Villach, Austria, on 8 November 1932. He obtained a degree in international law and economics (LL.D) from the University of Innsbruck in 1956. On 18 February 1982, Secretary-General, Javier Pérez de Cuéllar, announced his appointment as Director of the Division of Human Rights in Geneva. Herndl succeeded van Boven.

From 1975-77 Herndl was Deputy Executive Assistant to the Secretary-General of the United Nations and Director of his Executive Office. From 1973-75 he was Director of the Security Council and Political Committees Division of the Department of Political and Security Council Affairs, having joined that Division in 1969 as Principal Officer.

Herndl served as Deputy Permanent Representative of Austria to the United Nations in Geneva from 1965 to 1969, having joined the Federal Ministry for Foreign Affairs of his country in 1962. Prior to that he was Assistant Lecturer at the Law Faculty of the University of Innsbruck, Austria.

Herndl was appointed in the aftermath of the dismissal of van Boven as Director. It was a difficult situation and Herndl handled it with diplomacy and tact. He succeeded in gaining the confidence of the staff but had some problems with the non-governmental organizations – especially after a session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities had to be cancelled because of a financial crisis in the United Nations. Herndl, however, sought to give emphasis to foundation areas of the activities of the United Nations. He attached importance to professional servicing of the treaty bodies, gave importance to human rights education and to advisory services and technical assistance. Addressing the Commission on Human Rights on 4 February 1985, Herndl stated his core approach to human rights as follows:

> Respect for human dignity, the protection of life, physical and mental integrity, and individual liberty are the aspirations incessantly pursued through the various normative instruments and the different organs established within the United Nations. No one could, with a good conscience, claim that human life, physical and mental integrity and individual liberty are respected everywhere. But I would insist upon two aspects which we must not lose sight of: firstly, the international norms on human rights envisage and pursue patterns of the organization of society aimed at safeguarding life, human integrity and liberty. Ultimately, all governments are accountable to these standards. What this means in short, is that every system of government must pass the test

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> of consistency with international human rights law. Secondly, international concern for human rights is relatively new. A mere forty years have elapsed since such concern was voiced through the establishment of the United Nations. I prefer, therefore, to view the problems we have encountered, and are still encountering, not from the angle of despair but from the perspectives of the norms, processes and procedures already established, as well as their future potential. We can see, I believe, some of the most notable achievements of international cooperation for human rights in the fact that it is now commonly accepted that every government and every governmental system has to pass human rights compatibility tests and that the means and methods for administering these tests are largely in place. This is a source of encouragement and hope for the future.

Herndl launched the Voluntary Fund for Technical Cooperation in the Field of Human Rights, giving clear leadership on this initiative in his address to the Commission on Human Rights in 1987. The Voluntary Fund for Technical Cooperation remains one of the pillars of the United Nations human rights programme.

8.5. Mårtenson

Jan Mårtenson was the first Under-Secretary-General for Human Rights. He combined that position with being the Director-General of the United Nations Office at Geneva. His emphasis was on a "triangular relationship between legislation, implementation and information that forms the basis of our human rights programme". He placed particular emphasis on the last element, information and education:

> I would highlight the key role of information and education, the lifeblood of human rights. People must know of their rights to stand a chance of realizing them. This "vérité lapidaire" is none the less true for its simplicity. More than in perhaps any other sphere of United Nations activity, information and education constitute an intrinsic element in the programme's implementation ... I have set up an entirely new section within the Centre for Human Rights, the Section for External Relations, Publications and Documentation whose main task is to coordinate these crucial functions and enhance our cooperation with the wider human rights community, made out of governments, NGOs, media, academic and research communities and concerned individuals. Given the capital importance of information and education, furthermore, I need hardly stress the significance of ... the new world human rights information campaign. I ... cannot overestimate to you the long-term effects I believe we could expect from an effective and dynamic campaign to bring to the peoples of the world a direct knowledge of

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> the rights and freedoms they have been entitled to since the Universal Declaration was adopted ...[14]

8.6. Blanca

Antoine Blanca was head of the United Nations Centre for Human Rights for barely a few months. He was also responsible for preparations for the World Conference on Human Rights during this time. He had few opportunities to make an imprint on human rights at the United Nations.

8.7. Fall

Ibrahima Fall was first Director, then Assistant Secretary-General for Human Rights for a period of just over four years. He was Secretary-General of the World Conference on Human Rights and his best achievement was to help bring the conference to a successful conclusion. Everyone associated with the World Conference credits him with having engaged in persistent diplomatic efforts to achieve a consensus outcome that would reaffirm the universal validity of human rights.

8.8. Ayala Lasso

Jose Ayala Lasso served as United Nations High Commissioner for Human Rights for just over two years. His great achievement was to steer the negotiations that led to the establishment of the post of High Commissioner. As High Commissioner he encountered numerous administrative and other obstacles and NGOs were somewhat impatient with him, wanting more assertive leadership as High Commissioner.

He did, however, put down some important building blocks for the Office of High Commissioner. He established the first OHCHR field offices, began issuing public statements of human rights concerns, began visiting countries, called for a special session of the Commission on Rwanda, began dealing with violations of human rights during armed conflicts, and brought in an Adviser on national institutions – a step that later contributed to significant building-blocks activities on the role of national institutions for promotion and protection of human rights.[15]

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[14] Statement to the Third Committee of the General Assembly, 8 November 1988. Quote taken from the original address.

[15] We have written at length on the leadership of Ayala Lasso in *Human Rights and Human Security* (2002).

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8.9. Robinson

Mary Robinson served as High Commissioner for Human Rights for five years from 1997-2002. Hers was a period of strong leadership for human rights. She spoke out courageously against violations of human rights on numerous occasions. She visited problem spots and conflict situations repeatedly. She travelled far and wide, visiting nearly a hundred countries. She took on the powerful as well as the weak. She identified with non-governmental organizations. She spoke up for gender justice and against trafficking in human beings. She left office with the gratitude of the human rights movement for her accomplishments.[16]

9. Assessment

This snapshot of the human rights leaders in the United Nations shows that the Secretaries-General of the United Nations have been largely circumscribed by political considerations and have rarely given strong leadership on human rights – with the possible exception of Secretary-General Kofi Annan. He has highlighted the topic a great deal but it would be reasonable to reserve judgment until the end of his tenure.

As for the heads of the human rights programme, there is no doubt that John Humphrey, in his contribution to the drafting of the Universal Declaration, gave visionary leadership of an exceptional kind. The blueprint of the Universal Declaration of Human Rights has Humphrey's imprint, without any doubt. Visionary leadership was also given by Theo van Boven in a remarkable way. He argued for attention to root causes as well as symptoms and he consistently advocated a pervasive human rights approach to issues of peace and security, development, justice, and the treatment of vulnerable groups. He thus led on the integration and mainstreaming of human rights at a time when it was difficult to do so.

Conceptual leadership was given by Humphrey and van Boven as well. Kurt Herndl, in advocating the establishment of the Voluntary Fund for Technical Cooperation, did give conceptual leadership that was quite important. For we see nowadays the priority given to capacity-building for human rights within countries. The General Assembly's Millennium Declaration highlighted this. Technical cooperation, and the use of voluntary contributions therefore, is crucial to this. Herndl's advocacy of the voluntary fund therefore laid an important building block in the human rights programme.

Leadership to new frontiers was provided by van Boven and Robinson. It was van Boven who advocated post-violations justice and reconstruction.

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[16] We have written on Mrs. Robinson's period as High Commissioner extensively in *Human Rights and Human Security* (2002).

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It was he who launched the programme on the road to thematic and country rapporteurs, as well as thematic working groups. New frontier leadership was persistently provided by Mary Robinson. She raised the profile of human rights dramatically in the post-cold-war world. She led the charge for protection of human rights during armed conflicts. She highlighted the problem of trafficking in human beings and pleaded for gender justice. She made the case for the mainstreaming of human rights and broke new ground in this endeavour.

Foundation leadership was given by Ayala Lasso inasmuch as it fell to him to put down the building blocks for the new Office of the High Commissioner for Human Rights. He would also have to be credited with political leadership in the establishment of the position and in keeping it out of trouble in its first two years.

Political leadership was also given by Ibrahima Fall in his successful stewardship of the Vienna World Conference on Human Rights. The human rights heads during the cold-war period also had to be attentive to political leadership. Marc Schreiber had to steer the programme in particularly tense times and he kept it out of major political difficulties. Van Boven and Robinson sought to bend the political world towards greater attentiveness to human rights concerns and both received strong rebuffs in the end. They held their ground, nevertheless, and both won the respect of human rights non-governmental organizations.

Operational leadership was provided by van Boven, Ayala Lasso and Robinson and administrative leadership was provided by all the heads of the human rights programme to the extent that it was their charge to see to it that the human rights secretariat fulfilled its responsibilities.

What about the leadership challenges of tomorrow? This requires an understanding of the problems at hand, a topic to which we turn next.

10. Current challenges

As at the time of writing, the human rights cause faces serious challenges that would need the most careful handling. In the first place, the case for the universality of human rights must continue to be made in a world of growing poverty and assertiveness of religions and cultures. The universality of human rights must be upheld and defended.

Second, there is a deep North-South rift over how to deal with gross violations of human rights. Countries of the North insist that, as a matter of principle, the United Nations Commission on Human Rights and the High Commissioner for Human Rights must deal with gross violations of human rights. Countries of the South on the other hand, argue that it is not the business of the United Nations to place countries in the dock. They argue for co-

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operation instead of confrontation. It will be important to develop confidence-building in this area. It must be a sound principle that gross violations of human rights cannot be tolerated. At the same time, governments need to be treated with respect. Upholding a principled approach while maintaining respect will require measures of confidence-building on the part of the human rights leadership.

In the third place, new claims are coming to the fore such as claims for compensation for past slavery. This is new terrain and one would need to find a way to respect aspirations for justice with a sense of understanding about the responsibility of today's generation for the ills of their forebears.

In the fourth place, great wounds emerged from the Durban conference on racism and it would be important to make sure that the principle of equality is defended and upheld in ways that go beyond these wounds.

In the fifth place, the Commission on Human Rights is a theatre of great controversies. We have argued in this essay that the Commission has shown great leadership for human rights historically. It must, however, retain the character of a Commission on Human Rights rather than a Commission to protect governments. Leadership of the most sophisticated kind will be called for here.

Sixth and finally, the debates over poverty and the right to development need to be steered onto practical ground. A human rights approach to poverty reduction is essential and all peoples must be afforded the means for their development. This is another area in which confidence-building and wise leadership will be important.

Beyond these there is a range of issues that will require attention, some of which we set out below.

10.1. The implementation of standards

The foundation for the human rights programme ever since its beginning has been that standards would be developed, put into treaty form, accepted as binding obligation by Governments, and international cooperation would ensue to help in their implementation on the ground. With the re-structuring of the OHCHR secretariat in 1997, staff were moved away from the treaty bodies, with the result that the treaty bodies are in dire need due to insufficient staff support. The pleas of the treaty bodies for this situation to be redressed have resulted in some allocations of voluntary contributions. But the problem persists.

10.2. The petitions procedures

Great battles were fought at the United Nations for the establishment of the Charter-based and treaty-based petitions procedures. The restructuring of the

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OHCHR secretariat in 1997 did away with the Branch that previously attended to these procedures and there was no team in the secretariat assigned to dealing with petitions. After much insistence, a Petitions Team was re-established in 2000 and today there is a small staff funded from voluntary contributions. There is a strong need for core staff from the regular budget to prepare the decisions of the treaty bodies and to cultivate their jurisprudence. The case-law collection of selected decisions was last published some years ago.

10.3. Human rights investigations and other responses to gross violations of human rights

The credibility of a human rights programme depends upon prompt, adequate, and effective responses to situations of gross violations of human rights. Nowadays there are some forty human rights investigators appointed by the Commission on Human Rights. With the current staff allocations in the Office of the High Commissioner, each "special procedure", as they are called, receives about a quarter to one half of the time of a staff member by way of professional support. This is a distressing situation, to say the least.

10.4. Technical co-operation

Technical cooperation is high on the priority in today's United Nations human rights programme. Technical cooperation should have but one strategic rationale, namely to help advance the implementation on the ground of the international treaties on human rights promulgated by the United Nations. Technical cooperation has to be brought back to this basic rationale.

10.5. Regional co-operation

A great deal of money is being spent on events falling under the heading of regional cooperation. In Asia and the Pacific it might be possible to advance the explanation that there is no regional institution on human rights as such, but that is not the case in Europe, Latin America and the Caribbean where there are fairly well-developed regional regimes. The purpose of regional cooperation must be to advance the implementation of human rights at the national level.

10.6. Human rights education

The Office of the High Commissioner has, for the past seven years tried, with the support of a single staff member, to implement a United Nations Decade for Human Rights Education. It would be fair to say that due to lack

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of resources activities under the Decade have been rather limited with attention being accorded to the preparation of manuals for the training of professional groups and the organization of some workshops. UNESCO has not contributed much to the implementation of the Decade. Human rights education is strategically very important and this area needs much more attention.

10.7. Research and the right to development

Historically research activities have led the way to new standards and to new insights on implementation. Nowadays a fair amount of research is being carried out on globalization of human rights and on issues related to the international economic system. Research work on the right to development attracts different comments from delegations. Countries of the South assert claims for the transfer of resources while countries of the North emphasize respect for human rights in the development process. The United Nations Secretariat is expected to operate with objectivity and impartiality. It is a particularly difficult task to maintain the delicate balance between advocacy and impartiality when dealing with issues such as poverty and human rights, globalization and human rights and the right to development.

10.8. Mainstreaming and integrating human rights: development, conflict prevention, peacemaking, peacekeeping and peacebuilding

The push given by the second High Commissioner to get the international development and finance institutions to pay more attention to human rights has produced modest results. The conclusion of a memorandum of understanding with UNDP is a case in point. The same may be said of efforts to mainstream human rights in efforts for conflict prevention, peacemaking, peacekeeping, and peacebuilding. The memorandum concluded with DPKO has shown its worth as has the existence of human rights components of peacekeeping and peacebuilding.

The stated rationale of such efforts includes capacity building, the establishment of national institutions, the introduction of national action plans, monitoring, strengthening the judiciary, and working with non-governmental organizations. These are also among the goals of human rights field operations.

Time and money spent on inter-agency cooperation and coordination is well-meant, but one can ask about how high this kind of activity should be on the priority list – when compared with foundation areas. One should also ask questions about the amount of money spent on field operations in a few countries in comparison with amounts spent on field support and technical cooperation globally.

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10.9. Human rights in conflicts

Considerable capital has been expended in addressing situations such as those in Afghanistan, Kosovo, Sierra Leone, East Timor, and Chechnya. It is important, in today's world, to address human rights violations during conflicts. But what is the purpose of such interventions and how should they be kept in focus?

The question deserves to be asked: What is the balance to be struck between reacting to such situations and the foundation work that needs to be done in the areas of the implementation of treaties, the operations of the petitions procedures, the support of human rights investigations, and the development of strategic technical cooperation grounded in the human rights treaties?

10.10. Travels and country visits

A country visit by a High Commissioner can help bring the spotlight to local human rights issues. It can also show solidarity with local human rights defenders. But it should always have a strategic rationale. And these can be one of three: to advance the implementation of the human rights treaties tangibly, to support the efforts of the special procedures, or to zero in on an acute human rights problem.

11. The future

The protection of human rights is at the heart of the Charter's strategy of a world of peace grounded in the rule of law and economic and social progress. Without protection of human rights, the Charter's vision cannot be achieved. With such a central strategic role, what is the way forward for human rights?

Three strategic pillars must guide our future endeavours: First, maintaining the United Nations consensus on human rights. This is important morally and politically. Second, emphasizing the elements of independent expertise in following up on the treaty obligations of Governments to uphold human rights. Third, drawing on the well-spring of support for human rights at the grass-roots level and the world of NGOs. Whatever diplomatic battles are fought over human rights, individuals across the globe claim them as their birthright. People at the grass roots aspire for democracy, the rule of law and respect for human rights. This is the essence of the democratic test and affirmation of the validity of human rights universally.

The United Nations High Commissioner for Human Rights, a position first occupied in 1994, is the global coordinator of the human rights activities of the United Nations. The High Commissioner can facilitate and support the

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efforts of other parts of the human rights movement, spearheads activities in areas in need of special focus, is the voice of conscience in situations of international concern, engages in good offices, and helps spread the universal culture of human rights. The High Commissioner is part of the whole. As the percentage of resources drawn upon by the High Commissioner grows from voluntary contributions, it will be important to maintain the character of the human rights programme as one of the United Nations, grounded in the Charter and United Nations instruments. An institution outside the Charter framework, heavily dependent on voluntary contributions from a few countries, could lose its credibility.

It will be important in the future development of United Nations human rights policies and strategies to develop strategic mapping of each country, with a view to supporting national efforts for the development of national systems for the protection of human rights with constitutional, legislative, judicial, executive, educational, public awareness, and preventive/protective dimensions. Local monitoring for preventive purposes will increasingly be more important.

Against this background, the United Nations human rights programme must continue to give priority to Governments ratifying and implementing international conventions on human rights. The act of acceptance of such treaties is the first step on the road to implementation and compliance.

Led by a strategy of increasing ratification, the United Nations and regional/sub-regional organizations should continue to give particular attention to the promulgation of national plans for the promotion and protection of human rights, including the establishment or strengthening of national institutions.

A series of sub-regional training courses and exchanges of experience on the implementation of international conventions on human rights would help Governments take forward the process of integrating international human rights obligations nationally, and working towards the entrenchment of cultures of respect for human rights. Experience has shown that such training courses/workshops tangibly help Government officials.

Within the framework of the United Nations Decade for Education, activities of the United Nations system, particularly those of the Office of the High Commissioner for Human Rights and UNESCO, should place particular emphasis on human rights education at all levels. This is one of the keys to the future of the global human rights endeavour.

The implementation of economic, social and cultural rights, within the framework of efforts to realize the right to development must be taken forward more concretely. Judicial avenues for the protection of economic, social and cultural rights should be explored more. Courts such as the Indian Supreme Court and the South African Constitutional Court have provided

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good examples. The concept of consistent patterns of gross violations of economic, social or cultural rights should be drawn upon by the Courts as the Indian Supreme Court has effectively done in developing its public interest jurisprudence, with the aim of improving social justice.

United Nations petitions procedures are at the very heart of the human rights programme. This is where, in the final analysis, national systems for the protection of human rights can be tested against international norms and standards, and the international case law of protection can be further developed.

The investigations carried out by special rapporteurs and working groups are a practical expression of the international conscience against gross violations of human rights and must receive every support from the international community. Gross violations of human rights are always reprehensible and inexcusable.

Population groups in need of particular attention must attract strategies targeted at their needs for protection. These include minorities, indigenous populations, migrants, and victims of trafficking. The special perspectives and insights on the implementation of the rights of children and of women should also be further developed and put to use.

As already indicated, preventive efforts will be of great importance nationally. Such preventive efforts will also be important sub-regionally, regionally and internationally. At the sub-regional/regional and international levels, particular attention will need to be paid to violations of human rights in armed conflicts, to the plights of internally displaced persons, and to the need for their protection as well as those of refugees.

Building on the pilot field presences, it will be essential to aim for the placement of a human rights officer in every United Nations House within countries. UN Resident Coordinators or Resident Representatives now operate offices in over 130 countries. Human Rights expertise should be available in each of them.

From this perspective, technical cooperation activities should increasingly take place within the framework of national development plans and plans for the strengthening of national systems/plans/institutions for the protection of human rights. Technical cooperation, provided at the request of governments, should, more and more, be country-centered – allowing for the sub-regional training courses already suggested on the implementation of international human rights conventions.

Training and exchanges of experience could also beneficially target groups such as law-enforcement officials (police and prison); prosecutors, lawyers and judges; parliamentarians; human rights or community relations commissions; and educators. Law enforcement officials can help prevent violations of human rights; so can prosecutors, judges and lawyers. Parlia-

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mentarians should take special responsibility for watching over the incorporation and implementation of international human rights norms, economic, social and cultural as well as civil and political.

Strategies such as these will help build solid foundations for the future protection of human rights. Human rights belong to the people; the people expect professional support in the promotion and protection of human rights, drawing upon the well-spring of their commitment, aspirations and solidarity. People matter.

12. Conclusion

At the end of this essay reviewing the leadership provided by those in charge of human rights since the establishment of the United Nations and assessing the challenges that lie ahead, it is useful to recapitulate the foundations of international cooperation which are: community; interdependence; solidarity; human rights, democracy and the rule of law; conflict prevention; and development.

The following principles should underlie policy: (1) The principle of compliance with international human rights norms; (2) the principle of respect for human dignity; (3) the principle of understanding for cultures; (4) the cultural principle; (5) the principle of dialogue and consultation; (6) the principle of cooperation; (7) the principle of forthrightness where needed; (8) the principle of non-intervention in matters essentially within domestic jurisdiction; (9) the principle of partnership with NGOs; (10) the principle of promotion; (11) the principle of prevention; (12) the principle of protection; and (13) the principle of human security.

Policy accents should be placed on: (1) implementing the Universal Declaration of Human Rights, the Covenants and the Conventions; (2) equality and non-discrimination; (3) women and children; (4) human rights approaches to poverty reduction; the right to development; (5) spotlight on the disadvantaged and the vulnerable (minorities, indigenous peoples, Romas, etc.); (6) prevention and protection; (7) consistent patterns of gross violations of human rights, civil and political; (8) consistent patterns of gross violations of economic, social and cultural rights; (9) justiciability of economic, social and cultural rights; (10) national protection and prevention systems; (11) an effective international protection system; and (12) a world report based on the work of human rights rapporteurs and committees.

In dealing with gross violations of human rights, it is legitimate to act on the following bases: (1) a situation of alleged crimes against humanity; (2) a situation of gross violations of human rights or humanitarian norms; (3) a matter shocking to the international conscience; (4) an acute humanitarian situation giving rise to human rights concerns internationally; (5) a funda-

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mental breach of justice occasioning international concern; (6) a shocking disregard for internationally recognized democratic norms; (7) a flagrant breach of the principles of the rule of law; (8) a situation involving a wanton disregard of poverty that can be avoided or redressed; (9) an outrage on children; (10) the deliberate flouting of gender justice; (11) a watchfulness over groups at risk; and (12) a watchfulness over the principle of equality.

By relying on foundations, principles, policy accents, and bases such as the foregoing, the human rights leadership of tomorrow will, hopefully, be able to contribute to strengthening the international protection of human rights.

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XXXIII

The sources of fundamental rights of the European Union: a structural overview

Allan Rosas*

1. Introduction

In the late 1950s, the Court of Justice of the European Communities (hereinafter the European Court of Justice) was faced with a request to examine whether a European Coal and Steel Community decision constituted an infringement of fundamental rights as recognised in the constitution of a Member State. The Court did not answer the question, holding that it lacked competence for such an examination.[1]

This response was not surprising as the Court could only apply Community law, not national constitutional law. But the fact that the Court did not embark on any effort to develop a fundamental rights agenda of its own can perhaps also be explained by the state of European integration in the 1950s. While the fathers of the European Communities had certainly nurtured more ambitious plans and visions,[2] the first concrete steps of European integration concentrated on "deep" integration in limited areas related to economic activities (first the coal and steel sector, later areas such as the nuclear industry and free movement of goods, services and workers). The founding Treaties did not contain any references to human rights or fundamental rights, if one does not count the reference, in the Preamble of the Treaty of Rome (1957), to the need to preserve and strengthen "peace and liberty".

The supra-national nature of the project was underlined by two constitutional principles affirmed by the European Court of Justice in the early 1960:

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1 Case 1/58 *Stork v High Authority* [1959] ECR 43.

2 One can find a trace of these ambitions in the Preamble to the Treaty of Rome (1957), which sets out the determination "to lay the foundations of an ever closer union among the peoples of Europe", a formulation strengthened somewhat in Article 1 of the Treaty on European Union (TEU) of 1992, which declares this Treaty to mark "a new stage in the process of creating an ever closer union among the peoples of Europe".

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direct effect[3] and supremacy.[4] Through *direct effect*, Community law lays down rights and obligations not only for governments but also for the citizens, including, under certain conditions, in the "horizontal" relations between citizens. *Supremacy* implies that Member States cannot thwart the rights and obligations of Community law through national laws or practices.

Other constitutional principles have evolved over time, such as the "*Francovich* principle", according to which Member States may become liable to pay damages to private citizens if they have violated their rights under Community law, including Community law which does not have direct effect.[5] Already in the early 1960s, the European Court of Justice spoke of a new legal order bestowing upon the Communities "real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community".[6] Subsequently, the Court has characterized the basic Treaties establishing the Communities as "a constitutional charter of a Community based on the rule of law".[7]

Alongside these constitutional developments, unparalleled anywhere else in the world, the scope of the integration agenda has witnessed a continuing broadening, starting with the Single European Act of 1986. The Treaty of Maastricht (1992) introduced the Treaty on European Union (TEU) and the European Union (EU) as an umbrella concept for the (then) three Communities[8] and certain new forms of co-operation.[9] After the integration agenda has come to include a monetary union and a common currency,[10] a common immigration and asylum policy, since 1999 also part of the Community law framework rather than the more intergovernmental

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3 Case 26/62 *Van Gend en Loos* [1963] ECR 1.

4 Case 6/64 *Costa v. Enel* [1964] ECR 585. The principle of supremacy has, on the other hand, witnessed some challenges notably from some constitutional courts of Member States, unwilling to accept that Community law would always prevail over the national constitution, see *infra*, at notes 18 and 37-38.

5 Joined cases C-6/90 and 90/90 *Francovich* and *Bonifaci*, [1991] ECR I-5357.

6 Case 6/64 (note 4 *supra*).

7 Case 294/83 *Les Verts* [1986] ECR 1365 at para. 23; Opinion 1/91 *European Economic Area* [1991] ECR–6102 at para. 21.

8 The European Community – EC (formerly, the European Economic Community – EEC), the European Atomic Energy Community (Euratom) and the European Coal and Steel Community. The Coal and Steel Community, set up already in 1952, has in July 2002 been abolished and its assets and obligations have been transferred to the EC.

9 Title V of the TEU establishes a Common Foreign and Security Policy (the "Second Pillar") and Title VI, after some modifications introduced by the Treaty of Amsterdam (1997), concerns Police and Judicial Co-operation in Criminal Matters (the "Third Pillar").

10 Articles 105-124 of the Treaty establishing the European Community (ECT). By the third stage of monetary union, as from 1 January 1999, the Euro became a currency in its own right, while Euro notes and coins have been in use as from 1 January 2002.

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forms of co-operation,[11] and a common security and defence policy,[12] the idea of an EU with common external but no internal borders has been reinforced. It is today hard to think of any societal sector which would fall completely outside the range of EU law and activities.

For those who still misconceived the EU as an intergovernmental organization, the introduction, by the Treaty of Maastricht, of the concept of *Union citizenship* should, at least symbolically, have encouraged a corrigendum. But the very limited list of the rights of Union citizens and the fact that EU citizenship should only "complement and not replace national citizenship" (Article 17 ECT) suggested that the implications of Union citizenship were limited and even provoked derision from some quarters.[13] However, while the specific added value of Union citizenship may still be open to discussion, some judgments of the European Court of Justice have allayed the fears – or hopes – that it would be devoid of meaning.[14]

With such a combination of "deep" and "broad" integration, the question of fundamental rights/human rights was bound to enter the picture.[15] How could the Member States accept the constitutional principles of the Communities, and the threat to their own constitutional orders and national Bills of Rights posed by the supremacy of Community law, if the Community legal order itself was alien to the fundamental rights of the citizens?

The first answer of the Court of Justice came already in 1969, anticipating, in fact, later challenges from some national constitutional courts: Departing from its earlier case-law (see above), it noted that fundamental rights form part of the general principles of Community law the observance of

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11 Article 2 TEU (which refers to an "area of freedom, security and justice" and Articles 61-69 ECT ("Visas, Asylum, Immigration and Other Policies Related to the Free Movement of Persons"). See also Biannual Update of the Scoreboard to Review Progress on the Creation of an Area of "Freedom, Security and Justice" in the European Union, Communication from the Commission to the Council and the European Parliament, COM (2001) 628 final, 30 October 2001.

12 Title V of the TEU. In February 2000, the EU Council set up a Political and Security Committee (Council Decision 2000/143/CFSP of 14 February 2000, OJ L 49, 22.2.2000, p. 1) and in January 2001 a Military Committee and a Military Staff (Council Decisions 2001/79/CFSP of 22 January 2001, OJ L 27m 30.1.2001, p. 4, and 2001/80/CFSP of 22 January 2001, *ibid.*, p. 7).

13 See, *e.g.*, A. Rosas and E. Antola (eds.), *A Citizens' Europe: In Search of a New Order* (London 1995: Sage Publications).

14 See, *e.g.*, Cases C-85/96 *Martinez Sala* [1998] ECR I-2691; C-184/99 *Grzelczyk* [2001] ECR I-6193; C-224/98 *D'Hoop*, judgment of 11 July 2002; C-413/99 *Baumbast*, judgment of 17 September 2002.

15 A. Rosas, "The Role of the Universal Declaration of Human Rights in the Treaty Relations of the European Union", in P. Baehr *et al.* (eds.), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Amsterdam 1999: Koninklijke Nederlandse Akademie van Wetenschappen), pp. 201-209 at p. 201.

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which the Court ensures.[16] Soon thereafter, the Court specified that in finding such general principles, inspiration is provided by the constitutional traditions common to the Member States.[17]

And when the Italian and German constitutional courts in 1973-74 articulated their preference for their national Bills of Rights,[18] the European Court was ready to meet the challenge head-on. It first of all reaffirmed its commitment to fundamental rights and to the importance of national constitutions as a source of inspiration that it had already pronounced earlier and then, perhaps encouraged by the fact that a few days before the judgment, France as the last of the then EEC Member States had ratified the European Convention on Human Rights, added a reference to international human rights instruments: [19]

> As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.
>
> In safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.
>
> Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

These early cases have been followed almost by an avalanche of case-law and other developments relating to fundamental rights.[20] The TEU nowadays includes a general provision (Article 6) on the "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States" (1 paragraph), and on the respect for fundamental rights as general principles of

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16 Case 29/69 *Stauder* [1969] ECR 419.

17 Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

18 Judgments of the Italian Constitutional Court of 27 December 1973 *Frontini*, No. 183 in 18 Giur.Cost. (1973) 2401; German Constitutional Court of 29 May 1974 *Solange I*, BVerfGE 37, 271.

19 Case 4/73 *Nold* [1974] ECR 491. Later the Court has used a slightly modified formula, see, *e.g.*, Opinion 2/94 *European Convention on Human Rights* [1996] ECR I-1759 at para. 33.

20 Suffice it to refer here to N. Neuwahl and A. Rosas (eds.), *The European Union and Human Rights* (Dordrecht 1995: Nijhoff); P. Alston (ed.), *The EU and Human Rights* (Oxford 1999: Oxford University Press), and the collection of cases in E. Guild and G. Lesieur, *The European Court of Justice on the European Convention on Human Rights: Who Said What, When?* (London 1998: Kluwer).

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Community law (2 paragraph), the latter provision partly but not fully[21] mirroring the case-law of the Court of Justice. Another provision (Article 7) opens up the possibility of sanctions taken against Member States that violate seriously and persistently Article 6(1), and yet another (Article 49) limits the right to seek membership of the EU to European States which respect the principles set out in Article 6(1).

These developments reached a new stage when in December 2000 the European Parliament, the Council and the Commission issued a "solemn proclamation" on a new Charter of Fundamental Rights of the European Union.[22] While the Charter is not in itself a legally binding instrument,[23] it has already been used as a source of inspiration by the Court of First Instance of the European Communities[24] and by several Advocate Generals of the Court of Justice itself,[25] and has also been referred to by the European Court of Human Rights.[26]

At the time of writing, a Convention on the Future of the Union is in full swing.[27] This constitutional body, consisting of representatives not only of the Member States' governments (1 x 15) but also the European Parliament (16), the national parliaments (2 x 15 = 30) and the Commission (2), and in addition one specially nominated Chairman and two Vice-Chairmen, will probably propose a new constitutional instrument to reaffirm, develop and simplify the existing Treaties, to be adopted by the next Intergovernmental Conference in 2004.

One of the working groups of the Convention is devoted to the question whether the Charter of Fundamental Rights should be included in the consti-

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21 See A. Rosas, "The European Union and International Human Rights Instruments", in V. Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?* (The Hague 2001: T.M.C. Asser Press), pp. 53-67 at p. 56.

22 OJ C 364, 18.12.2000, p. 1.

23 On the Charter in general, see, *e.g.*, K. Lenaerts and E. De Smijter, "A 'Bill of Rights' for the European Union", 38 *Common Market Law Review* (2001), 273-300; Lord Goldsmith, "A Charter of Rights, Freedoms and Principles", 38 *Common Market Law Review* (2001), 1201-1216.

24 Cases T-54/99 *Max.Mobil*, judgment of 30 January 2002 and T-177/01 *Jégo-Quéré*, judgment of 3 May 2002.

25 The first reference to the Charter seems to have come in the conclusions of Advocate General Alber of 1 February 2001, in case C-340/99 *TNT Traco*. The judgment of the Court of Justice (17 May 2001), as indeed other judgments of this Court, have at least not yet followed the Advocate-Generals on this particular point.

26 Application no. 28957/95, *Goodwin v. United Kingdom*, judgment of 11 July 2002 (para. 100). See also the Order of the Rome Appeal Court of 11 April 2002 in the case of *Favelli*.

27 The Convention was convened by the European Council meeting in Laeken of 14 and 15 December 2001, see notably the Laeken Declaration on the Future of the European Union, Annex 1 to the Presidency Conclusions. The Web site of the Convention contains ample documentation, <http://european-convention.eu.int>.

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tutional instrument. The same working group also considers whether the EU should accede to the European Convention on Human Rights, something the EU (including the EC) has not been able to do so far because the European Court of Justice has held that competence for such a move is lacking under the existing Treaties.[28]

The fact that the EU (or the EC) has not yet adhered to the European Convention on Human Rights has not stopped the EU from developing a human rights agenda also in its *external* relations.[29] As we shall see later, these external human rights policies of the EU, too, have led to Treaty clauses and produced other legal acts which may be of relevance in the context of the sources of EU fundamental rights.

With all these developments, we are today faced with a complex web of different sources and norms, which seem to merit some structural clarification.

The modest purpose of this contribution is precisely this: to provide an overview of these different legal sources of EU fundamental rights and to propose a general structure in this regard. We are using the term "fundamental rights" rather than "human rights" as the main focus is on EU constitutional developments rather than EU human rights policies *vis-à-vis* the rest of the world.[30]

2. A general structure

The following Table is an attempt to list and categorise the various legal sources of EU fundamental rights. With this focus on the fundamental rights of the Union, national Bills of Rights of the 15 Member States and international human rights instruments are put in a specific EU context. It goes without saying that the picture would become even more complex and multifaceted if national Bills of Rights and national constitutional developments,

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[28] In Opinion 2/94 *European Convention on Human Rights* [1996] ECR I-1759, the Court of Justice held that as Community law stood in 1996, including the fairly broad powers contained in Article 308 ECT, the EC lacked competence to adhere to the European Convention.

[29] See, *e.g.*, B. Brandtner and A. Rosas, "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice", 9 *European Journal of International Law* (1998), 468-490; Rosas, *loc. cit.*, *supra*, note 15; B. Brandtner and A. Rosas, "Trade Preferences and Human Rights", in Alston, *op. cit.*, *supra*, note 20; Rosas, *loc. cit.*, *supra*, note 21, pp. 59-64; A. Rosas, "Economic, Social and Cultural Rights in the External Relations of the European Union", in A. Eide *et al.* (eds.), *Economic, Social and Cultural Rights: A Textbook*. Second revised edition (Dordrecht 2001: Nijhoff), pp. 479-492; A. Rosas, "Human Rights in the External Trade Policy of the European Union", in *Commerce mondial et protection des droits de l'homme – World Trade and the Protection of Human Rights* (Bruxelles 2001: Bruylant), pp. 193-215.

[30] See further Rosas, *loc. cit.*, *supra*, note 21, p. 55.

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or Member States' participation in international human rights regimes, were to be covered in their own right. The Table makes a distinction between the EU institutions themselves and the Member States as bearers of the obligations involved. It should be noted that Member States, too, are bound by EU fundamental rights in the application and implementation of EU law.[31]

The Table also makes a distinction between sources which are formally binding from a legal point of view, and sources which are not formally binding *per se* but which may have legal relevance as authoritative confirmations or interpretations of principles and rules which are indeed legally binding. Such "soft law" instruments (such as the Charter of Fundamental Rights of 2000, as it stands at the time of writing) and "sources of inspiration" (such as the national constitutions) are put in brackets to distinguish them from the legally binding sources.

	EU institutions	*Member States*
National Bills of Rights	(1)	(2)
General principles of Community law	3	4
EU Charter of Fundamental Rights	(5)	(6)
Articles 6 (1), 7 and 49 TEU	7	8
Articles 13, 136 and 177 ECT[32]	9	10
EC autonomous secondary legislation[33]	11	12
Human rights clauses in EC agreements	13	14
European Convention on Human Rights	(15)	(16)
Other international conventions	(17)	(18)
General international law[34]	19	20

The different elements of this Table require some further explanation and qualification, notably on the relevance of each source for EU fundamental rights. We shall proceed in the numerical order indicated in the Table. Some of the categories will receive only a very brief comment.

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31 See notably Case 5/88 *Wachauf* [1989] ECR 2609; Case C-260/89 *ERT* [1991] ECR I-2925. Article 51, paragraph 1, of the Charter of Fundamental Rights (see notes 22-23 *supra*) provides that the provisions of the Charter are addressed "to the Member States only when they are implementing Union law".

32 As we shall see later, Articles 13 and 136 focus on EU internal matters while Article 177 relates to (external) development co-operation. The Treaty of Nice of 2001, not yet in force at the time of writing, contains a further Article 181a, which concerns cooperation with third countries in general, not just developing countries, and contains a human rights clause similar to the one that exists in Article 177 ECT.

33 This concept refers above all to regulations adopted by the European Parliament and the Council, or by the Council, thus unilateral legal acts related to human rights.

34 This notion includes here both customary international law and general principles of law as recognized by civilized nations, both sources mentioned in Article 38 of the Statute of the International Court of Justice.

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3. Comments to the general structure

As to the *national Bills of Rights* mentioned at the outset (categories 1 and 2), the reasons for putting them between brackets as far as the EU institutions are concerned (category 1), is of course due to the fact that the Court, according to its own case-law, is only bound to "draw inspiration" from the "constitutional traditions" common to the Member States. While the wording of Article 6(2) TEU may be seen as somewhat more demanding ("fundamental rights ... as they result from the constitutional traditions ..."[35]), it is clear that the Court is not called upon to apply the national constitutions directly. The Court has in fact not been very keen to cite national constitutions,[36] which is certainly linked to the fact that the Court has accorded the European Convention on Human Rights "special significance", providing as it does a sort of a *résumé* of European human rights and fundamental rights standards in one single instrument (see further below).

With respect to the EU Member States, a national Bill of Rights is obviously legally binding on the Member State concerned. However, in applying fundamental rights as part of the general principles of Community law – that is, when applying and implementing Community law rather than national law solely, Member States are bound by these general principles of Community law rather than the national constitutions in themselves. The latter, as was noted above, serve merely as a source of inspiration for these general principles.

While the supremacy of Community law over the national constitutional Bill of Rights, or the national constitution more generally, has been contested or at least qualified by some constitutional courts,[37] the Court of Justice seems to have asserted such supremacy.[38] And the reference in Article

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[35] A similar formulation is to be found in the fifth preambular paragraph of the EU Charter of Fundamental Rights.

[36] One example is provided in Case 44/79 *Hauer* [1979] ECR 3727 at para. 20, where the judgment cites limitation clauses on the right of property contained in some national constitutions. See also the Opinion of Advocate General Mischo (paras 49-96) in Cases 46/87 and 227/88 *Hoechst* ECR [1989] ECR 2859 and the Opinion of Advocate General Jacobs (paras 36-39) in Case C-168/91 *Konstantinidis* [1993] ECR I-1159, and A. Clapham, *Human Rights and the European Community: A Critical Overview* (Baden-Baden 1991: Nomos), p. 50; B. de Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", in Alston, *op. cit.*, *supra*, note 20, p. 878.

[37] Suffice it to refer here to two recent contributions, A. Estella de Noriega, "A Dissident Voice: The Spanish Constitutional Court case Law on European Integration", 5 *European Public Law* (1999), 269-299; U. Elbers and N. Urban, "The Order of the German Federal Constitutional Court of 7 June 2000 and the Kompetenz-Kompetenz in the European Judicial System", 7 *European Public Law* (2001), 21-32.

[38] In Case 6/64 *Costa v. Enel* (note 4, *supra*), the Court asserted the supremacy of Community law over the laws of the Member States, "however framed", and in Case 11/70 Inter-

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53 of the Charter of Fundamental Rights to Member States' constitutions does not seem to call into question the principle of supremacy either.[39]

In a case before the European Court of Justice pending at the time of writing, Advocate General Jacobs has considered the possibility for a Member State to invoke its national Bill of Rights (in this case provisions on freedom of expression and freedom of assembly) as a justification for restricting a fundamental Community law freedom (in this case freedom of movement of goods):[40]

> 96. At first sight it might seem excessive and unduly intrusive to question whether a Member State which relies on a particular fundamental right recognized in its national legal order pursues a legitimate public interest objective.
>
> 97. Let us suppose however for a moment a (purely hypothetical) legal order of a Member State which expressly recognizes the fundamental rights to be protected against unfair competition from other firms and in particular from firms established abroad; or national case-law under which a similar right is recognized as a facet of the fundamental rights of free economic activity or the fundamental right of property. It must moreover be borne in mind that despite a basic consensus reflected in the European Convention on Human Rights about a core of rights which must be regarded as fundamental, there are a number of divergences between the fundamental rights catalogues of the Member States, which often reflect the history and particular political culture of a given Member State.
>
> 98. It cannot therefore be automatically ruled out that a Member State which invokes the necessity to protect a right recognized by national law as fundamental nevertheless pursues an objective which as a matter of Community law must be regarded as illegitimate.

If this is so, Member States are not only barred to invoke their national constitutions in a case of conflict with EC law, but also invoking a national constitutional fundamental right as a special source of justification for a public interest objective under EC law is subject to EC law scrutiny as to whether the right in question pursues an objective which is legitimate as a matter of Community law. It is for these reasons that in the specific EU law

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nationale Handelsgesellschaft (note 17, *supra*) the Court stated that "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its constitution". See also, *e.g.*, Case 106/77 *Simmenthal* [1978] ECR 629; Case C-118/00 *Larsy* [2001] ECR I-5063 (paras 51-52).

39 For a profound analysis see J. Bering Liisberg, "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law", 38 *Common Market Law Review* (2001), 1171-1199.

40 Case C-112/00 *Schmidberger*, Opinion of Advocate General Jacobs delivered on 11 July 2002.

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context that we are dealing with here, category 2 in the Table above has been put in brackets.

Some of the following categories in the Table do not require much explanation here. The legally binding source of EU fundamental rights as developed since 1969 by the Court of Justice are the *general principles of Community law* (which may cover also other general principles, such as principles of administrative law, which do not reflect fundamental rights[41]), as reflected in categories 3 and 4. The new *Charter of Fundamental Rights* (categories 5 and 6), on the other hand, is not legally binding in itself, although, as was noted above,[42] it has been used as a source of inspiration by the Court of First Instance and many Advocates Generals of the Court of Justice, and has also been referred to by the European Court of Human Rights.

With respect to Articles 6(1), 7 and 49 TEU (categories 7 and 8 above), it should be stressed here that they imply, at least in principle, a remarkable extension of the scope of EU human rights/fundamental rights: These provisions, unlike the concept of fundamental rights as part of general principles of Community law, apply to all situations and cover in principle all human rights relevant for the "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law" mentioned in Article 6(1). They thus go *beyond* the domain of Community law expressed notably in the EC Treaty.[43] Article 7 regulates the possibility to resort to sanctions against a Member State, such as suspension of its voting rights, while Article 49 makes respect for the principles mentioned in Article 6(1) a condition for EU membership.[44]

It is true, of course, that these general principles are rather indeterminate and moreover that the threshold for resorting to sanctions against a Member State for breach of these principles is quite high, as demonstrated already by the wording of Article 7(1), which requires "a serious and persistent breach".[45] The Treaty of Nice (not in force at the time of writing) would in-

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41 See, *e.g.*, de Witte, *loc. cit.*, *supra*, note 36, pp. 860-861.

42 See above, at notes 23-26, *supra.*

43 See, *e.g.*, Rosas, *loc. cit.*, *supra*, note 21, pp. 59, 66.

44 On the question of human rights "conditionality" with respect to enlargement see, *e.g.*, Brandtner and Rosas, *loc. cit.*, *supra*, note 29, 484; M. Nowak, "Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in, the EU", in Alston, *op. cit.*, *supra*, note 20, pp., 687-698.

45 Contrary to a widely held belief, the "sanctions" resorted to in 2000 against Austria because of the entry of the Freedom Party into the Austrian Government were not sanctions which had any legal standing under, or implications for, EU law but were limited political measures resorted to by the Governments of the 14 other Member States *vis-à-vis* Austria outside the work of the EU institutions. See also R. Burchill, "The Promotion and Protection of Democracy by Regional Organizations in Europe: The Case of Austria", 7 *European Public Law* (2001), 79-102 at 84-90.

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troduce certain modifications to Article 7, including the possibility (resorted to in extra-legal procedures relating to the Austrian situation in 2000[46]) of calling upon "independent persons" to submit a report on the situation in a Member State for which "a clear risk" of a serious breach of principles mentioned in Article 6(1) has been determined by the Council.

The provisions relating to human rights or fundamental rights of the EC Treaty (categories 9 and 10 above) are of a different nature. Article 13, introduced by the Treaty of Amsterdam, provides a legal basis for taking legislative action to combat discrimination of various sorts,[47] while Article 136 merely contains a reaffirmation that the Community and the Member States, in pursuing social policies, shall have in mind "fundamental social rights" such as those set out in the European Social Charter of 1961 and the Community Charter of the Fundamental Social Rights of Workers of 1989.[48] Article 177 (and its corollary Article 181a introduced by the Treaty of Nice), on the other hand, concerns the external relations of the EU and affirms the importance of the principles of democracy, the rule of law, and human rights and fundamental freedoms, in this respect.

Human rights have also received affirmation and regulation in *secondary* EC external relations legislation, adopted in the form of EC regulations (categories 11 and 12 above).[49] Apart from a number of regulations relating to specific regions or thematic subjects, two human rights regulations of a more horizontal nature were adopted in 1999, one covering co-operation with developing countries and the other covering co-operation basically with industrialised countries.[50] It will be noted that these two Regulations are

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[46] See the preceding note, and the Report on Austria's commitment to common European values adopted by a group of wise men (Martti Ahtisaari, Jochen Frowein and Marcelino Oreja) on 8 September 2000. The group had received its mandate, "through the President of the European Court of Human Rights", from the 14 Member States which had limited their bilateral relations with Austria because of the participation of the Freedom Party in the new Austrian Government.

[47] See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 199, 5.8.2000, p. 86; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 2, 5.1.2001, p. 42.

[48] The 1989 Charter was originally declared by 11 out of the then 12 Member States in December 1989. On fundamental social rights in Community law see, *e.g.*, E. Szyszczak, "Protecting Social Rights in the European Union", in Eide *et al.*, *op. cit.*, *supra*, note 29, pp. 493-513.

[49] See, *e.g.*, Rosas and Brandtner, *loc. cit.*, *supra*, note 29, 477-483; Rosas, in *Commerce mondial*, *loc. cit.*, *supra*, note 29, pp. 198-199.

[50] Council Regulation 975/1999/EC of 29 April 1999 (OJ L 120, 8.5.1999, p. 1) was adopted on the basis of Article 177 ECT referred to above, while Council Regulation 976/1999/EC (OJ L 120, 8.5.1999, p. 8) of the same date was adopted on the basis of Article 308 ECT, given the fact that with respect to industrialised countries, there was no explicit human rights legal basis in the EC Treaty (Article 308 provides under certain conditions a legal

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relevant not only as a procedural tool for human rights co-operation with third countries but also from a more conceptual point of view, reaffirming as they do, for instance, that the EU external human rights agenda gives equal weight to economic, social and cultural rights as well as civil and political rights,[51] and that the rights of minorities, and respect for international humanitarian law, are included in this human rights agenda. As this is provided in EC regulations, the EU institutions and the Member States are legally bound to carry out at least those external human rights activities which are based on the regulations in conformity with their priorities and concepts. Probably this obligation also goes beyond the technical scope of the respective regulations, taking into account Articles 10 and 180 ECT.[52]

In the field of external relations, references to human rights are also to be found in international *agreements* concluded by the EC with third countries (category 13 above). Since the mid-1990s, a human rights clause has been included in practically all trade and co-operation agreements of a general nature, providing that respect for fundamental human rights and democratic principles constitute an essential element of the agreement.[53] The main legal implication of this clause, read in conjunction with a non-execution (suspension) clause which normally accompanies it, is that breach of this essential element may entail partial or total suspension of the agreement.[54]

It is pertinent to stress two aspects of the human rights clause: It is first of all of a *reciprocal* nature, meaning that it is also binding, as an integral part of Community law, on the EU institutions as well as the Member States

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basis for action necessary to achieve the objectives of the Treaty where no specific legal basis is available to this end). Article 181a of the Treaty of Nice (note 32, *supra*) is designed to provide an explicit human rights legal basis for co-operation with other than developing countries.

51 Rosas in Eide *et al.*, *loc. cit.*, *supra*, note 29.

52 According to the basic solidarity clause of Article 10, Member States shall take all appropriate measures to ensure fulfilment of the obligations not only arising from the Treaty but also resulting from action taken by the institutions of the Community. They "shall facilitate the achievement of the Community's tasks" and "shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty". According to Article 180, the Community and the Member States shall co-ordinate their policies on development co-operation and shall consult each other on their aid programmes, including in international organisations and during international conferences.

53 Brandtner and Rosas, *loc. cit.*, *supra*, note 29, 473-477; F. Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft* (Berlin 1998: Springer); M. Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?* (Antwerpen – Oxford 2001: Intersentia – Hart).

54 In Case C-268/94 *Portugal v. Council* [1996] ECR I-6177, the Court noted that an important function of the human rights clause is to secure the right to suspend or terminate an agreement if the third State has not respected human rights.

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(the latter are covered by category 14 above).[55] Secondly, the clause resembles the system established by Articles 6(1) and 7 TEU in that, on the one hand, it is of a very general and indeterminate nature (for this reason it seems obvious that it is devoid of direct effect under Community law) and, on the other, covers in principle *all* fundamental human rights and democratic principles and not just the domain of Community law which defines the scope of the general principles of Community law discussed above (categories 2 and 3).

Thus, under the human rights clause, EU Member States are faced with an obligation which is not limited to the domain of Community law but which resembles that expressed in Article 6(1) TEU. The difference is that in the case of the human rights clause, breach could be met either by infringement procedures undertaken by the Commission under Article 226 ECT[56] or by sanctions (such as suspension of the agreement in question) resorted to by the third State Party to the agreement, while serious and persistent breach of the principles mentioned in Article 6(1) TEU can only be met by sanctions undertaken under the special procedures provided for in Article 7, involving specific powers of the three main EU institutions, the Parliament, the Council and the Commission.

The next legal source, the *European Convention on Human Rights* (category 15 above), brings us back to the general principles of Community law. As was already noted above, this Convention is not legally binding on the EC as such, but provides a "guideline", and not just any guideline, but a guideline that, according to the European Court of Justice, has "special significance".[57] Frequent are the specific references to individual provisions of

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[55] According to Article 300, paragraph 7, agreements concluded by the EC "shall be binding on the institutions of the Community and on Member States". The principle that EC agreements forms an integral part of Community law is well-established in the case-law of the Court of Justice. It will be noted that the human rights clause is not only included in so-called mixed agreements, which are concluded by both the EC and the Member States, but also in "pure" Community agreements. See, *e.g.*, Case C-268/94 *Portugal v. Council*, *supra*, note 54 (this case concerned an agreement between the EC and India); A. Rosas, "Mixed Union – Mixed Agreements", in: M. Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague 1998: Nijhoff), pp. 125-148 at pp. 145-146; *idem*, "The European Union and Mixed Agreements", in: A. Dashwood and C. Hillion (eds.), *The General Law of E.C. External Relations* (London 2000: Sweet & Maxwell), pp. 200-220 at pp. 217-218; Bulterman, *op. cit.*, *supra*, note 53, pp. 238 ff.

[56] It goes without saying that this remains a theoretical possibility. In general, infringement procedures under Article 226 are rarely undertaken with respect to alleged breach of international agreements concluded by the EC (but see Case C-61/94 *Commission v. Germany* [1996] ECR I-3989; Case C-13/00 *Commission v. Ireland*, judgment of 19 March 2002).

[57] This formula is well-established in the Court's case-law, see, *e.g.*, Opinion 2/94 *European Convention on Human Rights* [1996] ECR I-1759 at para. 33.

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the European Convention in the Court's case-law.[58] In this context it should also be noted that according to Article 52(3) of the EU Charter of Fundamental Rights, the meaning and scope of those rights of the Charter which correspond to rights guaranteed by the European Convention "shall be the same as those laid down by the said Convention".

While it is true that in the past, the Court has not so often made specific references to individual judgments of the European Court of Human Rights,[59] the Court has in a recent judgment noted that, in interpreting fundamental rights, the Community judicature "must take into account" the case-law of the European Court of Human Rights.[60] While the possibility of tension or even conflict between Luxembourg and Strasbourg case-law cannot be completely ruled out,[61] overall harmony is a much more likely scenario.

Theoretically speaking, EU Member States are not necessarily bound by the letter of the European Convention in the application and interpretation of Community law (under Community law, the Convention provides a "guideline" rather than a legally binding source *per se*), which explains why category 18 has been put between brackets in the Table above. This theoretical starting point, however, is significantly curtailed by the possibility that the Member States be directly responsible under the European Convention for action taken also in an EU framework.[62] Moreover, they might, depending on the circumstances, be in a position to rely on Article 307 ECT, which, under certain conditions, provides a defence for action in contravention of Community law which is required by an international agreement concluded

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58 Guild and Lesieur, *op. cit.*, *supra*, note 20, *passim*.

59 de Witte, *loc. cit.*, *supra*, note 36, p. 878.

60 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Montedison*, judgment of 15 October 2002, para. 274.

61 See, *e.g.*, C. Turner, "Human Rights Protection in the European Community: Resolving Conflict and Overlap Between the European Court of Justice and the European Court of Human Rights", 5 *European Public Law* (1999), 453-470 at 457-463.

62 See notably the cases of *Cantoni*, Application No 17862/91, judgment of the European Court of Human Rights of 22 October 1996, and *Matthews*, Application No 24833/94, judgment of the European Court of Human Rights of 18 February 1999. While the *Matthews* case concerned treaties and decisions in which the Member State concerned (the United Kingdom) had itself participated, the *Senator Lines* case (Application no 56672/00), pending at the time of writing, concerns the possible collective responsibility of the EU Member States for decisions by the Commission and the European Court of Justice in a field of Community law *par excellence*, competition law. See R. Harmsen, "National Responsibility for European Community Acts Under the European Convention on Human Rights: Recasting the Accession Debate", 7 *European Public Law* (2001), 625-649; A. Clapham, "The European Union before the European Court of Human Rights", in: L. Boisson de Chazournes *et al.* (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects* (New York 2002: Transnational Publishers), pp. 73-88.

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by the Member State concerned before 1 January 1958, or, for subsequently acceding States, before the date of their accession.

While the European Convention on Human Rights thus has "special significance", the case-law of the European Court of Justice also draws upon *other international human rights instruments*, such as the two Covenants of 1966, the European Social Charter of 1961 or International Labour Organisation Conventions (categories 17 and 18 above).[63] Also the EU Charter of Fundamental Rights refers in its Preamble to the European Social Charter and contains a provision (Article 53), according to which nothing in the Charter shall be interpreted as restricting or adversely affecting human rights as recognised, *inter alia*, by "international law and by international agreements to which the Union, the Community or all the Member States are parties".

As with the European Convention on Human Rights, the other international instruments are not directly binding on the EU (or, theoretically speaking, the Member States as far as EC law is concerned) but provide "guidelines" in the determination of the content of general principles of Community law. I have argued elsewhere that, unlike with the European Convention, the EC could already today, without further Treaty change, adhere to some of the universal instruments such as the Refugee Convention of 1951 and the Women Convention of 1979.[64]

Finally, the EC as a subject of international law is bound by *general international law*, be it customary international law or the general principles of law recognised by civilized nations (category 19 above).[65] This general international law obviously includes international human rights law to the extent human rights law has achieved that status. While it is not possible here to enter into a detailed discussion on that extent, it would seem that EU treaty practice, and notably the human rights clauses in international agreements referred to above, are based on the idea that the principles (but not necessarily the letter) of the Universal Declaration of Human Rights of 1948 express general international law, binding on the EC as well as on all third States, whether or not they have adhered to specific human rights conven-

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63 See Rosas, *loc. cit.*, *supra*, note 21, pp. 57-58.

64 The Refugee Convention is mentioned in Article 63 ECT, as amended by the Treaty of Amsterdam (1997). Gender equality, based on Article 141 ECT in particular, is one of the cornerstones of EC law. See Rosas, *loc. cit.*, *supra*, note 21, pp. 64-66.

65 See C. Timmermans, "The EU and Public International Law", 4 *European Foreign Affairs Review* (1999), 181-194; K. Lenaerts and E. De Smijter, "The European Union as an Actor under International Law", 19 *Yearbook of European Law* (1999-2000), pp. 95-138 at pp. 122-126; A. Rosas, "The European Union and International Dispute Settlement", in Boisson de Chazournes *et al.*, *op. cit.*, *supra*, note 62, pp. 49-71 at p. 51, with references to relevant case-law.

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tions.[66] There is nothing to suggest that this general international law would not, as Community law, bind the Member States as well (category 20 above),[67] although the practical relevance of this proposition is limited by the fact that the Member States are in any case bound by general international law in their own right.[68]

4. Trends and prospects

The general structure of legal sources set out above suggests that the European Union's fundamental rights and human rights agenda is already equipped with an elaborate but at the same time quite complex scheme of legal sources. Some of these sources are legally binding *per se*, while others offer inspiration or guidelines only. Most of the sources are limited to the scope of Community law, while some (probably categories 7 and 8, 13 and 14, and 19 and 20 above) contain a more general obligation to respect the principles of human rights and fundamental freedoms, the rule of law, and democracy.

It is notable that the two sources which seem the most important ones from a practical point of view, fundamental rights as part of general principles of Community law, and the European Convention on Human Rights, are surrounded by question marks. The main problem related to the former source is one of content: As there is no Bill of Rights in the founding Treaties, the search for fundamental rights as general principles draws upon various non-binding sources of inspiration or guidelines, including the European Convention, and increasingly also the new Charter of Fundamental Rights. To "find" the content of the general principles of Community law, one has to go through the elaborate case-law of the European Court of Justice, which is by definition *ad hoc* and incomplete.

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[66] According to the *European Union Annual Report on Human Rights 1998-1999*, adopted by the EU Council in October 1999 (Brussels 1999: Council of the European Union, General Secretariat), p. 22, the human rights clause in EC agreements "does not seek to establish new standards in the international protection of human rights. It merely reaffirms existing commitments which, as general international law, already bind all States as well as the EC in its capacity as a subject of international law". See also the *European Union Annual Report on Human Rights 2000*, p. 34. See further Brandtner and Rosas, *loc. cit.*, *supra*, note 29, 475-476; Rosas, *loc. cit.*, *supra*, note 15, p. 206.

[67] On the obligation of EU Member States to adjust to EC policies with respect to customary international law see V. Lowe, "Can the European Community Bind the Member States on Questions of Customary International Law?", in Koskenniemi, *op. cit.*, *supra*, note 55, pp. 149-168.

[68] The obligation of Member States to comply with general international law *qua* EC law may become more relevant in the development rather than application of general international law, taking into account Article 10 ECT (see note 52, *supra*) and the principle expressed with respect to EC agreements in Article 300 (7) ECT (see note 55, *supra*). On the (albeit theoretical) possibility of infringement procedures, see note 56, *supra*.

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The main question mark with the European Convention is that of formal status and responsibility. While the EU Member States, including Member States which have constitutional courts, have accepted the external control provided by the Strasbourg system, transfer of powers from them to the EU will probably imply that the matter escapes the full control of the European Court of Human Rights.[69]

It is the view of the present author that these two question marks should be remedied, for the sake of clarity, legal certainty, and coherence. As was already noted in the Introduction, the on-going Convention on the Future of Europe is at the time of writing considering both making the Charter of Fundamental Rights legally binding and the question of EU accession to the European Convention on Human Rights. As there is still some reticence in certain quarters to take these steps, ideas are floating around about possible limitations or caveats, in the former case linked to some common denominator provided by the European Convention on Human Rights and by the national constitutions of Member States,[70] and with respect to the European Convention, implying some kind of "functional" rather than formal and full accession.[71]

As far as the Charter and national constitutions are concerned, it should be recalled that the case-law of the European Court of Justice has never ventured into any detailed analysis of all the national constitutions and search for a precise common denominator in this regard. That would, in fact, be an almost impossible task. One is reminded of a phrase contained in a recent Opinion of Advocate General Jacobs: "It must moreover be borne in mind that there are a number of divergences between the fundamental rights catalogues of the Member States, which often reflect the history and particular political culture of a given Member State".[72] The enlargement of the EU, bringing perhaps ten more Member States already in 2004, can only serve to underline this problem.

Accession to the European Convention, for its part, should take as its starting point the nature of the Strasbourg human rights system as we know it, and the need to fill the gap created by the combined effect of increasing

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[69] It is true that the extent of such a "contracting out" is far from certain, as Member States may remain directly responsible for breach of the European Convention, at least if they have undertaken action not strictly required by EU law but rather action they have undertaken themselves, within their margin of discretion. Moreover, the *Senator Lines* case pending before the European Court of Human Rights raises the question of whether the Member States could be held collectively responsible for action undertaken by EC institutions (see note 62, *supra*).

[70] See, *e.g.*, Working document WD 004 – WG II by Baroness Scotland of Ashtal of 9 July 2002, <http://european-convention.eu.int>.

[71] See, *e.g.*, audition of Mr. Piris, Director-General of the Council's Legal Service, WD 13 – WG II of 5 September 2002, <http://european-convention.eu.int>.

[72] Case C-112/00 *Schmidberger*, see note 40, *supra*.

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transfer of powers to the EU and non-EU adherence to the external control system itself. There is no need to complicate matters further. But there *is* a general need for radical reform of the Strasbourg system in general, to enable it to cope better with the increasing case load caused by the considerable enlargement of the Council of Europe since the early 1990s, and to underline its role as an external control of last resort rather than as a further extended forum of litigation of all possible grievances.[73]

It is appropriate to end a contribution to a volume for *Asbjørn Eide* by a note on the principle of *universality.*[74] Is there a risk that with all the developments described above, the EU is strengthening the image of a "Fortress Europe", looking inwards rather than outwards? I do not think so. The adoption of the Charter of Fundamental Rights, and the current idea of making it legally binding, should not be seen as an effort to become inward-looking, but as an effort to clarify a situation that simply needs clarification, in view of all the other developments concerning the EU, that is, the development of both its internal powers and its external relations agenda.[75] Full adherence to the European Convention, and accession to other human rights conventions, including those of the UN family, would further dispel fears of EU egocentricity.

Many elements of the structure of existing sources outlined in this contribution suggest that the EU is, in fact, fairly open to external influences. The Charter of Fundamental Rights itself goes out of its way to point to such influences, referring as it does to international law and international agreements, including the European Convention on Human Rights. One of the preambular paragraphs states that the Charter reaffirms fundamental rights:

> as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

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[73] See, *e.g.*, Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, Council of Europe, Committee of Ministers, EG (2001) of 27 September 2001.

[74] See, for instance, his contributions to G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague 1999: Nijhoff), and Eide *et al.*, *op. cit.*, *supra*, note 29.

[75] It will be recalled that the EU has been much criticised for applying double standards, preaching human rights to the outside world but not making itself full and binding commitments to respect fundamental rights and human rights, see notably "Leading by Example: A Human Rights Agenda for the European Union for the Year 2000", adopted by a *Comité des sages* in 1998 and reproduced in Alston, *op. cit.*, *supra*, note 20, pp. 921-927, and various individual articles in *ibid.*

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And, as was noted above, Article 53 of the Charter provides that it shall not be interpreted as restricting or adversely affecting human rights as recognised not only by Union law but also by "international law and by international agreements to which the Union, the Community or all of the Member States are party".

Indeed, the ideological underpinnings of EU external human rights policies are centred on the principles of universality and indivisibility.[76] The EU is also a proponent of international governance and multilateral regimes such as the International Criminal Court, hopefully at the expense of unilateralism and *Diktatpolitik*.[77] But great minds such as Asbjørn Eide should constantly remind it of this sacred trust.

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[76] See, *e.g.*, the *EU Annual Report on Human Rights 1998-1999*, *op. cit.*, *supra*, note 66, p. 33, and *The European Union and the External Dimension of Human Rights Policy: From Rome to Maastricht and Beyond*, Communication from the Commission to the Council and the European Parliament, COM (95) 567 final, 22 November 1995, p. 10.

[77] Rosas, *loc. cit.*, *supra*, note 65, p. 71.

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XXXIV

Human rights for children

Lucy Smith*

Human rights are moral rights. But what gives them further strength is the fact that these moral rights to a certain degree have grown to become legal rights. They have been formulated and adopted in international documents, and they may be applied and enforced through the judicial system in many jurisdictions. These legal rights are my theme.

1. The human rights instruments concerning children

"Mankind owes to the child the best it has to give." These fine words were first expressed in the Declaration of the Rights of the Child from 1924, adopted by the fifth Assembly of the League of Nations (The Declaration of Geneva). This declaration was actually the first human-rights declaration adopted by any intergovernmental organisation.[1] The definition of the rights of the child was not at that time as we would define them today; however, they were first and foremost concerned with provisions on children's needs. The first (of six) principles states for example that the child *must be given* the means requisite for its normal development, both materially and spiritually. And the word *right* is only used in the title, not in any of the six principles. Furthermore, the declaration does not place any binding obligation on the states; it follows from the preamble that it is "men and women of all nations" that have the duty to provide for the needs of the child. The Declaration is still significant, though, especially because this first human rights declaration was about children, and because it did introduce the term *children's rights*.

In 1959 the United Nations General Assembly unanimously adopted the Declaration of the Rights of the Child.[2] This Declaration consists of a preamble and 10 principles. The preamble repeats from the Geneva Declaration that "mankind owes to the child the best it has to give". It also draws the

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1 Geraldine Van Bueren, *The International Law on the Rights of Child* (1995).

2 It is interesting to note that all instruments of children's rights have, at least in words, a wide acceptance. The Universal Declaration of Human Rights was not adopted unanimously, as there were eight abstentions. Even more remarkable is the near universal ratification of the UN Convention on the Rights of the Child, see further below.

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connection to the Universal Declaration and to the fact that the Declaration emphasises that everyone is entitled to the rights and freedoms "set forth therein", but that children need special safeguards and care. This Declaration calls upon

> parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures progressively taken ... .

In Principle 2 of the 1959 Declaration, the term "the best interest of the child" is introduced. It has the following wording:

> The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws of this purpose, the best interest of the child shall be the paramount consideration.

The Declaration states in Principle 3 that the child shall be entitled from birth to a name and a nationality, and in Principle 7 that the child shall be entitled to receive education, which shall be free and compulsory, at least in the elementary stages. Thus the declaration to a certain extent recognises the child as a subject of international law.[3]

The 1959 Declaration was not legally binding, and it did not embrace children's participation and liberty rights. At that time, there was little acceptance of a legally binding instrument regarding children, and it was still first and foremost the protection of children that was on the agenda. Gradually the states began to recognise the need for a more comprehensive and binding international instrument to secure the special interests of children. Based on a draft resolution from Poland, the UN started the work on a legally binding convention on children's rights in 1979, the International Year of the Child. Poland had also submitted a draft text of a convention, based on the 1959 Declaration. The plan was to finish the work in 1980, but due to the development during these years regarding the view on children's rights, the work took on a momentum, and it was only in 1988 that the final text was adopted. The United Nations Convention on the Rights of the Child (the CRC) was adopted by the General Assembly in November 1989. The Convention is now ratified by 191 states, all states except Somalia and the United States.

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[3] See also Geraldine Van Bueren, *supra*, note 1, p. 12: "The Declaration did, however, represent great progress in the conceptual thinking of children's rights".

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The drafting history of the Convention has been excellently described by others, and I will not go into detail regarding this.[4] It should be mentioned, however, that the UN Commission on Human Rights established an open-ended working group to draw up a text for a Convention. This made it possible also for states that were not members of the Commission on Human Rights to take part in the work, and also specialised organisations, regional intergovernmental organisations, and non-governmental organisations. The non-governmental organisations were very active in their lobbying, which obviously had an impact on the content of the Convention. The NGOs have since then continued their work as regards the implementation of the Convention, see further below.

The CRC has its obvious limitations. The working group worked on the basis of consensus. There was no voting. As has been pointed out by many scholars, this facilitated the adoption of the draft. But it also resulted in the abandonment of some proposals that had the support of a clear majority.[5] For example, the working group did not manage to agree on the very important issue of medical treatment and experimentation on children.[6] Moreover, many of the articles are vague and/or formulated in such broad terms that they do not really give the child any substantial and effective rights that are enforceable.

The adoption of the draft must still be characterised as a great achievement, and the unanimous adoption of the Convention extremely important. The Convention has first of all resulted in a greater focus on the rights of children. This was obvious, even in countries like Norway, where the legislation in most areas, especially as regards the children's active rights, were more advanced than the CRC. And as pointed out by Deirdre Fottrell, children's rights have become mainstreamed in the UN, and are discussed and prioritised at every level of UN activity.[7] The Convention is a comprehensive convention, encompassing most areas of human rights. It addresses the special needs that children have, and it introduced participation and liberty rights for children in international law. In a few national legislations, these rights were already included, but in most countries this was both new and controversial.

One of the reasons for the almost universal ratification of the Convention in spite of the very sensitive nature of several of its provisions is the possibility of making reservations. Most Muslim states have made reserva-

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4 See, for example, Geraldine Van Bueren, *ibid.*, chapter 1, and Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999).

5 Sharon Detrick, *ibid.*, p. 17.

6 Geraldine Van Bueren, *ibid.*, p. 311.

7 Deirdre Fottrell, "One step forward or two steps sideways?" in Deirdre Fottrell (ed.), *Revisiting Children's Rights* (2000), p. 13.

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tions on all articles of the Convention that are in conflict with the provisions of Islamic Law. Other countries have made general reservations regarding all articles that are in conflict with national law, without stating which articles may be excluded or modified. Many states parties have objected to these reservations for being too comprehensive and also in conflict with general principles of treaty interpretation.[8]

It is of course unfortunate that there is such a high number of reservations. Deirdre Fottrell argues that it is disputable whether the CRC has struck the right balance in relation to many of its provisions, taken into consideration the many reservations to several of its provisions.[9] In my opinion it has been extremely important that the Convention does contain the provisions that are most controversial, like article 12 on the right to be heard, article 13 on freedom of expression and article 14 on freedom of thought, conscience and religion. A majority of states have accepted these articles, and without them, the Convention would have been without much impact regarding the active rights of the child, and thus without its innovative character. Without the possibility of making reservations, the Convention could not have been ratified by many Muslim states, and this would have impaired the effect of the Convention.

The *implementation system* is – like that of the Convention on the Elimination of All Forms of Discrimination Against Women – based on periodic reports by states parties, the first report two years after ratification, and then with five years intervals. The Convention is monitored by an expert committee. The states parties are under a duty to report on measures which they have taken to bring its law and administrative practices into line with the Convention.[10]

The implementation system of CRC has been criticised for not having a mechanism of individual complaints, like for example the Convention Against Torture, that provides for both a reporting system and individual complaints, and the procedure for individual complaints in the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Optional Protocol to CEDAW contains two procedures: a communications procedure allowing individual women, or groups of women, to submit claims of violations of rights to the Committee on the Elimination of Discrimination against Women; and an inquiry proce-

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8 The CEDAW has the same problem with many reservations, a number of them to particular articles on the ground that national law, tradition, religion or culture is not congruent with Convention principles, and some to article 2, although their national constitutions or laws prohibit discrimination.

9 *Supra*, note 7, p. 3.

10 See further about the implementation system Geraldine Van Bueren, *supra*, note 1, chapter 14.

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dure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women's rights.

In my opinion a system of individual complaints regarding the CRC is not as well founded as it is regarding the two above-mentioned Conventions. There is good reason to believe that a system of complaints connected with the CRC would result in much resources being spent on complaints from quite resourceful parents regarding their children, while the children that suffer most seldom will have the possibility to make a complaint to an international committee. The question could also be raised whether it is desirable to have many different systems for individual complaints regarding human rights where the issues will be the same in many cases. There is a risk that we get different interpretations of the same principles.

With the enormous problems facing millions of children today, it seems more important to allocate additional resources to the expert committee with the aim of making the monitoring work it now does more effective. The committee has proved to be proactive both in the administration of its work and in the interpretation of the Convention. The great problem is its heavy workload, taking into consideration the number of reports that they receive. It is also a fact that the expert committee has no possibility of doing its own research. It is dependent on information from the NGOs, besides the report from the country itself. It seems to me that the Committee sometimes accepts the assertions of the different NGOs too easily. An inquiry procedure enabling the Committee to initiate inquiries into situations of especially grave character, like the one provided for in the Optional Protocol to CEDAW, could, however, be a useful tool for the committee, given that it receives the necessary resources for this type of work.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not include any specific provision regarding children's rights, and it does not contain any express reference to the best interest of the child. The objective of article 8 regarding the right to family life was obviously first and foremost to afford protection against interference with the family by totalitarian regimes, such as occurred during the Second World War. The provision was thus primarily aimed at protecting "normal" families against threats from the public authorities, and not at protecting members against threats coming from inside the family.

The need for protection against arbitrary interference by public authorities, and especially by totalitarian regimes, obviously still exists, and normally the interests of children and parents will coincide here. On the other hand, attaching too much weight on the legal protection of parents will reduce the legal protection of children in cases where the interests between parents and child conflict. This will especially be the case where the issue is whether the child should be taken into public care. Although states are al-

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lowed to intervene in family life to protect children, the states are not obliged to do so according to article 8. A recent case, however, shows that *article 3* on torture or inhuman or degrading treatment or punishment offers protection for the child against ill-treatment. In the case *Z and others v. the United Kingdom*, four adults complained to the European Court of Human Rights that the authorities failed to intervene in their family and remove them into state care when they were children, with the result that they suffered long-term and in some cases permanent psychological damage.[11] The Court agreed that the ill-treatment the applicants had endured as children constituted inhuman and degrading treatment, and that there had been a violation of article 3. It seems on the whole that the growing awareness of the children's rights has an influence on how cases involving interests of children are being argued and decided upon by the Court.[12] This trend could be strengthened if the domestic courts of the states parties that put more weight on the interest of the child emphasise this point more in their decisions and thus actively engage in a so-called dialogue between the national courts and the European Court of Human Rights. An inter-court dialogue like this, where the domestic courts defend national values, may promote an exchange of ideas and good practice.

A Norwegian example in this connection could be the relationship between children's rights and parents' rights, where the Norwegian point of view, based among other things on the *travaux préparatoires* of the Child Welfare Service Act, has been that the best interest of the child shall be the only consideration in cases of removing children from the home, or reuniting children with their biological parents. The European Court however, has held consistently that "a fair balance must be struck between the interests of the child and those of the parents", but also that "in doing so particular importance must be attached to the best interest of the child which, depending on their nature and seriousness, may override those of the parent".[13]

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[11] *Z and others v UK*, Judgement of 10 May 2001.

[12] See Ursula Kilkelly, *Effective Protection of Children's Rights in Family Cases: Using the UN Convention on the Rights of the Child to Interpret Article 8 European Convention on Human Rights*, paper presented at the 11th World Conference of The International Society of Family Law, p. 16.

[13] See, for example, *Johansen v. Norway,* Judgement of 17 August 1996, Reports 1996-III no. 15; *Elsholz v. Germany*, Judgement of 13 July 2000. In my opinion the majority of the Norwegian Supreme Court may have missed this opportunity to engage in a dialogue with the European Court in the case reported in *Norsk Retstidende* (Norwegian Law Reports), 2001, p. 14.

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2. Do children have human rights?

Special issues arise regarding children's human rights. First, the term "child" encompasses all human beings from birth until they reach maturity age, usually 18 years. It is thus a heterogeneous group, which at times makes it difficult to establish general guidelines. Furthermore, some of the traditional human rights are of such a nature that they cannot be exercised or have significance until the child has reached a certain age. This applies, for example, to freedom of expression, freedom of religion and freedom of association. Some rights must also be given a meaning in relation to children that differs from what applies in relation to adults. For instance, the ban on inhuman punishment must be interpreted in a different way where children are concerned than where adults are involved.

One special problem is that children themselves cannot – when they are small – exercise their rights. Some scholars maintain that because of this, children cannot be holders of human rights. Norman Lewis from the University of Warwick writes about the fallacy of children's rights and the fallacy of universal childhood.[14] In his opinion, children's rights are meaningless unless children are capable of exercising them. But he has a special agenda – he looks upon the demand for children's rights as a fundamental intrusion into the domestic affairs of the sovereign state and a fundamental attack on democratic freedoms and rights.[15]

There should be no doubt as to the fact that human rights are for all human beings, also when the rights must be claimed by others on their behalf. And I refuse to accept that this is merely a question of semantics. No one, I suppose, will maintain that old, senile persons are not protected by human rights, even though they will not be able to exercise some rights by themselves. Some rights will be of less interest, some rights will be dependent on an understanding that both small children and mentally handicapped people will lack. Other rights will be even more important for these groups of individuals. And if the individuals do not have the capacity to exercise their own rights, then others must do it on their behalf.

Moreover, there is no doubt that the CRC recognises the human rights of children as such.

Michael Freeman writes about the ideological conflict between those who see children's rights in welfare terms and those who wish to promote a child's self-determination, and that this is still present in the CRC. In my

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[14] In "Human rights, law and democracy in a free world", in Tony Evans (ed.), *Human Rights 50 years on* (1998).

[15] "There can be no clearer example of contemporary societies' tendency to hold free subjectivity in low esteem than the assertion of the existence of new rights unconnected with legal subjects like children or animals.", *loc.cit.*, p. 99.

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opinion there is no conflict here. The child has both a right to protection and a right to self-determination. It makes, however, little sense to discuss these questions without taking into consideration the age of the child. The child has a right to life, and a right to have its basic needs secured. The right to protection will be dominant in the first years when the child does not have the ability to protect itself, while the right to self-determination will gradually grow until the child reaches maturity age, and thus no longer is a child. The child has a right that we act in her or his welfare interests, but only as far as the child's capacity to act in his or her own interest has not yet developed. "We further have the obligation to provide those conditions and that assistance necessary for these capacities to develop."[16] And when the child has the capacity to act in its own best interest, then the child also must have the right to act and to decide for itself. Thus, children reach autonomy in different areas at different stages in their life. This is actually taken into account by Norwegian national law, where the principle of the evolving capacities of the child was introduced with the Child Act of 1981. The Act states: "Parents shall steadily extend the child's right to make his or her own decisions as he or she gets older and until he or she comes of age". I have interpreted this article in the following way: When the child has the capacity to act in his or her best interest, the child has the right to decide for itself. I can also cite the United States Supreme Court from 1976:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of maturity. Minors, as well as adults, are protected by the constitutional rights.

3. The best interest of the child

It has been said that with the coming into force of the Convention of the Rights of the Child, the "best interest of the child" has become an international legal concept.[17] This may be so, but in many countries it had already been a legal concept for several years. And the principle has been widely criticised, long before we got the CRC and article 3, because of its indeterminate nature and the difficulty of identifying the criteria that should be used to evaluate alternative options. In my opinion this criticism is based on a misconception of what the principle implies. This principle was first introduced in custody cases and cases of removal from the family home. It is obvious, however, that in most such cases there is no certain answer to the

[16] Susan A. Wolfson, "Children's Rights", in Michael Freeman and Philip Veerman (eds.), *The Ideologies of Children's Rights* (1992), p. 23.

[17] See, for example, Joachim Wolfe, "The Concept of the 'Best Interest' in Terms of the UN Convention of the Rights of the Child" in Michael Freeman and Philip Veerman (eds.), *The Ideologies of Children's Rights* (1992), p. 132.

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question of which alternative will be best for the child. As R. Mnookin among others has emphasised, the choice of criteria in custody cases is value-laden, and it must also be based on an uncertain future. Nobody has maintained that the best interest principle alone can give the whole answer in these cases. I interpret the principle of the best interest of the child in a more modest way: It is first of all a principle of interpretation. The most important message of the principle is that in all issues concerning children, and where there are competing interests from adults, it is the interest of the child that shall have primacy. When the principle was introduced, this was not at all an obvious thing. And to some people and some nations, it still is not.

So, although the principle cannot give the exact answer to what the best interests of the child will be, it is necessary as a basic principle also in our times. Again and again – even in these days – the interest of the adults are prevailing over the interest of the child, also in developed countries that pride themselves in being pioneers in the children's rights issues. The child is being used as a tool in a battle for adults' rights. Not long ago, a Norwegian mentally and physically handicapped married woman applied for permission to adopt a Chinese baby. The application was rejected, but the woman appealed to the minister, and the minister overruled the decision and gave her permission for adoption. This case led to a public discussion, and I especially remember a television debate where the leader of the debate asked one of the participants: "But isn't this an important step forward for the rights of handicapped people?". This was obviously the way many people regarded the problem, as a question of the rights of mentally handicapped people. Later, by the way, the adoption was refused by the Chinese authorities.

Many women and men talk about *justice* in custody cases and it is not justice for the child they are referring to. There are many examples of children being treated as appendages to women's interests – or to men's interest. It is also interesting to note that the conflict in the US regarding grandparents' visitation rights is mainly discussed as a conflict between the grandparents and the parents. Not much is said about the harm such court cases may inflict on the children involved.

My reasons for always giving priority to the interest of the child when in competition with the interests of adults is first of all that, at least small children, are not able to take care of themselves, and they are extremely vulnerable. If a small child does not have its basic needs fulfilled, it may have consequences for the rest of her or his life. And the child will be the parent of the next generation. Children who have been mistreated will not seldom mistreat their own children. It could also be added that it is never the child that is the cause of the situation and/or its social setting.

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In custody cases and in cases of removing a child from home, there is the problem of the indeterminacy when the best interest principle will not provide a clear answer. This is both a problem for the courts, for the parents who do not manage to solve the conflict by themselves, and also for the legislator. In most national legislations the principle will be supplemented by additional criteria, or some criteria will be established by case-law. But in the end, the judge – if it is a court case – will have to use her or his own judgement of what will be the best solution, and it is unavoidable that the values and experiences of the judge will play a role in the decision. My point in this connection is that the best interest principle in these cases means that it is the interests of the child that shall be paramount.

The UN Convention has included the best interest-principle in article 3, and many scholars have given their interpretation of this article. I agree with those who say that the principle is applicable in conjunction with each of the substantive provisions of the Convention, and also with respect to actions that are not covered by express obligations in it.

The article does not – as the African Charter on the Rights and Welfare of the Child – stress that the best interest of the child shall be *the* primary consideration, but only *a* primary consideration. This opens up for the state the possibility to balance the interest of the child with other interests that the state considers more important, and thus it represents a weakening of the principle. In Norway the Supreme Court has in expulsion cases referred to the fact that the interest of the child shall be only *a* primary consideration according to the UN Convention, and that the interest of the state in these cases must be given more weight. The expression "in all actions concerning children" is so sweeping, however, that to have the expression "*the* primary consideration" in this connection might have been too absolute and not give enough flexibility. Van Bueren gives a decree on the divorce of the parents as an example. Article 21 about adoption illustrates that with a more narrow scope of application it may be natural to speak about *the* primary consideration: here the states parties are required to ensure that the best interest of the child shall be *the* paramount consideration in cases of adoption.

4. Parents' rights and children's rights

Parental rights are also human rights, protected by the ECHR and several other human rights instruments. They are also embedded in the constitutions of several countries.

The protection of parental rights focuses on two points, the right of the parents to have the children living with them – the protection of family life – and the right to make decisions concerning their children's religious and secular education. The justificatory basis for these rights in the European

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Convention is somewhat unclear. As expressed by Torkel Opsahl, the justification needs to be sought mainly in intangible, deep-rooted preferences, rather than rational calculations. It does, however, appear already from the *travaux préparatoires* that most speakers emphasised that this right was perceived more in the sense of a duty or responsibility in the interest of the child. In the years since then, this fact has been stressed more and more. This must have implications as regards the scope of the parental rights.

To protect the parents' rights as regards education of their children seemed especially important after the experiences during the Second World War. It is not only a matter of protecting the religious beliefs of the parents, but also to protect the children from indoctrination from the state. I find it reasonable that the parents shall have the right to intervene between the state and the little child, and also that the state shall respect the right of parents to ensure that small children do not get an education that violates their parents' religious and philosophical convictions. It follows from the practice of the European Court, however, that teaching which only provides information cannot be regarded as being in conflict with the freedom of religion, but that any sort of indoctrination – be it religious or political – represents a breach of the European Convention. This is also in accordance with a ruling of the Human Rights Committee (*Hartikainen v. Finland*).[18]

The problem has been the lack of regard for the child's own convictions and wishes. In several of the cases that have been before international organs, it seems to me that the parents argue about the interest of the child, while it is their own interests that they are fighting for. In some connections the children are treated as derivatives of their parents. Respect for family life is usually considered as the family life of the parents, not of the child. This has been so in several cases at the European Court of Human Rights court. In the *Eriksson case* of 1989 regarding the taking into care of a small girl, the European Court found that there was a breach of articles 6.1 and 8 in relation to the mother. The mother, as the legal guardian of her daughter – at that time around 11 years old – argued that there was a breach of the articles also in relation to the daughter, and the Court agreed. The daughter had, however, never shown any interest in being reunited with the mother or visiting her. Thus, the majority of the Court, when deciding whether the right of the daughter had been interfered with, placed no weight on the child's own opinion. The European Court has, however, in two recent cases held that it is essential that that the competent court has direct contact with the child before assessing what lies in his or her best interest.[19] (It was the fathers, however, that were the applicants, not the children.)

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[18] R.9/40. HRC36, 147.

[19] The cases of *Sahin v. Germany* and *Sommerfeld v. Germany*, Judgements of 11 October 2001. The cases are referred to the Grand Chamber.

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The UN convention of children's rights is the first international instrument to include the active rights of the child. The participation rights are embedded in article 12, and article 14 confers on the state a duty to respect the right of the child to freedom of thought, conscience and religion. There are, however, several Catholic and Islamic states that do not accept the right of children to adopt a religion of their own choice, which is clear from the reservations to the Convention.

We are here in an area where there is deep difference of opinion among nations. But for those nations that have not made any reservations, article 14 raises problems of interpretation. It does not mention any age, and in the second paragraph it is stated that the state shall respect the rights and duties of the parents to provide directions to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. The content of the parents' right to provide "direction" to the child is not clear, and neither from which age the child shall have full autonomy in questions of religion. To a large degree it will be the task for the national legislation to give directions about these questions.

One question in this connection is to which extent the parents – or the state – legitimately can exercise the rights of the small child in areas of religion, or other questions of fundamental character that might mean fewer choices for the child later in life. Linda Papadopoulou argues that the parents cannot legitimately exercise their children's rights to freedom of conscience and religion.[20] Even less should the state then have a right to do this. This view is in conflict with the parental rights to decide about their children's education according to the European Convention and other international human rights instruments. It is far-reaching, in so far as it would among other things mean that the parents should not be allowed to christen their child. I believe that it is also unrealistic. But I sympathise with the idea that parents should not be allowed to indoctrinate their children. The goal for both the parents and certainly for the state should be to give the children the best possible background for making their own choice when they become competent to do so.

5. Final remarks

When Anders Bratholm, Tove Stang Dahl and I established child law as a subject and a field of research at the University of Oslo around 1980, we had also an agenda of a policy nature. Our aim was to focus attention on the child as a subject of its own, and thereby strengthen the rights of the child, both the welfare rights and the active rights. Much has happened since, the

[20] L. Papadopoulou, *Children and Religious Freedom*, paper presented at the 11th World Conference of The International Society of Family Law.

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most important thing being the adoption of United Nations Convention on the Rights of the Child in 1989, and its almost universal acceptance.

Many of the articles in the UN convention are vague, some rights are framed in broad language, and some give rather weak protection. It is, however, first and foremost in the individual states that the human rights will be implemented. Thus, the ultimate effect of international human rights will depend upon the national legislation and the judiciary, but also on the writings and other types of contributions from scholars. The expressions *judicial activism* and *judicial legislation* are well known. I believe that there is a constant need also for what I would call *scholarly activism* with an element of scholarly legislation in the field of human rights for children.

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XXXV

Reflections on human rights, sovereignty of states and the principle of non-intervention

Danilo Türk*

1. Introduction

The work of Asbjørn Eide in the field of human rights is wide-ranging. His teaching and writing and, above all, his long experience in international institutions, including especially the United Nations, reflect both careful thinking about human rights and an astute political analysis. Like other colleagues in the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, I still recall his repeated insistence on the multiple roles of states in the field of human rights: states are not only under the obligation to respect human rights but also have the duty to protect these rights and to contribute to their implementation. While insisting on this comprehensive approach he was aware of the complexity of situations involving states and their role in the implementation of human rights. He has applied this general approach to a variety of issues, including the implementation of economic, social and cultural rights, the right to food as a human right, the rights of the indigenous peoples and the rights of national, ethnic and religious minorities.

Working on these issues, as well as a variety of other activities in the Sub-Commission, have necessarily led Asbjørn Eide into the discussion of some of the fundamental issues of international law, such as sovereignty and use of force by states.

I vividly remember his activist advocacy in the summer of 1990, for humanitarian exemptions in the regime of sanctions imposed against Iraq, following Iraq's aggression against Kuwait. His work, related to the situation in Sri Lanka in the late 1980s, was focused on the question of how human rights work could contribute to the establishment of communication between the Tamil Tigers and the Government and how to expand the scope of human rights action from reporting and advocacy to human rights diplomacy. His work in the area of the rights of indigenous peoples has been a continu-

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ous examination of the interplay between the concerns of human rights, the rights of indigenous peoples as group rights and the issues of sovereignty of states. Similar and no less sensitive questions characterize his work on ethnic, national and linguistic minorities.

The fate of the individual is the ultimate concern of the authors and activists in the field of human rights. But no less significant attention has to be paid to the fate of states and sovereignty. Human rights exist in the condition of perpetual tension with the sovereignty of the state. However, they are not inimical to the state.

Asbjørn Eide's critical analysis of the role of the state *vis-à-vis* human rights and his concurrent recognition of legitimate concerns of the state belong to the many interesting aspects of his work. It seems appropriate, therefore, to reflect, in this short essay on some of the contemporary issues of sovereignty of states as they relate to human rights and of the use of force by states in cases of humanitarian emergencies, that is, in those situations where human rights are massively violated and where the very survival of populations is at stake.

2. Human rights as a problem of implementation

Human rights entered the global scene with the adoption of the Universal Declaration of Human Rights in 1948 as a part of the international order established in the post-World War II era. The motivation behind it was, and to a large extent still is, the same as the one that inspired the Charter of the United Nations: to prevent a future descent into the barbarism of war. That existential motivation to prevent recurrence of war and large-scale human suffering was accompanied by the optimism of the post-World War II era. This led to the belief that human rights are *universal* and *implementable* through international co-operation.

These expectations are still with us. Although the universality of human rights is sometimes challenged, it appears that the universal demand for human rights and their near universal acceptance through a plethora of international legal instruments provide a sufficient basis for acceptance of their universality. The problem of universality is not as difficult as it sometimes appears to be.

The problem of implementability of human rights is more difficult. The original enactment of universal human rights in 1948 was couched in general terms and was criticized as too vague and too open-ended to be applicable.[1] The Declaration itself was not a legal instrument. Its power was in its moral strength rather than in its legal enforceability. Human rights became interna-

[1] Hersch Lauterpacht, *International Law and Human Rights*, New York, Praeger (1950), p. 421.

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tional legal rights as a result of their codification in the decades which followed the adoption of the Universal Declaration.

The legal character of human rights gradually became a strength that added to their authority and influenced the legislative processes within States. However, the embodiment of human rights in legal norms brings with it all the problems involved in the interpretation and implementation of law. In a general sense, the problem could be defined in the following manner.

All legal norms, including human rights norms, have three essential dimensions: descriptive, prescriptive and constitutional. Each legal norm contains a description of the real life situation it intends to address, a prescription regarding the desired or prohibited behaviour and, finally, an identification of the norm's position in the hierarchy of legal norms. The latter constitutional dimension is defined by the content of the norm in question and by the level of its abstractness. Some legal norms require more and some fewer further norms as means of their implementation. Human rights norms, in general, are powerful in their content as basic constitutional norms. However, many among them require further, specific norms of more detailed descriptive and prescriptive content as means of their implementation. Human rights such as the right to fair trial (Article 10 of the UDHR), the right to privacy (Article 12 of the UDHR) or the right to work (Article 23 of the UDHR) – to mention just a few as examples. The process of implementation of such norms embodying human rights requires further legal elaboration – both on the descriptive and prescriptive side. That elaboration takes place through further (international and national) legislation and jurisprudence. The latter could be assisted, especially in the situations which are not subject to precise legislation, by those aspects of policy-making which the judicial bodies accept among the means of interpretation of legal norms.

The above outline indicates the importance of the legal system for the implementation of human rights. At the present time, legal systems are predominantly national although the importance of international law-making and jurisprudence continues to grow. Implementation, in other words, depends to a very significant extent on the law-making by the sovereign State. Additionally, implementation takes place within the social and political context of a state and often involves conflicting claims. Management of such conflicts is an essential feature of human rights implementation and it again takes place mainly within sovereign states. Sovereignty has an intrinsic importance for the implementation of human rights.

There are two additional reasons why the importance of states in the context of implementation of human rights needs to be emphasized. *First*, traditional human rights advocacy has focused on threats to human rights originating from the holders of state power. The emphasis on the protection of human rights against the state was historically justified and conceptually

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sound. However, it did not address all the threats to human rights. Recently the international community has witnessed atrocities which take place in situations of collapsed states and the resulting armed conflicts. State sovereignty has become appreciated as a firewall against anarchy and resulting abuses of human rights.

Second, the period of uncritical fascination with globalization and the views of sovereignty as an "outdated concept" which has allegedly "spent its historical energy" seems to be coming to its end. In a recent collection of essays titled "Human Rights as Politics and Idolatry", Michael Ignatieff wrote:

> [Yet] it is utopian to look forward to an era beyond state sovereignty. Instead of regarding state sovereignty as an outdated principle, destined to pass away in the era of globalization, we need to appreciate the extent to which state sovereignty is the basis of order in the international system, and that *national constitutional regimes represent the best guarantees of human rights*.[2] (emphasis added)

The above quotation, which has been left in the said collection of essays remarkably uncontested, sounds almost Westphalian in its tone. But is it historically and conceptually correct and does it suggest movement forward?

3. State sovereignty: the need for a proper understanding

In my opinion the answer to both these questions is yes, provided that the concept of sovereignty is properly understood. State sovereignty has historically established itself as a fundamental political and legal concept – but not as an absolute one. Sovereignty is not an absolute and, above all, not the only relevant legal and political concept.[3] It is important to distinguish sovereignty as the supreme authority which is necessary for the political community to exist and the absolutist uses and interpretations of sovereignty which have been characteristic of much of the twentieth century and which have added to serious problems of human rights. Now, in the new century and after the chaotic ending of the previous one, we should be able to appreciate better the core meaning and importance of sovereignty as a basic organizing principle of states and of the international system.

State sovereignty properly understood is not static. The frontiers of sovereignty and the modalities of its implementation change with time and with the obligations the state has under international law. Sovereignty is found in newly independent and highly independence-conscious states as well as in

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2 M. Ignatieff, *Human Rights as Politics and Idolatry*, Princeton University Press, Princeton and Oxford (2001), p. 35.

3 This realization is, of course, widely shared among legal and political theorists. See, for example, F.H. Hinsley, *Sovereignty*, London C.A. Watts and Co (1966).

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states extensively integrated in an international legal sub-system such as the European Union. The contexts of state sovereignty are diverse and its content is relatively indeterminate. It is through international law that we discover the exact scope of sovereignty. Of course it is necessary to assume, as the Permanent Court of International Justice stated in the Lotus case (1927), that a state is free and its sovereignty unfettered in absence of clear legal obligation. But in areas such as human rights, the scope of sovereignty is defined by obligations into which a state has freely entered. Such obligations confer upon states a duty to abide by law and to behave responsibly so as not to violate their legal obligations.

It is particularly important to stress the link between sovereignty and responsibility. The reason for this is historical. Much of the debate about sovereignty that has taken place since the establishment of the United Nations centered on sovereignty as a right of states and on the equality among sovereign states. This is understandable because the newly independent states which formed the majority of the UN's membership emphasized their own priorities – that is, their aspiration to establish themselves in the international community as free and equal with other states. This political aspiration has shaped much of the UN's discussions during the first fifty years of its existence. Now, at a time when the UN-led codification of international law has created a densely knit web of international obligations for states, it is much more important to understand that sovereignty carries with it responsibilities and that responsible exercise of sovereign rights is essential for international stability. The responsible exercise of sovereignty includes the respect for internationally accepted human rights as well as positive action by states when this is necessary for implementation of these rights.

Obligations relating to human rights have contributed to the shaping of sovereignty of states in a variety of ways. The most obvious is treaty-making. A number of international and regional treaties have defined the scope of sovereignty and the obligations of states with respect to implementation of rights embodied in these instruments. Furthermore, the interpretation of treaty provisions – both in the context of consideration of state reports and as a part of individual complaints procedures – have enriched the descriptive and prescriptive texture of human rights norms thus facilitating the process of their implementation. Adoption of declarations and other "soft law instruments" has helped in defining policy goals for states and their legislative agendas. Human rights law has thus become an important part of sovereignty as practised today by a large majority of states.

A further element of the impact of human rights on the evolution of sovereignty can be found in the international co-operation in the field of human rights which includes technical assistance and advice, capacity-building and other forms of co-operation. The patterns of co-operation in these do-

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mains are often expressed in memoranda of understanding and other international instruments of co-operation between recipient states and international organizations. States contributing to the funding of such arrangements also become part of this network of co-operation. Implementation of human rights thus becomes a part of the exercise of sovereignty of states both at the level of international co-operation and at the level of development of state structure of the recipient states. Although it might be argued that these forms of co-operation represent a relatively small part of the overall exercise of state sovereignty, it is important to bear in mind that for the recipients (often weak and not yet fully developed states or states in a situation of an acute crisis) this co-operation is very significant. Furthermore, the value and diversity of these forms of co-operation is growing. In some cases, especially in states engaged in post-conflict peace-building, international assistance in the area of human rights represents a basic feature of their re-emerging statehood.

International co-operation in the field of human rights has thus become an important aspect of sovereignty itself. Sovereignty is being internationalized. While internationalization of sovereignty is known from the very beginning – states did not, as a rule, exist as completely isolated entities – it has become a more prominent feature of the recent decades.

4. State sovereignty and non-intervention

In no other area are the problems of sovereignty more fundamental than in the area expressed by the principle of non-intervention in the affairs of sovereign states. Logically, sovereign states are equal and therefore protected against all forms of intervention in their own affairs by other states. Prohibition of intervention is a logical corollary of the fundamental principle of sovereignty of states. But it is precisely here that the most serious dangers of an absolutist interpretation and use of state sovereignty may arise.

Can sovereignty be used as a shield for gross violations of human rights? An answer based upon the current state of international law must be clearly in the negative. Ways must be found to address such violations and stop their occurrence. Might these ways include the use of force by other states and international organizations in certain conditions and under certain rules? In certain circumstances, probably, yes.

Before addressing these core questions I wish to make a short digression into history with the aim of shedding light on the evolution and the current status of the principle of non-intervention under international law.

As a corollary of state sovereignty, the principle of non-intervention belongs to the principles of international law which are basic to the international legal system since the Peace of Westphalia. And, like sovereignty, it

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has, from the very beginning, not been considered as an absolute principle. The principle was explicitly formulated in the eighteenth century in the work of Christian Wolff[4] and Emmerich de Vattel[5] both of whom recognized that under certain circumstances the "international community" (*civitas maxima* in the works of Wolff and community of nations in the work of Vattel) may intervene against a sovereign who threatens the international community. This approach established a certain type of dualism: the principle of non-intervention is recognized but so are the exceptions from this principle in certain circumstances. The subsequent development of international law practice and doctrine specified those exceptions which by the end of the nineteenth century included humanitarian intervention.[6]

This basic legal approach was not uniform: the lists of possible exceptions varied from one major author to another, and, above all, so did the practice of great powers that were in the position to decide whether to intervene or not. Legal principles and power politics mixed, not always to the advantage of international law. Humanitarian interventions in various parts of the Ottoman Empire in the nineteenth century were accompanied by the geopolitical interests of the intervening and other major powers. Selectivity and lack of consistent practice were among the main features. Furthermore, intervention can be undertaken only by more powerful states against weaker ones, and political considerations have been always part of the decision whether to intervene or not to intervene.

In Latin America the experience with different types of foreign intervention gave rise to powerful doctrines of non-intervention, advocated by Argentinian jurists and diplomats Carlos Calvo (1824-1906) and Louis Maria Drago (1859-1921) and later in the 1930s by Genaro Estrada, the Foreign Minister of Mexico. The legal instruments adopted in the Inter-American framework in 1930s and 1940s developed a strict non-interventionist model.[7]

Given this diverse historical background, the authors of the Charter of the UN adopted a realistic and wise approach. In its Article 2, paragraph 7 the Charter prohibited intervention by the UN (and therefore, *a fortiori* by individual member-states of the UN) in matters which are essentially within the domestic jurisdiction of states and defined one exception: the Security Council may act against a threat to the peace in accordance with its powers

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4 Christian Wolff, *Ius Gentium* (English translation, New York 1964), Prolegomena, para. 13.

5 Emmerich de Vattel, *The Law of Nations and the Principles of Natural Law*, Carnegie Endowment for Peace, Washington (1916), pp. 7-10.

6 For a comprehensive analysis of exceptions to the principle of non-intervention see L. Oppenheim, *International Law (edited by Hersch Lauterpacht)*, eighth ed. (1955), pp. 305-310.

7 Article 15 of the Charter of the Organization of American States (1948), Annals of the Organization of American States, vol. I, no. 1, 1949, p. 78. PURL: https://www.legal-tools.org/doc/5ecf1e/

under chapter VII of the Charter. This was a realistic framework, made in a form and content allowing for further evolution. It was expected that states would further define their sovereignty through the future evolution of international law, which is constantly changing the scope of "matters which are essentially within the domestic jurisdiction" of states. The Security Council was expected to decide which situations, including those arising from internal problems, constitute threats to the peace and therefore justify international intervention.

In subsequent years, however, the evolution of international law and state practice took a specific course. The Security Council became paralysed owing to Cold War divisions and deliberative organs of the UN became increasingly influenced by the newly independent states that gradually became a majority in the 1960s when they formed the non-aligned movement – a powerful block which strongly influenced the work of the UN until the 1990s. These states – being both new and not firmly established – were strongly interested in the use of the UN as an additional layer of protection of their new and precious sovereignty. As a result, near-absolutist interpretations of the concept of state sovereignty prevailed – a trend also favoured by the socialist camp which advocated strong statehood for reasons of ideology and the political needs of their ruling regimes. This trend produced a near-absolutist interpretation of the principle of non-intervention which found its expression in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, adopted in 1970 (GA resolution 2625 [XXV]). The relevant passage of that Declaration reads:

> No State or a group of States has the right to intervene, directly or indirectly, *for any reason whatever*, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats *against the personality of the State* or against its political, economic and cultural elements, are in violation of international law. (emphasis added)

This formulation, which bears more signs of the Latin American historical experience and legal tradition than that of Western European legal thought and practice, was adopted by consensus and was, like the Declaration as a whole, accepted as a reflection of customary international law.

The tendency of a near-absolutist interpretation of the principle of non-intervention continued in subsequent years. Consensus, however, was not maintained and a resolution detailing the prohibited practices of intervention (GA resolution 36/103) was adopted in 1981 by a vote signalling the limits of the tendency which had prevailed in the previous period. Further changes took place in the 1990s with the ending of the Cold War, the collapse of the socialist system and the dramatic weakening of non-alignment. The general

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political context started to change and the international community gradually became receptive to a more nuanced approach.

This change in the global political environment coincided with humanitarian disasters of Rwanda (1994) and Bosnia and Herzegovina (1992-1995), and in Kosovo (1999). The occurrence of the most terrible violations of human rights – that is, genocide and its variant, "ethnic cleansing" – put on the agenda, once again, the question of whether the international community should intervene militarily to prevent or stop humanitarian disasters or not, and if it should, under what conditions. At the opening of the 54th session of the General Assembly (1999) the Secretary-General put this question before the Organization's membership in his noted speech on two concepts of sovereignty. By clearly placing the moral question of whether state sovereignty should be allowed to shield massive violations of human rights, the Secretary-General took the courageous step of taking the debate on this issue to a new level.

The Security Council, meanwhile, had to face practical emergencies – in Kosovo, in Sierra Leone and in East Timor. Although its practice has not been coherent, one could say that the Security Council recognized, if only implicitly, that situations do arise in which military action must be taken as a result of "extreme necessity" – very much in the same way that might be legally acceptable under national law.[8] The questions of criteria for the assessment of such situations, and of authorization have not been answered yet. The debate continues and needs to evolve if an international consensus on these difficult and sensitive, but also very basic, issues is to be established.

5. Is there a case for an international standard on the use of force by states in humanitarian crises?

We are now in the midst of a debate and one should not presume that firm and precise conclusions are possible yet. Nevertheless, some guidance can be derived both from UN docs. and from authoritative statements made outside the UN, in particular from the recent report of the International Commission on Intervention and State Sovereignty, initiated by the Government of Canada and published in December 2001.[9]

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[8] At present, the concept of necessity is not recognized as a principle applicable in international law, although it is widely accepted within national legal systems. However, the international practice cannot ignore the need, occasionally, to resort to a lesser evil when no other device is left to avert greater evil. In order for such practice to be legitimate it must prove that all other means have been exhausted or that no other effective option exists and that no time is left to create an effective and timely alternative.

[9] The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty (ICISS), Ottawa (2001).

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A fundamental segment of this debate relates to the criteria to guide the decision-making in cases which might require an exception to the principle of non-intervention. In 1999, prior to his speech in the General Assembly, the Secretary-General issued a report to the Security Council on the Protection of Civilians in Armed Conflict (doc. S/1999/957 of 8 September 1999). In that report (paragraph 40), he identified five factors which the Security Council ought to consider in deciding on an enforcement action which might become necessary in the face of massive and ongoing abuses. They are: (a) the scope of the breaches of human rights or violations of international humanitarian law including the numbers of people affected and the nature of violations; (b) the inability of local authorities to uphold legal order or identification of their complicity; (c) the exhaustion of peaceful or court-based efforts to address the situation; (d) the ability of the Security Council to monitor actions that are undertaken; and (e) the limited and proportionate use of force with attention to repercussions upon civilian populations and the environment.

These criteria make sense both in political and legal terms. However, they are not, at least yet, enacted in the form of law. Nor is the level of agreement around these criteria sufficient to suggest that there exists an international customary standard governing the resort to enforcement action in the case of a humanitarian disaster.

The International Commission on Intervention and State Sovereignty reached a very similar and clearly formulated set of conclusions. In its report (December 2001), the Commission emphasized that military action is justified – as an exceptional and extraordinary measure. The "just cause threshold" must be high. Only when a large-scale loss of life or ethnic cleansing takes place or is apprehended, military intervention becomes justified.

Furthermore, the Commission also spelled out the following "Precautionary Principles": (a) right intention (the intention to halt or avert human suffering); (b) last resort (non-military options have already been explored, with reasonable grounds to believe that lesser measures would not succeed); (c) Proportional means; and (d) reasonable prospect of success.[10]

The two quoted, recent documents suggest that it might be possible to develop an internationally credible concept on the use of military force to stop or avert a major humanitarian disaster "as an exceptional and extraordinary measure". The main elements are already offered. They can be further refined, with the understanding that the decision-making bodies and, in particular, the Security Council, will have to make a separate judgment in every single situation. The suggested elements represent a broad framework of guiding principles for future decision-making. However, they cannot be in-

[10] *Ibidem*, p. XII.

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terpreted as clear legal prescriptions, something they are not and cannot be as yet. Clearer consensus, confirmed by actual practice, needs to emerge.

A future consensus on these guiding principles need not be sought through an abstract and formalized discussion in the UN General Assembly. A case by case approach, based on specific decisions of the Security Council and in accordance with the Security Council's powers under the Charter could be a more realistic and productive approach.

Such an approach brings to the forefront additional questions. Assuming that there is an agreement about the general criteria guiding the Security Council's action, how does the Security Council ensure coherence in its practice? When is the best moment to act? What should happen when the Council members cannot agree on the desired course of action? Should an unauthorized action by regional organizations or groups of states, or by individual states, be deemed acceptable in certain circumstances?

The discussion on these issues is only at an early stage and it is related to crisis situations recently dealt with by the Security Council, whose practices are sometimes less and sometimes more controversial. The unauthorized military action of ECOMOG (an ECOWAS force) in Sierra Leone in February 1998 was not controversial. NATO military action against the Federal Republic of Yugoslavia over the humanitarian crisis in Kosovo in 1999, on the other hand, was more controversial. In both cases, the Security Council acted *ex post facto* and adopted resolutions which defined the approach of the UN for the future. One could argue that this type of Security Council action amounts to an implicit rendering of legality to the international action as a whole since the consequences of the preceding action have now been accepted. However, opinions among the legal experts and among the political decision-makers are far from unanimous.

My own opinion is that NATO military action against FRY in 1999 met the criteria of extreme necessity. The situation in and around Kosovo had been clearly identified, in Security Council resolution 1199 (1998), as a threat to international peace.

While the use of force by NATO was not explicitly authorized by the Security Council, one could argue that NATO action remained in the confines of the need to remove the threat already identified by the Security Council. Furthermore, the situation which developed after the military action became the subject of the Security Council's decision-making and is now clearly within the framework of legality.

At the general level of discussion, the International Commission on Intervention and State Sovereignty offered an interesting approach. It proposed that in cases where the Security Council rejects proposals for action or fails to act, the alternative options are:

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> I. consideration of the matter by the General Assembly in Emergency Special Session under the "Uniting for Peace" procedure; and
> II. action within area of jurisdiction by regional or sub-regional organizations under chapter VII of the Charter, subject to their seeking *subsequent* authorization from the Security Council.[11] (emphasis added)

The suggested approach represents an innovation, insofar as it adds the word "subsequent" to the word authorization. While the prevailing interpretation of the Charter suggests the requirement of prior authorization, the quoted approach seems to suggest a shift of the balance in favour of the regional organizations.

This leads to one of the central issues of the Charter's system of maintenance of peace and security. Chapter VIII of the UN Charter offered a delicate and somewhat uneasy balance with a favour to a global as opposed to a predominantly regional approach to the issues of international peace and security. That balance came as a result of intense discussions in Dumbarton Oaks (1944) and in San Francisco (1945), a discussion which did not end with the adoption of the Charter. Regional organizations were established and have grown since the adoption of the Charter in many, although not in all, regions of the world. They have gained new roles and additional importance in the post-Cold War period. An effect of this evolution on the overall balance between the UN and the regional organizations is therefore expected. However, it would be politically unwise and legally problematic if this change weakened the UN. Working in partnership is perhaps one of the most important needs both for the UN and for the regional organizations in the field of maintenance of peace and security.

Partnership necessarily involves dialogue and a shared sense of responsibility. This would have to mean that both the UN and the regional organization need to address an incipient problem early on and to prevent violent conflict, if possible. Should the use of military force become necessary, they must act in a manner compatible with the primary responsibility of the UN for international peace and security. However, primary responsibility does not mean exclusive responsibility. If the UN manifestly fails to act when it should have acted, a regional organization might have to fill the gap.

Partnership and division of labour between the UN and regional organizations and other actors becomes particularly important in those situations in which it is difficult to generate the political will and resources necessary for action. In many situations, the case of Rwanda in 1994 being the most dramatic example, the questions of political will and resources represent the real obstacles to action in situations that had been recognized as a humanitarian crisis affecting international peace and security. The UN alone may not be able or fully prepared to act. Initiatives of regional organizations or individ-

[11] *Ibidem.*

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ual states, ready to work in partnership with the UN and carry a part of the burden are a vital ingredient in such situations. As the examples of Italian-led operation Alba in Albania (1997) and Australian-led military mission in East Timor in 1999 (INTERFET) – both being authorized in advance by the Security Council – show that such awareness, and action based on it can lead to results, although not without difficulty or sacrifice.

The need to generate political will and mobilize the necessary resources often represents the most important task in the international action to avert or stop a major humanitarian disaster. The critical question in such cases is not so much how to ensure legality of international action, including military action, but how to convince states to act at all in a situation where the need and legality of action are already recognized. There is no adequate substitute for the political wisdom and statesmanship which need to guide the international action in such situations.

6. In conclusion

Any serious discussion on human rights, state sovereignty and the use of force intended to avert or stop humanitarian disasters involves a fundamental ethical issue: that of responsibility. Human rights are a necessary guarantee for the well-being of individuals within groups and within a society as a whole. Individuals pursue their rights, in the vast majority of situations, responsibly – taking into account the equal rights of others and the needs of society as a whole.

The role of the state is essential in the need to ensure respect for and, as the case may be, also active action for the realization of human rights. The last decade of 20th century has demonstrated that war and chaos mete out the worst and most massive violations on human rights. Hence, the renewed realization of the important role of the state. But in order to play such a role, the state has to meet the standards of responsibility as defined in international human rights law. This is an inherent part of sovereignty itself.

Sovereignty is not absolute and includes respect for its legal limitations. In the past, as well as in many cases at present, very serious abuses of human rights have originated from the state. That danger continues to exist. At the time of the current, strengthened effort against terrorism, it is realistic to expect that threats to human rights will not come only from terrorists but also, and in some cases, perhaps, primarily from states which will try to take advantage of counter-terrorism to "settle accounts" with those whom they see as politically dangerous or subversive. Counter-terrorism could be a comfortable refuge for human rights violators. Once again, the international community will have to demonstrate vigilance and distinguish legitimate struggle against terrorism from abuse of state power. This will be a critical

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test of the responsible exercise of state sovereignty and of the responsibilities of the international community.

Finally, the responsibilities of the international community are also gaining in number and in importance. The evolution of international actions in the field of human rights has created standards of responsibility which need to be applied internationally to ensure respect for and the realization of human rights.

A particularly important aspect of international responsibility relates to the need to protect potential and actual victims of humanitarian disasters. That responsibility belongs primarily to states but also, and not less importantly, to the institutions of the international community, especially the United Nations. The responsibility to protect may, in particular circumstances involve the need to use military force. In such situations, it is essential to reach a broad international consensus about the existence of that need, the political will to act and the necessary resources. In such cases, state sovereignty cannot be legitimately and credibly invoked as a shield against international action. When states abandon their own sovereign responsibility to protect human lives against a large-scale and man-made humanitarian disaster, or even worse, they themselves become the source of such a disaster, they deprive themselves of the protection of sovereignty and international action becomes legitimate.

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XXXVI

Droits de l'homme et pratiques traditionnelles

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1. Introduction

Dans le monde d'aujourd'hui, on ne parle que des droits de l'Homme. Ils sont invoqués dans tous les domaines pouvant affecter l'être humain, que ce soit la santé, la nourriture, l'éducation, la globalisation et la pauvreté qu'elle engendre plus encore, l'intervention étrangère et même humanitaire, les guerres, l'occupation étrangère, les tortures, les disparitions, le racisme de plus en plus lié à l'émigration, les minorités, les peuples autochtones, le terrorisme, ses conséquences et les causes qui le sous-tendent, les femmes, les enfants, les personnes âgées. Bref, ce sont là des domaines où les violations des droits de l'Homme sont les plus massives, les plus critiques et les plus préoccupantes. Elles sont là, pratiquement immuables, narguant les défenseurs des droits de l'Homme car elles s'appuient sur de solides bases d'intérêts économiques, de politique, de puissance et d'hégémonie.

Pourtant depuis 1945, les Etats de notre planète et plus particulièrement ceux qui composent l'Organisation des Nations Unies se sont engagés, aux termes de la Charte, à agir seuls et conjointement pour faire de notre monde un havre de paix, de solidarité, de coopération, libéré de la peur et de la misère. Un an plus tard, la Déclaration universelle des droits de l'Homme établissait un ordre du jour international en matière de droits de l'Homme et de leur mise en œuvre.

Mais ce qui est devenu une obligation, souvent non respectée, pour les Etats, a en revanche été repris avec enthousiasme et dévouement par tous ceux qui, conscients de l'immense désespoir des victimes de ces violations, avaient décidé de prendre leur défense et de dénoncer avec force la faim, la violence, les inégalités criardes, les injustices, les viols massifs, les tortures, les massacres dus au fanatisme ethnique et religieux, les exploitations éhontées et cette immense misère et ignorance, source de tous les maux de la terre.

C'est notamment au sein de la Sous-Commission de la promotion et de la protection des droits de l'homme, créée par la Commission des droits de l'homme, qu'un travail d'envergure a été réalisé depuis sa création pour aler-

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ter l'opinion publique sur les souffrances intolérables subies par des centaines de millions d'êtres humains. Cette Sous-Commission a été et continue d'être le laboratoire international où experts et organisations non gouvernementales (ci-après les « ONG ») se mobilisent pour examiner, analyser, expérimenter et mettre sur pied des études, des recommandations et des projets d'instruments internationaux sur les droits de l'Homme s'adressant aux gouvernements en particulier, pour les alerter, les sensibiliser et les motiver afin qu'ils mettent fin à des situations caractérisées de violations des droits les plus élémentaires de leurs ressortissants et de tous ceux qui, sur leur territoire ou en dehors de leurs territoires, sont exposés aux pires violences.

Asbjørn Eide, que j'ai connu dès les années quatre-vingt et avec qui j'ai collaboré à ce jour, s'est distingué par ses connaissances, son dévouement à l'idéologie des droits de l'Homme, les causes engendrant leurs violations et les politiques à suivre pour y remédier. La communauté internationale lui doit de solides études notamment sur le racisme, le droit des minorités et une déclaration sur le droit à l'alimentation, problèmes qui lui ont été confiés par la Sous-Commission et dont les résultats ont reçu une approbation unanime.

Cette Sous-Commission a contribué à lever le voile sur des problèmes qui, dans certains cas, étaient considérés comme des sujets tabous, tels les pratiques traditionnelles. La Sous-Commission a toutefois su faire preuve de tact, de patience et de constance pour arriver au fil des années, à partir de 1982, à analyser ce sérieux problème avec la participation active des ONG, et notamment du Comité inter-africain présidé par une militante, Madame Ras-Work.

2. L'origine des pratiques traditionelles

Mais avant de parler de cette grave question de droits de l'Homme que constituent les pratiques traditionnelles affectant tout particulièrement les femmes et les fillettes, il conviendrait de se demander d'où viennent les traditions, en général, afin de ne pas émettre de jugements préconçus de nature à porter atteinte aux droits les plus importants pour la paix et l'entente entre les peuples, à savoir la compréhension, la tolérance et le respect entre tous les êtres humains.

Les peuples de la terre se distinguent, entre eux, non seulement par la nationalité, la religion, la civilisation, mais encore par leur mentalité. Cette mentalité reflète de façon fidèle la vie de ces peuples, et selon Luis Gardet, cette « mentalité présuppose donc l'appartenance à une culture, à une civilisation que l'on accepte, dont on est fier le plus souvent. Elle est une vision du monde et elle commande le comportement quotidien ». Cette mentalité, forgée par les us, les coutumes et les valeurs spirituelles humanitaires et sociales, est l'expression profonde du mode de vie de peuples en tant

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qu'entités, d'un peuple parmi d'autres ou d'un groupe de personnes au sein d'un peuple.

Bien avant que ne soit solidement ancrée la notion de nation et d'appartenance à cette nation, les relations humaines se centraient au sein d'un groupe, d'une tribu, d'un clan, d'une famille et d'une aire géographique, où les traditions et les coutumes héritées de générations en générations étaient respectées, et même jalousement gardées.

A ce propos, il est intéressant et, dans une certaine mesure, réconfortant pour ceux qui sont attachés aux bonnes traditions, de relever qu'un chef d'Etat européen avait, dans un discours célèbre prononcé en septembre 1984, défini ce qu'il entendait être son pays : « le pays où l'on est né et où l'on grandit, où l'on se sent chez soi. Cela comprend les hommes, la famille et les amis, les relations avec les voisins, la communion avec la ville, le village, la région, les souvenirs de la maison paternelle, l'église et d'adhésion aux valeurs et aux formes de vie du pays ».

Il a fallu des siècles et des siècles de guerres, d'affrontements, d'asservissement, de persécutions dues au sentiment de supériorité de certains peuples, aux ambitions grandioses, à la soif de conquêtes et de richesses, puis un siècle de bouleversements politico-socio-économiques, de prédominance des moyens de communications et d'informations pour que les peuples d'aujourd'hui, à quelques exceptions près, se recherchent, s'étudient mutuellement, tentent de comprendre ce qui était étrange et par conséquent condamnable, s'engageant ainsi sur la voie d'une découverte qui, dénuée de passion, de fanatisme, d'orgueil, de présomption, d'égocentrisme et de courte vue, les amènera un jour tous à se connaître, à se faire confiance, à se respecter et à s'estimer.

Les domaines qui ont suscité le plus d'incompréhension, de mépris et d'intransigeance, entraînant, la plupart du temps, des incompatibilités et des tensions dans les relations entre des peuples, des groupes de personnes et des individus ont été ceux de la culture, de la religion, des coutumes et des traditions. Si cette tendance antisociale a nettement perdu de son intensité, il n'en demeure pas moins que nombre de sociologues, de politiciens, d'écrivains tiennent encore à mettre l'accent sur la nécessité pour les étrangers de dépasser ce cap malencontreux et de faire preuve d'ouverture sur le monde extérieur en s'armant de l'impartialité et de la neutralité nécessaires à l'étude de ce sujet.

Lorsque l'on sait que l'attachement à un milieu d'origine, à une tribu, à un village, une ville ou un pays découle d'une fidélité aux traditions et aux coutumes de vie, forgées par une civilisation, une culture, des croyances et des conditions sociales qui se traduisent, à ce jour encore, dans de très nombreux pays par le respect du droit coutumier, on comprendra aisément l'importance qu'il y a lieu d'accorder aux sages conseils de prudence, de

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doigté, de compréhension, de jugements mesurés et réalistes, prodigués aux profanes qui veulent étudier les pratiques traditionnelles.

Sous le vent du progrès et de la modernité avec tout ce que cela comprend de mobilisation, de différentiation et de laïcisation, les traditions et leurs pratiques ont déserté les sociétés occidentales désormais marquées par l'industrialisation, le développement économique et social, des changements sans précédent dans les attitudes et les comportements conduisant à l'émancipation, à un individualisme plus prononcé, à l'éclatement de la famille et à la libération des mœurs.

En revanche, la pauvreté, l'ignorance, l'emprise de la religion, souvent mal interprétée, les croyances, le respect des structures familiales et des contraintes sociales, et, facteur à ne pas négliger, le colonialisme, ont contribué dans les pays du tiers-monde à maintenir des traditions – parfois millénaires – et à perpétuer des pratiques auxquelles des sociétés traditionnelles s'adonnent avec conviction et fidélité parce qu'elles ont toujours fait partie de leur vie quotidienne pour en avoir hérité de génération en génération.

3. Les femmes, victimes des pratiques traditionelles

Un phénomène nouveau s'est malheureusement manifesté ces dernières années qui, sous prétexte de lutter contre la modernité, considérée comme une agression culturelle ou, plus exactement, venue de l'Occident pour bouleverser tous les acquis du passé, conduit des peuples sous la direction de dirigeants passionnément nationalistes et parfois même fanatiques, à retourner aux sources les plus rigides et disons-le, les plus rétrogrades de leur civilisation et de leur culture. Or, les femmes, au sein de ces peuples, sont celles qui sont les plus affectées par ce rejet de la modernité et par les traditions néfastes dont elles sont victimes. Elles en sont les victimes, mais également les éléments moteurs. En effet, s'il est vrai que, depuis les temps les plus reculés, l'homme a forgé toutes les pratiques qui ont marqué les peuples du monde, il semble également vrai que ce sont les femmes qui les ont perpétuées à ce jour dans les sociétés traditionnelles. C'était là leur façon de se créer une sorte de pouvoir au sein de la famille face à la domination de l'homme.

Par ailleurs, lorsque l'on parle de pratiques traditionnelles, il convient également de dire que leur survivance doit avoir sa justification, tout au moins aux yeux de ces peuples qu'elles soient bonnes, rétrogrades ou nocives. Ces pratiques auraient pu continuer d'être le patrimoine exclusif des sociétés traditionnelles, si celles-ci étaient restées isolées d'un monde qui, depuis plus d'un siècle, est entré de plein pied dans une ère de révolutions sociales, économiques et culturelles, qui a balayé toutes les données classiques et bouleversé les mentalités. Grâce aux progrès de la science et de la

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technologie, les continents se sont rapprochés et les frontières ont éclaté. Face à cette vague irrésistible, aucun pays, aucun peuple, aucune société ne pouvait demeurer caché, isolé, ignoré.

L'essor des droits de l'Homme, à partir de la Déclaration universelle des droits de l'Homme, contribua à accélérer plus encore le processus de recherche de violations des droits de l'Homme et d'alerte de l'opinion internationale. Ce fut l'ONG « Terre des Hommes » qui, la première en 1975 tenta d'alerter la communauté internationale sur les méfaits de la pratique traditionnelle de l'excision féminine. Mais le sujet était trop sensible pour être abordé ne serait-ce que superficiellement. En effet, toute pratique liée à la culture et sujette à des croyances à haute charge émotionnelle, ne pouvait, sur le plan international, faire l'objet d'une étude ou d'une recommandation positive.

Ce fut toutefois en 1981, à l'occasion de l'étude par la Sous-Commission du rapport de son groupe de travail sur l'esclavage, que la question de la circoncision féminine fut soulevée par la représentante de l'ONG *Anti-slavery*. Néanmoins, la responsabilité ayant été imputée à l'Islam, ce qui risquait d'engager les débats sur une base équivoque et dénuée de fondement, je m'opposai, en tant que membre de la Sous-Commission, à l'étude de ce sujet.

En 1982, le sujet fut de nouveau introduit mais cette fois avec la rigueur et l'objectivité qui s'imposaient, étant donné que les informations collectées par l'ONG concernée avaient démontré que l'excision féminine était pratiquée dans les sociétés musulmanes, chrétiennes, juives ou animistes d'un certain nombre de pays africains. Le problème était de taille car les informations fournies, principalement sur vingt-huit pays africains, indiquaient que chaque année, deux millions de fillettes étaient circoncises. La méthode de circoncision ou d'excision des fillettes, âgées de quatre à douze ans était telle, sur le plan de l'hygiène et des instruments utilisés, qu'elle entraînait souvent la mort. Les autres, souvent traumatisées à vie, avaient à souffrir des conséquences de cette pratique, à savoir de diverses maladies gynécologiques.

Aussi la Sous-Commission, dans le cadre des responsabilités qui lui incombent en matière de protection et de promotion des droits de l'Homme, adopta le 7 septembre 1982 une résolution priant deux de ses experts d'effectuer une étude sur tous les aspects du problème et sur les meilleurs moyens d'y remédier afin de lui soumettre leurs recommandations. Cette résolution fut adressée à la Commission des droits de l'Homme. Les membres africains de la Commission où cette pratique était courante ne manifestèrent aucun enthousiasme face à la recommandation de la Sous-Commission.

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Il fallait les comprendre car ils se voyaient directement visés et mis sur la sellette. Il fut heureux que le représentant du Sénégal fasse preuve de tolérance et, en proposant des amendements à la résolution de la Sous-Commission, amena la Commission des droits de l'Homme à adopter une résolution qui ne traitait par uniquement de l'excision, mais demandait que l'étude couvre toutes les pratiques traditionnelles affectant la santé des femmes et des enfants. Aux termes de cette résolution, un groupe de travail fut créé en mars 1985, comprenant deux experts de la Sous-Commission et des représentants de l'OMS, de l'UNICEF et de l'UNESCO, avec pour mission de procéder à l'étude des pratiques nocives exercées contre les femmes et les enfants et de présenter un rapport à la Commission des droits de l'Homme. Bien que n'étant plus membre de la Sous-Commission, celle-ci, dans le cadre d'une décision exceptionnelle, me désigna pour la représenter avec l'expert indien qui proposa ma candidature pour présider le groupe de travail. Il convient de noter que de nombreuses ONG participèrent avec enthousiasme aux travaux du groupe.

A sa première session, le groupe de travail procéda à un échange de vues général sur les pratiques traditionnelles affectant la santé des femmes et des enfants. Je proposai au groupe d'établir une liste de pratiques traditionnelles les plus pernicieuses pour les femmes et les enfants et d'établir un ordre de priorité dans notre agenda en fonction de certains critères, à savoir : (a) ampleur du phénomène : taux de mortalité et de morbidité ; (b) possibilité de modifier la pratique ; (c) degré de sensibilisation de la communauté internationale et documentation disponible.

La liste soumise au groupe par le délégué de l'OMS comprenait l'excision féminine, les autres formes de mutilation (scarifications faciales), le gavage des femmes, le mariage précoce, les divers tabous nutritionnels et les pratiques traditionnelles entourant la naissance. De même, furent mentionnés le problème de la dot dans certaines régions du monde, les crimes d'honneur et les conséquences de la préférence accordée à l'enfant mâle. En se basant sur les critères fixés et sur l'effet direct des pratiques sur la santé et l'épanouissement des femmes, tous les membres du groupe furent amenés à étudier en premier lieu l'excision. C'est ainsi que l'objectif que s'étaient fixés les ONG, la Sous-Commission et certains experts du groupe de travail fut pleinement atteint puisque le groupe consacra tout le temps voulu à l'étude de cette question et se basa sur des informations fiables et utiles pour passer en revue tous les aspects du problème.

Compte tenu de la réaction enregistrée à la Commission des droits de l'Homme, j'avais tenu en tant que Président rapporteur à ce que le groupe soit prudent dans la préparation du rapport à soumettre à la Commission. Ainsi, il fallait clairement démontrer les méfaits de l'excision sur la santé des enfants et des femmes, en évitant d'entrer dans certaines considérations va-

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lables en Occident, mais considérées comme allant à l'encontre des valeurs morales des sociétés traditionnelles. De plus, il ne fallait en aucune manière porter un jugement pouvant être offensif. Tout au long des travaux, le groupe partagea l'opinion exprimée par les ONG, à savoir que cette pratique constituait une violation des droits de l'Homme au regard des normes définies dans les instruments internationaux. Mais le dire ou l'écrire, de but en blanc, n'allait pas rendre service à la cause. Aussi, le rapport se garda bien de commettre une telle erreur. Il était plus sage que l'étude amène les lecteurs, et en particulier les plus concernés, à réaliser la gravité du problème. Je pris sur moi de rédiger la partie, disons politique, du rapport. C'est ainsi que dans la conclusion et plus particulièrement dans la partie ayant trait aux conséquences, on peut lire :

> Il est intéressant de relever que certaines pratiques traditionnelles étaient destinées, dans les sociétés traditionnelles, à mieux insérer l'individu dans son milieu afin de le faire bénéficier de tous les droits que ces sociétés reconnaissaient à l'individu.
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> Aujourd'hui, en raison de l'évolution intervenue dans les sociétés traditionnelles sous l'effet de divers facteurs, ces pratiques se trouvent être en contradiction avec les normes nouvelles définies par divers instruments internationaux relatifs aux Droits de l'Homme.

Le rapport indiquait qu'à la lumière de ces principes, tous les Etats qui ont ratifié ces instruments internationaux « sont confrontés à l'incompatibilité qui existe, à l'heure actuelle, entre les obligations qu'ils assument en tant qu'Etats parties de ces conventions et le maintien de certaines pratiques traditionnelles, préjudiciables à la santé physique et mentale des femmes et des enfants. » Le groupe de travail ayant achevé son étude dans les délais prévus, son rapport fut présenté à la Commission des droits de l'Homme au cours de sa quarante-deuxième session en 1986.

Consciente du choc que ce rapport allait provoquer au sein de la Commission, je contactai, au préalable, de nombreuses délégations pour que leurs commentaires ne mettent pas les délégués africains dans une situation délicate, d'autant plus que la question des pratiques nocives n'était plus considérée dans son aspect social ou préjudiciable à la santé, mais bien dans le cadre des droits de l'Homme, ce qui constituait une première dans les annales de la Commission. Les réactions ne se firent pas trop attendre puisqu'en mars 1988, la Commission demandait à la Sous-Commission d'étudier les mesures devant être prises aux niveaux national et international pour éliminer ces pratiques et de lui présenter un rapport. C'est ainsi que la Sous-Commission a été appelée à nommer un rapporteur spécial et à suivre de très près la question à travers les divers rapports qui lui furent soumis à partir de 1989. Sur sa proposition, la Commission des droits et l'Homme approuva en 1990 la tenue de deux séminaires sur le problème des pratiques nocives pour les fem-

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mes et les enfants. L'objectif du premier séminaire qui réunit au Burkina Faso une quinzaine de pays du continent, était d'évaluer les implications pour les droits de l'Homme de l'excision féminine, la préférence accordée à l'enfant mâle et des pratiques entourant la grossesse et l'accouchement. De plus, des informations relatives aux mesures prises aux niveaux gouvernemental et non gouvernemental devaient être fournies par les participants au séminaire. L'expérience fut extrêmement riche et enrichissante. Les participants engagèrent un débat, au cours duquel les difficultés et les obstacles évoqués ainsi que les questions et les réponses données démontrèrent l'intérêt largement suscité par les problèmes étudiés, en particulier l'excision féminine. Il fut question de la rigidité des traditions, du contexte socioculturel qui les perpétue, des facteurs économiques sous-jacents, du facteur religieux qui favorise les hommes au détriment des femmes, du système de l'héritage, des disparités entre les sexes notamment en matière d'éducation, du rôle joué par les femmes dans la perpétuation de traditions qui leurs sont pourtant défavorables ou néfastes, ainsi que l'ignorance et de la pauvreté qui affectent plus particulièrement les femmes. Le constat qui se dégagea de ce séminaire fut que la persistance de ces pratiques était due à l'absence de volonté politique des gouvernements et au manque d'information et d'éducation des populations. Partant de ce constat, les participants au séminaire adoptèrent une série de recommandations ayant trait à l'action à entreprendre aux niveaux national et international. Ce séminaire devait permettre de dégager les grandes lignes de l'action à poursuivre par la Sous-Commission. De plus, il ouvrait la voie à suivre aux participants du second séminaire qui eut lieu trois ans plus tard au Sri Lanka.

Ce séminaire avait à débattre des mêmes problèmes que ceux traités par la rencontre au Burkina Faso, mais étudia également les pratiques nocives affectant les femmes du continent asiatique telles le mariage et la dot et leurs conséquences socio-économiques sur les jeunes femmes, le statut des femmes divorcées, la violence y compris la mutilation et l'immolation. Dans le cadre du premier point de l'ordre du jour du séminaire, les conséquences de la préférence accordée à l'enfant mâle, phénomène presque mondial, l'infanticide des filles, les avortements sélectifs, le rôle des femmes dans la persistance du favoritisme envers les garçons et les raisons socio-économiques et religieuses à la source de cette préférence ont été largement commentés. L'une des conséquences de cette pratique se reflète à travers de simples statistiques établies par les spécialistes en matière de populations. Ceux-ci ont indiqué qu'en dépit de la force biologique des femmes, qui auraient dû dépasser le nombre d'hommes, le pourcentage de femmes a atteint en Asie un taux très inférieur par rapport au pourcentage d'hommes.

On a remarqué, à cet égard, que l'Asie est un continent de contrastes, où d'une part on compte un certain nombre de femmes premiers Ministres mais

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où, d'autre part, les filles ne revêtent de valeur, aux yeux de leurs parents, qu'à condition de pouvoir, par leur travail ou leurs activités, assurer la sécurité économique des parents.

Les pratiques nocives entourant la grossesse et l'accouchement, et les mariages précoces ont été analysés, mais la violence à l'égard des femmes et les moyens d'y mettre fin ont retenu particulièrement l'attention des participants. Il a été reconnu que la violence est un phénomène universel, mais que ses manifestations diffèrent. La violence familiale et sociale, le viol, l'absence de contrôle par la femme de sa fertilité, l'inceste, la prostitution, les femmes battues, brûlées, mariées contre leur gré et le silence entourant ces violations massives et continues ont été longuement analysés. En fait, ont conclu les participants au séminaire, pour une large majorité de femmes, le cycle de la violence commence à la naissance de la fille et se termine par une vieillesse délaissée. L'excision féminine, a-t-on dit, existe dans certains pays, mais il ne s'agit pas, contrairement à l'Afrique, de mutilation, mais d'une simple petite incision qui n'entraîne aucune conséquence sur la santé. Toutefois les organisations féminines ont étudié ce problème et engagé des négociations avec les responsables religieux, étant donné que cette pratique est dans ces pays attribuée à l'Islam. Tout comme au Burkina Faso, les participants parlèrent de la nécessité pour les gouvernements de faire preuve d'engagement, de l'éducation des femmes, de leur accès au pouvoir économique et politique, de la mobilisation de toutes les bonnes volontés et des moyens de protéger les femmes et les fillettes. A l'issue des débats, un petit groupe s'est réuni pour recueillir toutes les recommandations exprimées au cours du débat.

De plus, le groupe élabora, à la lumière des résultats de deux séminaires, un projet de programme d'action qui porta sur la l'excision féminine, la préférence accordée à l'enfant mâle, le mariage et les pratiques y afférentes, et la violence. Ce programme d'action devait être adopté par la Sous-Commission en août 1994. Depuis, le Rapporteur spécial sur les pratiques traditionnelles affectant la santé des femmes et des enfants a été reconduit dans son mandat. Aujourd'hui, celui-ci a pour objectif de suivre la mise en œuvre du programme d'action à la lumière des réponses données par les gouvernements afin d'informer la Sous-Commission et, par conséquent, la Commission des droits de l'Homme, des progrès réalisés ou non dans l'application des recommandations contenues dans le programme d'action. Sous la haute surveillance de la Sous-Commission de la promotion et de la protection des droits de l'homme, les progrès réalisés depuis 1982 ont été conséquents. Tout d'abord, à l'instar des ceintures de chasteté que jadis, en France, les hommes partant en guerre ou en croisade imposaient à leur femme et qui ont finalement disparu, les tabous entourant les pratiques traditionnelles nocives sont, aujourd'hui, définitivement levés. L'OMS,

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l'UNICEF, le HCR et le Fond des Nations Unies pour la Population (FNUAP) ont uni leurs efforts ces dernières années et consacrent une partie de leurs activités à la sensibilisation des populations et des gouvernements, accompagnée d'une assistance financière et technique. Certains gouvernements apportent une aide matérielle aux ONG s'occupant de l'élimination des pratiques traditionnelles nocives, notamment sur le terrain. La Commission des droits de l'Homme a nommé un Rapporteur spécial contre la violence, considérée comme une des graves violations affectant les femmes et les fillettes. Les Conférences de Vienne (1993) et de Beijing (1995) ont condamné sans équivoque les pratiques traditionnelles nocives et l'Assemblée Générale des Nations Unies adopte depuis quelques années une résolution spécifique sur ces pratiques. Il n'en demeure pas moins qu'il reste beaucoup à faire pour que soient respectées la dignité et l'intégrité des femmes et que les droits de l'Homme soient intégralement appliqués aux femmes dans le monde.

Quant aux pratiques traditionnelles affectant la santé des femmes et des fillettes, les études et les informations recueillies au cours des dernières années ont dévoilé des pratiques néfastes qu'il convient d'éliminer. Ainsi, en Afrique, il existe à ce jour des interdits traditionnels qui frappent particulièrement les femmes tels les interdictions d'une part aux femmes ménopausées d'avoir des relations sexuelles, et d'autre part aux femmes de voir une dépouille pendant leurs menstruations ou grossesse, même s'il s'agit de leur mari ou enfant. Par ailleurs, certaines sociétés pratiquent une coutume selon laquelle, lorsqu'une femme perd son mari, elle devient automatiquement la femme de son beau-frère. Celles qui sont condamnées au veuvage sont souvent rejetées par la société et se retrouvent dans la rue, dépouillées et sans ressources.

Quant aux fillettes, elles sont dans quelques pays d'Afrique condamnées à servir d'esclaves aux chefs religieux afin de laver les parents de péchés qu'ils auraient commis. Toutefois il convient de relever que cette pratique, en vigueur au Ghana, a fait l'objet de mesures de prohibition de la part du gouvernement. D'autres pays concernés devraient suivre cet exemple.

Les tabous et interdits entourant la grossesse et les accouchements sont nombreux, que ce soit en Afrique, en Asie ou dans des pays d'autres continents. La plupart de ces interdits, découlant de l'ignorance, de préjugés ou de croyances, portent préjudice à la santé des femmes, ce qui explique largement le phénomène de mortalité des femmes enceintes dans les pays en développement, où, par ailleurs, l'accès aux soins manque terriblement.

En Asie, les pratiques traditionnelles nocives pour les femmes et les fillettes ne se limitent pas aux problèmes de la dot, qui entraînent la mort de nombreuses jeunes épouses tuées par les beaux-parents pour la simple raison que la dot promise a été jugée insuffisante ou nulle. Elles ne se limitent pas

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non plus à la violence, à l'inceste dans la famille, au viol dans les rues, à l'infanticide des fillettes, à l'immolation des veuves, aux crimes d'honneur, aux femmes au long cou qui, dans un village de Thaïlande, font l'objet de visites spéciales de touristes ignorant les souffrances endurées, dès leur jeune âge, en raison des lourds colliers qu'on leur enfile au cou. Il y en a certainement d'autres, mais le silence entoure à ce jour des pratiques traditionnelles nocives, en dépit des appels répétés du Rapporteur spécial lancés en direction des ONG asiatiques.

Toutefois, tous les espoirs sont permis dans la lutte contre les pratiques traditionnelles nocives, à condition que cette lutte se base sur le dialogue, l'éducation dès le plus jeune âge, l'information et la sensibilisation des populations concernées, avant l'adoption de mesures répressives. On ne saurait trop insister sur la nécessité de souligner que toute politique visant à l'élimination des pratiques nocives doit être respectueuse de l'identité des populations concernées. De plus, cette œuvre de longue haleine, entreprise par la Sous-Commission de la promotion et de la protection des droits de l'homme, requiert une solidarité agissante et sans faille. Certes, la volonté politique des gouvernements est une nécessité sur laquelle on ne saurait trop insister. Mais au-delà des gouvernements, il y a tous ceux qui jouent un rôle majeur dans la vie nationale et qui doivent aussi s'impliquer. Je pense aux politiques, aux syndicats, aux parlementaires, aux responsables des médias de masse, aux responsables religieux et aux personnes dotées d'une autorité morale ou intellectuelle, et bien sûr aux associations féminines et aux ONG. La lutte contre la discrimination et l'injustice à l'égard des femmes, qui se traduisent entre autres par des pratiques répressives, exige de nous tous sans exception, une attention constante, un engagement à toute épreuve et une coopération active aux niveaux national et international.

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An attempt has been made to be comprehensive; however, considering the diversity and quantity of Asbjørn's authorship, this seems an unattainable goal. The compiler would therefore appreciate being notified of any omissions.

The bibliography includes books, reports, articles, and selected newspaper items. Reports of official committees on which Eide sat are also included. Draft editions, translations, parallel publications, and reprints are, as a rule, not included.

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