

INTERNATIONAL PROTECTION OF CIVIL RIGHTS
VERSUS
STATE SOVEREIGNTY

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in partial fulfilment of the requirements
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INTRODUCTION

Very frequently, international protection of civil rights is limited by the defensive doctrine of state sovereignty. The affected individuals, especially those within the territories of and/or under the jurisdictions of states which have not undertaken any corresponding treaty obligations, are eager to have at least some form of international protection that pierces the veil of state sovereignty. Contemporary international law, therefore, is asked to provide a solution to the confrontation of the two international rules: the rule of international protection of civil rights and the rule of state sovereignty.

The subject of this dissertation is to examine the nature and sources of international protection of civil rights, with an emphasis on customary law and *jus cogens* of civil rights, and to examine the relationship between those norms and state sovereignty.

The thesis of this dissertation is that, because of customary norms of civil rights and the *jus cogens* nature of some civil rights, international obligations to respect and to observe many of the civil rights enumerated in Universal Declaration of Human Rights (the Universal Declaration)¹ and the International

¹ This declaration was approved by the UN General Assembly on December 10, 1948. Forty-eight states voted in favour, none against, and eight abstained (including Byelorussia,

Covenant on Civil and Political Rights (the Covenant)² further extend to non-signatories to the Covenant such as China, and that nationals of a non-treaty state to the Covenant affected by the government of that state do have some access, though limited in certain circumstances, to international protection.

International protection of civil rights is an emerged or emerging principle in international law. This idea is by no means something completely new. It has developed from a broad concept of international protection of human rights. The term "civil rights" as used in this thesis indicates a sub-category of the entire corpus of human rights. As opposed to comprehensive spectrum of political, social, economic and cultural rights enumerated in a variety of international documents, international protection of civil rights only concerns those rights designated as being civil in the Universal Declaration and its follow-up legal contract: the Covenant. To distinguish international protection of human rights in general from international protection of civil rights in particular helps to reveal the development and present status of international protection of civil rights. Such a narrowed-down approach perhaps offers us a better picture of the normative question of some specific rights in international law.

Czechoslovakia, Poland, the Ukraine, the Soviet Union, Yugoslavia, Saudi Arabia and the Union of South Africa). G.A. Res. 217 A. U.N. Doc. A/810 at 56 (1948).

² Entered into force March 23, 1976, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 52, U.N.Doc. A/6316 (1966).

Historically, how a state treated persons within its territory was completely its own affair, implicit in its sovereignty over its own territory and in the freedom to act there as it wants unless specifically forbidden by international law. The world of states emphasized the commitment to state values---state equality, autonomy, independence, impenetrability, national interest and sovereignty. Such state values, very often, were achieved or preserved at a great sacrifice to the rights and interests of individual human beings under the states' jurisdiction. The system of international law did not penetrate the state monolith, did not address---or even look at individual human beings directly, did not secure them from governmental indifference, mistakes, misdeeds. At the same time, international law had little to say about mistreatment of persons by their own government.

At the termination of the Second World War, two events completely changed the status of individuals under international law. Both were closely connected with Nazi actions and with other atrocities committed before and during the war. The first event was the punishment of war criminals at Nuremberg and Tokyo; the second was the desire to prevent the recurrence of such crimes against humanity through development of new standards for the protection of human rights. The war crimes tribunals pointed out that international law was not concerned solely with the actions of sovereign states, but "imposed duties

and liabilities upon individuals as well as upon states."³

In a parallel development, individuals gained rights under international law and, to some extent, means for vindication of those rights on the international plane. This development entailed four different law-building stages: (a) assertion of international concern about human rights in the Charter of the United Nations;⁴ (b) listing of those rights in the Universal Declaration of Human Rights; (c) elaboration of the rights in the International Covenant on Civil and Political Rights and the Optional Protocol to the Covenant; and (d) the progressive formation of customary norms of civil rights for international protection. The pyramid of documents, with the UN Charter at its apex, has become a veritable internationalization and codification of human rights law, and an international bill of rights for international protection of human rights in general and civil rights in particular.

Penetrating state values to pursue safeguarding individual values is the essence of international protection of civil rights.⁵ Nation-states, by observing international norms based

³ The Nuremberg Trial, 6 F.R.D.69, 110 (1946); see L. Sohn, "Case on United Nations Law," 898-967 (1st ed. 1956).

⁴ See e.g., UN Charter Art.1, para.3 and Art.55. The UN Charter gives to the Economic and Social Council the responsibility for making "recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." *Ibid.* Art. 56, Art. 62, para. 2. See also *ibid.* Art.13, para.1(b).

⁵ See Louis Henkin, "International Law: Politics, Values and Functions," 216 *Recueil des Cours* (1989-IV), at 215.

upon either customary norms or international human rights instruments, adhere to the rule of civil rights protection, and ensure the implementation of civil rights within the territories under their jurisdictions. The historical development after the end of World War Two has witnessed the human rights movement which has represented radical change in the assumptions of the inter-state system and has signalled radical change in international law, reflecting a commitment to human rights, rather than to state values, even when the two conflict.

The concept of international protection of civil rights, like international protection of human rights generally, should also follow the norms set by international law.⁶ One of the tasks of an international lawyer, therefore, is to help identify whether or not an act of protection of a particular right rests upon a particular legal seat, i.e., whether or not it is based upon a treaty, a customary law rule or other source of international law. The significance of this endeavour, obviously, is to pave the way for future human rights protection. Once the legal basis is found, international organizations, or organs expressly entrusted with such function, or any states with entitlements or even injured individuals in certain circumstances may make claims for remedies.

⁶ In its judgement in the *Nottebohm* case (second phase), the International Court of Justice, referring to the institution of diplomatic protection, commented that "to exercise protection is to place oneself on the plane of international law. It is international law which determines whether a state is entitled to exercise protection..." I.C.J.Rep.1955, at 20-21.

Because of the adherence of the International Court of Justice to the traditional positivist theory that nation-states are mainly subjects of international law, and because the World Court hears cases that mainly concern with nation-states, the World Court has not been, so far, an important source of remedies available for individuals injured by their governments. In fact, up to now, the International Court of Justice is the least available source of remedies provided for the injured individuals as a result of deprivation of their civil rights. From this point of view, the International Court of Justice will not be cited by this thesis as a major available source of international remedies which can be easily resorted to by individuals.

The contributions of the International Court of Justice to the international protection of civil rights, however, should not be ignored. The World Court has been an important source of norms and principles in relation to international protection of human rights in general and civil rights in particular. The Court' opinion in the case of *Reservations to the Convention on Genocide*,⁷ Judge Tanaka's dissenting opinion in *South West Africa case*,⁸ and *Barcelona Traction's dictum*⁹ have confirmed

⁷ *Reservation to the Convention on Genocide*, 1951 I.C.J. Rep.15 (Advisory Opinion of 28 May), at 23.

⁸ Judge Tanaka delivered a much acclaimed opinion, which exerted a decisive influence on the opinion of the Court in the later case of *Barcelona Traction* of 1970. Judge Tanaka articulated in ringing words the intense and peremptory character of the human rights prescriptions:

the basic values of human dignity and have manifested the world's concerns about international protection of human rights in general. The World Court has contributed considerably, in particular, to the development of the *jus cogens* principle, which has manifestly and repeatedly reconfirmed the peremptory norms of some of civil rights. Furthermore, these opinions and the spirit of the opinions have been widely cited, as very convincing sources, both by various international documents and by international lawyers for advocating and advancing the international protection of basic and fundamental human rights. Also to be noted are the regional courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights, which have contributed substantially to the protection of human rights, and have provided a great bulk of valuable

If a law exists independently of the will of the state and, accordingly, cannot be abolished or modified even by its constitution, because it is deeply rooted in the conscience of mankind and of any reasonable man, it may be called "natural law" in contrast to "positive law". Provisions of the constitutions of some countries characterized fundamental human rights and freedoms as "inalienable," "sacred," "eternal," "inviolable," etc. Therefore, the guarantee of fundamental human rights and freedoms possesses a super-constitutional significance.

If we can introduce in the international field a category law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between states, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*.

1966, I.C.J. at 298.

⁹ ICL Rep., 1970, at 33.

legal opinions, which may be resorted to as analogies for international protection of civil rights. Because of the limited length of this thesis, the remedies available before other regional courts are not examined in detail.

This dissertation, consisting of four parts besides introduction and conclusion, discusses possible mechanisms to resolve these conflicting principles. Part One will address the question as to what form of legal protection international law can provide concerning civil rights in relation to those states which have not signed or accepted the International Covenant on Civil and Political Rights. Part Two of this dissertation concerns the issue of whether or not a non-signatory state to the International Covenant on Civil and Political Rights can use the existing rule of state sovereignty to shield that state from the censorship of the world community in order to escape its international obligations to live up to customary norms of civil rights. Part Three discusses what sort of international law rules respond to violations of international obligations to respect and to observe civil rights either under treaty or customary norms. Part Four, the last part of the thesis, identifies and discusses some of the difficult aspects of international remedies, such as the question of what kind of remedies, if any, the mechanism of international protection can provide for the injured nationals of a non-signatory state under international law when that state violates international obligations to respect and to observe the customary law of civil

rights.

CHAPTER ONE

LEGAL BASIS FOR INTERNATIONAL PROTECTION OF CIVIL RIGHTS

1.1. Customary International Law in General

International custom is traditionally accepted as one of the major sources of international law. Article 38 of the statute of International Court of Justice, regarded by most jurists as an authoritative statement of the sources of international law, allows the World Court to apply "international custom, as evidence of a general practice accepted as law"¹ along with international conventions, general principles of law recognised by civilised nations and, as a subsidiary means, judicial decisions and the writings of the most highly qualified publicists.²

The traditional explanations of the two main sources of law, treaties and custom, reflect the preoccupation of the international community with the preservation of state sovereignty. As Cassese notes, both sources "responded to the basic need of not imposing duties on such states as did not want

¹ The wording of Article 38.1(b) is rather confusing. It is generally accepted as meaning "international practice as evidence of a general custom accepted as law". See Greig DW, "International Law," 2nd ed., 1976, at 17; Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", 1965, 5 *Indian J Int L* 23, at 36.

² Jurists have debated whether Article 38 creates or recognises a hierarchy between the various sources of law. See Akehurst, "The Hierarchy of Sources of International Law," 1974-75, 47 *BYIL*, at 273; Bos, "The Hierarchy among the Recognised Manifestations 'Sources' of International Law," 1978, 3 *Neth ILR*, at 334.

to be bound by them. No outside "legislator" was tolerated: law was brought into being by the very states which were to be bound by it. Consequently there was complete coincidence of law-making and law-addressees".³

Traditional theories of the nature of obligation in international law are, then, positivist and individualistic: states are bound by international law only insofar as they consent to its rules. These theories are one aspect of what Cassese terms the "old" or "Westphalian" pattern of international law.⁴ The expansion of the international community to include a great number of states and international organisations, and recognition of the applicability of international law to individuals and groups within states, has allowed the purely voluntarist account of international law to be challenged by one based on communal interests, solidarity and idealism.⁵ On this "new" view, international law binds because it is necessary for stability and communication in the international community.⁶ Despite this challenge, the traditional, consent-based, theories of international law

³ See Cassese, "International Law in a Divided World," 1986, at 169.

⁴ *Ibid.*

⁵ *Ibid.*, at 398.

⁶ *Ibid.*, at 30-32, 396-407; H. Kelson, "Principles of International Law," 1952, at 307.

continue to have considerable and imaginative power.⁷

Treaty law binds only those states which have accepted its obligations. By contrast, most theorists accept that customary international law binds states generally whether or not they have formally consented to its rules.⁸ Oppenheim notes that

"[C]ustom is the older and the original source of international law in particular as well as of law in general. For this reason, although an international court is bound in the first instance to consider any available treaty provisions binding upon the parties, it is by reference to international custom that these treaties are interpreted in case of doubt."⁹

Professor D'Amato emphasizes the need for a custom in international law when he states that

"[T]he primary 'sources' of international law, as any textbook on the subject will report, are custom and treaty. The latter is, of course, increasingly significant as states find it in their self-interest to make explicit agreements with other states for their mutual benefit and to avoid future conflicts. But of the two, perhaps custom is the more important, for it is generally regarded as having universal application, whether or not any given state participated in its formation or later 'consented' to it."¹⁰

Lissitzyn observes that

"[I]ndeed, it may be asked why 'custom' or 'general practice' should be binding on states. The answer must be sought not in legal abstractions but in the realities of international life. Uniformity of conduct and the process

⁷ See Weil, "Towards Relative Normativity in International Law?", 1983, 77 AJIL 413, at 420.

⁸ See Akehurst, "Custom as a Source of International Law," 1974-75, 47 BYIL, at 1, 23.

⁹ See H. Lauterpacht (ed.), "Oppenheim's International Law," 1955, 8th ed., at 26.

¹⁰ See A. D'Amato, "The Concept of Custom in International Law," 1971, at 4.

of 'reciprocal claims and mutual tolerance' often create expectations of continuation of the same kind of conduct. States and other interested entities, including private persons, develop their policies and plan their actions on the basis of such expectations. There is, therefore, a common interest in the fulfilment of these expectations and in the stability of conduct. This interest is translated into the doctrine that 'custom' or 'general practice' create legally binding norms."¹¹

Kunz explicitly expresses his view that

"[C]ustomary law, like all law, is positive, man-made law. Law regulates its own creation. Treaty and custom are two different, independent procedures for creating international legal norms...Custom can lead to norms of particular or general international law...Some writers see in custom a secondary procedure. But it is, in fact, not only the older, but also the hierarchically higher form of creating norms of international law."¹²

Waldock is of the view that customary law is an independent form of law; and that, when a custom satisfying the definition in Article 38 of the Statute of the International Court of Justice is established, it constitutes a general rule of international law.¹³

This aspect of custom is typically reconciled with a consensual theory of international law by the device of the "persistent objector" principle which allows a state to opt out

¹¹ See O.J. Lissitzyn, "International Law Today and Tomorrow," 1965, at 34-35.

¹² See J.L. Kunz, "The Nature of Customary Law," 47 Am. J.Int'l L., 1953, at 665; see also C.C. Hyde, "International Law," 2nd ed., 1945, vol. II, 1945, at 10; H. Lauterpacht, "Oppenheim's International Law: A Treatise," 7th ed., 1948, vol. I, at 25; Verdross in 30 Recueil des Cours (1929-V), at 293; Kelsen, "Principles in International Law," 1952, at 314.

¹³ See H. Waldock, "General Course on Public International Law," 106 Recueil des Cours (1962-II), at 49.

of a particular customary norm in the process of formation.¹⁴ Unless a state persistently objects to a rule of custom in its formative phase, it is assumed to have tacitly accepted the rule.¹⁵ The persistent objector principle, however, is usually assigned very limited scope.¹⁶ Moreover, its function as anything more than a negotiation tool between states has been forcefully questioned.¹⁷ On the other hand, it is no less clear that, if a custom becomes established as a general rule of international law, it binds all states which have not opposed it, whether or not they themselves played an active part in its formation. This means that in order to invoke a custom it is not necessary to show specifically the acceptance of the custom as law by that state; its acceptance of the custom will be presumed so that it will be bound unless it can adduce evidence of its

¹⁴ See Thirlway, "International Customary Law and Codification," 1972, at 74-75.

¹⁵ See Brownlie, "Principles of Public International Law," 3rd ed., 1979, at 10-11.

¹⁶ Villiger argues that "meticulous compliance" with two conditions is necessary: the objection must begin before the formation of the rule and continue after its formation; and the objection must be maintained consistently. See Villiger, "Customary International Law and Treaties," 1985, at 16. Also see Thirlway, "International Customary Law and Codification," 1972, at 110; Brownlie, "Principles of Public International Law," 3rd ed., 1979, at 9; D'Amato, "The Concept of Custom in International Law," 1971, at 187-195, 261.

¹⁷ See Charney, "The Persistent Objector Rule and the Development of Customary International Law," 1986, 56 BYIL 1, at 18, 22-23.

actual opposition to the practice in question.¹⁸

Apparently bearing in mind that custom in international law has universally legal binding effect upon states, the World Court, on many occasions, has made efforts to seek out customary norms. For instance, in the *Lotus (France v. Turkey)* case, the Permanent Court of International Justice held that "[I]n principle a court is presumed to know the law and may apply a custom even if it has not been expressly pleaded."¹⁹

Since the late nineteenth century, international legal scholars have adopted from domestic jurisprudence the belief that legally recognisable, as opposed to merely social, custom is composed of two distinct elements, one material and objective, the other psychological and subjective.²⁰ The first element is usage or practice of the custom, the second is *opinio juris sive necessitas*, the belief that the usage is a legal right.²¹ This apparently neat formula, described as "axiomatic" by the International Court of Justice in its decision in the *North Sea Continental Shelf* cases has provoked great controversy both as to the manner of its satisfaction and as to the

¹⁸ See H. Waldock, "General Course on Public International Law," 106 *Recueil des Cours* (1962-II), at 49-50.

¹⁹ PCIJ. Ser. A, No. 10, 1927, at 18.

²⁰ See D'Amato, "The Concept of Custom in International Law," 1971, 47-49.

²¹ See J. Brierly, "The Law of Nations," 6th ed., 1963, at 59; D.P. O'Connell, "International Law," 2nd ed., 1970, Vol 1, at 15.

relationship between its two elements.²²

1.1.1. State Practice

The activities of states take myriad forms. Some state actions have immediate and tangible manifestations (such as the invasion of another state, or the shooting down of another nation's aircraft), some are characterised by abstention (for example, nonretaliation for the shooting down of an airliner), some are statements or claims that do not have direct physical consequences (such as voting for a resolution in an international forum or demanding compensation for a wrong) and others are commitments to a particular course of action (for example, entering into a treaty). All international jurists accept that conscious acts or abstentions with direct or physical consequences qualify as state practice. Most jurists also agree that entry into binding agreements to take action similarly constitutes state practice.²³ Thus in the *North Sea Continental Shelf* cases both majority and dissenting Judges assumed that entry into the Geneva Convention on the Continental Shelf of 1958 as well as the conclusion of continental shelf delimitation agreements qualified as usage for the purposes of

²² *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands)*, ICJ, Rep., 1969, at 44-45.

²³ See Brownlie, "Principles of Public International Law," 3rd ed., 1979, at 5-6; Baxter, "Treaties and Custom," 1970, 129 HR 24, at 43.

formation of custom.²⁴

Controversy surrounds the extension of the category of state practice to less tangible forms of activity such as claims and statements of position. D'Amato, for example, confines state practice to acts which have physical consequence and he rejects claims or statements because of their poor predictive power as to what states will actually do.²⁵ Without this quantitative or concrete element, he reasons, "one could not tell which of the numerous and often contradictory articulated norms were actually embodied in customary law".²⁶ This element also offers a certainty unavailable when relying on claims alone:

Many contradictory rules may be articulated, but a state can only act in one way at one time. The act is concrete and usually unambiguous. Once the act takes place, the previously articulated rules contrary to it remain in the realm of speculation. The state's act is visible, real and significant; it crystallizes policy and demonstrates which of the many possible rules of law the acting state has decided to manifest.²⁷

Resolutions of the General Assembly cannot, on D'Amato's analysis, constitute state practice because they are not formally binding. At best they can provide the "element of articulation" of a rule of custom, the concept D'Amato uses to

²⁴ North Sea Continental Shelf cases, ICJ Rep. 1969, at 3.

²⁵ See D'Amato, "The Concept of Custom in International Law," 1971, at 89-90; see also *Anglo-Norwegian Fisheries case*, ICJ Rep. 1951, at 191.

²⁶ *Ibid.*, at 87.

²⁷ *Ibid.*, at 88.

replace *opinio juris*.²⁸

D'Amato's attempt to confine state practice to quasi-physical activity (or deliberate inactivity) is challenged by other writers. Akehurst, for example, points out that physical acts by states do not necessarily produce more consistency than claims or statements do and that in certain international contexts (such as recognition) distinguishing between actions and statements is artificial.²⁹ He also argues that giving treaty commitments the status of acts does not fit logically with denying that status to claims and statements.³⁰ Akehurst, and others such as Brownlie and Greig who are not in direct debate with D'Amato, support a wider notion of state practice, one that would encompass any act or statement by a state, made in a concrete or abstract context, from which its attitude towards a particular customary law can be inferred.³¹ General Assembly resolutions can thus qualify as state practice if they purport

²⁸ *Ibid.*, at 78-79. Compare MacGibbon, "General Assembly Resolutions: Custom, Practice and Mistaken Identity," in Cheng ed., *International Law: Teaching and Practice*, 1982, at 10 (arguing that General Assembly resolutions cannot, by their very nature, constitute either state practice or *opinio juris*).

²⁹ See Akehurst, "Custom as a Source of International Law," 1974-75, 47 BYIL, at 3.

³⁰ *Ibid.*

³¹ See Brownlie, "Principles of Public International Law," 3rd ed., 1979, at 5; R. Higgins, "The Development of International Law Through the Political Organs of the United Nations," 1963, at 2; Sloan, "General Assembly Resolutions Revisited (Forty Years Later)," 1987, 58 BYIL 39, at 72-74.

to state a rule of *lex lata* rather than *lex ferenda*.³² The probative force of such statements will be affected by the voting figures, the reasons given by states for their votes and whether the resolution is latter confirmed by practice.

The International Court of Justice has never provided detailed guidance on the issue of how widely accepted a practice must be to qualify as a norm of general customary international law or "extensive" state practice as necessary.³³ The implications of states' inaction in relation to a particular practice are ambiguous: inaction or silence may mean acquiescence to, disinterest in or rejection of a rule of custom.

A related issue raised in the definition of state practice for the purpose of the formation of custom is the duration and consistency of the practice. Most jurists accept as a general rule that duration has an inverse relationship to consistency: the shorter the duration of a practice, the more consistent it must have been.³⁴ In principle, then, customary law can develop

³² See Akehurst, "Custom as a Source of International Law," 1974-75, 47 BYIL, at 5-6.

³³ See Skubiszewski, "Elements of Custom and the Hague Court," 1971, 31 Z Aus of R V 810, at 827-830.

³⁴ E.g., Villiger, "Customary International Law and Treaties," 1985, at 25; Skubiszewski, "Elements of Custom and the Hague Court," 1971, at 832-837; Akehurst, "Custom as Source of International Law," 1974-75, 47 BYIL, at 12; The Restatement of the Foreign Relations Law of the United States (Third) (1987), para 102 Comment b.

in very short space of time.³⁵ In the North Continental Shelf cases the International Court of Justice spoke of the need for "virtually uniform" state practice.³⁶ This strict formula may have been employed in the North Sea Continental Shelf cases because the equidistance rule argued for by the Netherlands and Denmark involved the transformation into custom of a treaty provision which altered existing customary international law and because of the short period in which it was asserted that the principle had been generated. However, other decisions of the International Court have also stressed the importance of consistency. In the *Anglo-Norwegian Fisheries* case "substantial uniformity" was demanded of state practice.³⁷ In the *Asylum* case a regional customary law allowing a host state to qualify political offenses for the purposes of diplomatic asylum was not found established because of the inconsistencies in practice:

The facts brought to the knowledge of the court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in official views expressed on various occasions there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it has not been possible to discern in all this any constant and uniform usage, accepted as law..."³⁸

Thus significant consistency is required of state practice, but

³⁵ *North Sea Continental Shelf* cases, ICJ Rep. 1969, at 43 para 74.

³⁶ *Ibid.*

³⁷ *Anglo-Norwegian Fisheries* case, ICJ Rep. 1951, at 131.

³⁸ *Asylum* case, ICJ Rep. 1950, at 277.

this need not be complete. In some contexts the International Court has countenanced a level of inconsistency.³⁹

1.1.2. *Opinio Juris*

Opinio juris, as the psychological element of custom, is by definition more elusive than state practice. Indeed some writers have denied that it has significance in the formation of custom.⁴⁰ The absence of *opinio juris* is considerably easier to establish than its presence. On many occasions, the World Court considered *opinio juris* in the context of general customary law rules.

In 1927, the Permanent Court of International Justice discussed the components of custom in the *Lotus* case.⁴¹ The

³⁹ *Anglo-Norwegian fisheries case*, ICJ Rep. 1951, at 229.

⁴⁰ E.g. Kelsen's view as cited both in D'Amato's "The Concept of Custom in International Law," 1971, at 51-52, and Brownlie's "Principles of Public International Law," 3rd ed., 1979, at 8 note 5.

⁴¹ The dispute concerned Turkey's assertion of criminal jurisdiction over a French naval officer responsible for the watch on a French ship at the time of its collision with a Turkish vessel. The Permanent Court did not accept that the asserted rule of customary law had been established as claimed by France. It found the writings of publicists equivocal, the decisions of tribunals distinguishable, and the conventional law specialised and not necessarily applicable to the type of circumstances involved in the *Lotus* case. State practice in the form of abstention from criminal prosecution in collision cases was relied on by France. France argued for a principle of customary international law according the flag state jurisdiction over everything occurring on board a ship on the high seas. To establish this custom it relied on the writings of publicists, decisions of municipal and international tribunals, the existence of conventions reserving jurisdiction over merchant ships on the high seas to the flag state and on the rarity of disputes over jurisdiction in criminal cases

Court held that the fact that few issues of jurisdiction had arisen in criminal collision cases was regarded as inconclusive for "only if such abstention were based on [states] being conscious of having a duty to abstain would it be possible to speak of an international custom".⁴² In the *North Sea Continental Shelf* cases the instances of state usage of the equidistance principle relied on by Denmark and the Netherlands were rejected by the International Court of Justice not only as numerically insignificant, but also as ambiguous with respect to the existence of the requisite *opinio juris*, the feeling by states "that they are conforming to what amounts to a legal obligation".⁴³

A logical dilemma is created by the World Court's insistence in both the *Lotus* and *North Sea Continental Shelf* cases that states are required to believe that something is already law before it can become law. As D'Amato points out, "if custom creates law, how can a component of custom require that the creative acts be in accordance with some prior right or obligation in international law? If the prior law exists, would not custom therefore be... 'superfluous' as a creative element?"⁴⁴ This paradox of the traditional theory of customary

concerning collisions. (1927) PCIJ Ser A, No 10.

⁴² *Ibid.*, at 28.

⁴³ ICJ Rep. 1969, at 44 para. 77.

⁴⁴ See D'Amato, "The Concept of Custom in International Law," 1971, at 53. Also see *North Sea Continental Shelf* cases, ICJ Rep. 1969, at 176 (Judge Tanaka diss op), 231 (Judge Lachs

international law has never been persuasively resolved.⁴⁵

The World Court's jurisprudence with respect to *opinio juris*, then, suggests that it involves unequivocal evidence of a consciousness of legal obligation. The type of evidence required is not made clear. Occasionally the Court seems to have identified *opinio juris* in state practice itself.⁴⁶ The *Lotus* and *North Sea Continental Shelf* cases imply, however, that evidence of *opinio juris* is to be found mainly in explicit statements made by states about the reasons for their actions or abstentions. Jurists have accorded an evidentiary role in this respect to resolution of the General Assembly adopted by a representative majority of members including those states most directly concerned, if there is separate evidence of state practice.⁴⁷

The practical problems of establishing *opinio juris* separately from state practice have often been noted. In dissent in the *North Sea Continental Shelf* cases, Judge Tanaka pointed to the difficulties of gathering proof of psychological motivation behind state action and suggested that *opinio juris*

diss op); Kybz, "The Nature of Customary International Law," 47 AJIL, 1952, at 667.

⁴⁵ See Tunkin, "Remarks on the Juridical Nature of Customary International Law," 1961, 49 Calif LR, at 424.

⁴⁶ E.g., *Rights to Passage* case, ICJ, 1960, at 44.

⁴⁷ See Thirlway, "International Customary Law and Codification," 1972, at 66-67; Villiger, "Customary International Law and Treaties," 1985, at 26, 28; The Restatement of the Foreign Relations Law of the United States (Third) (1987), sec 102 Comment b Reporter's Note 2 at 31.

should be presumed from "the fact of the external existence of a certain custom and its necessity felt in the international community".⁴⁸ Ad Hoc Judge Sorensen also noted the practical impossibility of producing conclusive evidence of governmental motives and cited with approval Sir Hersch Lauterpacht's view⁴⁹ that a presumption should operate that all uniform conduct of governments evidenced an *opinio juris* unless the contrary was proved.⁵⁰ This is effectively to subsume the two elements of custom into one: to imply the existence of a psychological element from state practice unless there is some form of explicit disclaimer.⁵¹ A similar tactic is to reduce *opinio juris* to acquiescence or lack of protest.⁵²

An opposite, but equally reductionist, approach is taken by those commentators who play down the significance of widespread and uniform state practice and who emphasize the importance of

⁴⁸ See *North Continental Shelf* cases ICJ Rep. 1969, at 176.

⁴⁹ See H.Lauterpacht, "The Development of International Law by the International Court," 1958, at 380.

⁵⁰ ICJ Rep. 1969, at 246-247. See also *ibid* at 231 (Judge Lachs diss op).

⁵¹ It is argued that *opinio juris* simply operates to place the burden of proof upon the party affirming the existence of customary law. The proponent of a custom has to establish a general practice and, having done this in a field which is governed by legal categories, the tribunal can be expected to presume the existence of an *opinio juris*. In other words, the opponent on the issue has a burden of proving its absence. See Brownlie, "Principles of Public International Law," 3rd ed., 1979, at 8.

⁵² See MacGibbon, "Customary International Law and Acquiescence," 1957, 33 BYIL, at 115.

opinio juris. These jurists typically stress that the binding nature of international law depends completely on the consent of states. Thus custom has legal force only insofar as states have explicitly or implicitly consented to it.⁵³ On this view, *opinio juris*, the acceptance that a practice is legally binding, is of far greater significance than repeated practice which is regarded as of relatively modest evidentiary value.

D'Amato's solution to the issue of the relationship between practice and *opinio juris* is to preserve the dualism of the traditional definition of custom but to reduce the *opinio juris* requirement to an apparently objective one. He argues that the psychological element of custom is met if "an objective claim of international legality [is] articulated in advance of, or concurrently with, the act [or abstention] which will constitute the quantitative elements of custom".⁵⁴ The articulation, it seems, may be made by an international tribunal or organization or by an individual states official or a responsible jurist as long as it is reasonably likely to come to the attention of states.⁵⁵ Statements by single writers or states, however, cannot affect an already established consensus of the

⁵³ Cheng refers to *opinio juris* as the "one constitutive element" of customary international law. See Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?" 1965, at 36; Corbett, "The Consent of states and the Sources of the Law of Nations," 1925 47 HR 263. Corbett's view is summarised by D'Amato, "The Concept of Custom in International Law," 1971, at 49-51.

⁵⁴ *Ibid.*, at 74.

⁵⁵ *Ibid.*, at 76-84.

international community.⁵⁶ D'Amato argues that an important advantage of this analysis is that it preserves the "voluncaristic" quality of international law:

The articulation of a rule of international law...in advance of or concurrently with a positive act (or omission) of a state notice that its action or decision will have legal implications...[G]iven such notice, statesmen will be able freely to decide whether or not to pursue various policies, knowing that their acts may create or modify international law.⁵⁷

D'Amato would apparently accept as valid an articulation of a rule of custom made by a state at the time it took action it wanted to claim formed part of international law.⁵⁸ As long as no contrary international consensus existed, this would allow the articulation to be totally self-serving and subjective.

Akehurst, too, argues that the traditional view of *opinio juris* as an independent element of custom needs only modest revision. For Akehurst this is because "the judicial support for the traditional view is so strong that the tractional view ought not to be modified except to the minimum degree necessary to meet these objection".⁵⁹ Akehurst agrees with D'Amato that statements not beliefs are crucial. While the traditional view implies that *opinio juris* consists of the genuine beliefs of

⁵⁶ *Ibid.*, at 76-77.

⁵⁷ *Ibid.*, at 75.

⁵⁸ D'Amato state that "[t]here is no need for the acting state itself, through its officials, to have articulated the legal rule" implying that articulation by the acting state is sufficient (but not necessary). *Ibid.*, at 85.

⁵⁹ See Akehurst, "Custom as a Source of International Law," 1974-75, 47 BYIL, at 37.

states, Akehurst accepts as evidence of *opinio juris* statements of belief by states "even if the State does not believe in the truth of the statement".⁶⁰ Both D'Amato and Akehurst, then, reduce the requirement of *opinio juris* to a notional one: the logic of their position is that *opinio juris* had little independent role to play in the formation of custom.

1.1.3. *The Nicaragua Case and Customary International Law*

The case concerns a dispute between the Government of the Republic of Nicaragua and the Government of the United States of America. Nicaragua challenged certain military and para-military activities conducted in Nicaragua and in the waters off its coasts, responsibility for which is attributed by Nicaragua to the United States.⁶¹

The issue of customary law⁶² loomed particularly large in the Nicaragua case. In its judgement, the International Court of Justice dealt with many of the controversial aspects of customary law and entered the debate over the definition and place of this source of law in the modern international

⁶⁰ *Ibid.*

⁶¹ ICJ Rep., 1984, at 20-22.

⁶² The International Court of Justice considered such customary norms in international law as non-use of force, nonintervention, respect for the independence and territorial integrity of states. *Ibid.*, at 18-19.

community.⁶³ The Court, in *Nicaragua*, apparently endorsed the orthodox method for establishing customary rules. It quoted its 1985 decision in *Continental Shelf (Libya v. Malta)*:

It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.⁶⁴

Generally, in *Nicaragua*, the Court appears to expand the category of activities that can constitute state practice. The Court relies on acceptance of treaty obligations as state practice.⁶⁵ The Court accepts General Assembly resolutions and resolutions of other international organisations, particularly those in which both parties (*Nicaragua* and the United States) participated, as forms of state practice.⁶⁶ The Court seems to accord the status of state practice to statements made by the International Law Commission and decisions of the International Court itself.⁶⁷ While noting the need for state practice to be

⁶³ Seven of the judges who accepted much the substance of *Nicaragua's* case wrote separate opinions. Only Judge Ago took issue with the majority judgement on its analysis of customary law. See the case concerning *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Rep. 1986, at 181-191.

⁶⁴ See ICJ Rep. 1985, at 29-30, para. 27, quoted in *Nicaragua*, *ibid.*, at 97, para. 183.

⁶⁵ *Ibid.*, at 98, para. 185.

⁶⁶ *Ibid.*, paras. 193, 202, 203, 204, 205.

⁶⁷ *Ibid.*, at 100, para. 190 and at 106-107, para. 202.

in conformity with *opinio juris*,⁶⁸ the Court avoids any discussion of actual state practice. The Court argues that the psychological element of custom is "backed by established and substantial practice"⁶⁹ but offers no examples of it.

The requirement of consistency of state practice is also significantly qualified in *Nicaragua*. Earlier cases had stressed the importance of uniformity and consistency in state actions and had pointed to inconsistency as one basis for rejecting an asserted rule as custom. The precise level of consistency, however, had never been spelled out. In *Nicaragua*, the Court finds that:

It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule... [t]he conduct of States should, in general, be consistent with rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule.⁷⁰

Apparently, the Court's point on the inconsistency of state practices is based on the assumption that a customary rule has

⁶⁸ *Ibid.*, at 107-109, paras 205, 206, 207.

⁶⁹ In his separate opinion, Judge Ago notes that he is "somewhat surprised" at the assurance. *Ibid.*, at 186 note 1.

⁷⁰ *Ibid.*, at 98, para. 186.

been already formed, and is not applicable to the situation in which evidence of inconsistent actions by states concerns a customary norm that is in the process of formation where inconsistency has generally been treated as a threat to the formation of the custom.

The Court, in *Nicaragua*, also emphasises the importance of the "subjective" or psychological factor in the creation of custom and implies that it is of greater significance than state practice. Its requirement of *opinio juris*, however, is satisfied by relatively slight evidence of the motivation of states in the traditional sense. There is also considerable overlap in the actions considered as evidence of state practice and those considered evidence of *opinio juris*. Sources of *opinio juris* approved by the *Nicaragua* Court which come within the traditional parameters include references by state representatives to principles as "fundamental or cardinal" rules of customary international law.⁷¹ The Court also extends the traditional sources *opinio juris* in taking a single example of an abstention as constituting the subjective element of custom. Unlike the Court's approach in the *Lotus* case,⁷² the non-assertion by the United States in the jurisdiction phase of the *Nicaragua* case of any right to collective armed response to acts not constituting an armed attack is taken by the International Court as *opinio juris* that no such right exists in customary

⁷¹ *Ibid.*, at 100-101, para. 190.

⁷² (1927) PCIJ Ser A, No 10.

law.⁷³

The role of resolutions of international organisations as evidence of *opinio juris* is endorsed in *Nicaragua*. In the context of customary law, the Court argues that *opinio juris* may be deduced "with all due caution" from the attitudes of the Parties and other states towards certain General Assembly resolutions, particularly the UN Declarations. The Court notes explicitly that consent to the text of such resolutions has a significance greater than a mere reiteration of the principles of the United Nations Charter: they amount to "an acceptance of the validity of the rule or set of rules declared by the resolutions themselves".⁷⁴ Resolutions of other fora are also significant, as are texts of declarations of international organisations and conferences in which the parties concerned took part.⁷⁵ The *Nicaragua* analysis suggests that voting for a resolution in an international forum without more provides both adequate state practice and *opinio juris* for the formation of customary rules.

The *Nicaragua's* treatment of customary law is not without criticism. The strongest one, perhaps, comes from Professor D'Amato. He has described it as a "lack of theoretical explicitness", a "failure of legal scholarship" and its authors

⁷³ See ICJ Rep. 1986, at 110-111, para. 211.

⁷⁴ *Ibid.*, at 100, para. 188.

⁷⁵ *Ibid.*, at 100, para. 188; at 107, 133, paras. 203, 204, 264.

as "collectively naive" about custom as a source of law.⁷⁶ The treatment of state practice in Nicaragua is criticized as putting too much weight on the rhetoric of a state rather than on the response of the international community.⁷⁷ The Court, in *Nicaragua*, draws no distinction between various international fora.⁷⁸ Its treatment of the contribution of resolutions of international fora to the formation of custom goes considerably further than most jurists.⁷⁹

The *Nicaragua's* treatment of customary law, however, is not without some significance in terms of international protection of human rights in general and civil rights in particular. First, instead of looking only at treaty obligations, the Court has re-enforced the importance and the value of customary norms governing the relationship between and/or among states. The greatly increased scope of custom is potentially crucial for international implementation of civil rights. Secondly, contrary to traditional way of distinguishing state practices from *opinio juris*, the Court's treatment of regarding certain actions

⁷⁶ See A. D'Amato, "Trashing Customary International Law," 81 AJIL 101, 1987, at 101, 105.

⁷⁷ See H. Charlesworth, "Customary International Law and the Nicaragua Case," Austr. Y.B.Int'l L., Vol. 11, 1991, at 18, 21.

⁷⁸ Charlesworth, *ibid.*

⁷⁹ *Ibid.*, at 24-25. Jurists like Thirlway argue that resolutions of the General Assembly have been regarded as evidence of *opinio juris* but only when there is "a sufficient body of State practice for the usage element of the alleged custom to be established without reference to the resolution". H. Thirlway, "International Customary Law and Codification," 1972, at 67.

(such as participation in treaties or voting for resolutions in international fora) as constituting both state practice and *opinio juris* is of great help in identifying the formation of customary norms since the test for differentiating the two is, sometimes, artificial and gives rise to substantially divergent views among jurists. Thirdly, the use of resolutions of UN institutions as evidence of formation of customary law is very important in terms of civil rights protection since there is a rich body of resolutions (including declarations) concerning human rights issues.

1.1.4. International Conventions and Customary Law

Most of the substantive legal discussion in the latest case of *Nicaragua* takes place on the premise that certain treaty provisions have parallel customary norms. The Court accepts the possibility that the provisions of the conventional law and customary international law could be identical.⁸⁰ It notes that the two sources of law have an independent existence and treaty law does not oust parallel customary norms.⁸¹ The relationship between the two, however, is not examined in any detail by the Court. And the Court's effort has offered little, if any, guidance as to how to solve the still existing controversial theme in the jurisprudence of customary international law which

⁸⁰ ICJ Rep. 1986, at 93-94, paras. 175, 181. The Court finds in fact that the two sources of law do not completely overlap.

⁸¹ *Ibid.*, at 94-97, paras 177-182.

concerns the relationship between custom and international conventions.⁸²

Some aspects of the relationship between treaty and custom appear settled. First, entry into a treaty is certainly a form of state practice for the purposes of custom. Of itself, it does not, however, automatically provide the necessary *opinio juris* for the formation of a customary rule.⁸³ Second, treaties codifying customary rules, such as the Vienna Convention on Diplomatic Relations and the Convention on the Law of Treaties, have a special status and many of their rules are binding on non-parties as custom.⁸⁴

Less clear is the generation of customary rules from the fact of states' participation in treaties alone.⁸⁵ The International Court, in the previous cases of the *North Sea Continental Shelf*, acknowledged that a rule originating in a treaty could become

⁸² See A. Weisburd, "Customary International Law: The Problem of Treaties," 12 Vand.J.Int'l L., 1988, at 1-46; A. D'Amato, "Custom and Treaty: A Response to Professor Weisburd," 12 Vand. J. Int'l L., 1988, at 459-472; Weisburd, "A Reply to Professor D'Amato," *Ibid.*, at 473-490.

⁸³ See Thirlway, "International Customary Law and Codification," 1972, at 85-86; Villiger, "Customary International Law and Treaties," 1985, at 11-12.

⁸⁴ Baxter points out that most codifying treaties also include elements of progressive development of the law. He proposes three methods of ascertaining the relationship between treaty and customary norms: reference to travaux préparatoires, the text of the treaty referring directly to custom, and a comparison of the text with customary norms. See Baxter, "Treaties and Custom," 129 HR., 1970, at 38-42.

⁸⁵ *North Sea Continental Shelf* cases, ICJ Rep., 1969, at 43, para. 75.

generally binding as part of customary international law. The Court stated various conditions for the transformation of contractual treaty rules binding only the parties to an agreement into customary law binding non-parties. The provision in question must be in its content, structure and expression of "a fundamentally norm-creating character",⁸⁶ the instrument in which the rule is contained must have attracted "a very widespread and representative participation...[including] that of States whose interests were specially affected"⁸⁷ and subsequent practice of states, especially those not parties to the treaty, should have been consistent with it.⁸⁸ The Court accepted that customary norms could be developed within a short period of time on the basis of a conventional rule but implied that the briefer the time of development, the more extensive and uniform the evidence of state practice must be.⁸⁹

The dissenting judgments in the *North Sea Continental shelf* cases took issue with the Court's opinion on the generation of custom from convention, suggesting that its conditions were too

⁸⁶ *Ibid.*, at 43-45, paras. 76-78.

⁸⁷ *Ibid.*, at 42, para. 71.

⁸⁸ *Ibid.*, at 43-45, para. 76-78. See also Baxter, "Multilateral treaties as Evidence of Customary International Law," 41 BYIL, 1965-66, at 296-297. Compare the Restatement of the Foreign Relations Law of the United States (Third) (1987) sec 102 Comment i (a multilateral agreement may come to be law for non-parties that do not actively dissent if "a multilateral agreement is designed for adherence by states generally, is widely accepted and is not rejected by a significant number of important states".)

⁸⁹ *Ibid.*, at 43, para. 75.

strict. Judge Lachs criticised the Court's rejection of the significance of the number of states that had become parties to the Continental Shelf Convention, arguing for a qualitative rather than quantitative analysis of treaty participation. Thus, as most states which were actively engaged in the activities governed by the Convention were parties to the Convention and as the states observing the principle enumerated in the Convention were representative of different political, economic and legal systems, Judge Lachs could deem evidence of "a practice widespread enough to satisfy the criteria for a general rule of law" to have been produced.⁹⁰

International lawyers have proposed their views to refine the International Court's theory in the *North Sea Continental Shelf* cases. Baxter argues that for treaty law to become part of customary international law, there must be evidence that the treaty norms have been accepted and applied to the behaviour of states. This evidentiary burden can be discharged by showing that the norm has been accepted by non-parties or that customary international law independent of the treaty is the same as the treaty.⁹¹

Charney suggests more detailed criteria: the translation of conventional obligations into custom depends on the nature of the subject matter (the more generalised the concern, the more

⁹⁰ *Ibid.*, at 229.

⁹¹ See Baxter, "Multilateral Treaties as Evidence of Customary International Law," 41 BYIL, 1965-66, at 296-297.

likely it is to create new law), the nature of the negotiations (the more general the compromises made in the negotiation of an instrument, the less likely a particular provision will attain customary force), the nature of the obligation (the more discrete the conventional obligation, the more likely it is to produce a rule of custom) and the nature of the rule (the more technical the method of implementation, the less likely for the rule to achieve the rule to achieve customary status).⁹²

Other jurists have argued for an expanded possibility of custom creation from treaty provisions. D'Amato argues that norm-creating conventions themselves constitute or generate customary rules of law.⁹³ Sohn even proposes that it is not necessary for a treaty to be concluded for it to create binding customary international law: the treaty drafting process in itself can give rise to customary rules. "[O]nce a principle is generally accepted at an international conference, usually through consensus," writes Sohn, "a rule of customary international law can emerge without having to wait for signature of the convention."⁹⁴

It seems that none of these above refining efforts can escape from some criticism. D'Amato responds to Baxter's view by noting

⁹² See J.I. Charney, "International Agreements and the Development of Customary International Law," 61 Wash. LR., 1986, at 983.

⁹³ See D'Amato, "The Concept of Human Rights in International Law," 82 Columbia Law Review, 1982, at 1127-1159.

⁹⁴ See L. Sohn, "'generally Accepted' International Rules," 61 Wash L R, 1986, at 1077.

that such a subsequent practice is hard to find. "Indeed, suppose all the states in the world that are at all interested in the subject matter of the treaty sign it;" says D'Amato, "we might wait in vain for the nonsignatories to express any attitude toward the rules of the treaty."⁹⁵ Weisburd rejects D'Amato's view that treaties provide conclusive evidence of practice by emphasizing that the act of undertaking a treaty obligation is simply one form of state practice and may be overcome by contrary state practice.⁹⁶ Sohn's and D'Amato's approach of separating the treaty process from the creation customary international law has also been strongly challenged. Weil has criticised the destruction of the boundary between conventional and customary norms through the transformation of treaty principles into custom without any other evidence of state practice.⁹⁷ This "artificial enhancement" of customary international law and "ever decreasing fastidiousness" about the degree of generality demanded of state practice devalues conventional law and prejudices the rights of non-parties to treaties.⁹⁸

It is this writer's view that Charney's "nature" test is

⁹⁵ See D'Amato, "The Concept of Human Rights in International Law," 82 Columbia Law Review, 1982, at 1134.

⁹⁶ See A.M.Weisburd, "Customary International Law: The Problem of Treaties," 21 Van.J.Trans.L., 1988, at 1-46.

⁹⁷ See Weil, "Towards Relative Normativity in International Law?" 77 AJIL, 1983, at 433-438.

⁹⁸ *Ibid.*, at 434, 438.

important in observing the relationship between custom and international conventions. Simultaneously, the "subsequent practice" test as set by the International Court of Justice in the *North Sea Continental Shelf* cases is also valuable. The two tests, however, are in reverse relationship: the more important the nature, the less subsequent practice it requires. Furthermore, when we look at state subsequent practice, we, for the purpose of trying to identify evidence to the formation of customary norms, should draw a special attention to how non-signatories react to treaty norms by observing what they do internationally as well as internally. In the field of international protection of civil rights, subsequent state practice is not at all that "hard to find" as D'Amato has put it. D'Amato would not be disappointed to "wait in vain" in connection with finding evidence of customary norms of rights if he took a look at what those states put in their constitutions and domestic laws: the legislative act itself seen as both state practice and *opinio juris*.

Dinstein made a further distinction between constitutive and declaratory law-making treaties.⁹⁹ Law-making treaties of the first type create legal norms which did not exist before in the form of a custom or a general principle of law; or abolish existing ones. Law-making treaties are considered declaratory if they crystallize existing norms of customary international law.

⁹⁹ See Y. Dinstein, "International Law and the State," 1971, at 47.

The legal reference of this distinction is to the extent of the duty of third States to respect conventional obligations.¹⁰⁰ In practice, however, it is sometimes difficult to draw a clear-cut line between the two, especially in international human rights treaties. Some treaties themselves contain both provisions declaratory of customary norms and provisions constitutive of contents of customs for future development to their full extent. The International Covenant on Civil and Political Rights is such a typical example.

1.2. Civil Rights as Customary Law

For the purpose of this section and the subsequent sections, it is useful to define explicitly here what we mean by civil rights as designated in the Universal Declaration and in the Covenant. Civil rights, which are given some priority in the above two documents, particularly indicate the following rights: the rights to life, liberty, and security of person, the prohibition of slavery and servitude, the prohibition of torture and cruel, inhuman, or degrading treatment or punishment, the right to legal recognition, the rights to equality before the law and to nondiscrimination in its application, the right to a remedy, the prohibition of arbitrary arrest, detention or exile, the right to a fair trial, the presumption of innocence and prohibition of *ex post facto* laws. Another group of the rights concerns the right to privacy, the right to freedom of movement,

¹⁰⁰ *Ibid.*

the right to marry and found a family, and the freedoms of thought, conscience, and religion.¹⁰¹

In many situations treaty law of civil rights provides a solid and compelling legal foundation. But despite a steady increase in the number states adhering to international treaties in recent years, reliance upon treaties alone provides an ultimately unsatisfactory patchwork quilt of obligations and still continues to leave many states largely untouched. Thus treaty law on its own provides a rather unsatisfactory basis for international protection of rights. The prospects for the development of an effective and largely consensual international regime depends significantly on the extent to which those institutions are capable of basing their actions upon a coherent and generally applicable set of rights norms. Reliance upon treaty law is likely to be even less rewarding in relation to domestic legal argumentation in the courts, legislatures and executives of countries which have ratified few if any of the major international treaties. There is thus a strong temptation

¹⁰¹ Although some scholars clarify the freedom of thought, conscience, and religion as a politically-related right, they sometimes acknowledge that this right is more civil than political. See J.P.Humphrey, "Political and Related Rights," in T.Meron ed., *Human Rights in International Law and Policy Issues*, Vol. 1, 1984, at 174-181. Although the Universal Declaration of Human Rights contained a provision on an individual's right to own property and not to be arbitrarily deprived of it, the great differences among states on this issue precluded inclusion of a similar provision in the Covenant on Civil and Political Rights. Similar things happened to the right to asylum and right to nationality. See Universal Declaration of Human Rights, approved Dec. 10, 1948, G.A.Res. 217A, U.N.Doc. A/810 at 56 (1948).

to turn to customary law as the formal source which provides, in a relatively straight-forward fashion, the desired answers. In particular, if customary law can be construed or approached in such a way as to supply a relatively comprehensive package of norms which are applicable to all states, then the debate over the sources of international human rights law can be resolved without much further ado. Given the fundamental importance of the human rights component of a just world order, the temptation to adapt or re-interpret the concept of customary law in such a way as to ensure that it provides the "right" answers is strong, and at least to some, is irresistible.¹⁰²

The significance of looking at the norms of international protection of rights in particular as part of customary international law is thus threefold. First, despite the many treaties and the considerable number of state parties to most of them, a considerable number of state parties have not become parties to many of the treaties. They are therefore neither bound by the treaty obligations nor entitled to invoke those obligations against the parties. It is therefore of some consequence to determine their obligations and rights under customary law. Second, violations of international obligations of observing customary norms of rights, like violations of treaty obligations under international law, entail state responsibility. Third, the possible customary norm status of

¹⁰² See B. Simma, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles," 12 *Australian Y.B.Int'l L.*, 1992, at 82-83.

civil rights in international law allows not only the treaty non-parties, but also the parties to have recourse to international remedies not provided for in the treaties. It has been suggested that such general remedies are available in any case for treaty violation, but this is problematic since the treaty drafters apparently meant to limit means of implementation to those agreed in the treaties. However, if the rights in question are part of customary law, the remedies are generally available to all states.¹⁰³

Whether the norms of rights protection have become customary law can not readily be answered on the basis of the usual process of customary law formation.¹⁰⁴ States do not usually show much interest in making claims on other states or protesting violations that do not affect their nationals. It is, therefore, difficult for international lawyers to obtain evidence as to the formation of customary law when they are very often frustrated at determining what constitutes a state practice carrying a sense of legal obligation (*opinio juris*). Professor Henkin notes that

"practice contributing to human rights law looks different from that which has served to make law on other subjects in the past. Whereas ordinarily practice building customary law consists of actions of States in relation to other States and the responses of those States, practice in human rights is internal to a State in relation to its own

¹⁰³ See Oscar Schachter, "International Law in Theory and Practice," 178 *Recueil des Cours*, (1982-V) at 334.

¹⁰⁴ See generally Ian Brownlie, "Principles of Public International Law," 1990, at 4-11; Anthony A. D'Amato, "The Concept of Custom in International Law," 1971, at 47-72.

inhabitants, and ordinarily there is no reaction from other States. In human rights, practice accepted as law-building may take unusual forms..."¹⁰⁵

Keeping in mind the above problems in evidencing the formation of customary norms, Professor Schachter also observes other particularities in this regard. He states that:

One can find scant State practice accompanied by *opinio juris*. Arbitral awards and international judicial decisions are also rare except in tribunals based on treaties such as the European and Inter-American courts of human rights. The arguments advanced in support of a finding that rights are a part of customary law rely on different kinds of evidence.¹⁰⁶

Professor Schachter, therefore, has recommended different kinds of evidence in support of finding that human rights are part of customary law.¹⁰⁷ They include, among others, (1) frequent references in United Nations resolutions and declarations to the "duty" of all states to observe faithfully the Universal Declaration of Human Rights and resolutions of the United Nations and other international bodies condemning specific rights violations as violation of international law; (2) a dictum of the International Court of Justice that obligations *erga omnes* in international law include those derived from the principles and rules concerning the basic

¹⁰⁵ See L. Henkin, "International Law: Politics, Values and Functions," 216 *Recueil des Cours* (1989-IV), at 224.

¹⁰⁶ See O. Schachter, "International Law in Theory and Practice," 1991, at 336.

¹⁰⁷ *Ibid*, at 334-335.

rights of the human person;¹⁰⁸ (3) incorporation of the human rights provisions of the Universal Declaration of Human Rights in national constitutions and laws; and (4) some decisions in various national courts that refer to the Universal Declaration as a source of standards for judicial decisions. The emphasis on the above elements, according to Professor Meron, is able to provide more accessible evidence of emerging norms of rights.¹⁰⁹

When we adopt Professor Schachter's test, there are three points which should be noticed. First, Professor Schachter's approach of testing formation or emergence of customary law has not substantially freed him from the traditional way of considering maturation of customary international law.¹¹⁰ A careful analysis will demonstrate that all elements which he has recommended can be characterized, in one way or another, as either state practices, whether single or collective, or as *opinio juris*, or as both. Second, Professor Schachter's list of elements is certainly not exhaustive. Some other evidence like regional protection of human rights might exert influence upon the emergence of customary human rights law. In addition, the

¹⁰⁸ *Case concerning the Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)*, Second Phase, ICJ. Rep., 1970, at 33.

¹⁰⁹ See Theodor Meron, "Human Rights and Humanitarian Norms as customary Law," 1989, at 132.

¹¹⁰ See generally, Sir Humphrey Waldock, "General Course on Public International Law," 106 *Recueil des Cours*, (1962); Karol Wolfke, "Custom in Present International Law," 1964; Anthony A. D'Amato, "The Concept of Custom in International Law," 1971.

Charney's "nature" approach, the North Sea Continental Shelf's "subsequent state practice" approach, and Baxter's approach should be taken into a consideration together, since one sometimes finds it hard to distinguish which has exerted influence-the Universal Declaration or the Covenant, or both. Some weight should also be given to scholarly works, as these works are of a dual-role character: not only a subsidiary source¹¹¹ but also an indispensable evidence. Third, as to consideration of whether or not a particular right has emerged as a customary law rule, weight should not necessarily be distributed equally among all the listed factors, nor is it necessary to refer to all the evidence. In certain circumstances, some elements carry more weight than the others. Among the list Professor Schachter made, priority should be given to (3), since what nonsignatories to the Covenant provide in their constitutions and domestic laws may offer more convincing evidence as to the formulation of customary norms of rights corresponding to those enumerated in the Universal Declaration and the Covenant. Frequently, cumulative developments should also be taken into consideration.

¹¹¹ Article 38 (1)(c) of the Statute of the International Court of Justice provides that "... teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

*1.2.1. The Universal Declaration of Human Rights
and Customary Law*

The United Nations Charter,¹¹² to which virtually all states adhere, includes a "pledge" to act "for the achievement of ", inter alia, "universal respect for, and observance of, human rights and freedoms for all without distinction as to race, sex, language or religion".¹¹³ Although the UN Charter mentions human rights in many places, time constraints at the San Francisco conference made it impossible to prepare an additional document paralleling the national bills or declarations of the rights of man and of the citizen. It was promised at that time, however, that the United Nations would commence the drafting of an International Bill of Rights as one of the first items of business.¹¹⁴ The Commission on Human Rights was established in 1946 and was asked to prepare such a document.¹¹⁵ Two years later the first document---the Universal Declaration of Human Rights¹¹⁶---was ready. On December 10, 1948, the General Assembly, after some amendments, approved it unanimously, with

¹¹² Signed at San Francisco on June 26, 1945; entered into force on October 24, 1945.

¹¹³ Articles 55 and 56 of the UN Charter.

¹¹⁴ See generally, Sir Hersch Lauterpacht, " An International Bill of the Rights of Man," 1945; Sir Hersch Lauterpacht, " International Law and Human Rights," 1950.

¹¹⁵ E.S.C.Res. 5 (I), 1 U.N. ESCOR Supp. (No. 1) at 163, U.N.E/1 (1946).

¹¹⁶ Approved December 10, 1948, G.A.Res. 217A, U.N. Doc. A/810 at 56 (1948).

eight abstentions.¹¹⁷ The rights guaranteed in the Universal Declaration of Human Rights (the Declaration) are broad. Civil rights find their expression in articles 3-18 of the Declaration which are restated, supplemented, and occasionally modified by companion articles in the International Covenant on Civil and Political Rights.¹¹⁸ Although some delegations emphasized that the Universal Declaration of Human Rights was not a treaty imposing legal obligations,¹¹⁹ others more boldly argued that it was more than an ordinary General Assembly resolution, that it was a continuation of the UN Charter and shared the dignity of that basic document. The Chilean delegation, that detected elements of juridical obligation in the Universal Declaration of Human Rights, said that "violation by any state of the rights enumerated in the Declaration would mean violation of the principles of the United Nations."¹²⁰

¹¹⁷ The Soviet bloc, Saudi Arabia, and the Union of South Africa. Universal Declaration of Human Rights, G.A.Res. 217A, U.N.Doc. A/810, at 71, 1948.

¹¹⁸ International Covenant on Civil and Political Rights, adopted Dec.16, 1966, entered into force Mar.23, 1976, G.A.Res. 2200, 21 U.N.GAOR, Supp. (No. 16) 52, U.N.Doc. A/6316, 1966. The right to asylum (Article 14), the right to nationality (Article 15) and the right to property (Article 17) do not find their way into companion provisions in the International Covenant on Civil and Political Rights. See R.B.Lillich, "Civil Rights," in Human Rights in International Law: Legal and Policy Issues, ed. by T. Meron, Vol.1, at 152-158.

¹¹⁹ Mrs. Roosevelt was obliged to state on behalf of the United States that the Declaration " was not a treaty of international agreement and did not impose legal obligations." 3 U.N. GAOR (pt. 1, 3d. Comm.) at 32 (1948).

¹²⁰ A/C.3/s.R. 91 at 97.

It is true that the travaux préparatoires make it clear that the overwhelming majority of the speakers in the various organs of the United Nations did not intend the Declaration to become a statement of law or of legal obligations, but rather a statement of principles devoid of any obligatory character, and which would have moral force "only". It is equally true that the General Assembly, according to Article 13 (1) of the UN Charter, is responsible for making "recommendations" for the purpose of promoting and assisting in the realization of human rights and fundamental freedoms. Nevertheless, a complete denial of the legal relevance of the Universal Declaration of Human Rights does not do justice to a document which was adopted---without a dissenting vote---by the governments forming the most representative body of the international community. The General Assembly adopted the Declaration not only as "a common standard of achievement", but also stressed that a "common understanding" of the rights and freedoms, to which the pledge of Member States expressed in Article 56 of the UN Charter applies, was of the greatest importance.¹²¹ Professor Sohn asserts that the Declaration is now considered to be an authoritative interpretation of the UN Charter, spelling out in considerable detail the meaning of the phrases "human rights and fundamental freedoms", and has become a basic component of international

¹²¹ See Egon Schwelb, " The Influence of the Universal Declaration of Human Rights on International and National Law," 1959, Proc. Am. Soc. Int'l. L. at 218.

customary law.¹²² Other international lawyers like Humphrey agree and have asserted that the Declaration "is now part of the customary law of nations and therefore binding on all States".¹²³ Professor Schachter's comment on the Declaration is more focused on its character of "general principles of law", but he has reached a conclusion, although appearing more cautious than that of Professor Sohn's, that state practice has given to some of the Declaration's provisions the character of customary law.¹²⁴

No scholars have yet attempted to review all the cases where the Declaration has been invoked either within or outside the United Nations with a view to determining whether they provide evidence of practice accepted as law and hence juridical consensus. But mention will be made of a few cases to illustrate that some provisions of the Declaration have been accepted as law.

The Declaration was less than five months old when, on 25 April, 1949, the General Assembly invoked two of its articles--- Article 13 on the right of everyone to leave any country including his own and Article 16 on the right to marry without

¹²² See Louis B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States," 32 Am. U.L.Rev., (1982), at 16-17.

¹²³ See J.Humphrey, "The International Bill of Rights and Implementation," 17 William and Mary Law Review, 1976, at 259. See also McDougal, Lasswell, Chen, "Human Rights and World Public Order," 1980, at 273-274, 325-327.

¹²⁴ See Oscar Schachter, "International Law Implications of U.S. Human Rights Politics," 24 N.Y.L.Sch.L.Rev., 1979, at 68.

any limitation due to race, nationality or religion---in a resolution stating that "measures which prevent or coerce the wives of citizens of other nationalities from leaving their country of origin with their husbands or to join them abroad are not in conformity with the Charter" and recommended that Soviet Union withdraw measures of that nature.¹²⁵ The resolution does not say in so many words that the Declaration is binding; but it does say after invoking the two articles in question that the measures adopted by the Soviet Union were not in conformity with the Charter. Since the Charter neither catalogues nor defines human rights, the logical and inescapable conclusion is that the states which voted for the resolution were using the Declaration to interpret the Charter. This was the first of many times that the General Assembly used the Declaration---as certain delegations said in 1948 it should be used--- as an authentic interpretation of the Charter.¹²⁶

Further evidence of the growth of the practice is to be found in the Declaration on the Granting of Independence to Colonial Countries and Peoples which the General Assembly adopted in 1960.¹²⁷ This Declaration, which was adopted by eighty-nine votes (including the votes of all the states except South Africa which abstained in the voting on the Universal

¹²⁵ G.A.Resolution 285 (III).

¹²⁶ See MacGibbon, "General Assembly Resolutions: Custom, Practice and Mistaken Identity," in Cheng (ed.): International Law: Teaching and Practice, 1982, at 199.

¹²⁷ G.A.Resolution 1514 (XV) of 14 December 1960.

Declaration of Human Rights) to none with nine abstentions, provides in its seventh and final paragraph that "all states shall observe faithfully and strictly the provisions of ... the Universal Declaration of Human Rights". Like that declaration, the Declaration on the Granting of Independence to Colonial Countries and Peoples is not binding by virtue of its having been adopted by the General Assembly; its peremptory terms are however evidence of the practice and juridical consensus of states. The fact that the powers responsible for the administration of the colonial territories in question all abstained from voting undoubtedly affects the quality of the evidence. It may be noted, however, that Professor Tunkin has nevertheless said that the 1960 declaration is itself part of customary law. His arguments can be applied with much greater force to the Universal Declaration of Human Rights.

The objection that the most interested states abstained from voting can not be used to diminish the probative value of the Declaration on the Elimination of All Forms of Racial Discrimination, which the General Assembly unanimously adopted on 20 November, 1963. In terms only slightly different from those used in the 1960 Declaration, Article 11 of this Declaration says that "every state shall promote respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and shall fully and faithfully observe the provisions of...the Universal

Declaration of Human Rights."¹²⁸ In voting for such a provision states must be taken as meaning what they say. They can not on one occasion say that the Declaration is to be fully and faithfully observed and on the another that it is not binding. The provision is also pertinent for another reason, for it is obviously another example of the use of the Universal Declaration of Human Rights to interpret the Charter.

In the same year, on 4 December, 1963, the Security Council adopted a resolution which speaks of apartheid as being "in violation" of South Africa's "obligations as a member of the United Nations and of the provisions of the Universal Declaration of Human Rights".¹²⁹ Here again the Security Council was obviously using the Declaration to interpret the Charter. Because of its limited membership, resolutions of the Security Council, however authoritative in other respects, are not as good evidence of state practice as are those of as Assembly the membership of which is now practically universal. Reference may therefore be made to the resolution of 27 October 1966 by which the General Assembly terminated the mandate of South Africa over South West Africa (Namibia) on the ground that the mandate had been conducted in a manner contrary to the mandate, the Charter of the United Nations and the Universal Declaration of Human

¹²⁸ G.A. Resolution 1904 (XVIII) of 20 November, 1963.

¹²⁹ Resolution S/5471.

Rights.¹³⁰ That the General Assembly was again using the Declaration to interpret the Charter is clear enough. When, however, the International Court of Justice upheld in 1971 the right of the United Nations to terminate the mandate over South West Africa, it did not have to base its opinion on the Declaration although Judge Fuad Ammoun very nearly did so in his separate opinion.¹³¹ Although the Charter does not catalogue or define human rights, it does stipulate that they shall be enjoyed "by all without distinction as to race, sex, language or religion".¹³² Therefore, in the words of the Court, "to establish instead, and to enforce, distinctions, exclusions, restrictions and limitations based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter".

The Advisory Opinion of the Court in the *Namibia* case is, therefore, of little help in promoting the proposition that the Universal Declaration now has the character of customary international law. Of more help is the Proclamation of Teheran which was unanimously approved on 13 May, 1968 by the International Conference on Human Rights, an inter-governmental conference convened by the United Nations at which 84 states

¹³⁰ Resolution 2145 (XXI). Portugal and South Africa voted against and France, Malawi and the United Kingdom abstained.

¹³¹ I.C.J. Reports, 1971, at 16 et seq. For Hudge Ammoun's separate opinion, see at 76 et seq.

¹³² E.g., articles 1 and 55.

were represented. Article 2 of this proclamation which was later endorsed by the General Assembly in its resolution of 19 December 1968, says that the Universal Declaration of Human Rights "constitutes an obligation for the members of the international community".¹³³ Still more recent evidence of the now binding character of the Declaration can be found in the Final Act of the Helsinki Conference on Security and Cooperation in Europe of 1975, section VII of which says, inter alia, that "in the field of human rights and fundamental freedoms, the participating states will act in conformity with the purposes and principles of the Charter of the United Nations and with the purposes and principles of the Universal Declaration of Human Rights".¹³⁴ Again we see the same consistent association of the Declaration with the Charter and the same underlying assumption that the latter must be interpreted with reference to the former. That the participating states were treating the Declaration as giving rise to legally binding obligations appears most clearly from the ensuing sentence where they say that "they will also fulfil their obligations as set forth in the international declarations and agreements in this field, including inter alia the international covenant on human rights, by which they may be bound". The fact that the Final Act may itself not be binding is for present purposes irrelevant; for

¹³³ Final Act of the International Conference on Human Rights, Teheran, 22 April-13 May, 1968, A/Conf. 32/41 p.4.

¹³⁴ See generally, Thomas Buergenthal, " Human Rights, International Law and the Helsinki Accord, " 1977.

what we are looking for is evidence of state practice and opinio juris.

There are innumerable instances of the use of the Declaration as a yardstick to measure the degree of respect for human rights: by international conferences, by inter-governmental organizations, by specialized agencies, and by the United Nations , or as a basis for action or exhortation. They range from the Essentials of Peace Resolution of the General Assembly to the Declaration of the Caracas Conference of American States of 1954 and to the pronouncements of the Bandung Conference of Asian-African States of 1955;¹³⁵ other examples range from the recommendation of the Buenos Aires session of the Plenipotentiary Conferences of the International Telecommunication Union of 1952 on the unrestricted transmission of news to the widespread United Nations-International Labour Organization activities to combat forced labour; from the

¹³⁵ China was one of twenty-nine Asian and African states participating in the Bandung Conference. The first of ten principles set forth by the Declaration on the Promotion of World Peace and Co-operation, which was included in the Final Communiqué of 24 April 1955, was "[R]espect for Fundamental human rights and for the purposes and principles of the Charter of the United Nations." (Collection of Documents, Vol. 3, 1954-55, at 261-262.) In May of the 1955, the Chinese Premier Zhou Enlai, speaking at an enlarged session of the Standing Committee of the National People's Congress, said that "the ten principles contained in the Bandung Declaration also include respect for fundamental human rights and for the purposes and principles of the Charter of the United Nations....All these are the principles that have been consistently advocated by the Chinese people and adhered to by China." See Information Office of the State Council of the People's Republic of China, "Human Rights in China," (The White Paper of the People's Republic of China) 1991, at 80.

General Assembly resolution in the so-called Russian wives case to the long line of recommendations on the racial situation in South Africa; from exhortations concerning discrimination in Non-Self-Governing and Trust Territories to the recommendation to abolish certain ancient customs and practices inconsistent with the physical integrity and dignity of women or the rights and duties of parents; from widespread governmental activities which include the co-operation of governments to what is sometimes described as the "program of practical action" in human rights. This consists of the established system of reports, of world-wide studies and surveys of various rights set forth in the Declaration and of advisory services in the field of human rights.¹³⁶

The above review of collective state practice relating to the Universal Declaration of Human Rights mainly in the United Nations does not pretend to be exhaustive. Enough has been said, however, to conclude that if governments mean what they say--- and it must be assumed that they do mean what their officially authorized representatives say on their behalf--- then the Declaration is to be "faithfully and strictly" observed (words of the Declaration on the Granting of Independence to Colonial Countries and Peoples), that it is to be "fully and faithfully" observed (words of the Declaration on the Elimination of All Forms of Racial

¹³⁶ See generally, John P. Humphrey, " Human Rights: New Directions in the United Nations Programme, " N.Y.L.Forum, October, 1958.

Discrimination) that states shall "act in conformity" with it (words of the Helsinki Agreement) and that it therefore "constitutes an obligation for the members of the international community" (words of the Teheran Conference). It is now generally recognized that, by the development of a new customary rule, the Universal Declaration of Human Rights has become an authentic interpretation of the Charter of the United Nations.

Like the above research, a further effort will also show that although mention of the various kinds of human rights in the Universal Declaration of Human Rights by the UN documents is frequent, references have been made most frequently to some particular rights rather than all human rights enumerated in the Declaration. The examples are included genocide, slavery, apartheid, torture, mass murders, prolonged arbitrary imprisonment, systematic racial discrimination, the sort of civil rights concerning with personal life, integrity and security. These acts have been castigated as unlawful in numerous resolutions and treaties.¹³⁷ They are widely regarded

¹³⁷ General Assembly Resolution 2144 (XXI) concerning to policies of racial discrimination and segregation and of apartheid; ECOSOC Resolution 1102(XL) relating to the Elimination of All Forms of Racial Discriminations; ECOSOC Resolution 1164(XLI) relating to racial discrimination and segregation and of apartheid; General Assembly Resolution 34/175 relating to mass and flagrant violations of human rights; General Assembly Resolution 33/173 relating to disappeared persons; Commission on Human Rights Resolution 1985/33 condemning torture and other cruel, inhuman or degrading treatment or punishment; General Assembly Resolution 2074(XX)(1965) condemning the policies of apartheid in South West Africa as " a crime against humanity"; Resolution 2145 (XXI)(1966) were among of the many in which the General Assembly condemned South Africa's policy of apartheid as " a crime

as atrocities which can not be justified on any grounds of state policy or social philosophy. It is also the rights in this regard that have a strong claim to the status of customary law.

Although international references to the Universal Declaration of Human Rights have made it relatively clear that civil rights have convincingly developed, or are developing into customary law, broad domestic references to it may be vague in terms of deciding which rights have become customary law. The least we can say, however, is that frequent references made by a non-treaty state to the International Covenant on Civil and Political Rights or to the Universal Declaration of Human Rights are more able to contribute to the cumulative evidence that at least some of rights designated in the Universal Declaration of Human Rights have obtained status of customary law. For instance, China, in its White Paper, a recent governmental document, officially reconfirmed that¹³⁸

" '[U]niversal Declaration of Human Rights' is 'the first international instrument which systematically sets forth the specific content regarding respect for and protection of fundamental human rights. Despite its historical limitations, the Declaration has exerted a far-reaching influence on the development of the post-war international human rights activities and played a positive role in this regard.' "¹³⁹

against humanity".

¹³⁸ In September 1988, the Chinese foreign minister, in his speech at the 43rd session of the United Nations General Assembly, made an official reference to the Universal Declaration of Human Rights. See Information Office of the State Council of the People's Republic of China, "Human Rights in China," November 1991, at 80.

¹³⁹ *Ibid.*

Therefore, one would reasonably assume that China, when making the above statement, feels that it, although staying away from the International Covenant on Civil and Political Rights, is still under some sort of international obligation to enhance the rights enumerated in the Universal Declaration of Human Rights. As to the question of what specific rights it feels to be binding, however, one has to take a combined look at its constitution and other domestic laws.

1.2.2. Decisions in National Courts

Courts in many states have, in one way or another, referred to or invoked the Universal Declaration of Human Rights although their attitudes were quite different.

In the early years after the Declaration's adoption, some courts' practices with respect to it were seen as rejection of recourse to it by simply denying its binding quality. A Netherlands Special Court of Cassation in *Re Beck* had to decide on an appeal against the conviction, under retroactive criminal provisions, of a German officer for war crimes. The Court refused reliance on the Declaration's prohibition of retroactive criminal legislation,¹⁴⁰ since the Declaration was "not intended as a binding instrument".¹⁴¹

Similarly in the *State (Duggan) v. Tapley*, the supreme Court of Ireland, in extradition proceedings, rejected reliance on the

¹⁴⁰ Article 11 (2).

¹⁴¹ April 11, 1949, 16 Annual Digest 279 (1949).

right of asylum as laid down in Article 14 (1) of the declaration. It found that

this Declaration does not, ... , purport to be a statement of the existing law of nations, far from it. The declaration itself states that it proclaims "a common standard of achievement ..." The declaration, therefore, thought of great importance and significance in many ways, is not a guide to discover the existing principles of international law.¹⁴²

The German federal administrative Court in two decisions in 1956 and 1957, while denying that the articles of the Declaration were general rules of international law, still found it necessary to point out that the domestic provisions called in question did, in fact, conform to the Declaration's principles.¹⁴³

In a similar way, the Court of Taranto (Italy) in *Re Tovt*,¹⁴⁴ on the one hand denied that the Declaration had the force of a binding rule of law, but on the other emphasized that article 15 was a "guiding principle of the highest moral value".¹⁴⁵

The Austrian Constitution Court, in an early decision refused to apply the Declaration for the somewhat unconvincing reason that

[T]his decision of the UN does not, as yet, form part of Austrian law, since the Republic of Austria has not yet

¹⁴² December 12, 1950, 18 Int'l L R. 336, 342, (1951).

¹⁴³ February 22 1956, *Fontes Iuris Gentium A*, II, 4, No. 256; June 29, 1957, *Fontes Iuris Gentium A*, II, 4, No. 297.

¹⁴⁴ March 20, 1954, UN Yearbook on Human Rights 169 (1954).

¹⁴⁵ *Ibid.*, 171.

been admitted to the United Nations.¹⁴⁶

The requirement of an incorporation of treaties into domestic law by specific legislation has had its indirect effects also on the treatment accorded to the Declaration. The Supreme Court of Ireland in *Re O'Laigheis*, when it was referred to the Declaration and to the European Human Rights Convention, dismissed the argument that relied on the Convention for lack of its incorporation, but found it unnecessary even to deal with the Declaration.¹⁴⁷

The High Court of Mauritius in *Rousetty v. the Attorney General*, similarly dismissed both the European Convention and the Declaration since they had not been enacted by Parliament.¹⁴⁸ The Court of Justice of the Netherlands Antilles in *X. V. Public Prosecutor*, steered around the question of the Declaration's domestic effect. When the defendant, in criminal proceedings for giving an illegal public speech, relied on the Declaration's guarantee of the right of freedom of opinion and of expression (Article 19), it found:

This Court will examine this plea on the basis of Article 10 para. 1 of the European Convention which, unlike the Universal Declaration, creates for individuals a possibility of filing a petition claiming violation of human rights.¹⁴⁹

¹⁴⁶ October 5, 1950, S/g. 1030, 78 *Clunet* 622 (1951).

¹⁴⁷ December 3, 1957, 8 *Brit. Int'l Cases*, 871.

¹⁴⁸ March 30, 1967, 44 *Int'l L.R.* 108, 130 (1971).

¹⁴⁹ February 6, 1968, 18 *Netherlands Tijdschrift Voor International Recht* 81 (1971).

As against these instances of a refusal to apply the Declaration, there is a much larger group of cases in which courts have relied on it and quoted from its text.

In the case of *R. v. Oakes*, the Supreme Court of Canada makes an express reference to the Universal Declaration of Human Rights, to reconfirm the principle of the presumption of innocence as a "hallowed principle" protecting "the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct".¹⁵⁰

Certain British cases are of considerable importance for the recognition of human rights as customary law. In *Waddington v. Miah alias Ullah*, for instance, the Court of Appeal quashed a conviction based on the retroactive application of statute, and the House of Lords affirmed. The Court of Appeal emphasized that the "presumption against retrospection applies in general to legislation of a penal character and such legislation is, in general, forbidden by Article 7 of the European Convention on Human Rights and Article 11 (2) of the Universal Declaration of Human Rights..."¹⁵¹

In the case of *Mullin v. Administrator, Union Territory of Delhi and Others*, concerning the right of a detainee to have interviews with members of her family and friends, the Indian Supreme Court held that Article 21 of the Indian Constitution implicitly incorporated "the right to protection against torture

¹⁵⁰ [1986] 1 S.C.R. 103; 26 D.L.R. (4th) 200.

¹⁵¹ 1974 1 WLR 683, 690-1 (HL).

or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights".¹⁵²

The courts of the Federal Republic of Germany have, in numerous instances, relied on the Declaration when interpreting their domestic law, especially the fundamental rights and freedoms protected by the constitution. In particular, the Constitutional Court has shown a tendency to resort to the Declaration: it relied, *inter alia*, on the Declaration in upholding the presumption of innocence in criminal proceedings¹⁵³ and confirmed the protection of the freedom of information, embodied in the Constitution, in the light of the Declaration (Article 19).¹⁵⁴ In a similar way, the Bundesgerichtshof in extradition proceedings interpreted the right of asylum, laid down in the Constitution, in the light of Article 14 of the Declaration, "which the Federal Constitution seeks, generally speaking, to follow."¹⁵⁵

The Civil Court of Courtrai (Belgium), in a whole series of

¹⁵² 1981 1 SCC, at 619.

¹⁵³ December 15, 1965, 19 NJW 243 (1966).

¹⁵⁴ October 3, 1969, 23 NJW 235 (1970).

¹⁵⁵ July 12, 1955, 8 NJW 1365 (1955), 22 Int'l L. R. 520, 524 (1955).

decisions,¹⁵⁶ found it appropriate to read domestic legislation in the light of the Declaration:

The Declaration has not yet been ratified and is not part of Belgian law. Nevertheless, as it was approved and endorsed by the Belgian representatives, it may serve as a guide in the interpretation and construction of national laws the terms of which support such a construction.¹⁵⁷

Similarly, the French Cour de Cassation and High Court of Mauritius found it appropriate to examine the conformity of convictions, and of the provisions underlying the criminal proceedings, with the principles of the Declaration.¹⁵⁸

Netherlands¹⁵⁹ and Italian¹⁶⁰ courts have in a similar manner interpreted their respective constitutions by reference to the Declaration, or have made sure that legislation was in line with its requirements.

In *Auditeur Militaire v. Krumkamp*, a German policeman was prosecuted for the torture of Belgian civilians during the

¹⁵⁶ In re Pietras, November 16, 1951, UN Yearbook on Human Rights 14 (1951); in re Jacqueline-Marie Bukowicz, October 10, 1952, UN Yearbook 21 (1953); Vanderginste v. Vanderginste, November 18, 1955, UN Yearbook 23 (1956); Vanderginste v. Sulman, April 26, 1956, *ibid.*; Leoen v. Simoens, June 29, 1956, *ibid.*; Vanneste v. Vanneste, December 27, 1956, *ibid.*

¹⁵⁷ In re Jacque-line-Marie Bukowicz, October 10, 1952, UN Yearbook 21 (1953).

¹⁵⁸ In re Hauck, Voigtand Others, June 3, 1950, 17 Int'l L.R. 388 (1950); Director of Public Prosecutions v. Labavarde and Another, March 9, 1965, 44 Int'l L.R. 104 (1971).

¹⁵⁹ Public Prosecutor v. F.A.v.A., UN Yearbook on Human Rights 251 (1951); I.C. v. Minister of Justice, March 4, 1970, 2 Netherlands Yearbook of Int'l Law 238 (1971).

¹⁶⁰ Fallimento Ditta Maggi v. Ministry of Finance, Tribunal of Rome, July 27, 1959, 28 Int'l L.R. 607 (1963).

occupation, before the Military Court of Brabant. The Military Court of Brabant in Belgium confirmed the illegality under international law of the torture which the accused had committed:

In searching for principles of international law arising out of the usages established by the civilized nations, the law of humanity, and the requirement of the public conscience, the Military Court is today guided by the Universal Declaration of Human Rights, adopted without opposition by the General Assembly of the United Nations on 10 December 1948. In Article 5 that Declaration provides: 'no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment...'¹⁶¹

The Court of Appeal of Milan found that it had to apply Article 14 of the Declaration, granting to everyone a right to asylum. The court, while admitting that the legal value of the Declaration was disputed in doctrine, found that the development of human rights in nearly seventeen years since its proclamation, left no doubt that it was now to be included among the generally recognized principles of international law to be observed in Italy by virtue of Article 10 of the Constitution.¹⁶²

In *Ministry of Home Affairs v. Kemali*, the Italian Court of Cassation, referring to Article 15 of the Universal Declaration of Human Rights and stating that it is a general principle of law which has become part of Italian law by virtue of Article 10

¹⁶¹ February 8, 1950, 17 Int'l L.R. 390 (1950).

¹⁶² November 27, 1964, 88 IL Foro Italiano II 122, 126 (1965); also *Borovsky v. Commissioner of Immigration*, September 28, 1951, UN Yearbook on Human Rights 287 (1951).

of the Constitution,¹⁶³ refused a finding which would have resulted in the defendant's statelessness and confirmed the individual's right to a nationality.¹⁶⁴

Customary human rights law, like customary international law in general, is a part of the law of the United States to which both the federal and state courts must give effect.¹⁶⁵ The determination of customary international law, including customary human rights law, is a matter of law to be decided by judges and courts, which is appropriate for judicial notice of such rules.¹⁶⁶ Thus, as stated in section 113 (1) of the Restatement of the Foreign Relations Law of the United States, customary law need not be pleaded or proved. In reality, however, given the difficulties inherent in ascertaining customary rules and some judges' lack of familiarity with international law, a growing practice of considering evidence on customary international law, including expert testimony, has evolved.¹⁶⁷ In 1975, class action plaintiffs in *Nguyen Da Yen v.*

¹⁶³ Article 10 provides that "[I]taly's legal system conforms with the generally recognized principles of international law." See A.J. Peaslee (ed.), "Constitutions of Nations," The Hague 1965, vol. III, at 501.

¹⁶⁴ February 1, 1962, 40 Int'l L.R. 191 (1970).

¹⁶⁵ See Restatement of the Foreign Relations Law of the United States, sections 111 and 702 comment c; see Cassese, "Modern Constitutions and International Law," 185 Recueil des Cours, (1985-III) at 331, 368-393.

¹⁶⁶ The Paquete Habana, 175 U.S. at 708; Restatement, section 113 (1).

¹⁶⁷ Restatement, section 113 (2).

Kissinger¹⁶⁸ alleged that the US Immigration and Naturalization Service and other had violated the fundamental human rights of Vietnamese children by, among other things, subjecting them to continued involuntary detention in the United States. Although the case was not decided on this issue, the Court observed on a lengthy footnote¹⁶⁹ that the illegal seizure, removal, and detention of alien against their will in a foreign country may well be a tort in violation of the law of nations under the Alien Tort Claims Act.¹⁷⁰ The evidence adduced by the Court for this tentative conclusion included articles 12,13, 15 and 16 of the Universal declaration of Human rights.¹⁷¹

The leading case on human rights and customary international law in American courts is the 1980 decision by the Second Circuit Court of Appeals in *Filartiga v. Pena-Irala*.¹⁷² Because the action did not arise directly under a treaty, the Court had to determine whether the prohibition against torture was embodied in customary international law. The Court answered this question in the affirmative after consulting the work of jurists, judicial precedents,¹⁷³ and , most important, the usage

¹⁶⁸ 528 F. 2d 1194 (9th Cir. 1975).

¹⁶⁹ *Ibid.*, at 1201-2 n. 13.

¹⁷⁰ 28 USC section 1350.

¹⁷¹ *Nguyen Da Yen v. Kissinger*, 528 F. 2d. at 1201 n. 13.

¹⁷² 630 F. 2d.876 (2d Cir. 1980).

¹⁷³ *Ireland v. United Kingdom*, 25 Enr. Ct. HR (Ser. A.) 1978.

and practice of states. Citing the *Paquete Habana* for the idea that comity matures into a settled rule of international law by means of the general assent of civilized nations,¹⁷⁴ the Court referred to Articles 55 and 56 of the Charter of the United Nations to demonstrate that a state's treatment of its citizens is a matter of international concern.¹⁷⁵ Although there was no universal agreement among nations regarding the status of all the rights guaranteed by the Charter, there was no dissent that those accepted include, at a bare minimum, freedom from torture.¹⁷⁶ The proposition that this right had become part of customary law was supported by citation of the Universal Declaration of Human Rights and the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading treatment.¹⁷⁷ The Court considered these UN declarations significant because they specify with great precision the obligations of member nations under the Charter.¹⁷⁸ As evidence for the prohibition of torture by the modern practice of nations, the Court adduced the consensus about the prohibition of torture expressed in the American Convention on Human rights, the International Covenant

¹⁷⁴ 175 US 677, 694 (1900).

¹⁷⁵ *Filartiga v. Pena-Irala*, 630 F. 2d at 881 (2d Cir. 1980).

¹⁷⁶ *Ibid.*, at 882.

¹⁷⁷ GA Res. 3452, 30 UN GAOR Supp. (No. 34) at 91, UN Doc. A/10034 (1976).

¹⁷⁸ 630 F. 2d at 883.

on Civil and Political Rights and the European Convention on Human Rights, as well as an amicus curiae brief submitted by the US Department of State. The substance of these instruments was reflected in national laws, since the constitutions of more than 55 nations prohibit torture explicitly or implicitly.

Not all courts in the United States acknowledged international human rights instruments as a source of customary law. In 1984, in *Jean v. Nelson*,¹⁷⁹ a class action suit brought on behalf of detained Haitian alien who were subjected to deportation ("excludable aliens"), the US court of Appeals for the 11th circuit rejected the argument that prohibition of arbitrary detention, articulated in several international human rights instruments, is an embodiment of customary international law.¹⁸⁰ By contrast, a year later, in *Fernandez-Roque v. Smith*,¹⁸¹ a district court agreed that the plaintiffs relying on international human rights instruments " established that customary international law prohibits prolonged arbitrary detention ".¹⁸²

In the case of *Tel-oren v. Libyan Arab Republic*,¹⁸³ Judge Robert H. Bork delivered the opinion that individual rights

¹⁷⁹ 727 F. 2d 957 (11th Cir. 1984).

¹⁸⁰ *Ibid.*, at 964 n. 4.

¹⁸¹ *Fernandez-Roque v. Smith*, 622 F. Supp. 887 (ND Ga. 1985).

¹⁸² 622 F. Supp. 887, 903 (ND. Ga. 1985).

¹⁸³ 726 F. 2d 774 (DC Cir. 1984), cert. denied, 470 US 1003 (1985).

recognized in such instruments as the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, and the American Convention on Human Rights are not intended to be judicially enforceable, because some of them are merely precatory and some define rights at such a high level of generality as to preclude their application by courts in a traditional adjudicatory manner.¹⁸⁴

In *Forti v. Suarez-Mason*, the Court, following the rationale and method of *Filartiga*, recognized torture, prolonged arbitrary detention, and summary executions as prohibited by customary international law. However, applying a standard of "universal acceptance and definition", the Court denied, with regard to the prohibition of "causing disappearance", the existence of the requisite degree of international consensus which demonstrates a customary international norm. "Even if there were greater evidence of universality, there remain definitional problems. It is not clear precisely what conduct falls within the proposed norm, or how this prescription would differ from that of summary execution."¹⁸⁵ In so finding, the Court noted the absence of any case-law confirming that causing disappearances constitutes a violation of the law of nations. For similar reason, the Court did not recognize as a customary norm the prohibition of cruel,

¹⁸⁴ *Ibid.*, at 818.

¹⁸⁵ *Forti v. Suarez-Mason*, 672 F. Supp. 1531-1552 (N.D. Cal. 1987).

inhuman, and degrading treatment.¹⁸⁶ Upon reconsideration, the Court, citing international legal experts, the Restatement, and condemnations of causing of the disappearance of individuals, recognized that this offence violates several universally recognized human rights and constitutes an international tort. "This tort is characterized by the following two essential elements: (1) abduction by state officials or their agents; followed by (2) official refusals to acknowledge the abduction or to disclose the detainee's fate."¹⁸⁷

The inconsistent practices of various national courts have indicated that it is still too early to draw the conclusion that the Universal Declaration of Human Rights as a whole has already acquired the status of customary international law. Such inconsistencies are reflected as follows: First, there exists difference in recognizing the binding character of the Declaration. Second, the provisions of the Declaration referred to by different national courts vary. Third, the purposes of referring to the Declaration are different.

A careful analysis of the above courts' practices, however, will provide a clue to have a better understanding of these practices. Those positive court decisions in favour of the Declaration are almost always focused on the rights pertaining to personal life, integrity and security, or what we call civil rights.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

1.2.3. Civil Rights in National Constitutions and Law

By looking at various national constitutions and laws, no one can draw a ready answer as to whether or not the Universal Declaration of Human Rights as a whole is now part of customary international law because constitutions and domestic laws seldom mention it by name directly and because emphasis and repetitions of those rights enumerated in the Universal Declaration do not appear universal in national constitutions. But if we make a further and broader research, we find clear evidence that there exist frequent repetitions of civil rights in almost all constitutions. Except a few constitutions like that of the United States which came being before the Universal Declaration and the Covenant, such a phenomenon can be explained by the fact that either: (a) states incorporate or transfer their international treaty obligations into domestic law in order to make them have domestic law effect after these states accept the International Covenant on Civil and Political Rights; or (b) they, especially those nonsignatories, feel that they should internally guarantee these civil rights in order to live up to international standards of protecting civil rights. As to (b), an unclear matter is which particular document was in the drafters' minds when those constitutions and laws provide with civil rights guarantees, the Universal Declaration or the Covenant, or the both. Two conclusions, however, are evident. One is that the Declaration has influenced greatly national constitutions and laws and that states in the world society at

large feel under some sort of obligation to respect the human rights written in the Declaration although the mechanisms for respecting it may sometimes differ from state to state. Another is that we feel more comfortable with the observation that civil rights as enumerated in the Universal Declaration and the Covenant on Civil and Political Rights have obtained the status of customary international law which are binding upon all states.

Many national constitutions and municipal statutes have incorporated civil rights provisions enumerated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. When a new national constitution is to be drafted, the Declaration is always a ready resource for reference.

Of particular interest are developments in the French Trust Territories of Togoland and the Cameroons. The Statute of Togoland under French Administration of 1956, which established the "Autonomous Republic of Togoland"¹⁸⁸ provided that the laws issuing from the legislature of Togoland must be in conformity with, among other things, the principles set forth in the Universal Declaration of Human Rights. This statute also provided that when the High Commissioner was of the opinion that

¹⁸⁸ Journal Official de la Republique française, of Aug. 26, 1956, Decree No. 56-847; Journal Official du Togo of Aug. 30, 1956; reproduced and commented upon in the Report of the UN Commission on Togoland under French Administration, Doc. T/1343, Trusteeship Council 17th spec. Sess., Official Records, Sept., 1957, Supp. No. 2; also Doc. A/3677.

a law of Togoland violated this provision, he might appeal to the Conseil d'Etat sitting as a court (le Conseil d'Etat statuant au contentieux) for a judgement that in enacting a law repugnant to the Universal Declaration, the Assembly of Togoland has committed an *exces de pouvoir*. The Declaration was therefore made the yardstick for the measurement of the constitutionality and validity of the laws enacted by the Togoland legislature.¹⁸⁹ Togoland, therefore, has been styled a Republic Founded upon respect for treaties and international conventions and the principles proclaimed in the Universal Declaration of Human Rights.¹⁹⁰ Judicial review of Togolese laws with respect to their conformity with the Declaration is, however, no longer provided.

In the trust Territory of the Cameroons under French Administration, the influence of the human rights work of the United Nations has been similar to that which it had exercised in Togoland. A statute promulgated in 1957 prohibited the enactment of laws repugnant, *inter alia*, to the Universal Declaration.¹⁹¹ The new statute for the French Cameroons, which

¹⁸⁹ For explanations of these provisions given to the UN Commission on Togoland under French Administration and to the Trusteeship Council, see Doc. T/1343, paras.149 et seq., 155 and 164, and T/SR. 841, paras. 14 and 18.

¹⁹⁰ Article 1 of the new statute enacted by Decree No. 58-187 of Feb. 22, 1958; see also Report of the UN Commission or for the Supervision of the Elections in Togoland under French Administration, T/1392, paras. 19 and 22.

¹⁹¹ Decree No. 57-301 in Journal Officiel de la Republique française of April 18, 1957, Vol. 89, No. 92.

came into force on January 1, 1959, also provides that Cameroons laws and regulations must respect the principles and fundamental freedoms inscribed in the Universal Declaration of Human Rights.¹⁹²

The influence of the Universal Declaration is also reflected in the constitutional law of two European states, the Federal Republic of Germany and France.

The Declaration provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. This idea was taken over by the authors of the Basic Law of the Federal Republic of Germany, which provides in Article 6 that marriage and the family are under the special protection of the state. On the basis of this provision, the Federal Constitutional Court, in a decision of January 17, 1957, in which it traced the provision back to the Universal Declaration, declared unconstitutional and therefore void the provisions of the German Income Tax Act which provided for the joint assessment of the income of husband and wife. The Court held that such an arrangement for married persons amounted to a disturbing interference of the state with marriage and the family and was therefore violative of the constitutional provision.¹⁹³

¹⁹² Ordinance No. 58-1375 of Dec. 30, 1958, establishing the Statute of the Cameroons; Annex II to the Report of the UN Visiting Mission to Trust Territories in West Africa, 1958, T/1427, Art. 5.

¹⁹³ January 17, 1957, 6 BVerfGE 55 (1957).

The provision of Article 12 of the Universal Declaration of Human Rights that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence also found its way into the municipal law of the Federal Republic of Germany, this time via Article 8 of the European Convention of Human Rights.¹⁹⁴

The Declaration provides that "no one shall be arbitrarily deprived of his nationality." This provision, in a strengthened wording, became Article 16 of the German Basic Law, which is to the effect that no one may be deprived of his German citizenship.

In the preamble to the new French Constitution of 1958 "the French people solemnly proclaims its attachment to the rights of man as defined by the Declaration of 1789, confirmed and complemented by the Preamble of the French Constitution of 1946." In the draft of the preamble as recommended by the Consultative Constitution Committee, it was proposed that the words "and of the Universal Declaration of Human Rights" be added after the reference to the preamble to the French Constitution of 1946. In the final text of the Constitution, however, the reference to the Universal Declaration does not appear. Contrary to its predecessor of 1946, the new Constitution does contain a series of provisions guaranteeing human rights, including at least one which uses the same

¹⁹⁴ See Golson in 33 British Year Book of International Law 317 et seq. (1957).

language as the corresponding provision of the Universal Declaration. This is Article 66 which, in the language of Article 9 of the Universal Declaration, provides that "no one shall be subjected to arbitrary detention." The Constitution further provides that the judicial power, the guardian of individual liberty, shall insure respect for this principle under the conditions provided by law. Professor Carl J. Friedrich has expressed the opinion that this article of the new French Constitution marks an important safeguard of individual liberty and that whoever is responsible for it is to be congratulated for erecting a bulwark for the Rechtsstaat (Rule of Law State).¹⁹⁵

The 1982 Canadian Charter of Rights and Freedoms (part of Canadian constitution) provides constitutional guarantees of civil rights, which are parallel to those in the Universal Declaration and the Covenant. They include the right to life, liberty and security (section 7), the right not to be subjected to any cruel and unusual treatment or punishment (section 12), the rights to be secure against unreasonable searches and seizures and against arbitrary detention or imprisonment (sections 8 and 9), the right to be equal before the law, under the law and has the equal protection of the law and equal benefit of the law (section 15), the right to remedies (section 24), the right to freedom of conscience and religion (section 2), and the right to freedom of movement (section 6). Although

¹⁹⁵ 72 Harv. L.Rev. 837 (1959).

there exists an argument that the 1982 Canadian Charter of Rights and Freedoms is not proposed and adopted because of Canada's ratification of the International Covenant on Civil and Political Rights in 1976,¹⁹⁶ the consensus is that the birth of the Canadian Charter of Rights and Freedoms of 1982 is partly due to the influence of the Universal Declaration, and partly due to the Canada's concern about its duty to implement its international obligations under the UN Charter and the Covenant.¹⁹⁷ Just as Professor Cohen observes that

"[T]hus the Canadian Charter came into being as a central element of a Canadian constitutional restatement influenced, of course, by some sense of duty arising from the pervasive effects of the United Nations Charter, the 1948 U.N. Declaration and the two Covenants of 1969, already ratified by Canada. Indeed, these had made it probable that most truly democratic member states could not long remain unwilling to follow those powerful U.N. models and obligations."¹⁹⁸

Extensive research by this writer has shown that almost all nonsignatories to the Covenant have included civil rights provisions, in one way or another and with different degree of

¹⁹⁶ One argues that the series of domestic events shows that the impetus for the Charter was not the Covenant, but rather the proposals made by the Trudeau government since 1968, and the responses of critics and supporters, either of the whole proposal as such, or of differing versions of what should be included in the Charter. See J.W.S. Tarnopolsky, "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights," 8 Queen's L.J., 1982-83, at 211-213.

¹⁹⁷ *Ibid.*

¹⁹⁸ See Maxwell Cohen, "Reflections on Human Rights, the Canadian Charter and International Influences," in Irwin Cotler and S.Pearl Eliadis (eds.): *International Human Rights Law: Theory and Practice*, 1992, at 161.

emphasis, into their constitutions and internal laws. This may be taken as a convincing evidence to persuade people that civil rights have emerged and/or are emerging as customary norms. It is impossible within the length of this writing to offer an exhaustive example, but a fairly extensive demonstration will certainly help reenforcing the argument. One notable fact is that these civil rights are very often described as "fundamental rights and freedoms" when they are written into constitutions. It is obvious that the valuable nature of civil rights is an opinion intensively and extensively shared among constitutions despite differences in political, economic, social and cultural backgrounds upon which those constitutions are drafted.

The Prejet de Revision Constitutionnelle was published in Arabic and French in an Algerian newspaper in the first week of February, 1989. It was approved in a national referendum on February 23, 1989.¹⁹⁹ Article 28 of the Algerian Constitution guarantees the right to be equal before law when it provides that

"[T] citizens of equals before the law without any possible discrimination on the birth, race, gender (sex), opinion or all other conditions or personal or social circumstance."²⁰⁰

The right to life, liberty and security is guaranteed by Articles 31, 32, 33 and 34 of the Algerian Constitution, and the

¹⁹⁹ See A.P. Blaustein and G.H. Flanz (ed.), "Constitutions of the Countries of the World," v.1, issued November 1990, at 7-11.

²⁰⁰ *Ibid.*

right against arbitrary arrest and detention is guaranteed by Article 44.²⁰¹ To protect the right to privacy, the Algerian Constitution provides that

"[T]he private life and the honour of the citizen are inviolable and protected by the law. The secrecy of correspondence and private communications, in all forms, is guaranteed."

The state guarantees the inviolability of the domicile. No search can be made, except on the basis of the law and with respect to it."²⁰²

The Algerian Constitution, in order to guarantee the right to fair trial, provides that

"[E]very person is presumed to be innocent until the establishment of culpability by a regular court and subject to all the guarantees required by the law.

No one may be considered guilty except by virtue of a law, duly promulgated before the incriminating act."²⁰³

Both the right to remedies and the right to free movement are provided for in Articles 46 and 41 of the Algerian Constitution. Article 35 guarantees the right to conscience and freedom of opinion. One, however, can not find the provision of guaranteeing the freedom of religion in the Algerian Constitution. But Article 2 expressly provides that "[I]slam is the religion of the State."²⁰⁴ We are not sure whether or not there is some non-constitutional provision that protects freedom of religion.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ Articles 42 and 43, *Ibid.*

²⁰⁴ *Ibid.*, at 5.

Some other believing-Islam states' constitutions, however, do protect explicitly the right to religion though there is as a similar provision in their constitutions as in Algerian Constitution, saying that Islam is the religion of the state. The Constitution of the Islamic Republic of Pakistan, for instance, does guarantee the right to freedom of religion in spite of the words, in its constitution, of "Islam to be state religion".²⁰⁵ Bahrain, an island state in the Arab world, also provides in its constitution of 1973 a provision guaranteeing the right to freedom of conscience and religion.²⁰⁶

Besides the guarantee of the right to religion, the Constitution of the State of Bahrain of 1973 also provides a package of other civil rights.²⁰⁷ Article 18 protects the right to be equal before the law as it provides

"[P]eople are equal in human dignity, and citizens shall be equal in public rights and duties before the law, without discrimination as to race, origin, language, religion or belief."

Article 19 specifies that

(a) Personal liberty is guaranteed in accordance with the

²⁰⁵ The Constitution of the Islamic Republic of Pakistan provides a comprehensive guarantee of civil rights. See The Constitution of the Islamic Republic of Pakistan, Amended to May 27, 1981, in A.P. Blaustein and G.H. Flanz, "Constitutions of the Countries of the World," issued March 1986, at 10-19.

²⁰⁶ Article 22 of the Constitution of State of Bahrain, see A.P. Blaustein and G.H. Flanz, "Constitutions of the Countries of the World," v.1, issued June 1985, at 21.

²⁰⁷ *Ibid.*, at 5-21.

law.

(b) No person shall be arrested, detained, imprisoned, searched or compelled to reside in a specified place, nor shall the residence of any person or his liberty to choose his place of residence or his liberty of movement be restricted, except in accordance with the law and under the supervision of the judicial authorities.

....

(d) No person shall be subjected to physical or mental torture, enticement or degrading treatment and the law shall provide the penalty for these acts.

The right in relation to fair trial is written into Article 20, which reads that

(a) No crime or penalty may be established except by virtue of law, and no penalty may be imposed except for offenses committed after the relevant law has come into force.

...

(c) An accused person shall be presumed innocent until proved guilty in a legal trial in which the necessary guarantees for the exercise of his right of defence in all the stages of investigation and trial are ensured in accordance with the law.

(d) No physical or moral injury shall be inflicted on an accused person.

Articles 25 and 26 of the Constitution of State of Bahrain guarantee the right to privacy.²⁰⁸

The Antigua and Barbuda Constitution Order came into operation in 1981.²⁰⁹ The sort of civil rights which have found their way into the constitution of Antigua and Barbuda include the right to life, liberty, security of the person, the right to

²⁰⁸ *Ibid.*

²⁰⁹ See A.P. Blaustein and G. H. Flanz (ed.), "Constitutions of the Countries of the World," v.1, issued October 1981, at 8-22.

enjoyment of property and the protection of the law, the right to freedom of conscience including freedom of thought and of religion, the right to family life and private property;²¹⁰ the right to protection from slavery and forced labour;²¹¹ the right to protection from torture, or inhuman or degrading punishment or other such treatment;²¹² the right to freedom of movement.²¹³ To ensure the right to fair trial, Article 15(2) (a) provides for the presumption of innocence, and Article 15(4) further guarantees that

No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is more severe in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

The civil rights guaranteed by the 1977 Constitution of Bahamas are broad enough to include all those corresponding to civil rights designated by the Universal Declaration and the Covenant.²¹⁴ Chapter III of the constitution, which is entitled "Protection of Fundamental Rights and Freedoms of the Individual", guarantees the right to life (Article 16), the right to protection from torture or cruel, inhuman, or degrading

²¹⁰ Article 3 of the Antigua and Barbuda Constitution Order, *ibid.*

²¹¹ Article 6, *ibid.*

²¹² Article 7, *ibid.*

²¹³ Article 8; *ibid.*

²¹⁴ *Ibid.*, at 17-32.

treatment or punishment (Article 17), the right to protection from slavery and forced labour (Article 18), the right to protection from arbitrary arrest or detention (Article 19), the right to protection for privacy of home and other property (Article 21), the right to remedies (Article 19(4)), the right to fair trial including fair hearing, presumption of innocence and prohibition of *ex post facto* laws (Article 20), the right to protection for privacy of home and other property (Article 21), the right to protection of freedom of conscience including freedom of thought and of religion (Article 22), and the right to protection of freedom of movement (Article 25).²¹⁵

Part III (Fundamental Rights) of the Constitution of the People's Republic of Bangladesh as amended in 1986 guarantees comprehensive civil rights as corresponding to those in the Universal Declaration and the Covenant.²¹⁶ From Article 26 to Article 46, the constitution of Bangladesh provides guarantees to the right to be equal before law, the right to protection of life, personal liberty, the right to safeguards as to arrest and detention, the right to protection from forced labour, the right to prohibition of *ex post facto* laws, the right to protection from torture or cruel, inhuman or degrading punishment or treatment, the right to freedom of movement, the right to thought, conscience and religion, the right to property, the

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*, issued June 1989, at 19-25.

right to privacy and the right to remedies.²¹⁷

Under Title II (about the rights, liberties, guarantees and fundamental duties) of the 1984 Constitution of the Public of Guinea-Bissau, various kinds of civil rights are protected.²¹⁸ Article 23 guarantees the right to be equal before the law. Article 25 protects the right to found a family. Article 32 provides

1. Every citizen has the right to live and to physical and moral integrity.

2. Every citizen enjoys the inviolability of his person, and can't be arrested or suffer any sanction, but in the cases, forms and warranties foreseen by the law. Every accused or offender has the right to a defense.

3. Nobody can be submitted to torture, penalties or cruel, inhuman and degrading treatments.

Article 33 provides that "[P]enal law can't be retroactive. Exceptions are made only in cases when retroactivity can benefit the condemn or accused person." The right to privacy and right to freedom of thought and religion are guaranteed by Articles 38 12 and 44 of the Constitution of the Public of Guinea-Bissau.²¹⁹

The Constitutional Law of the People's Republic of Angola, as revised and altered on 11 August 1980 guarantees some civil rights parallel to those set forth both in the Universal Declaration and the Covenant.²²⁰ Article 17 protects the right

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*, issued September 1987, at 19-23.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*, v.1, issued November 1992, at 14-17.

to life and liberty as it reads

"[T]he State shall respect and protect the human person and human dignity. Every citizen shall have the right to the free development of personality while maintaining the respect due to the rights of other citizens and to the higher interests of the Angolan people. The life, liberty, personal integrity, good name and repute of every citizen shall be protected by law."

other civil rights guaranteed by the Constitution include the right to be equal (Article 18), the right to privacy (Article 24), the right to freedom of conscience, belief and worship (Article 25).²²¹

The 1853 Constitution of Argentina after its amendment also contains protection of civil rights.²²² The Constitution of Argentina, in a single article (Article 18), establishes a relatively comprehensive protection of civil rights when it provides

"[N]o inhabitant of the Nation may be punished without previous trial, based on an earlier law than the date of the defence, nor tried by special commissions, nor removed from the judges designated by law before the date of the offence. No one can be compelled to testify against himself, nor be arrested except by virtue of a written order from a competent authority. The defense, by trial, of the person and of right is inviolable. The residence is inviolable, as are letters, correspondence and private papers; and a law shall determine in what cases and for what reasons their search and seizure for political offenses, all kinds of torture, and flogging, are forever abolished. The prisons of the Nation shall be healthy and clean, for the security and not for the punishment of the prisoners confined therein; and any measures that under pretext or precaution inflicts on them punishment beyond the demands of security, shall render liable the judge who authorizes it."

²²¹ *Ibid.*

²²² *Ibid.*, issued July 1983.

The right to freedom of religion and the right to protection from slavery are guaranteed by Article 14 and Article 16 respectively. To ensure other rights which are not expressly designated by the Constitution, Article 33 specially states that

"[T]he declarations rights, and guarantees that the Constitution enumerates shall not be construed as a denial of other rights and guarantees not enumerated, but which rise from the principle of the sovereignty of the people and from the republican form of government."

Another South American state, Brazil, also offers a broad protection of civil rights in its constitution of 1988.²²³ Under Title II (Fundamental Rights and Guarantees), guaranteed civil rights as enumerated in the Universal Declaration and the Covenant are: the right to be equal before the law (Article 5), the right to life, liberty, equality, security, and property (Article 5), the right to protection from torture, inhuman or degrading treatment (Article 5 (II)), the right to freedom of conscience, thought and religion (Article 5 (IV) (VI)), the right to privacy (Article 5 (X) (XI) (XII)), the right to free movement (Article 5 (XV)), the right to prohibition of *ex post facto* laws (Article 5 (XL)), the right to fair trial including due process of law (Article 5 (LIV) (LV) (LVII)), the right to protection for presumption of innocence (Article 5 (LVII)).²²⁴

In addition to the foregoing constitutions, extensive research may also offer another fairly long list of non-signatories to the Covenant, whose constitutions protect all

²²³ *Ibid.*, v.2, issued August 1990, at 1-4.

²²⁴ *Ibid.*

civil rights as enumerated in the Universal Declaration and the Covenant. Such a partial list includes the following states: Belize, Botswana, Burkina Faso, Cape Verde, Dominica, Zagreb, Equatorial Guinea, Guatemala, Haiti, Honduras, Israel, Kiribati, the Republic of Korea, Kuwait, Liberia, Malaysia, Malta, Namibia, Nauru, Nepal, Nicaragua, Nigeria, Papua New Guinea, Paraguay, the Republic of the Philippines, Qatar, St. Christopher and Nevis, St. Lucia, St. Vincent, Democratic Republic of Sao Tomé.

Some communist states, when they rewrite or amend their constitutions, have also specified comprehensive civil rights guarantees in their constitutions. These constitutions, as this research has shown, include: the 1976 Constitution of the People's Socialist republic of Albania, the 1976 Constitution of Cuba, the 1987 Constitution of Ethiopia, State of Cambodia Constitution of 1989, the Constitutional Law of Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities in the Republic of Croatia, the 1991 Charter of Fundamental Rights and Freedoms as a Constitutional Law of the Federal Assembly of the Czech and Slovak Federative Republic, the 1992 Constitution of Estonia, and the Constitution of Lithuania.

The 1982 Constitution of the People's Republic of China is no exception in terms of civil rights protection.²²⁵ Like legal

²²⁵ Adopted on December 4, 1982 by the fifth National People's Congress of the People's Republic of China at its fifth session.

systems of other states, the Chinese Constitution is the supreme law in China and possesses the highest legal effects (Preamble to the Constitution). Any law which conflicts with the Constitution is void and null. The Constitution provides general principles of rules. Other domestic laws, also passed by the National People's Congress (the Legislature in China), elaborate on those principles in separate documents.²²⁶

The new Chinese Constitution and municipal laws, although not directly referring to the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights by name, have incorporated comprehensively almost all of the provisions of the Declaration, or put another way, contain provisions parallel to those in the Declaration.

The personal rights (civil rights) include: the right to life, the right to health, the right to personal liberty.²²⁷ The rights to life and health are seen as the basis of implementation and enforcement of the above personal rights. The

²²⁶ The expressions of "In accordance with the Constitution" and "Based upon the Constitution" are used as the foundation of making other domestic laws, see for example, Article 1 of the Civil Law of the People's Republic of China, Article 1 of the Criminal Law of the People's Republic of China, Article 1 of the Criminal Procedural Law of the People's Republic of China. "Collection of the Laws of the People's Republic of China," 1990, at 1, 97-98, 315, 207-208.

²²⁷ The personal rights also include the right to names, the right to fame, the right to honour, the right to portrait, and other rights pertaining to persons, which include the right of personal residence not to be infringed, the right to freedom of communications, the right of confidential communications and the right of environment. Articles 37, 38, 39 and 40 of the Constitution of the People's Republic of China, see Collection of the Laws of the People's Republic of China, 1990, at 7-8.

Chinese Criminal Law of 1980 explicitly provides that those who deliberately cause physical harm to citizens so as to cause personal damage or death shall, according to law, receive punishment, including set terms of imprisonment, life imprisonment, or the death penalty.²²⁸ Those who cause others' bodily damage by torts shall pay damages.²²⁹

The implication of the right to personal liberty is threefold. First, it connotes that the freedom of personal activities shall not be unlawfully restricted. Second, it means that a person shall not be subjected to unlawful detention and arrest. Third, it suggests that a person shall not be subjected to physical infringement. Article 37 of the Chinese Constitution provides that the personal liberty of the citizens of the People's Republic of China shall not be subjected to infringement. No citizen shall be subjected to arrest unless it is approved by People's Procurate, or decided by People's Court and enforced by Public Security Organ. Unlawful deprivation or restriction of citizens' personal freedom by detention or other means is prohibited; and unlawful search of persons is prohibited. The Chinese Criminal Law further provides that a person who commits the crime of unlawful detention or unlawful deprivation of other citizens' personal freedom through other

²²⁸ The Criminal Law of the People's Republic of China, Articles 132 to 135, Collection of the Laws of the People's Republic of China, 1990, at 106.

²²⁹ General Provisions of Civil Law of the People's Republic of China, Article 119, *ibid.*, at 324.

means shall be punished for less than three years of imprisonment, detention or deprivation of political rights.²³⁰ A person who unlawfully restricts or searches other persons shall be punished for less than three years of imprisonment or detention.²³¹

The State protects the rights of the whole people and collective ownership by the working people, which include the right to property ownership, the right to management, the right to contract, and the right to use of state-owned resources.²³² The Constitution provides that the State protects the right of citizens to own lawfully-earned income, savings, houses and other lawful property.²³³ As the General Provision of Civil Law defines in the constitutional sense, that private property include citizens' lawful income, houses, savings, articles for daily use, cultural relics, books and reference materials, forest trees, livestock and poultry , and citizens'-earned means of production and property as permitted by law.²³⁴ No organizations are permitted to seize, loot, damage, or unlawfully confiscate, detain, freeze, and expropriate

²³⁰ See Article 143 of the Criminal Law of the People's Republic of China, *Ibid.*, at 107.

²³¹ *Ibid.*, Article 44.

²³² General Provisions of Civil Law of the People's Republic of China, Articles 80 and 81, Collection of the Laws of the People's Republic of China, 1990, at 321.

²³³ *Ibid.*, Article 13, at 6.

²³⁴ See General Provisions of Civil Law of the People's Republic of China, *ibid.*, Article 75, at 321.

individuals' lawful property.²³⁵ Property seized unlawfully should be returned. If the property cannot be returned, damages, including damages for the other material losses incurred by the sufferers, should be paid in terms of converted money.²³⁶

Other civil rights guaranteed by the Chinese Constitution and laws include the right to equality before the law²³⁷ and nondiscrimination in application of the law,²³⁸ the right to remedies,²³⁹ the right to privacy,²⁴⁰ the right to marry and found a family,²⁴¹ the right to religion,²⁴² the right to prohibition of arbitrary arrest and detention or exile,²⁴³ and the right to a fair trial.²⁴⁴

²³⁵ *Ibid.*

²³⁶ *Ibid.*, Article 117, at 324.

²³⁷ Article 33 of the Constitution of the People's Republic of China, *ibid.*, at 7.

²³⁸ Article 4 of the Criminal Procedure Law of the People's Republic of China, *ibid.*, at 208.

²³⁹ Article 41 of the Constitution of the People's Republic of China, *ibid.*, at 7.

²⁴⁰ Article 39 and 40 of the Constitution of the People's Republic of China, *ibid.*

²⁴¹ Article 49 of the Constitution of the People's Republic of China, *ibid.*

²⁴² Article 36 of the Constitution of the People's Republic of China, *ibid.*

²⁴³ Article 37 of the Constitution of the People's Republic of China, *ibid.*

²⁴⁴ Although the Chinese Constitution does not directly provide such provisions, Articles 2-10 of the Criminal Procedure Law of the People's Republic of China regulate criminal procedure to that effect of fair trial. *Ibid.*, at 208.

Although the Universal Declaration of Human Rights was not adopted by the present Chinese government, the Chinese government, as indicated earlier, has made frequent official references to it both in international and domestic fora, to express China's faith in and respect for it. In addition, China is not a party to the International Covenant on Civil and Political Rights, and its existing Chinese Constitution went into effect in 1982, fourteen years after the International Covenant on Civil and Political Rights. The existing Chinese Constitution, however, does incorporate almost all of the civil rights provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The incorporation or embodiment of the Declaration into the Chinese Constitution is reflected by the following characters:

First, although phraseology and terms as used in the Chinese Constitution to guarantee civil rights enumerated in the Declaration and the Covenant, partly due to different languages, are not exactly the same, the contents of these documents share many similarities. Article 9 of the Declaration says that "no one shall be subjected to arbitrary arrest, detention or exile," while Article 37 of the Chinese Constitution says that "no citizens may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court, and arrests must be made by a public security organ". Article 8 of the Declaration states that "everyone has the right to an effective remedy by the competent national tribunals for acts

violating their fundamental rights granted him by the constitution or by law", while Article 41 of the Chinese Constitution provides that "citizens who have suffered losses through infringement of their civic right by any State organs or functionary have the right to compensation in accordance with law". One, therefore, would reasonably argue that China, when drafting its constitution and laws, is fully aware of the existence of international norms of civil rights. Such norms exist not only in international conventions or covenants, but also in general practice of states, and China must have felt that it is under some sort of obligation to observe these norms. Such high similarities can not be explained otherwise.

Second, although the methods of prescriptions of civil rights are somewhat different, the legal obligations of respecting and observing civil rights are tangible. The Chinese Constitution appears to put more emphasis on the balance of rights and obligations than the Declaration does. Both of them talk about the freedom of religion,²⁴⁵ the latter, however, emphasizes that "no one may make use of religion to engage in activities that disrupt public order impair the health of citizens or interfere with the educational system of the State".²⁴⁶ As to the right to work,²⁴⁷ the Chinese Constitution also provides that citizens of

²⁴⁵ Article 18 of the Declaration, and Article 36 of the Chinese Constitution.

²⁴⁶ Article 36 of the Chinese Constitution.

²⁴⁷ Article 23 of the Declaration.

the People's Republic of China have the right as well as the duty to work.²⁴⁸ Compared with the right to marry and found a family in Article 16 of the Declaration, Article 49 of the Chinese Constitution prescribes that "marriage, the family and mother and child are protected by the State, and both husband and wife have the duty to practise family planning". The term of "duty" used in prescribing rights reflects certain relative rather than absolute character of human rights incorporated into the Chinese Constitution. Jurisprudence never denies the balance between enjoying rights and carrying out duties. For example, no legal system in the contemporary world permit one to exercise his rights to such an extent as to cause detriment to other people's rights and interests. Besides, even in the Universal Declaration and the Covenant, certain civil rights are subject to certain limitations.²⁴⁹

Third, some provisions of human rights in the Chinese Constitution are more detailed than those contained in the Declaration. For example, the Chinese Constitution prescribes explicitly the protection of the rights and interests of old people, women, children, ill or disabled people.²⁵⁰ It is fair to say that this aspect is due more to the fact that the Chinese

²⁴⁸ Article 42 of the Chinese Constitution.

²⁴⁹ See generally A.C. Kiss, "Permissible Limitations on Rights," in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, 1981, at 290-310; Armand de Mestral, et al (ed.), *The Limitation of Human Rights in Comparative Constitutional Law*, 1984.

²⁵⁰ Articles 45, 48 and 49 of the Chinese Constitution.

Constitution has codified existing moral and legal obligations which reflect Chinese practice, customs and traditional culture than to the fact that the Chinese Constitution has incorporated the provision of the Declaration.

Fourth, some of the rights written in the Universal Declaration of Human Rights are have not found their ways into the Chinese Constitution. They include: (1) Article 4 concerning prohibition of slavery; (2) Article 5 relating to prohibition of torture or cruel, inhuman or degrading treatment or punishment; (3) Article 10 concerning the entitlement to full equality to a fair and public hearing by an independent and impartial tribunal; (4) Article 11 concerning the right of presumption of innocence before conviction; and (5) Article 13 relating to the right to freedom of movement and residence within the borders of each state. The absence of such a basic or fundamental human rights are said to be made in regard to the particular situation in China. For instance, the absence of the provision of prohibition of slavery is due to the fact that no slaves or slavery exist in China at all,²⁵¹ while the absence of the right to freedom of movement and residence is due to the existing situation that China is an over-populated State and free movement would put extraordinary pressures on the urban areas. The Chinese Constitution does not have a provision

²⁵¹ See News Office of the State Council of the People's Republic of China, "On Sovereignty of Tibet and Its Human Rights Situations," White Paper of the People's Republic of China, People's Daily (Overseas Edition), September 23 and 24, 1992.

prohibiting torture and cruel, inhuman, or degrading treatment or punishment, but China in 1986 accepted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. China has also joined other relevant international conventions like the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid. In China, international obligations arising from acceptance of treaties or conventions have a superior legal effect as opposed to domestic law.²⁵²

It is true, as Professor Schachter has put it, that:

General statements by international bodies (such as the United Nations general Assembly or the Tehran conference on Human Rights) that the "Universal Declaration constitutes an obligation for the members of the international community" are not without significance, but their weight as evidence of custom cannot be assessed without considering actual practice. National constitutions and legislations similarly require a measure of confirmation in actual behaviour. One can readily think of numerous constitutions that have incorporated many of the provisions of the Universal Declaration of Human Rights or other versions of the Human Rights norms, but these provisions are far from realization in practice. Constitutions with human rights provisions that are little more than window-

²⁵² It is to be noted that the Chinese Constitution has no express provision in respect to the relative position of treaties and law. From the procedures of law-enacting and treaty making, it appears that laws and treaties have equal legal force. However, when the conflicts occurs, a tendency during recent years in China is that treaties will be given superiority over laws and the provisions of treaties will be applied internally whether they are concluded before or after the enactment of laws. This tendency, as indicated by a Chinese writer, "manifests the resoluteness of China to put into effect the principle that treaties must be scrupulously respected." See Wang Tieya, "International Law in China: Historical and Contemporary Perspective," 221 *Recueil de Cours* (1990-II), at 326-333.

dressings can hardly be cited as significant evidence of practice or "general principles of law".²⁵³

It is equally true that no states in the world of today are perfectly and historically clean in their record of protection of rights, no matter how many civil rights provisions they claim to contain. On the contrary, the fact that a dictatorial and totalitarian state has incorporated civil rights provisions into its constitution has strongly evidenced itself that it feels the sort of international pressure from the sense of international obligations regardless of whatever window-dressing the constitution may prove to be. Just as Judge Lachs has put it in his dissenting decision in the *North Sea Continental Shelf* cases that "[F]or in the world today an essential factor in the formation of a new rule of general international law is to be taken into account: namely that States with different political, economic and legal systems."²⁵⁴

"Universal words do not imply universal deeds", and "it is perhaps obvious that we are not to be satisfied by merely taking note of the fact that the ideal of human dignity is verbally accepted".²⁵⁵ An audience of international lawyers will perhaps respond with greater understanding than any other to the suggestion that general principle embodied, and general

²⁵³ See Oscar Schachter, "International Law in Theory and Practice," 178 *Recueil des Cours*, (1982-V) at 335.

²⁵⁴ ICJ Rep., 1967, at 227

²⁵⁵ See Myres McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order," 53 *A.J.I.L.* 9 (1959).

phraseology used, in a basic document sometimes have a decisive effect on subsequent legal history. The Constitution of the United States might be different if the Fifth and Fourteenth Amendments had not prohibited deprivation of life, liberty, or property "without due process of law," or if general expressions such as "the privileges and immunities of citizens" had not been used. There are already cases on record where the general language of the Universal Declaration has tended to encourage similar developments.

What is very important in the first place is to have a constitution which contains civil rights provisions. The implementation of a constitutional right is irrelevant in terms of citing it as an evidence of customary law. Scholars very often see U.S. constitution as a contribution to the development of international protection of civil rights.²⁵⁶ Its early implementation, however, was somewhat different. In the early case of *Scott v. Sandford*, the Supreme Court of the United States held, *inter alia*, that for Congress to purport to free the slave deprived his master of property without due process of law, in violation of the Fifth Amendment.²⁵⁷ Henkin made a comment that

"[E]ven in the United States, where the Declaration of Independence was early domesticated in state and national constitutions and bill of rights, the Alien and Sedition

²⁵⁶ See L. Henkin, "International Human Rights in the United States," in Meron (ed.): *Human Rights in International Law: Legal and Policy Issues*, 1984, Vol. 1, at 25-55.

²⁵⁷ 60 U.S. (19 How.) 393 (1857).

Laws came soon after; and the Supreme Court invoked the national Bill of Rights only once before the Civil War, to protect the master's property rights in a famous slave, Dred Scott."²⁵⁸

Although a difference of state practices in the right to freedom of movement suggests that it might be a possible exception, majority of the civil rights enumerated in the Universal Declaration and the Covenant is guaranteed even by many non-treaty states in their constitutions. The generalization, therefore, may be drawn from such a phenomenon: majority of civil rights has emerged or are emerging as customary norms in international law.

1.3. Jus Cogens and Customary Law of Civil Rights

1.3.1. U.N. Human Rights Provisions and Jus Cogens

The inquiry into the nature of the UN Charter must go even further: one must now take into account the general acceptance of the concept of *jus cogens* by the international legal community and the characterisation of certain portions of the Charter as such.²⁵⁹

Principles of *jus cogens* are imperative principles of

²⁵⁸ See L. Henkin, "The Rights of Man Today," 1978, at xi.

²⁵⁹ See L.A.Alexidze, "Legal Nature of *Jus Cogens* in Contemporary International Law," 172 *Recueil des cours* (1881-III), at 219; G.Gaja, "*Jus Cogens* Beyond the Vienna Convention," *ibid.*, at 271. *Jus cogens*, a Latin concept, originates in ancient Roman Law under which transactions and obligations involving infringement of rules of law relative to "public order" were invalid because illegal. For detail, see Suy, "The Concept of *Jus Cogens* in Public International Law," Carnegie Endowment for International Peace (Geneva, 1967) at 18-20.

international law and Article 53 of the 1969 Vienna Convention on the Law of Treaties provides that treaties are void if they conflict with these peremptory norms of general international law. A peremptory norm is defined as a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.²⁶⁰ Although the concept of *jus cogens* was a subject of controversy among international lawyers for some decades, its inclusion in the Vienna Convention on the Law of Treaties is evidence that it has now been accepted by virtually all States. However, one of the difficulties with the definition of peremptory norms in the Vienna Convention is, as is well known, the absence of detailed discussion or examples, potential as well as actual. It is generally recognised that some provisions in the UN Charter: parts of Article 2, the fundamental principles, and aspects of 33, on peaceful settlement, enjoy the character of *jus cogens*.²⁶¹ In addition, for the purpose of exemplifying *jus cogens*, the International Law Commission has listed, among other things, a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which

²⁶⁰ For the text, see 63 Am.J.Int'l.L., 1969, at 891.

²⁶¹ See R.St.J.Macdonald, "The Charter of the United Nations and the Development of Fundamental Principles of International Law," in Bin Cheng and E.D.Brown (ed.), *contemporary Problems of International Law: essays in Honour of Georg Schwarzenberger on His Eighty Birthday*, 1988, at 200.

every State is called upon to co-operate.²⁶²

In the course of the Commission's debates on the draft article, further possible examples of unlawful treaties had been mentioned, among them that of a treaty "violating human rights".²⁶³ This suggestion implies that the duty to respect human rights is a peremptory norm of general international law and any treaty whereby States attempt to contract out of it is void.

The suggestion attaching peremptory character to the obligation of respecting human rights is debatable.

The question may be asked first whether the issue has much practical importance since States are not likely to enter into treaties that deprive persons of the rights mentioned. While it is true that treaties are not likely to include provisions that directly deprive persons of basic rights, a treaty may have such consequences in its implementation. This may be true, for example, of a treaty of extradition. It is noteworthy that the Institut de droit international adopted a resolution on extradition in 1983 in which it declared that extradition otherwise required by a treaty may be refused in case there are serious reasons to fear that the accused will be a victim of a violation of basic human rights by the requesting State.²⁶⁴ This

²⁶² Yearbook Int'l L. Comm., Vol. 2, 1966, at 247-249.

²⁶³ See Report of the International Law Commission to the General Assembly, 18th Session (A/6309/Rev.I), 61 Am. J.Int'l L., 1969, at 411.

²⁶⁴ See Ann.de l'Inst. de droit int., 1983, Vol. 60-II.

example indicates that by recognizing the *jus cogens* character of human rights, it may be applied not only to a case in which a treaty provision is contrary to human rights, but also where the application of a treaty requirement results in an infringement of a right in that particular case. Examples of such use of *jus cogens* are hard to find, but they are likely to occur in the future if States become more sensitive to rights concerns.²⁶⁵

The second question is whether or not the provisions in the UN Charter in relation to human rights constitute *jus cogens*. A sweeping negation of it is introduced by Sztucki, who admits that

"rules of international law relative to the protection human rights are, certainly, of a specific nature since they are intended not so much for the benefit of the States, as directly for the benefit of the individuals concerned. But...still the international practice would not confirm the proposition that the specific nature of rules pertaining to human rights has conferred upon these rules the quality of *jus cogens*".²⁶⁶

The most authoritative support for classifying respect for human rights as a peremptory norm comes from Judge Tanaka as expressed in 1966 in his Dissenting Opinion in the *South West Africa Cases (Second Phase)*, in these words:

If we can introduce in the international field a category of law, namely, *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum*,

²⁶⁵ See Oscar Schachter, "International Law in Theory and Practice," 1991, at 343-344.

²⁶⁶ See Sztucki, "Jus Cogens and the Vienna Convention on the Law of Treaties," 1974, at 49.

capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*.²⁶⁷

More balanced is the opinion of Verdross, according to which:

Not all human rights proclaimed in the Declaration of Human Rights and accepted by the General Assembly are recognized by general international law. It cannot be denied, however, that an open and permanent violation of fundamental human rights is a violation of the Charter, because the Member States are obliged under its Article 56 to cooperate with the United Nations Organization for the achievement of the purposes set forth in Article 55. Among the purposes indicated there we find "universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions to race, sex, language, or religion."²⁶⁸

Those who are of the view that the UN human rights provisions belong to *jus cogens* very often refer to Article 103 of the Charter, which reads:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

This stipulation has been interpreted by Lord McNair to the effect that provisions of the Charter which purport to create legal rights and duties possess a semi-legislative character, the result being that any attempt to derogate from them by treaties between Member States will be void.²⁶⁹ Others point out that Article 103 does not pronounce invalidity of conflicting treaties and it is possible that they will merely be

²⁶⁷ [1966] ICJ Reports 298.

²⁶⁸ See Verdross, "*Jus Dispositivum* and *Jus Cogens* in International Law," 60 Am. J.Int'l L., 1966, at 59.

²⁶⁹ See L.McNair, "The Law of Treaties," 1961, at 217.

unenforceable.²⁷⁰

Verdross, however, might provide us a better approach when he notes that

"a norm having the character of *jus cogens* can practically be created only by a norm of general customary law or by a general or multilateral convention."²⁷¹

Jus cogens is a form of customary international law. This point has already been generally accepted by jurists. The Restatement (Third) of the Foreign Relations Law of the United States notes that *jus cogens* "is now widely accepted...as a principle of customary law".²⁷² Brownlie refers to *jus cogens* as "rule of customary law".²⁷³ D'Amato claims that it "should be possible to argue that a rule of *jus cogens* simply means a very strong rule of customary international law".²⁷⁴ Christenson refers to the "customary norm of *jus cogens*" and discusses "customary norm possibly having *jus cogens* quality", and "Customary rules of public order".²⁷⁵ In the case of *Military and Paramilitary*

²⁷⁰ Third Report on the Law of Treaties, 1958, 2 Y.B.Int'l L. Comm'n 43.

²⁷¹ See Verdross, "Jus Dispositivum and Jus Cogens in International Law," 1967, 61 Am.J.Int'l L., at 946.

²⁷² The Restatement (Third) of the Foreign Relations Law of the United States, section 102, Reporter's n.6.

²⁷³ See I. Brownlie, "Principles of Public of International Law," 3d ed., 1079, at 513.

²⁷⁴ See A.D'Amato, "The Concept of Custom on International Law," 1971, at 111, 132.

²⁷⁵ See G. Christenson, "The World Court and Jus Cogens," 81 AM.J.Int'l L. 1987, at 99. See also K. Venkata Raman, "Toward a General Theory of International Customary Law," in *Toward World Order and Human Dignity* (W.Reisman and B.Weston eds.), 1976, at

Activities in and Against Nicaragua (Nicaragua v. U.S.), the International Court of Justice indicates that *jus cogens* is "not only a principle of customary international law but also a fundamental or cardinal principle of such law... 'having the character of *jus cogens*'".²⁷⁶ Although the text concerning *jus cogens* is found in Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, it, like other customary norms, has a general binding force upon all states: party states and non-party states. Obviously, a formation of customary law is a necessary but insufficient element for a norm to become *jus cogens*. Therefore, one of our tests is to take a look at the legal nature of the provisions of the UN Charter. Since not all the UN provisions are adopted as customary international law especially when some of the provisions deal with only administrative and procedural issues within the framework of the United Nations itself, we feel rather reluctant to draw a conclusion that a particular norm established by a particular provision obtains the status of *jus cogens* unless we are convinced that the norm first becomes a customary law under international law. Not all customary law belongs to *jus cogens*, but *jus cogens* must first belong to customary law. A *jus cogens* norm stands at the top of customary law in terms of hierarchy of

365, 377, 383; Richard B. Lillich, "Remarks," 79 Proc., Am. Soc. Int'l L., 1985, at 84, 86; Myres S. McDougal, "Remarks," *ibid.*, at 284-285; T. Meron, "The Geneva Conventions as Customary Law," 81 Am. J. Int'l L. 1987, at 348, 350, 370.

²⁷⁶ Reprinted in 25 I.L.M. 1986, at 1023, 1066.

norms.

Another test used by Verdross is to take into account general or multilateral treaties. A general international treaty is an alternative process from which peremptory norms may emerge. It is accepted that only "law-making treaties" may produce cogent norms which cannot be contracted out.²⁷⁷ Within the category of law-making treaties, a further distinction has to be drawn between constitutive and declaratory. It is also generally recognised that declaratory treaties reflect and restate existing customary norms.²⁷⁸ Very frequently, however, it is in practice difficult to make such distinctions as between the two

²⁷⁷ An international treaty may correspond not only to contract but also to legislation. Treaties whose nature corresponds to a legislation--so called "law-making treaties"--are usually multilateral, whereas "treaty-contracts" are ordinarily bilateral. The criterion relates to the essence of the treaty: the question is whether it regulates an entire subject and formulates legal principles of general application, or just settles a specific issue concerning the contracting parties only. Thus, the Vienna Convention itself is a typical example of the first category, while a treaty between two neighbouring States concerning border arrangements is an example of the other. See Dinstein, "International Law and the State," 1971, at 47-48.

²⁷⁸ Law-making treaties of the constitutive type create legal norms which did not exist before in the form of a custom or a general principle of law; or abolish existing ones. Law-making treaties are considered declaratory if they crystallize existing norms of customary international law. The legal reference of this distinction is to the extent of the duty of third States to respect conventional obligations. Indeed, it is an uncontested principle that a treaty is binding only on its contracting parties. therefore, if a State is not a party to a constitutive law-making treaty, it may lawfully ignore it. However, a State not party to a declaratory law-making treaty--although not bound by it as such--is nevertheless obliged to obey its provisions insofar as they reflect existing customary norms. See Dinstein, "International Law and State," 1971, at 47-48.

categories of treaties of the two natures, especially when treaties are codified in such a way as some of the provisions seem declaratory and others appear constitutive. Besides, there are situations in which constitutive treaties, which are said to be excluded from the rank of *jus cogens*, may become so universal that the norms embodied develop into the forms of customary law. This has given rise to the conclusion that a customary law status is a preliminary stage for a norm to develop into *jus cogens*.

The UN human rights provisions, for the time being, have been the subject of debate as to their customary norm nature.²⁷⁹ Two factors are of major concern. First, although the provisions exert upon the Member States the legal obligations to respect and observe human rights there is great variety in States' practices in terms of protection of human rights. The states' practices lack generality and consistency. Human rights are divided between fundamental human rights and other human rights, between civil rights and political rights, between civil and political rights and economic, social and cultural rights, between individual rights and collective rights, and between first generation rights and second and third generation rights.²⁸⁰ The scope of human rights has never stopped

²⁷⁹ See J.S.Watson, "Legal theory, Efficacy and Validity in the development of Human Rights Norms in International Law," Vol. 1979, No. 3, at 609-641.

²⁸⁰ See T.C.van Boven, "Distinguishing Criteria of Human Rights," in Karel Vasak (ed.), *The International dimensions of Human Rights*, Vol. 1, 1982, at 43-57.

expanding. New human rights have been claimed.²⁸¹ Second, different States feel that they are under different obligations to observe different human rights. Respect for and observation of human rights are influenced by different political, social, economic and cultural systems.²⁸² This means that there are differences in moral and social obligations and even in legal conscience (*opinio juris*).

It seems to us, therefore, that the correct course is not to argue the overall validity of the proposition that the UN human rights provisions as a whole constitute a peremptory norm (*jus cogens*) of general international law, but to examine each concrete human right in the perspective of the elements necessary to attach a peremptory character to an international norm. Any human right which allegedly constitutes *jus cogens* must possess all the cumulative elements which from the

²⁸¹ Galtung and Wirak have proposed the longest list of human rights, which includes the right to sleep, the right not to be killed in a war, the right not to be exposed to excessively and unnecessarily heavy, degrading, dirty and boring work. See Galtung and Wirak, *On the Relationship between Human Rights and Human Needs*, UNESCO Doc. SS-78/CONF.630/4, 1978, at 48; also Galtung and Wirak, "Human Rights: A Theoretical Approach," 1977, 8 Bull. Reace Proposals at 251. Similarly the International Association of Democratic Lawyers proposed in 1982 in the context of a Draft declaration of Human Rights and the Rights of Peoples to Peace and Disarmament a list of new human rights, including the right of every individual and people to permanent peace, the right of every individual to enjoy the highest attainable standard of physical and mental health, and in particular, the right to freedom from genetic mutation or damage. See P. Alston, "Conjuring up New Human Rights: A Proposal for Quality Control," 78 Am. J. Int'l L., 1984, at 607-621.

²⁸² See L. Henkin, "The International Bill of Rights," 1981, at 10, 41-43.

definition in Article 53 of the Convention on the Law of Treaties. First of all, it has to be a legal right, that is, an interest protected by customary law. Secondly, the right must be recognized as legal norm by general international law. A regional norm alone cannot claim *jus cogens* rank. Thirdly and principally, even if a concrete human right is a norm of general international law, we must establish general recognition by States--an *opinio juris*--that derogation from it is not permitted.

The conclusion that the UN human rights provisions as a whole do not for the time being merit *jus cogens* status, however, does not at all mean that some particular human rights have not obtained the status of being *jus cogens*.²⁸³ The basic human rights values and spirits as enshrined in the Charter of the United Nations have been and still will be of crucial help to shape and broaden existing and future customary law of human rights and *jus cogens*.²⁸⁴

²⁸³ See T. Meron, "On a Hierarchy of International Human rights," 1986, 60 Am. J.Int'l L., at 1-23; also T. Meron, "Human Rights Law-Making in the United Nations: a Critique of Instruments and Process," 1986, at 173-231.

²⁸⁴ Professor Sohn asserts that "not only the letter of the Charter but also the spirit of its human rights provisions have thus had a profound influence on the changes in the human rights field which have occurred in many parts of the world since 1945. See L.B.Sohn, "the Human Rights Law of the charter," 1977, 12 Tex.Int'l L.J., at 131-132.

1.3.2. Relevance of Jus Cogens in Protection of Customary Civil Rights

Since customary human rights are universally binding upon all nation-states, the question may arise as to whether the rule of *jus cogens* has much practical importance as opposed to customary norms in the field of protection of human rights.²⁸⁵ Professor D'Amato also asks the question: "[W]hat is the utility of a norm of *jus cogens* (apart from its rhetorical value as a sort of exclamation point)?"²⁸⁶ The commentators share the same concerns. Professor Meron puts it that "[e]ven for those who accept the norm, the principle gives rise to difficult questions like what is, in the contemporary reality, the relevance of *jus cogens* for agreements implicating human rights?"²⁸⁷ Obviously, the above commentators share the same concern:

"[A]s a matter of fact, States do not conclude agreement to commit torture or genocide or enslave. Many of the examples of *jus cogens* commonly cited in legal literature are really *hypothèses d'école*. Moreover, States are not inclined to contest the absolute illegality of acts prohibited by the principle of *jus cogens*."²⁸⁸

To respond the above concern, Professor Schachter notes that the notion of *jus cogens* has some significance when a treaty

²⁸⁵ See O. Schachter, "International Law in Theory and Practice," 1991, at 343.

²⁸⁶ See A. D'Amato, "It's a Bird, It's a Plane, It's Jus Cogens!" 6 Conn. J.Int'l L., 1990, at 6. D'Amato even regards it as one of the three questions, and whoever can answer them deserves the very next International Oscar. *Ibid.*, at 6.

²⁸⁷ See T. Meron, "Human Rights Law-Making in the United Nations: A Critique of Instruments and Process," 1986, at 190.

²⁸⁸ *Ibid.*, at 190.

provision may indirectly deprive persons of basic rights as described earlier.²⁸⁹ Professor Meron's approach is to relate it to the notion of hierarchy of norms. He observes that:

"[T]hus, while the principle of *jus cogens* has a moral and potential value, its immediate practical importance to the validity of agreements is still limited. However, when it comes to balancing one human rights which has assumed the status of *jus cogens* against another human rights which has not gained such an exalted status, the concept may be relevant."²⁹⁰

Both Schachter's and Meron's arguments are very convincing. And it is presumed that their interpretations about the concept of *jus cogens* are not intended to be limited only to states' acts of making treaties or choosing treaty provisions.

In fact, the significance of *jus cogens* rule in the field of human rights protection is broad enough to include regulating all acts which states may conduct. Professor Meron observes that:

"[S]ince violations of human rights almost always result from the unilateral acts of States, rather than from international agreements, the non-treaty aspect of the problem is far more important than the treaty aspect. Even scholars who reserve *jus cogens* to treaty law tend to agree with the elementary proposition that international public order, public order of the international community and international public policy do not allow States to violate severally such norms as they are prohibited from violating jointly with other States."²⁹¹

²⁸⁹ See O. Schachter, "International Law in Theory and Practice," 1991, at 343-344.

²⁹⁰ See T. Meron, "Human Rights Law-Making in the United Nations: A Critique of Instruments and Process," 1986, at 190-191.

²⁹¹ See T. Meron, "Human Rights Law-Making in the United Nations: A Critique of Instruments and Process," 1986, at 197-198.

According to Article 53 of the Vienna Convention on the Law of Treaties, there is an invalidation of all treaties which, at the time of their conclusion, conflict with peremptory norms.²⁹² If all treaties in conflict with a peremptory norm are prohibited and, consequently, all acts based on such treaties are unlawful, it seems evident that the outcome is the comprehensive prohibition of all acts contrary to peremptory norms. If a provision in a treaty providing for genocide in extreme urgent necessity is in conflict with a peremptory norms, such act outside a treaty cannot be lawful.²⁹³ Otherwise, peremptory norms would be made nearly meaningless: the States concerned need only take care not to conclude a formal treaty referring to the violation.²⁹⁴ During the drafting of the Vienna Convention on the Law of Treaties, the International Law Commission, after some preliminary hesitation, stated in its commentary to draft article 61 (Article 64 in the final text of the Vienna Convention) in 1966 that "a rule of *jus cogens* is an overriding rule depriving any act or situation which is in conflict with it

²⁹² See Y. Ogawa, "International Jus Cogens Revisited," *Kwansei Gakuin Law Review*, 1986, at 24.

²⁹³ According to Crawford, it is difficult to accept the stand that a rule should be sacrosanct in one context and may be dispensed with in another. See J. Crawford, "The Creation of States in International Law," 1979, at 82.

²⁹⁴ See J. Sztucki, "Jus Cogens and the Vienna Convention on the Law of Treaties," 1974, at 21, 161.

of legality".²⁹⁵ In the contemporary world, interests and values common to all mankind must prevail over the interests of single nations, parties or social classes.²⁹⁶

Jus cogens are peremptory customary norms. This position has been reconfirmed by Judge Sette-Camara in his concurring opinion in the case of *Military and Paramilitary Activities in and Against Nicaragua* when he discusses *jus cogens* "as peremptory rules of customary international law".²⁹⁷ Hannikainen describes *jus cogens* as "customary peremptory norms" in his literature dedicated to the concept of *jus cogens*.²⁹⁸ Apparently, what is in their minds is that *jus cogens* norms have extra features--- unlike custom in general, it must be generally expected that such norms are of high relevance in terms of hierarchy of norms, and that their mandatory and compelling nature enables them to stand higher than other ordinary customary norms. Because *jus cogens* norms protect overriding interests and fundamental values of the international community, States, therefore, owe imperative and compelling obligations not to individual states

²⁹⁵ ILC Report 1966, UN Doc. A/6309/Rev. 1, at 89. Instead, when in ;1963 Waldock, the Special Rapporteur, proposed after the phrase "from which no derogation is permitted" the addition "whether by agreement or otherwise", the International Law Commission's vote was completely divided: five for, five against, five abstaining. See ILC ybk, 1963, Vol. I. at 292.

²⁹⁶ See R.A. Mullerson, "Sources of International Law: New Tendencies in Soviet Thinking," 83 Am. J.Int'l L., 1989, at 504.

²⁹⁷ Reprinted 25 I.M.L. 1986, at 1116.

²⁹⁸ See Lauri Hannikainen, "Peremptory Norms (*Jus Cogens*) in International Law---Historical Development, Criteria, Present Status," 1988, at 237-242.

but to the international community of States as a whole. The International Court of Justice stated in the famous *Barcelona Traction* case 1970 that there exist obligations of States towards the international community, i.e. obligations *ergo omnes*, that these obligations are the concern of all States.²⁹⁹ Hannikainen states that imperative obligations are owed by all States and other subjects of international law to the international community of States, and regards the compelling character as the fifth criterion of *jus cogens*.³⁰⁰

The peremptory nature of *jus cogens* notably requires States to take active measures to observe their international obligations. In the field of protection of human rights, taking active measures means that States should take whatever measures necessary to ensure the international obligations observed and, when in infringement, provide remedies to the injured. Although customary rules also demand that such measures be taken, the requirements of substance, process, intensity and degree may be different as far as the concept of peremptory norms (*jus cogens*) concerns. Simply not derogating passively from an international obligation is far from being sufficient in the situation in

²⁹⁹ ICJ Rep. 1970, at 32.

³⁰⁰ The other criteria are based on Article 53 of the International Convention on the Law of Treaties of 1969. They are: (1) norms of general international law, (2) being accepted by the international community of States as a whole, (3) permitting no derogation, and (4) being modified only by new peremptory norms. See L. Hannikainen, "Peremptory Norms (*Jus Cogens*) in International Law---Historical Development, Criteria, Present Status," 1988, at 2-6.

which peremptory norms are involved.

Jus cogens norms are nonderogable. Because the interests and values protected by *jus cogens* norms are so important and so essential to the international community that even in emergency no derogations are allowed.³⁰¹ Compared with the civil rights with *jus cogens* status, other customary civil rights are subject to derogations in emergency. An example is given by Paragraphs 1 and 2 of Article 4 of the 1966 International Covenant on Civil and Political Rights:

"1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant 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.

2. No derogation from Articles 6, 7, 8, (paragraphs 1 and 2), 11, 15,16 and 18 may be made under this provision."³⁰²

The Articles mentioned in para.2 of Art. 4 of the Covenant protect the following rights:

- Art. 6 protects the rights to life. According to it the death penalty may be imposed "only for the most serious crimes" in accordance with the law in force at the time of the commission of the crime and can be carried only pursuant to a final judgment rendered by a competent court.

- Art. 7 prohibits torture and cruel, inhuman or degrading treatment or punishment. In particular, this prohibition covers the subjection of a person without his free consent to medical experimentation.

³⁰¹ See L. Hannikainen, "Peremptory Norms (*Jus Cogens*) in International Law," 1988, at 429-430.

³⁰² As regards the background of Article 4, see J.F. Hartman, "Derogation from Human Rights Treaties in Public Emergences," *Harv. Int'l L. J.*, 1981, at 4-10.

- Art. 8 (1 and 2) prohibits slavery, the slave trade and servitude.
- Art. 11 stipulates that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.
- According to Art. 15 (1) no one shall be held guilty of any criminal offence which did not constitute a criminal offence, under national or international law, at the time when it was committed.
- Art. 16 stipulates that everyone shall have the right to recognition everywhere as a person before the law.
- According to Art. 18 everyone shall have the right to freedom of thought, conscience and religion.

Thus, the notion of *jus cogens* in the international protection of human rights is of particular significance when we consider whether or not some particular kinds of civil rights are derogable in the time of public emergency.

The persistent objector rule is inapplicable to norms of *jus cogens*. According to the predominant principle in international law, a customary rule does not obligate a State which, during the formation of that rule, has stated persistently and unambiguously its opposition to the practice being adopted as law.³⁰³ This rule, therefore, allows the persistent objector to opt out of a particular customary norms in the process of formation. The International Court of Justice, Judge Lachs, recognized the effect of this rule:

"[n]or can a general rule [of customary international law] which is not of the nature of *jus cogens* prevent some States from adopting an attitude apart. They may have opposed the rule from its inception and may...decide upon

³⁰³ The classic authority for the principle is the *Anglo-Norwegian Fisheries* case (*UK v. Norwegian*), ICJ Rep 1951, at 116, 131, 138-139; see also *Nuclear Tests* case (*Australia v. France; New Zealand v. France*), ICJ Rep 1974, at 253, 280-293; *Asylum* case (*Col. v. Peru*), ICJ Rep 1950, at 266, 277-278.

different solutions of the problem involved."³⁰⁴

Waldock attributes to the International Court of Justice the view that a general customary norm can arise notwithstanding the opposition of one State, or a few States, but then that norm does not bind the objectors.³⁰⁵ Hannikainen observes that "[T]he predominant principle concerning the formation of customary rules gives little support for interpreting Art. 53 of the Vienna Convention to the effect that a customary norm can be imposed upon a dissenting State".³⁰⁶ Once an international norm becomes *jus cogens*, it is absolutely binding on all states, whether they have persistently objected or not. The rule is very clear: when a norm acquires *jus cogens* status, it is binding even on persistent objector states.³⁰⁷

Violations of peremptory norms of civil rights constitute international crimes. Under the theory of state responsibility, the wrongful acts of State, which violates either treaty or customary obligations, entail the international responsibility

³⁰⁴ *North Sea Continental Shelf cases* (W.Ger v. Den.; W.Ger. v. Neth.) ICJ 1969 at 3, 41-43.

³⁰⁵ See A. Waldock, "General Course on Public International Law," *Recueil des Cours*, 1962, Vol.ii, at 49-50.

³⁰⁶ See L. Hannikainen, "Peremptory Norms (*Jus Cogens*) in International Law---Historical Development, Criteria, Present Status," 1988, at 240.

³⁰⁷ See L. Henkin, "International Law: Politics, Values and Functions," 216 *Recueil des Cours* (1989-IV), at 227.

of that State.³⁰⁸ The International Law Commission (ILC), when codifying the law of state responsibility in its Draft Articles on State Responsibility, makes a distinction between international delict and international crimes according to the seriousness of the wrongful acts of States. What is meant by the ILC is that the violations of different norms must "be subject to a different régime of responsibility".³⁰⁹ Therefore, the distinction between an ordinary customary norm of civil right and a *jus cogens* civil right is very relevant in terms of entailment of state responsibility. While all international wrongful acts are subject to the governing of international state responsibility rules like making remedies for the injured, acts of international crimes, as opposed to international delict, entail additional responsibilities, i.e. imposing an punishment on individuals and making it available for the international community as a whole to consider UN enforcement measures.³¹⁰

³⁰⁸ Year Book of Int'l L. C., Rep to the commission to the General Assembly, Vol. II, 1973, at 173; see generally, I. Brownlie, "System of the Law of Nations: State Responsibility," Part I, 1983; J.G. Starke, "Introduction to International Law," Ninth Edition, 1984; W. Riphagen, "State Responsibility: New Theories of Obligation in Inter-State Relations," in *The Structure and Process of International Law: Essay's in Legal Philosophy Doctrine and Theory*, R.St. Macdonald and Douglas, M. Johnson, ed., 1983, at 581- 610.

³⁰⁹ *Ibid.*, at 102.

³¹⁰ *Ibid.*, at 102-104.

Jus cogens avoids the last in time rule.³¹¹ In some states like the United States, the domestic effects of treaty and/or customary international law obligations can be prevailed by subsequent legislation. In the case of *Committee of United States Citizens Living in Nicaragua v. Reagan*,³¹² a U.S. court, relying on the principle of the *Head Money Cases*,³¹³ held that "treaties and statutes enjoy equal status [in domestic law] and therefore...inconsistencies between the two must be resolved in favour of the *lex posterior*."³¹⁴ The court also held that the statute would prevail because subsequently enacted statutes supersede existing customary international law.³¹⁵ The decision that statutes supersede earlier treaties or customary rules of international law follows the principle of the Restatement (Third) of Foreign Relations Law of the United States, which instructs the court to give effect to the statute only if the intent of Congress to supersede the treaty or customary rule is clear and the two cannot be harmonized.³¹⁶ The court was reluctant to extend this principle to the notion of *jus cogens*,

³¹¹ See K. Parker and L.B. Neylon, "Jus Cogens: Compelling the Law of Human Rights," 12 *Has. Int'l & Comp. L.Rev.*, 1989, at 449-452.

³¹² U.S. Court of Appeals, D.C.Cir., 1988, 859 F. 2d 929.

³¹³ 112 U.S. 580 (1884).

³¹⁴ 859 F.2d 936, 1988.

³¹⁵ *Ibid.*

³¹⁶ Restatement (Third) of Foreign Relations Law of the United States, Sections 114, 115.

and avoided considering whether *jus cogens* had peremptory effect in domestic law.³¹⁷ It is argued that the last in time rule can have no effect on a *jus cogens* norm, for the obvious reason that *jus cogens* norms exist and are enforceable apart from treaties.³¹⁸ By analogy, although customary international norms may be compromised by subsequent legislations,³¹⁹ the last in time rule is inapplicable to *jus cogens*.

1.3.3. Tests of Peremptory Norms of Civil Rights

In the *Barcelona Traction* case, the International Court of Justice said:

In particular, an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the

³¹⁷ The court holds that the customary rule requiring nations that have submitted a dispute to an international court to abide by its judgment is not a matter of *jus cogens*. *Ibid*.

³¹⁸ See K. Parker and L.B. Neylon, "Jus Cogens: Compelling the Law of Human Rights," 12 *Has. Int'l & Comp. L. Rev.*, 1989, at 451.

³¹⁹ Whether the last in time rule is in conformity with international law is very much questioned. In fact, States are under international obligations to observe their international duties, either treaty or customary norms. Therefore, they are under obligations to make laws to conform with rather than to violate their international duties. The last in time rule may be domestically legitimate, but it is internationally wrong, and entails state responsibility.

human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ...; others are conferred by international instruments of a universal or quasi-universal character.³²⁰

The Court seemed to distinguish diplomatic protection in general, including protection for ordinary violations of human rights, which is available only for nationals of the complaining States, from protection against violation of "basic rights of human persons", as to which "all States can be held to have a legal interest in their protection".

The Court, in this case, has advanced four propositions.³²¹ They are: (1) that obligations derived "from principles and rules concerning the basic rights of the human person" are obligations owed by all states to the international community as a whole; (2) that all states have a legal interest in the protection of the rights involved since they represent obligations erga omnes; (3) that some of the corresponding rights of protection have entered into the body of general international law and other such rights have been conferred by international instruments of a universal or quasi-universal character; and (4) that the principles and rules concerning the basic rights of the human person, in contemporary international law, include at least protection from slavery and racial

³²⁰ Case Concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, 1970, I.C.J. Rep. at 33.

³²¹ *Ibid.*

discrimination, to which one may claim that the norms of customary law have emerged to a full extent.

Notwithstanding the apparent acceptance of the *erga omnes* concept, no states have invoked it in judicial proceedings since its enunciation in the *Barcelona Traction* case. Some years before *Barcelona* a similar idea had been asserted in a case brought in the ICJ by Ethiopia and Liberia against South Africa for violation of the League of Nations mandate under which South Africa administered the territory of South West Africa. Ethiopia and Liberia asserted that as former members of the League they had a legal interest to vindicate the rights of that community of states in the mandate allegedly violated by South Africa. The Court in denying their legal standing (*locus standi*) referred to their claim as analogous to the *actio popularis* in Roman law under which a citizen could request the courts to protect a public interest. The Court observed that the *actio popularis* "was not known to international law at present".³²²

Also in the *South West Africa* case, however, Judge Tanaka delivered a much acclaimed opinion, which exerted a decisive influence on the opinion of the Court in the later case of *Barcelona Traction* of 1970. Judge Tanaka articulated in ringing words the intense and peremptory character of the human rights prescriptions:

If a law exists independently of the will of the state and, accordingly, cannot be abolished or modified even by its constitution, because it is deeply rooted in the conscience

³²² *South West Africa* case, 1966, I.C.J. Rep. 47.

of mankind and of any reasonable man, it may be called "natural law" in contrast to "positive law". Provisions of the constitutions of some countries characterized fundamental human rights and freedoms as "inalienable," "sacred," "eternal," "inviolable," etc. Therefore, the guarantee of fundamental human rights and freedoms possesses a super-constitutional significance.

If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between states, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*.³²³

The division of the Court denying standing to Ethiopia and Liberia was strongly criticized in the United Nations and by many legal commentators. When the Court declared some four years later in the *Barcelona Traction* case that *erga omnes* obligations could be vindicated by any state, it was generally surmised that this dictum was the judges' response to the criticism of the earlier decision. The changed composition of the Court made it possible to adopt this implicit reversal of doctrine.³²⁴

Judge Tanaka's advocacy of human rights status of *jus cogens* has enriched scholars' writings, and also advanced *jus cogens* principle in international law. This term, in contrast to *jus positivum*, connotes the rule of law which is peremptory in the sense that it is cannot be contracted out at will, that it is a norm from which no derogation is permitted, and that it can be modified only by a subsequent norm of general international law

³²³ 1966, I.C.J. at 298.

³²⁴ See Oscar Schachter, "International Law in Theory and Practice," 178 *Recueil des Cours*, (1982-V) at 340-341.

having the same character.³²⁵ The introduction of the notion of *jus cogens* into human rights protection fields is of significance in terms of enforcement of basic or fundamental human rights, particularly when the emphasis is put on the idea that "no derogation is permitted," i.e., nation-states are under obligation to respect and observe basic or fundamental human rights.

Customary international law becomes *jus cogens* because of the subject matter: the content of *jus cogens* principles makes them different from other rules of international law.³²⁶ *Jus Cogens* norms protect humankind and the existence of the international community in a profound way.³²⁷ Professor Schachter's criterion for determining inclusion of *jus cogens* norms is generally said to be whether the principles are of concern to all States and protect interests which are not limited to a particular State or

³²⁵ See generally Verdross, "Jus Dispositivum and Jus Cogens in International Law," 60 A.J.I.L. 53, 59 (1966); Rozakis, "The Concept of Jus Cogens in the Law of Treaties," Whiteman, "Jus Cogens in International Law: with a Projected List," 1977, 2 Ga.J.Int & Comp. L. 609; Sinclair, "The Vienna Convention on the Law of Treaties," 1973, chap. V.

³²⁶ U.N.Conference on the Law of Treaties, 1st and 2nd Sessions, Official Records, Documents of the Conference, U.N.Doc. A/CONF. 39/11/Add. 2 (1971), The International Law Commission Commentary to the draft article 50 at 67 ("It is not the form of a general rule of international law but the particular nature of the subject matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*.").

³²⁷ See Verdross, "Jus Dispositivum and Jus Cogens in International Law," 60 Am.J.Int'l L., 1966, at 55, 59.

group of States but belong to the community as a whole.³²⁸

When an overwhelming majority of States declare given gross violations criminal under international law or establish machinery for major enforcement action, that overwhelming majority may be determined to assume the authority to require the universal observation of the norms in question to ensure the functioning of the international legal order.³²⁹ Thirlway submits that no State can evade the operation of any principle which is either a matter of *jus cogens* or so bound up with the essential nature of international law that it would be impossible to exclude it without denying the existence of international law.³³⁰ There appears to be at present much support in the international community of States for the view that "the international community of States as a whole", which includes all essential elements of the international community of States, is entitled to assume in extremely urgent cases, to protect the overriding interests and values of the community itself and to ensure the functioning of the international legal order, the authority to require one or a few persistent objectors to observe a customary norm of general international law as a peremptory customary norm. In the theory of customary law such requirement could be viewed as a consequence of the

³²⁸ See O. Schachter, "International Law in Theory and Practice," 1991, at 343.

³²⁹ *Ibid.*

³³⁰ See H.W.A. Thirlway, "International Customary Law and Codification," 1972, at 110.

increasing importance of the collective formation of customary norms.³³¹ "The international community of States as a whole" appears to have imposed particularly upon South Africa more far-reaching obligations in the field of human rights than South Africa has consented to under the UN Charter and under those few human rights conventions which South Africa has ratified.

Article 53 of the Vienna Convention says that the specific decision on whether a principle is a peremptory norm must be made by "the international community as a whole". The meaning of the latter phrase was explained by Yasseen, the Chairman of the Drafting Committee of the Vienna Conference on the Law of Treaties in the following statement:

"[T]here was no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough if a very large majority did so. That would mean that, if one State in isolation refused to accept the peremptory character of the rule or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected".³³²

Yasseen also stated:

"[I]t appeared to have been the view of the Committee of the Whole that no individual State should have the right of veto, and the Drafting Committee had therefore included the

³³¹ See M. Kreca, "Some General Reflections on Main features of Jus Cogens as Notion of International Public Law," in *New Directions in International Law---Essays in Honour of Wolfgang Abendroth, Gutiérrez Girardot, R. & Ridder, H. & Sarin, M.L. & Schiller, ed.*, 1982, at 30.

³³² See I. Sinclair, "The Vienna Convention on the Law of Treaties," 1973, at 128-131; See also Int. Law Comm. Report, 1976, in *Y. B. Int'l Law Comm.* 119 (1976), Vol.2, at 2.

words 'as a whole'."³³³

The phrase "the international community as a whole", according to the International Law Commission, certainly does not mean the requirement of the unanimous recognition by all members of the international community; this would give each State a right of veto, which would be unthinkable. The recognition by "all the essential components of the international community" is sufficient.³³⁴ According to Ago this was made clear by the debates of the Vienna Conference on the Law of Treaties.³³⁵

A considerable majority of the writers who have commented upon the meaning of "as a whole" seem to have accepted the view of Yasseen and of the ILC.³³⁶ For a norm to be recognized by "the international community as a whole" it would be sufficient that all the essential components of the international community recognize it. In practice that would mean nearly all States.

³³³ *Ibid*, at 471.

³³⁴ See ILC Report 1976, UN Doc. A/31/10, at 287.

³³⁵ See ILC Ybk 1976, Vol. I. at 248.

³³⁶ See L.A. Alexidze, "Legal Nature of Jus Cogens in Contemporary International Law," *RdC* 1981, Vol. III, at 246-247, 258; G. Gaja, "Jus Cogens Beyond the Vienna Convention," *Recueil des Course* (1981-III), at 283; V.N.Rao, "Jus Cogens and the Geneva Convention on the Law of Treaties," *IJIL*, 1974, at 381; E. Jiménez de Aréchaga, "International Law in the Past Third of a Century," *Recueil des Course* (1978-I), at 65; M. Kreca, "Some General Reflections on Main Features of Jus Cogens as Notion of International Public Law," In Gutiérrez Girardot, R. & Ridder, H. & Sarinm M.L. & Schiller, ed.: *New Directions in International Law---Essays in Honour of Wolfgang Abendroth*, 1982, at 32, 34; M. Bos, "the Identification of Custom in International Law," *GYIL*, 1982, at 43.

According to Gaja most writers agree that the lack of acceptance or even the expression of opposition on the part of one or a few States is no obstacle to a norm having peremptory status.³³⁷

Permitting no derogation of certain civil rights, as set forth in Article 4 of the International Covenant on Civil and Political Rights, can also be seen as a test for identifying *jus cogens* norms. Professor Lillich explicitly cites nonderogability as "evidence that at least some of these rights may have 'attributes' of *jus cogens*".³³⁸ It can be reasonably interpreted that when the civil rights provisions were drafted into the Covenant, the framers were fully aware that some civil rights were of common concern to international community as a whole, and therefore these civil rights should not be derogated even in emergent situations. What these framers did was just to declare the peremptory norm character of these civil rights. Although Professor Meron holds different view,³³⁹ "common interest as a whole" test and "nonderogation" test should not compete, but rather complement with other, since the latter makes the former test more tangible and more concrete.

³³⁷ G. Gaja, "Jus Cogens Beyond the Vienna Convention," *Recueil des Course* (1981-III), at 283.

³³⁸ See R.B. Lillich, "Civil Rights," in *Human Rights in International Law: Legal and Policy Issues*, T. Meron, ed., 1982, at 119-120.

³³⁹ "Certain civil rights have obtained peremptory norm status not because international covenants provide that they are nonderogable, but because they are of common concern to international community as a whole." See T. Meron, "Human Rights Law-Making in the United Nations: A Critique of Instruments and Process," 1986, at 192.

1.3.4. *Substantive Jus Cogens*

The drafters of the Vienna Convention on the Law of Treaties purposely omitted an enumeration of *jus cogens* rules in the Convention itself because of their evolving nature.³⁴⁰ Agreement on existing *jus cogens* norms is very broad, though jurists frequently disagree on norms that are developing. At least one commentator has expressed concern that enumeration of established norms in a time-fixed treaty might restrict the evolution of other norms into *jus cogens*.³⁴¹

In spite of the reluctance to enumerate *jus cogens* norms in the Vienna Convention, there is wide agreement on past and current *jus cogens* norms. The oldest recognized *jus cogens* norms are the prohibition of piracy,³⁴² and slavery.³⁴³ International

³⁴⁰ The Commission decided against including any examples of rules of *jus cogens* in the article [draft article 50, later article 53] for two reasons. First, their mention of some cases of treaties void for conflict with a rule of *jus cogens* might, even with the most careful drafting, lead to misunderstanding as to the position concerning other cases not mentioned in the article. Secondly, if the Commission were to attempt to draw up, even on a selective basis, a list of the rules of international law which are to be regarded as having the character of *jus cogens*, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles. See UN Conference on the Law of Treaties, 1st and 2nd Sess., Vienna May. 26-May 24, 1968, Un Doc. A/CONF./39/11/Add. 2 (1971), at 67-68.

³⁴¹ Paul noted that enumeration of *jus cogens* norms would restrict the possibilities of their future development. See V. Paul, "The Legal Consequences of Conflict between a Treaty and an Imperative Norm of General International Law (*Jus Cogens*)," *Osterreichische Zeitschrift für Öffentliches Recht*, 1971, at 33.

³⁴² See L. Oppenheim, "International Law: A Treatise," 1909, at 528; see A. McNair, "The Law of Treaties," 1961, at 215. In *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-161 (1820), Justice Story utilizes the standard customary law test to

Court of Justice Judge Manfred Lachs, citing early writers, posits that *jus cogens* as a principle of law evolved to address the special gravity of piracy and slavery.³⁴⁴

Brownlie, stressing the indelibility of *jus cogens* rules, lists these examples of *jus cogens*: the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy.³⁴⁵ Former International Court of Justice Judge Fitzmaurice's enumeration of *jus cogens* norms, which most authorities agree with, lists, among examples, rules prohibiting crimes against peace and humanity, including genocide, near-genocide, and acts in nature of genocide.³⁴⁶ The Restatement of foreign relations Law of the United States lists six prohibitions affecting human rights as

determine that piracy violates the law of nations. He also uses *jus cogens* language. ("There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature...[piracy is] an offence against the universal law of society, a pirate being deemed an enemy of the human race.").

³⁴³ Report of the ILC to the General Assembly, 18 UN GAOR Supp. (No. 9) at 1, UN Doc. A/CN.4/Ser. A/1963/Add.1. (Prohibition against slavery "one of the most obvious and best settled rules of *jus cogens*"). See also L. Oppenheim, "International Law: A Treatise," 1909, at 528.

³⁴⁴ See Lachs, "The Law of Treaties: Some General Reflections on the Report of the International Law Commission," in *Recueil d'Etudes de Droit International, En Hommage à Paul Guggenheim*, 1968, at 399.

³⁴⁵ See I. Brownlie, "Principles of Public International Law," 1979, 3rd ed., at 513.

³⁴⁶ See G. Fitzmaurice, "The Future of Public International Law and the International Legal System in the Circumstances of Today," 1975, at 323.

jus cogens: (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, and (f) systematic racial discrimination.³⁴⁷

In any event, there is now a wide agreement, among scholars and jurists, that *jus cogens* norms under international law prohibit genocide, slavery or slave trade, torture or any inhuman, degrading treatment or punishment, and massive and arbitrary killings.

Genocide is universally recognized as violating *jus cogens*.³⁴⁸ The General Assembly resolution 96 (I), unanimously passed in 1946, declared that

"genocide is a crime under international law which the civilized world condemns and for the commission of which principals and accomplices whether the private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds, are punishable."

The Convention on the Prevention and Punishment of the Crime of

³⁴⁷ The Restatement (Third) of Foreign Relations Law of the United States, sec. 720 (1987) ("Not all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) of this section are, and an international agreement that violates them is void.") *Ibid.* comment n.

³⁴⁸ In order to qualify as an act of genocide, an act has to fulfil a number of characteristics: (1) There must be the intent to destroy, in whole or in part, a group envisaged by the Genocide Convention. (2) The target of genocide is a group of persons, in whole or in part. (3) According to the Genocide Convention, only acts against national, ethnic, racial or religious groups can constitute genocide. See The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), in force Jan. 12, 1951, 78 U.N.T.S. 277.

Genocide (Genocide Convention) was concluded in 1948. As of the end of 1991, the Convention had been ratified by 101 States.³⁴⁹ Article I states that genocide, whether committed in time of peace or war, is a crime under international law which the parties undertake to prevent and to punish.³⁵⁰ According to Article II

"genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group."

Under Article IV persons committing acts of genocide "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". Article V obligates the parties to enact necessary legislation to provide effective penalties for persons guilty of acts of genocide. Under Article VIII any party "may call upon the competent organs of the UN to take such action under the UN Charter as they consider appropriate for the prevention and suppression of acts of genocide". Article VI stipulates that persons charged with acts of genocide shall be tried by a competent tribunal of the State

³⁴⁹ See M.J. Bowman and D.J. Harris, "Multilateral Treaties: Index and Current Status," 1991, at 120.

³⁵⁰ See also Article 6 (2 and 3) of the International Covenant on Civil and Political Rights.

in the territory of which the acts was committed, or by such international penal tribunal as may have jurisdiction with respect of those parties which shall have accepted its jurisdiction.

The International Court of Justice (the ICJ) stated in 1951 in its Advisory Opinion concerning *Reservations to the Genocide Convention* that there is little doubt about the universal prohibition of the crime of genocide:

"The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact unanimously adopted by fifty-six States."³⁵¹

The ICJ in its *Barcelona Traction* case states that the prohibition of genocide imposes *erga omnes* obligations on States.³⁵² The International Law Commission in draft Article 19

³⁵¹ ICJ Reports 1951, at 23.

³⁵² See *Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain)*, ICJ Reports 1970, at 32 ("[E]rga omnes...obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide as also from the principles and rules concerning the basic rights of the human persons including protection from

on State Responsibility includes genocide among examples of "crimes by States". As has been shown above, the Court's view that genocide is an international crime is firmly supported by General Assembly resolutions affirming that genocide is a crime under international law.³⁵³ The Court's position is also backed by Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide.³⁵⁴ The Court's opinion has suggested that prohibition of the crime of genocide is a general principle of law, which is binding on all states.³⁵⁵

The right to life is considered as one of the most fundamental human right. The right to life is positioned prominently in virtually every major international human rights instrument.³⁵⁶ In the Charter of the Nuremberg, the definition

slavery and racial discrimination.")

³⁵³ GA Res. 96 (I), (11 December, 1946), U.N. Doc. A/64 Add.1 at 188, 189 (1947).

³⁵⁴ Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, by confirming that genocide is a crime under international law, clearly expressed the consensus of the UN General Assembly concerning the codificatory nature of the Convention.

³⁵⁵ The character of "binding on states" derives from the notion that the principles underlying the convention are principles falling within the language of Article 38 (1)(c) of the ICJ's Statute, which says "the general principles of law recognized by civilized nations".

³⁵⁶ See, e.g., the Universal Declaration of Human Rights, Article 3 ("Everyone has the right to life, liberty and the security of the person."); the International Covenant on Civil and Political Rights, Article 6 (1) ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."). All the four 1949 Geneva Conventions include among the 'grave breaches' of the Conventions the 'wilful killings' of persons protected by

of "crimes against humanity" included the crimes of "murder" and "extermination", committed against any civilian population; the definition of "war crimes" included the "murder" of civilians of occupied territories or of prisoners of war, as well as the killings of hostages. However, the obligation not to kill or execute human being is not absolute. From the point of view of *jus cogens*, one should note the following: (a) Lawful acts of warfare in international armed conflicts or legal collective or self-defense may result in the killings of a great number of persons; (b) Humanitarian intervention may lead to the killings of persons of both intervened and intervening states; (c) The imposition of death sentences is not prohibited, but the contemporary international law effort is to limit the imposition of death sentences only for the most serious crimes, and is subject to strictest scrutiny in international forums.³⁵⁷

The *Jus cogens* nature of the right to life should be understood, in the contemporary world, to mean that states are under obligation to refrain from mass extermination, arbitrary killings, summary executions and imposition of death penalty for

the Conventions (Art. 50 of Convention I, Art. 51 of Convention II, Art. 130 of Convention III and Art. 147 of Convention IV.). Various provisions of the Geneva Conventions provide judicial guarantees against summary executions for the persons protected by the Conventions, prohibit collective punishments, limit death sentences, prohibit extermination and prohibit reprisals against the persons protected by the Conventions.

³⁵⁷ For instance, in a case the Inter-American Commission on Human Rights found that the United States Government violated the right to life in imposing the death penalty on two juveniles. See Roach Death Penalty case, Case 9647, Inter-Am. C.H.R. 147, 166, OEA/ser.L/V/II.71, doc. 9 rev.1 (1987)

"political crimes".

States shall refrain from summary executions. A "summary execution" is arbitrary deprivation of life, the result of a sentence imposed by a summary procedure in which the due process of law and the minimum judicial guarantees have been disregarded or distorted.³⁵⁸

States shall refrain from arbitrary killings. By "arbitrary killings" are meant killings which are committed outside the judicial process and which cannot be considered lawful under the of armed conflicts.³⁵⁹ There is no doubt that the killing of persons who have been forced by the government to disappear constitutes "arbitrary killing".

States shall refrain from mass extermination. By "mass extermination" is meant any deliberate killings or executions of persons on a mass scale, whether of members of certain groups (genocide), a political opposition, adversary armed forces, or the population of a given territory. The deliberate mass extermination of persons runs manifestly counter to that obligation.³⁶⁰

The UN has reacted against governments engaging in mass

³⁵⁸ See S.A. Wako, "Summary or Arbitrary Executions," U.N.Doc. E/CN.4/1983/16, at 15.

³⁵⁹ See C.K. Boyle, "The Concept of Arbitrary Deprivation of Life," in Ramcharan (ed.): *The Right to Life in International Law*, 1985, at 19-20.

³⁶⁰ See Amnesty International's *Political Killings by Governments*, at 5; see B.G. Ramcharan, "The Right to Life in International Law," 1985, at 14-17.

killings of their political opposition, particularly in the 1980's. The General Assembly Resolutions 35/172, 36/22, 37/182, and 40/143, adopted without submission to a vote, have expressed alarm and condemned the occurrence in different parts of the world of politically motivated summary and arbitrary executions.³⁶¹ Similar condemnations have been expressed by the Economic and Social Council of the United Nations and the Human Rights Commission.³⁶² Massacres, summary and arbitrary executions, and killings of disappeared persons have been among those flagrant and massive violations of human rights which have been especially condemned by the UN. When the prohibitions of mass extermination, arbitrary killings and summary executions are looked at from the perspective of *jus cogens*, no exceptions appear legitimate. It is true that there have been many gross violations of those prohibitions and that the international community of States has been inactive in reacting systematically against such gross violations in practice. However, the international community of States has not left any doubt that it considers mass extermination, arbitrary killings and summary

³⁶¹ In its 40th session in 1985 the General Assembly expressed grave concern for summary executions in Afghanistan (in res. 40/137), in Guatemala (in res. 40/140) and in Iran (in res. 40/141) and for massacres in South Africa (in res. 40/64 B).

³⁶² See ECOSOC res. 1982/35, as well as res. 1982/29, 1983/34 and 1983/36 by the Human Rights Commission. Regarding international reactions against arbitrary or summary killings by governments, see D. Weissbrodt, "Protecting the Right to Life: International Measures Against Arbitrary or Summary Killings by Governments," in Ramcharan, (ed.): *The Right to Life in International Law*, 1985, at 297-314.

executions grave offenses against elementary considerations of humanity and gross violations of international law.³⁶³

It is a *jus cogens* rule that States are under obligations refraining from legitimizing or encouraging slavery, and slave trade. The prohibition of slavery is intimately related to human right to personal freedom. The struggle of international law against slavery is reflected in a series of legal instruments repeatedly spelling out the prohibition of slavery. Among these instruments we ought to mention the 1926 Slavery Convention, the 1930 Convention Concerning Forced or Compulsory Labour, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, and the 1957 Convention (No. 105 of the International Labour Organization) Concerning the Abolition of Forced Labour.

The Supplementary Convention on the Abolition of Slavery prescribes in Article 3 regarding the slave trade that the act of conveying or attempting to convey slaves from one country to another by whatever means of transport shall be a criminal offence under the laws of the parties and the persons convicted thereof shall be liable to 'very severe penalties'. According to Article 4 of the Universal Declaration of Human Rights of 1948 no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all forms.

In the opinion of the ILC, the obligations of States not to

³⁶³ See L. Hannikainen, "Peremptory Norms (*Jus Cogens*) in International Law: Historical Development, Criteria, Present Status," 1988, at 519.

legitimatize slavery and the slave trade are peremptory.³⁶⁴ The view that those obligations have a peremptory character had also gained a great deal of support among writers.³⁶⁵ No derogations from those obligations are justified. It can be safely submitted that the obligations of States to refrain from legitimizing or encouraging slavery and the slave trade are peremptory in contemporary international law.³⁶⁶

Prohibition of torture and other manifestly cruel, inhumane or degrading treatment or punishment of human beings is widely recognized as contravening *jus cogens*.³⁶⁷ All major human rights agreements and instruments contain a prohibition against torture. Article 7 of the International Covenant on Civil and Political Rights, Article 3 of the European Convention for the

³⁶⁴ See ILC Report 1966, U.N. Doc. A/6309/Rev. 1, at 89, and ILC Report 1976, U.N. Doc. A/31/10, at 216.

³⁶⁵ See L.A. Alexidze, "Legal Nature of Jus Cogens in Contemporary International Law," *Recueil des Course*, 1981, Vol. III, at 262; M.M. Whiteman, "Jus Cogens in International Law, with a Projected List," *Geor. J. Int'l & Comp. L.*, 1977, at 625; M. Lachs, "The development and General Trends of International Law in our time," *Recueil des Course*, 1980, Vol. IV, at 206-207; I. Brownlie, "Principles of Public International Law," 1979, 3rd ed., at 513; F. Domb, "Jus Cogens and Human Rights," *Israel Ybk on Human rights*, 1976, at 117-121; and W.P. Gormley, "The Right to Life and the Rule of Non-Derogatability: Peremptory Norm of Jus Cogens," in Ramcharan, (ed.): *The Right to Life in International Law*, 1985, at 146.

³⁶⁶ See L. Hannikainen, "Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status," 1988, at 446-447.

³⁶⁷ See R. Higgins, "Derogations under Human Rights Treaties," *BYIL* 1976-77, at 281-282 ("There certainly exists a consensus that certain rights---the right to life, to freedom from slavery or torture---are so fundamental that no derogation may be made.").

Protection of Human Rights (the ECHR), Article 5 of the American Convention on Human Rights (the ACHR) and Article 5 of the Universal Declaration of Human Rights stipulate that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 7 of the Covenant also stresses that no one shall without his free consent be subjected to medical or scientific experimentation. According to Article 4 of the Covenant, Article 15 of the ECHR and Article 27 of the ACHR the parties have no right to derogate, even in time of public emergency, from the prohibitions of torture and other cruel, inhuman or degrading treatment or punishment.³⁶⁸

To reinforce the prohibitions against torture, the United Nations General Assembly promulgated the Torture Convention.³⁶⁹ Because of the universal concern about the widespread occurrence of torture, the United Nations Commission on Human Rights appointed a special rapporteur on torture, Peter Kooijmans, to

³⁶⁸ Torture in time of war is a grave breach of humanitarian law. Geneva Conventions: the Geneva Convention of 1949, in force Oct. 21, 1950, 75 U.N.T.S. 31 (armed forces in the field) Art. 50; 75 U.N.T.S. 85 (armed forces at sea) Art. 51; 75 U.N.T.S. 135 (prisoners of war) Art. 130; 75 U.N.T.S. 267 (civilian) Art. 147.

³⁶⁹ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, in force June 26, 1985, reprinted in 23 I.L.M. 1027 (1984). Paragraph 5 emphasizes the Assembly's intention to achieve "a more effective implementation of the existing prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment". *Ibid.*, at 197. G.A.Res. 39/118, passed Dec. 14, 1984, again included the reference to "the existing prohibition under international law of every form of cruel, inhuman or degrading treatment or punishment," making it clear that the Assembly recognized an existing customary law standard independent of the resolutions.

"promote the full implementation of the prohibition under international and national law of the practice of torture and other cruel, inhuman, or degrading treatment or punishment."³⁷⁰

In Mr. Kooijmans's 1986 report, he emphasized the *jus cogens* nature of the prohibition against torture:

Torture is now absolutely and without any reservation prohibited under international law whether in time of peace or of war. In all human rights instruments the prohibition of torture belongs to the group of rights from which no derogation can be made. The International Court of Justice has qualified the obligation to respect the basic human rights, to which the right not to be tortured belongs beyond any doubt, as obligations *erga omnes*... which every State has a legal interest [to implement]. The International Law Commission...has labelled serious violations of these basic human rights as 'international crimes,' giving rise to the specific responsibility of the States concerned. In view of these qualifications the prohibition of torture can be considered to belong to the rules of *jus cogens*. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture.³⁷¹

The Human Rights Committee, which supervises the observance of the Covenant on Civil and Political Rights, stated in 1982 that the "humane treatment and the respect for the dignity of all persons deprived of their liberty is a basic standard of universal application".³⁷² Among writers, the overwhelmingly predominant view is that the universal prohibition of torture

³⁷⁰ Commission on Human Rights, Res. 1985/33, 1985 U.N. ESCOR, supp. (No. 2) at 71, U.N.Doc. E/1985/22.

³⁷¹ U.N.Doc.E/CN.4/1986/15 at 1. Kooijmans made similar mention in his 1987 report. U.N.E/CN.4/1987/13 at 13-15.

³⁷² Report of the Human Rights Committee 1982, U.N.Doc. A/37/40, at 96.

permits no derogation, not even in emergency situations.³⁷³

³⁷³ See M.C. Bassiouni, "An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture," RIDP 1977, at 64, 80-81; M. O'Boyle, "Torture and Emergency Powers under the European Convention on Human Rights: Ireland v. the United Kingdom," AJIL 1977, at 686-688; E.I.A. Daes, "Study on the Individual's Duties to the Community and the Limitation of Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights," U.N.Doc. E/CN.4/Sub. 2/432/Rev.2 (1983), at 203; Y. Dinstein, "The Right to Life, Physical Integrity, and Liberty," in Henkin (ed.): The International Bill of Rights, 1981, at 122; and T. Meron, "Human Rights in Internal Strife: Their International Protection," 1987, at 52.

CHAPTER TWO

STATE SOVEREIGNTY AND CIVIL RIGHTS

2.1. *Concept of Sovereignty*

The concept of state sovereignty is a traditional and still existing principle in international law. Sovereignty, by definition, is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally.¹ Internal sovereignty is that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what had been called internal public law, but which may more properly be termed constitutional law. External sovereignty consists in the independence of one political society, in relation to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies. The law by which it is regulated has, therefore, been called external public law, but may more properly be termed international law. Sovereignty is acquired by a State, either at the origin of the civil society of which is composed, or when it separates itself from the community of which it previously formed a part, and on which it

¹ See H. Wheaton, "Elements of International Law," 1866, at 20.

was dependent.²

The rules underlying the principle of sovereignty derive their importance from the basic fact that "almost all international relations are bound up" with the independence of States. Thus, the principle of sovereignty in general, and that of territorial sovereignty in particular, remains of necessity the "point of departure in settling most questions that concern international relations."³ Beyond this, as the International Court of Justice re-emphasised in the *Corfu Channel (Merits)* case (1949), "between independent States, respect for territorial sovereignty is an essential foundation of international relations."⁴

Both the Permanent Court of Arbitration and the World Court have provided definitions which fully explain the meaning and legal significance of the principle of sovereignty or independence in international law. According to the award in the *Palmas* case (1928), "sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."⁵ The Advisory Opinion of the World Court on the *Austro-German Customs Union* (1931) furnishes further elucidation. The Court emphasised that

² *Ibid.*

³ *Island of Palmas* case, 1928, 2 R.I.A.A., at 839.

⁴ ICJ Rep., 1949, at 35.

⁵ 2 R.I.A.A., at 838.

it had to deal with a special problem: the definition of independence in the meaning of Article 88 of the Peace Treaty of St. German, and the legal consequences resulting from the additional undertaking given by Austria in the Geneva Protocol of 1922 not to alienate her independence. According to the Advisory Opinion, this meant "the continued existence of Austria within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other with the result that independence is violated, as soon as there is any violation thereof, either in economic, political, or any other field, these different aspects of independence being in practice one and indivisible."⁶ The Court introduced its definition with the proviso: "irrespective of the definition of the independence of States which may be given by legal doctrine or may be adopted in particular instances in the practice of States."⁷ Apart from the special treaty obligations incumbent upon Austria to preserve her independence, this definition appears to be of general applicability and is especially welcome because of its emphasis on the indivisibility of political and economic independence.

If the emphasis is put upon the prohibitive rules underlying the principle of sovereignty, by which duties of abstention and

⁶ Series A/B 41, containing the Pleadings, Oral Statements, and Advisory Opinions of the Permanent Court of International Justice, 1931-40, at 45.

⁷ Series B, containing the Advisory Opinions of the Permanent Court of International Justice, 1922-30, at 24.

non-interference are imposed upon other subjects of international law, sovereignty and domestic jurisdiction appear to become interchangeable terms. So long as international law does not impose any limitations on the exercise of sovereign rights, such matters are within the exclusive jurisdiction of sovereign States. The Court of International Justice, as in *Nicaragua* case, reconfirms this position when it states that "[A] state's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every state possesses a fundamental right to choose and implement its own political, economic and social systems."⁸

2.2. *Origin and Early Theory of Sovereignty*

In the East in the olden times most states did not seem to feel the need of a legal theory with regard to the state, public authority and international relations.⁹ In China, Egypt, Babylonia, Assyria, Persia, and Israel, state and public authority, like international relations, have to our knowledge never been the object of methodical legal study. The subject of sovereignty was no exception, in spite of the existence of many sovereign states which had dealings with one another of various

⁸ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*). 1986, I.C.J.Rep. at 14.

⁹ See generally E.N.V. Kleffens, "Sovereignty in International Law," 82 *Recueil des Cours* (1953-I), at 5-130.

kinds. The explanation was, of course, partly that, in those countries, there was no spiritual freedom, and partly that public law had no individual existence, bound up as it was with religion and moral philosophy to an extent which excluded independent treatment. In China, there have at least been attempts at formulating a code of behaviour for sovereign states,¹⁰ but its practical importance was insignificant. India appears, to some extent, to have been an exception, having evolved at least a concept of territorial sovereignty,¹¹ but it is difficult to assess the influence that concept had in actual practice.

The emergence of the concept of sovereignty, therefore, is usually linked to the disintegration of feudalism, of the medieval *civitas maxima* and the birth of the modern nation state.¹² In the struggle against the atomistic feudal order, on the one hand, and the supremacy of the Holy Roman Empire, on the other, the ruler strove to unshackle his authority from the limitations of the medieval order, indeed from all forms of limitation, to achieve "an authority which did not depend upon any other authority," an authority "sovereign" in the literal,

¹⁰ See Gettell, "History of Political Thought," 1936, at 45.

¹¹ See B.K. Sarkar, "Hindu Theory of International Relations," *American Political Science Review*, XIII, 1919, at 400-414.

¹² See Coleman Phillipson, "The International law and Custom of Ancient Greece and Rome," 1911, at 29-30.

etymological sense of the term.¹³

A product of that struggle, the concept of sovereignty, subsequently elaborated and rationalized by lawyers from the ranks of the bourgeoisie upon which the rulers came to rely as their political, military and ideological mainstay, itself became a powerful weapon in this struggle, and, as such played an undoubtedly progressive role. The idea of sovereignty became linked to the concept of an authority which in the words of Engels "represented order in chaos, the emerging nation as against the state split into rebellious feudal units."¹⁴ As such it contributed to the downfall of a social and political system which had outlived its usefulness and to the creation of a new and more advanced one. The practical forms in which this idea appeared were, however, necessarily determined by the conditions under which it arose and by the political purposes it was intended to serve. Sovereignty, as understood at that time, tended, in other words, to provide theoretical justification for arbitrary rule both in domestic and in external relations. We can thus discern in sovereignty, at this early stage of its growth, certain elements which remained its attributes in the subsequent phases of its development, such as the notion that (a) sovereignty is an essential attribute of state power, and (b) that the essence of sovereignty is constituted by the

¹³ *Ibid.*

¹⁴ See Marx and Engels, "Collected Works," Vol. XVI, part I, at 445.

independence of state power from any other power. We may also, however, observe a tendency to free the state from any form of limitation, both legal and moral, as well as an inclination to identify sovereignty with force, in which we find the main ingredients of the so-called theory of absolute sovereignty.

With the decay of the Roman Empire and the birth of modern states, there emerged a broader theoretical basis than could be provide by either the Roman texts or the conceptions of a decaying feudalism. Rights when once acquired by prince or city inevitably tended to cast off their semi-private cloak and to appear as inherent and inalienable attributes of political supremacy.¹⁵ Bodin's theory of sovereignty contributed to the emergence of such a basis.¹⁶

Sovereignty, according to Bodin,¹⁷ is the mark of the State.

¹⁵ See J.J. Burlamaqui, "Principles of Natural Law," trans., 1763, at 73; Rutherford, "Institutes of Natural Law," 1754, at 36.

¹⁶ See H. Lauterpacht, "Oppenheim's International Law: A Treatise," 1955, 8th ed., vol. I, at 120.

¹⁷ Bodin is usually considered to be the founder of the modern theory of sovereignty and his famous *Six Livres de la République*, which was published in 1577, provides the first comprehensive formulation of that theory. It is true that his references to the law are only incidental to his main theme, but his approach to the law *ab extra*, from the side of the State, gave him an opportunity to start a line of inquiry as to the nature of law, which had been closed to the civilians preoccupied with the internal details of the private law.

Even before Bodin, however, there had already existed the civilian theory of the State. The Glossators had not been able to avoid touching upon the position of rulers towards the ruled, particularly as the question of the power of princes to expropriate the private property of their subjects had already become the focus of heated theoretical controversy. The standpoint of the Glossators was simple. The Holy Rome Empire

A state differs from other communities through the presence within it of supreme or sovereign power. Sovereignty is to Bodin no longer simple superiority or suzerainty; it is the absolute and perpetual power in a State, and whoever possesses it may be termed sovereign.¹⁸ In theory a group of men might possess this sovereignty, though at the risk of anarchy or the tyranny of an uninstructed majority. Believing that the internal condition of France demanded the further consolidation of the central power at the expense of all subordinate groups and individuals, Bodin had no doubt that a monarchy was preferable to any other form of government. Parliament in England, the Estates in France, meeting "in all humility" to present their petitions to the prince, were rather a testimony to the greatness of the monarch than a diminution of his sovereignty. A power subject to charges or conditions is not sovereignty. This means that there must be external as well as internal independence. Bodin asserted

was the revived Empire of old Rome. In the fourteenth century, however, the medieval Empire was already in decay and, when Bartolus put into general currency the famous distinction between *civitates* which recognized and those which *de iure* or *de facto* did not recognize a superior, he was merely giving authoritative expression, in legal terms, to the changed political conditions of the Italy of his day. Starting from this classification, the lawyers gradually established the principle that independent communities and princes could legally exercise within their territory all the power---including the powers of legislating and taxing---formerly attributed exclusively to the *Populus Romanus* or the Emperor. See D. Nincic, "The Problem of Sovereignty in the Charter and in the Practice of the United Nations," 1970, n4, at 3.

¹⁸ See J. Bodin, "Six Livres de la République," 1577, Knolles's translation, 1606, at 135; "Six Books of the Commonwealth," translated and selected by M.J. Tooley, 1955, at 25-36.

explicitly that a sovereign is not only supreme within his territory but also owes obedience to no man outside it.¹⁹

Law is the command of the sovereign. It is only for the purpose of bringing out more clearly the nature of this sovereignty that Bodin turns to consider the law and its relation to the State. Apart from its connection with sovereignty he does not appear to attribute to the law any special pre-eminence in that scheme of things which is the State. He finds it necessary to explain that, in addition to sovereignty, a State must have other things which are "common and public", for there is no State where there is nothing common or public or both. Among these things he enumerates "the public domain, including law, customs, justice, rewards, and punishments. But when he is examining the content of the concept of sovereignty, he cannot insist too strongly that it consists essentially in the power to give law to all the subjects in general without the consent of anyone else, superior equal, or subordinate, and that all the other marks of sovereignty---the power of war and peace, of appointing officials, of supreme jurisdiction in disputes between subjects, and so on---are in the last analysis included in this power of legislation. And it is because he has already defined sovereignty as the power to make laws, that he is led to define these laws as "nothing but the command of the sovereign" in the exercise of his power.²⁰

¹⁹ *Ibid.*, at 135.

²⁰ *Ibid.*, at 155.

Bodin's sovereignty is seen as a concept. Sovereignty is merely the generalized form of the aggregate rights or regalities which, though their acquisition had often been grounded upon some actual or assumed proprietary title, were in fact being found indispensable for the effective government of the States which were everywhere springing into active life. Though Bodin assumes that the *summa potestas*, as a kind of abstract *universitas iurium* into which these powers are transmuted, is inherent in the nature of the State, he nevertheless vests them as legal rights, *propria iura maiestatis*, not in the state itself but in the individual physical man or men possessing *de facto* the supreme power.²¹

Since Bodin's conception of law is a corollary to the place accorded by him to legislation as the principal mark of sovereignty, it is statute which he has primarily in mind when he speaks of law. Customs, he admits have considerable force, "almost the force of laws," but they "creep in sweetly and without force" and are not in the full sense law until they receive the confirmation of the sovereign; in the meantime they exist by sufferance and as long as it is the pleasure of the prince.²² But, when he is not dealing directly with the power of legislation, Bodin's notion of legal obligation is by no means restricted to the definition of law as a command of the sovereign. Thus certain fundamental law, like the "Salic" rule

²¹ *Ibid.*, at 108.

²² *Ibid.*

in France, is so intimately woven into the texture of the State that the ruler cannot derogate from nor abrogate them.²³ And there is *ius* as well as *lex*, *droit* as well as *loi*, not the outcome of the prince's command but of justice and equity and yet in a manner binding as law.²⁴ Finally, Bodin fully accepts the doctrine which coloured the whole of medieval legal and political thought, that the sovereign who makes human laws is not on that account free to disregard the law of Nature and of God.

The influence of Bodin's book was immediate and widespread. In opposition to it, Althusius propounded in Holland his theory of a democratic Commonwealth with fundamental laws agreed upon by freely associating groups, because it was vested not in one or more individuals within the state but in the organized community as a collective whole.²⁵ Although Althusius denies that a power which is subject to the law of God and of Nature can properly be called supreme, his concept of law, is essentially that of Bodin.²⁶

Althusius thus anticipated the modern doctrine that sovereignty is an attribute of the State as an abstract entity, rather than of an individual man or group of men. But it was in

²³ *Ibid.*, 137.

²⁴ *Ibid.*, at 155.

²⁵ See J.W. Jones, "Historical Introduction to the Theory of Law," 1970, at 86-87.

²⁶ *Ibid.*

its original form, and not as modified by Althusius, that Bodin's theory of sovereignty and law was taken over by later writers---in England where it has established itself under the name of the Austinian theory of law. Between Bodin and Austin²⁷ the theory had passed through the hands of Hobbes²⁸ and Bentham.²⁹ Bodin's sovereign, though above human laws, was subject to the law of Nature and therefore to the duties assumed by agreement with his subjects. Hobbes combined Bodin's doctrine of the legally absolute power of the wielder of *de facto* political force with the theory of social contract, in order to show that sovereignty was incompatible with any sort of duty of a sovereign to his subjects.

The increasingly obvious need to ensure the mutual adjustment of sovereignties, to achieve coexistence among the sovereign national states, led a number of authors to seek ways and means to place sovereignty under certain restrictions in order to make it possible for states to live alongside one another.³⁰ These limitations were sought either in a willingness of the sovereign powers to impose such limitations upon themselves (by assuming certain obligations towards other equally sovereign powers), or

²⁷ See generally J. Austin, "Lectures on Jurisprudence," 1911, vol. I.

²⁸ See generally Hobbes, "De Cive," c.6, sections 12-15.

²⁹ See generally J. Bentham, "Of Laws in General," ed. Hart, 1970.

³⁰ See D. Nincic, "The Problem of Sovereignty in the Charter and in the Practice of the United Nations," 1970, at 3-4.

else in norms imposed upon states "objectively," i.e. independently of their immediate will, as was done by the various schools of natural law. This, at the same time, foreshadowed the main lines along which future solution to this problem were to be sought. It should be noted that Bodin, with whom the early theories of absolute sovereignty are usually linked, recognized both these types of limitations, considering that a state may be limited not only by rules of "divine and natural law." The writers who followed, such as Grotius,³¹ Pufendorf,³² Burlamaqui,³³ tried to find these limitations in natural law, while Christian Wolf felt they could be found in an international organization which he called "*civitas maxima*."³⁴ While these writers seem to discern the frontiers of sovereignty in certain objective although metajuridical and even metaphysical norms, some of their contemporaries, such as Suarez³⁵ and especially Vattel,³⁶ seem to herald future

³¹ See H. Grotius, "De Iure Belli ac Pacis," 1st ed., 1625, part X. "The Law of War and Peace." (vol. 3 in "Classics of International Law" series), trans. by F.W. Kelsey et al., 1925.

³² See S. Pufendorf, "De iure naturae et gentium," French translation: *Le Droit de la nature et des gens*, 1712, Ch.III, at 169.

³³ J.J. Burlamaqui, "Principe du droit de la nature et des gens et du droit public général," 1747, at 188, 189, 595, 628, 867.

³⁴ See C. Wolf, "Institutiones iuris naturae et gentium," 1772.

³⁵ See F. Suarez, "Tractatus de legibus ac de legislatore," 1612.

positivist theories according to which limitation upon sovereignty can emanate only from the will or consensus of wills of the states themselves.

The changes occurred in the late eighteenth and in the early nineteenth century gave rise to a new concept of sovereignty or, rather, gave a new content to the concept which had already emerged (thus, of course, modifying the concept itself).³⁷ Within the domestic field, sovereignty was transferred from the ruler to the "people" (i.e. the bourgeoisie). Having thus become "popular", sovereignty tended to acquire certain external features which were derived from the then prevailing bourgeois ideology. More specifically, sovereignty was coming to include the concept of the equality of states as one of its essential elements. The freedom and equality of the individual within the state, was being paralleled by the independence and equality of states in international life, and sovereignty was to constitute the legal expression of the independence and equality, which were appearing as the two aspects of single concept.

Thus by the early nineteenth century the basic elements and features of sovereignty, both constant and variable, began to emerge with increasing clarity. It was generally accepted that

³⁶ See E.de Vattel, "Le droit des gens ou principes de la loi naturelle, appliquée à la conduite et aux affaires des nations et des souverains," 1916, at 18. "The Law of Nations or the Principles of Natural Law," (vol. 4 in the "Classics of International Law" series), trans. by C.G. Fenwick, 1916, vol. III.

³⁷ See H. Lauterpacht, "Oppenheim's International Law: A Treatise," 1955, 8th ed., vol. I, at 121-122.

sovereignty is an essential feature of state power, that it signified "supremacy" of the state in its internal and independence in its external relations. The forms the supremacy will assume, the frontiers it will extend to and the significance it will acquire---whether it is to mean independence only from any other "authority" or also independence from legal and moral norms, how it will adjust itself to the independence of other subjects of sovereignty, what the relationship between sovereignty and equality will be---all these were questions to which different answers were provided in function of changing conditions and of the political and ideological inclination of those they emanated from.³⁸

2.3. *Absolute Sovereignty and the Voluntarist Theories*

The growth of the theory (and of the practice) of absolute sovereignty may be traced most easily in the late nineteenth century to Germany, probably because of the specific conditions under which this country entered the phase of industrial development and achieved its national and political unity.³⁹ Bismarck sought to translate this concept of sovereignty into political reality through his struggle for the unity of the Reich, on the one hand, and through his *Kulturkampf* with the Roman Catholic Church, on the other. This concept acquired its

³⁸ See D. Nincic, "The Problem of Sovereignty in the Charter and in the Practice of the United Nations," 1970, at 5.

³⁹ See H. Lauterpacht, "Oppenheim's International Law: A Treatise," 1955, 8th ed., vol. I, at 121-122.

theoretical expression in the works of Fichte, Savigny and his historical school, and especially of Hegel and his philosophy of law, which reduced international law to "external constitutional law," whose legal basis derived solely from the will of the contracting states, and, according to which the "supreme manifestation of sovereignty, was war."⁴⁰ Ihering followed a similar line of thinking, when he claimed that a state may be limited by its own will alone, and so did the historian Treitschke when he drew a sharp distinction between private and public morality and considered that it is ethical for a state to do anything that is in accordance with its interests and that these interests have priority over contractual and other international obligations.⁴¹ In the field of constitutional and international law these theories, and especially those of Hegel and Ihering, were further elaborated by Gerber, Laband, Jullinek Ph. Zorn, A. Zorn and Heller.⁴² In the light of these voluntarist and positivist doctrines, with their more or less apparent absolutist overtones, sovereignty is not merely the supreme authority---"summa potestas" (an authority over which there is no other authority), but also the "plenitudo potestatis"---i.e. full and more or less unlimited power. According to these theories, the difference between "summa

⁴⁰ See D. Nincic, "The Problem of Sovereignty in the Charter and in the Practice of the United Nations," 1970, at 6.

⁴¹ *Ibid.*

⁴² *Ibid.*

potesta" and "plenitudo potestatis" consists in that "summa potestas" means that the state wields the greatest power and is not subjected to the "superior will" of another state, etc., while "plenitudo potestatis" means that the state possesses the "competence of its competence". Or, according to the succinct description given by Fauchille, "to say that a person is sovereign, not merely means to say that it does not recognize any authority above its own, but that it may issue orders at its own discretion, that it may do freely and without limitation all that it considers fit to do."⁴³

The extreme consequences to which this theory may lead are obvious: states become independent, not only of one another, not merely of any other authority, but of any higher principle, including any superior moral principle; they enjoy full freedom with regard to the obligations they assume and have the freedom to denounce these obligations when they no longer consider them to serve a useful purpose and to resort to force as the supreme arbiter in international relations.⁴⁴ Absolute sovereignty implies the possibility that any state can take a decision in arbitrary fashion at any given moment and reverse this decision a moment later, and the absence of limitation (i.e. the fact that no limitation has been imposed) and "illimitation" (which implies the condition of being without limitation) are not

⁴³ See P. Fauchille, "Traité de droit international public," 1923, vol. I, at 428.

⁴⁴ *Ibid.*

identical concepts. Only the latter actually implies "absolute sovereignty." This German concept of sovereignty tends to merge with that of "Kompetenz-Kompetenz" (the competence of one's own competence), which signifies the power of a state to determine both the limits of its competence and the forms in which it will be exercised. What this concept actually implied, therefore, was that the only limitations to which sovereignty may be subjected, are those which it imposes upon itself, this line of thinking found expression in the theory of auto-limitation, propounded by German and also such French authors as Carré de Marlberg and Meringhac,⁴⁵ as well as by proponents of some of the more moderate variations of the basic voluntarist--- positivist school of thought.

A further consequence of the theory of absolute sovereignty, particularly in its more extreme forms, was, on the one hand, an at least implicit negation of equality as an element of sovereignty, and, on the other, the equation of sovereignty with the actual power to exercise it, which, in the final analysis, meant its identification with force and led to a distinction, frequently made in this context, between "legal" and "factual" sovereignty. Moreover, in the light of this theory the traditional controversy regarding the primacy of domestic or international law tended naturally to be settled in favour of the former while the antinomy between sovereignty and

⁴⁵ See Carré de Manlberg, "Contribution à la théorie générale de l'Etat," 1920, at 237;

international law was solved by sovereignty being granted supremacy over international law. And this, it may be added, usually occurred within a monistic conceptual framework, such as that offered by the theory of the auto-limitation of the state. It should also be noted, however, that there is a wide range of difference among these theories and that some of the more moderate ones tend to come close to the relativist theory of sovereignty.

The theory (and the practice, for that matter) of absolute sovereignty was not confined to Germany. It had a number of distinguished adherents in England, like Hobbes, Bentham, Austin and his so-called analytical school.

Hobbes, unlike Bodin, who saw law merely as the outcome of the actual exercise of power, spoke of the sovereign as "by right" having command over others.⁴⁶ Consequently it was necessary to find some basis for this "right" or authority which would be at the same time legal rather than merely ethical and yet not of positive law. Such a basis could only in those days be found in the law of Nature, bidding men to perform their promises; and the pre-State contract is formulated by Hobbes in terms which impose duties on subjects while relieving the sovereign from any reciprocal obligations. In order to make such a sacrifice plausible it was necessary to go on and picture a "natural" condition of mankind which was neither "*la république*

⁴⁶ See J.W. Jones, "Historical Introduction to the Theory of Law," 1970, at 88-90.

des moutons' of Voltaire, nor the freedom without licence of Locke, but a perpetual war of all against all. The logical, if not chronological, truth of this picture is deduced by Hobbes from the chaos which the absence of a common superior had produced in the relations of independent States.⁴⁷

Bentham saw jurisprudence as an experimental science founded upon the careful observation of legal realities. These realities could only be the acts and thoughts of men.⁴⁸ To speak of natural law and natural rights was to deal in unrealities; to identify natural law which the common law was only to substitute a set of abuses for a bundle of fictions. What required investigation was the effect of those "metaphysical" propositions, which make up the law, upon the desires and motives of men. It seemed idle to say that a rule of law ceased to be law because it was bad law. A command of the legislature continued to be law until repealed by the legislature. To secure such repeal it was necessary to demonstrate in each case the defects of the existing rule and the superiority of a new rule to be put in its place.⁴⁹

Bentham proceeded to apply the principle of utility as the measure of right and wrong over the whole field of legislative activity.⁵⁰ Since for him all government and all laws were to

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, at 90-95.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

some extent an evil, as being an infraction of liberty, legislation was essentially the choice of evils. Its only justification therefore lies in the extent to which it "maximises happiness", which it attempts to do by attaching pleasures and pains to the doing of certain acts which are then said to be subject to a sanction. Bentham's doctrine is that of Hobbes stripped of its natural law trappings; we are under an obligation only so far as we are affected by a sanction.⁵¹

When Hobbes's doctrine had been relieved of its natural law fictions and Bentham's of its utilitarian ethics, Austin found that what remained was the concept of law as the command of a sovereign and he made it the starting-point of his own teaching. Every law strictly so-called "is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme."⁵² While Austin, through an application of his analytical method reached conclusions in favour of unlimited sovereignty, adapted, it is true, to British conditions (he speaks of the "sovereignty of Parliament"), Bosanquet, for his part liberated the state, as the "embodiment of the common good" of all limitations, particularly in the field of foreign relations.

It was left, however, to the doctrine and practice of fascism to draw the most extreme conclusions from the "theory of

⁵¹ *Ibid.*

⁵² *Ibid.*, at 94.

absolute sovereignty." Thus, according to the national-socialist view of sovereignty, "the racist national state", is alone called upon to decide as to its international interests and, in the case of conflicts among states, the final decision belongs to force. This notion was consistently and comprehensively elaborated in Nazi works on constitutional and international law and applied, with a thoroughness with which the world was to become only too well acquainted, in the policy of the Third Reich. Similar theories appeared in Mussolini's Italy, where one of the leading legal theorists Rocco, claimed that "the fascist state is the only genuinely sovereign state."⁵³

2.4. Relative Sovereignty

The need to adjust sovereignties in an increasingly interdependent international community and the actual possibility of doing so within a family of nations mainly confined to the Western Hemisphere and to countries belonging to "Western Civilization" and organised along similar political and social lines, led many writers to depart from, or at least to water down, the hitherto prevailing voluntarist theories and adopt a more relativist approach to the problem of sovereignty. This relativist approach appeared in its turn in various forms, some of which had the more modest ambition of curbing the most absolutist expressions of sovereignty, i.e. of "de-absolutizing"

⁵³ See D.Nincic, "The Problem of Sovereignty in the Charter and in the Practice of the United Nations," 1970, at 8.

sovereignty within the framework of the prevailing subjectivist concepts, while others went as far as to seek its complete elimination. Common to these various schools of relativist thought---which seemed to dominate the period between the two world wars was, to borrow Fauchille's description again, the notion that "while a sovereign state is the sole master of its actions, all actions are not permitted to it."⁵⁴ And it is not permitted to take actions which are incompatible with the sovereignty---also a relative sovereignty---of other states. In the words of de Visscher, "the theory of relative sovereignty acknowledges the fact that the individual states are included in a pattern of relationships which necessarily imposes certain limitations upon their will to be autonomous."⁵⁵ These necessary limitations are imposed upon states by means of legal norms which are not exclusively dependent upon their will but are derived from this "system of relationships." The paramountcy of international law is thus more or less explicitly recognized. Also, the flexibility of relative sovereignty, its capacity, in Kaufmann's words, to "shrink or expand" as the case may be, is a flexibility which, in his opinion, actually constitutes "the foundation of international law."⁵⁶

⁵⁴ See P. Fauchille, "Traité de droit international public," at 428.

⁵⁵ See C. de Visscher, "Théorie et réalité en droit international public," 1953, at 30.

⁵⁶ See Kaufmann, "Règles générales du droit de la paix," 1935, at 259.

Best known perhaps is the so-called Vienna or normativist school founded by Kelsen and Verdross. This school, like the classical school, stems from a monistic vision of the legal system; it differs, however, from its predecessors in that it settles the problem of primacy between international and domestic law in favour of the former, i.e. it considers that the original norm of the entire legal system is to be sought in international law. Within this system sovereignty does not, it is true, vanish in a formal sense, but actually signifies little more than the delimitation of a state's sphere of competence---a delimitation which is, moreover, left to international law: the confines of a state's jurisdiction are drawn by international law. Sovereignty is thus actually only an expression of a competence which is transferred by international law.⁵⁷ This leads to the theory of "immediacy" of international law, which the Vienna school introduced into international legal theory. These ideas of sovereignty were not, however, solely confined to the Vienna school, but had many proponents among other writers belonging to the positivist line of thinking.⁵⁸

Dickinson observed that few, if any, would support the view of absolute sovereignty, and that the very concept of state equality at least implied that the sovereign rights of each

⁵⁷ See H. Kelsen, "Principles of International Law," 2nd ed., 1966, at 581-585.

⁵⁸ See D. Gidel, "La mer territoriale et la zone contiguë," 1934, at 186.

state were limited by the equally sovereign rights of others.⁵⁹

Kelsen, a prominent jurist, emphasized that

"[I]f by sovereignty an unrestricted power is meant, it is certainly incompatible with international law, which, by imposing obligations upon the state, restricts its power."⁶⁰

Although Starke agreed with some limitations on state sovereignty, his agreement with the limitations was based upon the "acceptance" of the states concerned.⁶¹

Another form in which this radical negation of sovereignty appeared, were the theories which called for a rejection of the classical concept that states are the sole subjects of international law and which claimed that individuals are the subjects, or are also the subjects of international law. Thus the French author Duguit who was unwilling to recognize states as subjects of international law because he viewed their personality to be a "metaphysical concept," considered individuals to be the sole subjects of law in general and of international law in particular.⁶² Another contemporary French writer, George Scelle felt that neither the state nor any other

⁵⁹ See E.D. Dickinson, "The Equality of States in International Law," 1920, reprinted 1972, at 114-115.

⁶⁰ See H. Kelsen, "Principles of International Law," 2nd ed., 1966, at 193-194.

⁶¹ Starke noted that "[A]t the present time there is hardly a state which, in the interests of the international community, has not accepted restrictions on its liberty of action." See J.G. Starke, "Introduction to International Law," Ninth ed., 1984, at 95-96.

⁶² See Duguit, "L'Etat, le droit objectif et la loi positive," 1901, Part I.

community are subjects of international law and that only individuals may be viewed as subjects of international law.⁶³ Deprived of the status of subject of law, the state could obviously no longer assume that complex of subjective rights which constitutes sovereignty.

A third group of authors from those period among whom the Greek international lawyer, Politis is probably the most prominent, contended that the theory of sovereignty was no longer in accordance with the development of positive international law and should, therefore, either be completely disregarded or adapted to new international realities through a process of relativisation.⁶⁴ Anand saw sovereignty as an "archaic, unworkable, misleading and dangerous" political dogma.⁶⁵ Laski declared that: "it would be of lasting benefit to political science if the whole concept of sovereignty were surrendered".⁶⁶ Jenks was one of the powerful denigrators of the concept. He characterized sovereignty as "sanctified lawlessness, a juristic monstrosity and a moral enormity".⁶⁷

It should be noted that while the most contemporary

⁶³ See G. Scelle, "Précis du droit des gens," at 10.

⁶⁴ See D. Nincic, "The Problem of Sovereignty in the Charter and in the Practice of the United Nations," 1970, at 11.

⁶⁵ See R.P. Anand, "sovereignty of States in International Law," in R.P. Anand (ed.), *Confrontation or Co-operation? International Law and the Developing Countries*, 1987, at 72.

⁶⁶ See H. Laske, "Grammar of Politics," 1941, at 44.

⁶⁷ See C.W. Jenks, "A New World of Law?" 1969, at 134.

international lawyers criticize the concept of sovereignty, their object of attack is the doctrine of absolute sovereignty, and they do not abolish the concept itself. Jessup, for example, maintains a critical attitude toward sovereignty of the state, as he points out that sovereignty "in its meaning of an absolute, uncontrolled State will, ultimately free to resort to the final arbitrament of war is the quicksand upon which the foundations of traditional law are built". He admits, however, that "the world is today organized on the basis of the coexistence of States" and, therefore, "sovereignty in the sense of exclusiveness of jurisdiction in certain domains, and subject to overriding precepts of constitutional force, will remain a usable and useful concept".⁶⁸ Brierly rejects the notion of sovereignty in the international sphere, but the notion he rejects is one that he conceives as entirely in conflict with the very concept of international law, that is, sovereignty as the supreme will not subordinated to any overriding obligations. One has to agree with him that "if sovereignty means absolute power, and if States are sovereign in that sense, they cannot at the same time be subject to law".⁶⁹ But he admitted, that the doctrine of sovereignty was an expression of the overriding reality of the actual power wielded by States and an analysis

⁶⁸ See P.C. Jessup, "A Modern Law of Nations: An Introduction," 1948, at 12, 17; M.S. Korowicz, "Introduction to International law," 1959, at 14.

⁶⁹ See J.L. Brierly, "The Law of Nations," 6th ed., edited by S. Humphrey Waldock, 1963, at 16.

which ignored that factor was bound to be incomplete.⁷⁰ As stated by the dissenting judges in their dissenting opinion in the *Customs Régime* case before the Permanent Court of International Justice, "Complete and absolute sovereignty unrestricted by any obligation imposed by treaties is impossible and practically unknown".⁷¹

Whatever the forgoing views are, contemporary international law imposes limitations on the permissible scope of the internal and external actions of independent sovereign states.⁷² The nature of territorial sovereignty necessarily implies the fundamental limitation that no state has the right to impose its will on the territory of another, with the exception of certain narrow circumstances such as the protection of a state's own nationals.

State sovereignty is also limited in many other aspects by general and customary international law. Examples may be given by the right of innocent passage and freedom of navigation on the high seas and through international waterways.⁷³ While it may be premature to speak of an international customary "law of the commons," such law seems to be in the process of development with respect to the peaceful uses of outer space and economic

⁷⁰ *Ibid.*, at 46-47.

⁷¹ Permanent Court of International Justice, Series A/B, No. 41, 1931, at 77.

⁷² See generally I. Delupis, "International Law and the Independent State," 1974.

⁷³ *Ibid.*, at 29-44.

exploitation of ocean resources.⁷⁴

Even within their own territory, states have been limited by international law in a manner which makes any argument in favour of absolute sovereignty difficult to maintain. Some of the limitations are related to the protection of other states, such as state responsibility for acts wholly within one state which cause damage to another state.⁷⁵ The equitable use of water resources upon which other states depend also is mandated by international law.⁷⁶

State responsibility for injuries to aliens in general, and the principle of diplomatic immunity, in particular, constitute long-standing restrictions on the unfettered use of state power even within a state's own territory.⁷⁷

Some fundamental human rights norms have achieved the status of customary international law or *jus cogens*, including the prohibition against genocide, systematic racial discrimination, prohibition torture and degrading and inhumane treatment to

⁷⁴ See H. Caminos and M.R. Molitor, "Progressive Development of International Law and the Package Deal," 79 Am. J. Int'l L., 1985, at 871; K. Hailbronner, "Freedom of the Air and the Convention on the Law of the Sea," 77 *ibid.*, 1983, at 490; S. Gorove, "The Geostationary Orbit: Issues of Law and Policy," 73 *Ibid.*, 1979, at 444.

⁷⁵ See, e.g., the Trail Smelter arbitration, 1941, Annual Digest of Public International Law Cases (1938-40).

⁷⁶ See I. Delupis, "International Law and the Independent State," 1974, at 95-97.

⁷⁷ See generally R.B. Lillich, "The Human Rights of Aliens in Contemporary International Law," 1984; *ibid.*, "International Law of State Responsibility for Injuries to Aliens," 1982; F. V. Garcia-Amador, "The Changing Law of International Claims," 1984.

human persons, and all other civil rights.⁷⁸

Under contemporary international law, state sovereignty is not absolute. It is relative or limited. It is so not only because states in the world community are under various kinds of treaty obligations with regard to other states coexisting, but also because states should act in accordance with the obligations originating from international customary norms. While, for the former, states may choose to accept such limitations upon their sovereignty at their free will; state sovereignty is restricted in the latter situation in any event, whether or not states are willing to accept such limitations.

2.5. The Chinese Perspective of the Concept of Sovereignty

The People's Republic of China (the PRC) sticks to the doctrine of sovereignty not only because China has bitter experiences of its sovereignty being ruthlessly encroached upon by foreign powers in the past, but also because it has the conviction that the principle of sovereignty is the only foundation upon which international relations and international law can be established and developed.⁷⁹ The Chinese put emphasis on sovereignty because it is the hard-won prize of their long struggle for their lost sovereignty, and because of its bitter experiences of being colonized by foreign powers. They adopt

⁷⁸ See supra 1.3.

⁷⁹ See Leng Shaochuan, "Chinese Law," in A. Larson and C.W. Jenks (eds.), *Sovereignty Within the Law*, 1965, at 260-261.

sovereignty to shield against foreign domination and aggression, and to safeguard the country's independence. From this point of view, the Chinese share the value of sovereignty as much as other newly-independent states.⁸⁰

China has never, as Professor Wang Tieya notes, adhered to the doctrine of absolute sovereignty.⁸¹ It has always maintained a sharp vigilance against violation or infringement of its sovereignty by foreign powers, yet it has never taken the position that sovereignty is an illimitable power. The Five Principles of Peaceful Coexistence which it consistently supports manifests that the principle of sovereignty is, in effect, restricted by four other principles. According to the principles of non-intervention and non-aggression, sovereignty is conditioned on no intervention in internal affairs of other states and on no aggression against other states. The principle of sovereignty is presented in the Five Principles of Peaceful Coexistence⁸² as "mutual respect for sovereignty"---"respect for

⁸⁰ The newly established states are most attached to the concept of sovereignty as they are extremely sensitive to any infringement of their newly acquired independence and sovereignty. The same may be said of the Latin American states. See R.P. Anand, "Sovereignty Equality of States in International Law," 197 *Recueil des Cours* (1986-II) at 38-41.

⁸¹ See Wang Tieya, "International Law in China: Historical and Contemporary Perspectives," 221 *Recueil des Cours* (1990-II), at 292.

⁸² The Five Principles of Peaceful Coexistence are the principles of (a) mutual respect for each other's territorial integrity and sovereignty, (b) mutual non-aggression, (c) mutual non-interference in each other's internal affairs, (d) equality and mutual benefit, and (e) peaceful coexistence. The Five Principles were initially declared in the Preamble of the

sovereignty" being qualified by the word "mutual". By "mutual respect for sovereignty" it means that the sovereignty of one state is restricted by that of others and the sovereignty of all states should be equally respected.⁸³ The idea that sovereignty is absolute in nature and gives the states the freedom to do whatever they like, including the right to resort to war, is thus definitely refuted.⁸⁴

The idea of absolute sovereignty has not been entertained by China and it is deemed incompatible with the principles of peaceful coexistence. Thus, China, in this regard, shares the same point of view with scholars from the former Soviet Union,⁸⁵ when Professor Wang reaffirms that

"[P]roclaiming unlimited sovereignty of one state and thereby rejecting the sovereignty of all other states is in effect a rejection of sovereignty as a principle of international law. Nor can it be admitted, however, that the rejection of the idea of absolute sovereignty should lead to the denial of the whole concept of sovereignty. The attempt to annihilate the sovereignty of several states by the establishment of a super-state with a 'World Government' and to replace international law by a 'World Law' will definitely be opposed by the PRC, because such an

Agreement between the People's Republic of China and the Republic of India on the Trade and Intercourse Between the Tibet Region of China and India of 29 April 1954. Chian is of the view that the Five Principles are fundamental principles of international law. For the origin, development and China's view about the Five Principles, see generally Wang Tiewa, "International Law in China: Historical and Contemporary Perspective," 221 *Recueil des Cours* (1990-II), at 263-287.

⁸³ *Ibid.*, at 292-293.

⁸⁴ See Chen Tiquang, "The People's Republic of China and Public International Law," 8 *Dalhousie L.J.*, 1984, at 24-25.

⁸⁵ See F.I.Kozhenikov, "International Law," 1981, a Chinese translation, 1985, at 95.

attempt would not introduce order in the world, but it would secure the predominance of one big power or a group of powers and violate the rights and interests of small states."⁸⁶

It is very significant that some Chinese scholars have also noticed that even Bodin's concept of sovereignty was not absolute and was subject to the laws of God and of Nature and to certain human laws common to all nations.⁸⁷ They have recognized that the sovereign has to obey the rules of international law and to observe its obligations towards other sovereign.⁸⁸ Unfortunately, such scholars have stopped there. They and the Chinese government have opposed to the concept of absolute sovereignty only for the purposes of fighting against foreign intervention and to safeguard China's newly-won independence from foreign powers. They, however, do not think that the theory of limited sovereignty is applicable to international protection of civil rights, especially if there is, as they assert, a lack

⁸⁶ See Wang Tieya, "International Law in China: Historical and Contemporary Perspectives," 221 *Recueil des Cours*, (1990-II), at 296.

⁸⁷ See, i.e., Professor Wang notes that

"[U]nfortunately, the original idea has been distorted and the doctrine of absolute sovereignty has been invented to justify the expansionist and aggressive policy of some states, especially during the years before the First and Second World Wars."

See Wang Tieya, "International Law in China: Historical and Contemporary Perspectives," 221 *Recueil des Cours* (1990-II), at 291.

⁸⁸ See M.S. Korowicz, "Some Present Aspects of Sovereignty in International Law," 102 *Recueil des Cours* (1961-I), at 8-9; E.N.V. Kleffens, "Sovereignty in International Law," 82 *Recueil des Cours* (1953-I), at 52-55.

of international treaty obligations in this regard.

2.6. *International Protection of Civil Rights and State Sovereignty*

The topic is relevant here when international protection of civil rights is in conflict with state sovereignty. Compatibility between the two is of course a welcome phenomenon, which is of great help in terms of respecting and observing civil rights. In terms of international protection of civil rights vis-à-vis state sovereignty, several major schools of thought have developed and have advocated corresponding strategies.

One school takes a position of transnationalism or supranationalism aimed at overcoming the sovereign state as the dominant constituent element of the international system. Transnational mechanisms of human rights implementation are supposed to replace international protection of human rights. These mechanisms are conceived of as being either of a grass roots, populist, nongovernmental type or of a supranational, vertical, "hierarchical" nature. In any case, national sovereignty as a supposed barrier to the implementation of human rights is to be bypassed or overcome, thereby transforming the traditional nature of the state, which is characterized by the exercise of exclusive jurisdiction over its people and territory. Richard Falk leans towards this position when he states that without the emergence of a new system of world order, not based on sovereign nation states, international

protection of human rights is bound to remain weak or marginal.⁸⁹ However, Falk admits that in some instances effective international protection may be procured even today.⁹⁰ Among the questions which remain with regard to this position is how---and more importantly, when---such a new system is going to be brought about.⁹¹

Another school includes some writers and especially practitioners in the field of foreign policy who tend to take a rather resigned or forthrightly negative attitude toward the notion of international protection of human rights. They claim that the protection of human rights is essentially an internal matter of states and certainly not a proper or primary object to be pursued by means of foreign policies. The principle of nonintervention into the internal affairs of states takes precedence over human rights concerns.⁹²

Contrary to the above two cases of the assumption of incompatibility of international protection and state sovereignty, a third school of thought emphasizes the international implementation of rights, but at the same the time contends that the sovereign states, because of major

⁸⁹ See R. Falk, "Responding to Severe Violations," in *Enhancing Global Human Rights*, 1979, at 245.

⁹⁰ *Ibid.*, at 212.

⁹¹ See the critical appraisal of Falk's approach by S. Hoffmann, "Duties Beyond Borders," 1981, at 139.

⁹² See, for example, R. Vincent, "Nonintervention and International Order," 1974.

deficiencies in enforcement authority, remain the prime constituent elements of the international system, both politically and legally. Thus, the sovereign states not only are creating the international norms of protection of human rights, but also are determining the process of their implementation--- or nonimplementation---according to their sovereign will.⁹³ One nevertheless has to recognize that, at least for now, no mechanisms for the adequate enforcement of human rights other than governmental ones have been devised. The task international lawyers, as well as politicians, are confronted with, therefore, is to look for tools and incentives to induce states to come into line with their international obligations to implement human rights. It is not the sovereign state as such that is a barrier to the enforcement of human rights.⁹⁴ The overwhelming number of international human rights norms are addressed to the states, rather than to individuals or to groups of persons.⁹⁵ Furthermore, the process of implementation of these rights of individuals reveals that it is the state which is to enforce any decision in favour of the individual by an international

⁹³ See J. Delbrueck, "International Protection of Human Rights and State Sovereignty," 57 *Ind. L.J.*, 1982, at 567-568.

⁹⁴ *Ibid.*, at 575.

⁹⁵ *Ibid.*, at 574. It should be noted that the Optional Protocol to the International Covenant on Civil and Political Rights is an exception to this rule. Under the Optional Protocol, decisions are entered by Human Rights Committee rather than by an international tribunal. States which have accepted the Protocol are under treaty obligations to implement the decision made.

tribunal or organization.⁹⁶ This approach places emphasis on international implementation mechanisms with effective or even active cooperation with the "good state", not on the check on government encroachment on the individual's freedom.⁹⁷

Reisman in his article entitled "Sovereignty and Human Rights in Contemporary International Law" offers a new approach to the problem of international protection of human rights and state sovereignty.⁹⁸ To avoid the issue of incompatibility and/or compatibility between the two rules under international law, Reisman shifts the concept of state sovereignty to that of people's sovereignty. According to him, traditional notions of sovereignty "often came to be an attribute of a powerful individual, whose legitimacy over territory (which was often described as his domain and even identified with him) rested on a purportedly direct or delegated divine or historic authority but certainly not in the consent of the people".⁹⁹

"[W]ith the words "We the People" (US Constitution Preamble), the American Revolution inaugurated the concept of the popular will as the theoretical and operational source of political authority. On its heels, the French revolution and the advent of subsequent democratic governments confirmed the concept. Political legitimacy henceforth was to derive from popular support; governmental authority was based on the consent of the people in the territory in which a government purported to exercise

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, at 573.

⁹⁸ See W. M. Reisman, "Sovereignty and Human Rights in Contemporary International Law," 84 Am J. I. L., 1990, at 866-876.

⁹⁹ *Ibid.*, at 867.

power. At first only for those states in the vanguard of modern politics, later for more and more states, the sovereignty of the sovereign became the sovereignty of the people: popular sovereignty."¹⁰⁰

Reisman observes that the concept of people's sovereignty is confirmed by international legal system, of which he cites (a) Article 1 of the UN Charter establishing as one of the purposes of the United Nations, to develop friendly relations between states, not on any terms, but "based on respect for the principles of equal rights and self-determination of peoples"; and (b) Article 21(3) of the Universal Declaration of Human Rights providing that "[t]he will of the people shall be the basis of the authority of government". He states that "[I]n international law, the sovereign had finally been dethroned", and that "the concept of popular sovereignty was not to remain mere aspiration."¹⁰¹ Reisman then confidently draws the conclusion that

"[A]lthough the venerable term 'sovereignty' continues to be used in international legal practice, its referent in modern international law is quite different. International law still protects sovereignty, but---not surprisingly---it is the people's sovereignty rather than the sovereign's sovereignty."¹⁰²

To solve the domestic jurisdiction-international concern dichotomy in terms of human rights protection, Reisman, therefore, emphasizes that the will of people is the real test. The authority of the government against the wishes of the

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, at 868.

¹⁰² *Ibid.*, at 869.

people, by naked power, by putsch or by coup, by the usurpation of an election or by those systematic corruptions of the electoral process in which 100 percent of the electorate purportedly votes for the incumbent's list violates the popular sovereignty.¹⁰³ He cites various examples:

" [T]he Chinese Government's massacre in Tiananmen Square to maintain an oligarchy against the wishes of the people was a violation of Chinese sovereignty. The Ceausescu dictatorship was a violation of Romanian sovereignty. President Marcos violated Philippine sovereignty. General Noriega violated Panamanian sovereignty, and the Soviet blockade of Lithuania violated its sovereignty. Fidel Castro violates Cuban sovereignty by mock elections that insult the people whose fundamental human rights are being denied, no less than the intelligence of the rest of the human race."¹⁰⁴

Just as sovereignty can be violated as much by outsiders as by insiders, sovereignty can be liberated as much by an indigenous as by an outsiders force.¹⁰⁵

While Reisman's approach is capable of solving the dichotomy of international protection of civil rights and state sovereignty theoretically, it is certainly faced with significant hardships in practice. Firstly, the world community will find it very difficult to ascertain the real will of the people concerned. In most cases, the internal political situation is unclear and people's wishes are divided even in a democratically-elected-government state. If the wish of the majority people is regarded as the will of people sovereign, the

¹⁰³ *Ibid.*, at 870.

¹⁰⁴ *Ibid.*, at 872.

¹⁰⁵ *Ibid.*

interests and wishes of the minority people, indigenous or aboriginal people are very easily put into jeopardy and to be neglected. Cross-border scrutiny of real wishes in the territory, due to many factors such as lack of understanding of political, economic, cultural and historical situation in particular state, is almost impossible. Secondly, even in some extreme situations in which massive killings have occurred or are happening, the violating government still acts *de facto* as sovereign. The declamation of "l'état, c'est moi" is still recognized in today's world. The atrocities occurring domestically do not necessarily outlaw or forfeit the legitimacy of the violating government in terms of sovereignty under international law. The state practice nowadays is not yet ready to accept the concept of people's sovereignty as the international norm, at least for the time being. Thirdly, since unilateral measures acting in the name people's sovereignty are subject to abuse, "the most satisfactory solution to this problem is the creation of centralized institutions, equipped with decision-making authority and the capacity to make it effective."¹⁰⁶ However, Reisman himself also realizes that in the immediate future, that solution remains unlikely,¹⁰⁷ because of the existence of divergent interests among states.

It seems that none of the forgoing schools of thought is satisfactory. Any return to the classical notion that the

¹⁰⁶ *Ibid.*, at 875.

¹⁰⁷ *Ibid.*

protection of civil rights is essentially or exclusively an internal matter of states appears to be out of step with present state practice and international political and legal theory, as well as with many scholars' endeavours. Protection of civil rights completely based upon the denial of sovereignty and the reliance of supranationalism is also viewed as premature; and ignore the fact that in some fields of human rights protection states are playing active or positive roles. The emphasis upon international implementation measures still can not offer a satisfactory solution when incompatibility emerges or implementation measures are blocked by sovereign states. Furthermore, the notion of people's sovereignty is not mature enough for the world community as a whole to accept yet. Therefore, what most jurists have been doing is to make great efforts in interpreting Article 2(7) of the Charter of the United Nations (discussed in the next section) in order to enhance international protection of human rights and, at the same time, to preserve the value of state sovereignty.

2.7. Civil Rights and Domestic Jurisdiction

One very concrete and important aspect of State sovereignty concerns states' treatment toward their inhabitants within their own territories: i.e., whether the treatment is within their domestic jurisdiction and whether scrutiny and censure by other governments and international organizations constitute intervention and, therefore, are unlawful in international law.

"Domestic jurisdiction" and its counterpart "nonintervention" have confused international human rights activities since their inception. Volumes of official debate and scholarly comment have been devoted to these terms, particularly as regards the human rights activities of the United Nations, in the light of Article 2(7) of the Charter of the United Nations, which provides as follows:

"[N]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

Article 2(7) was placed in Chapter I ("Purposes and Principles") of the U.N. Charter. It was inserted there at the San Francisco Conference in order to make it applicable to the whole Charter. In the text of the paragraph an explicit exception was made for Chapter VII, which deals with situation in which the Security Council has expressly found the existence of a threat to the peace, breach of the peace, or act of aggression.¹⁰⁸

In the Dumbarton Oaks proposal there was a clause similar to Article 15(8) of the Covenant of the League of Nations, which related only to disputes between states.¹⁰⁹ The current

¹⁰⁸ Article 39 of the U.N. Charter.

¹⁰⁹ Article 15(8) of the Covenant read:

"[I]f the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendations as to its settlement."

provision in the U.N.Charter, however, is broader. The legislative history of Article 2(7) suggests that it was feared that Article 55 and 56 would give powers to the United Nations to penetrate directly into the domestic sphere of a member state.¹¹⁰

Unlike the formulation of Article 15(8) in the League Covenant, Article 2(7) makes no reference to international law as the determining factor of what is "essentially within domestic jurisdiction". Nevertheless the international law standard is still considered to be the criterion to determine the borderline between U.N. jurisdiction and domestic jurisdiction.¹¹¹ Another difference between Article 15(8) of the Covenant and Article 2(7) of the Charter is that the former speaks of matters which are "solely within domestic jurisdiction" and the latter, of matters which are "essentially within domestic jurisdiction". Again the difference in practice

¹¹⁰ See L.M. Goodrich, E. Hambro and A.P. Simons, "The Charter of the United Nations," 3rd ed., 1969, at 61-62; H. Lauterpacht, "The International Protection of Human Rights," 70 *Recueil des Cours* (1947-V), at 22; R. Higgins, "The Development of International Law Through the Political Organs of the United Nations," 1963, at 64.

¹¹¹ Lauterpacht noted that "[T]he omission of the reference to 'international law' in Article 2(7) is probably merely verbal and devoid of legal consequences". See H. Lauterpacht, "International Law and Human Rights," 1968, at 177. See also R. Higgins, "The Development of International Law Through the Political Organs of the United Nations," 1963, at 75; L.M. Goodrich, E.Hambro and A.P.simons, "The charter of the United Nations," 3rd ed., 1969, at 68.

has not been significant.¹¹²

Most commentators have made references to the U.N. practice in order to find the answers. In contrast, Professor Watson does not think that the U.N. practice in this regard is relevant. He denies that the U.N. Charter left the interpretation of Article 2(7) to the organs of the United Nations; rather he maintains that the member states have retained the power to interpret Article 2(7) and that therefore U.N. practice is irrelevant. Unlike Article 15(8) of the League Covenant, article 2(7) of the Charter does not specify who is to give the final interpretation of this provision. Watson has concluded that the members of the United Nations did not leave the interpretation of Article 2(7) to the organs of the United Nations.¹¹³ Furthermore, he attacks the assumption that consistent U.N. practice produces a legally binding rule.¹¹⁴ The only way in which such a rule could have been produced is custom.¹¹⁵ Watson denies that decisions in U.N. practice generate new customary rules. Votes are cast not on the basis of the required *opinio juris* but on the basis of political expediency.¹¹⁶ His conclusion is that U.N. practice has made

¹¹² See L.M. Goodrich, E. Hambro and A.P. Simons, "The Charter of the United Nations," 3rd ed., 1969 at 68.

¹¹³ See J.S. Watson, "Autointerpretation, Competence and the Continuing Validity of Article 2(7) of the U.N. Charter," 71 Am. J. Int'l L., 1977, at 60.

¹¹⁴ *Ibid.*, at 72.

¹¹⁵ *Ibid.*, 73.

¹¹⁶ *Ibid.*, at 76-77.

Article 2(7) redundant but that he would only be willing to accept this new interpretation as a binding norm if states such as South Africa and Israel, which are unwilling targets of U.N. resolutions, were to comply with these resolutions "against their political interests and because of a feeling that they must comply."¹¹⁷

Watson has failed to distinguish between the internal and external effect of Article 2(7). Even if Watson's thesis, that member states of the U.N. have retained their power to interpret the Charter, is correct, that should not give any member state at the U.N. the right to prevent a debate or the passing of a resolution by arguing "domestic jurisdiction". Watson's thesis would therefore have no internal effect within the U.N. organs, or other business at the U.N. would grind to a halt.¹¹⁸ However, the consequence of Watson's interpretation is that member states can invoke Article 2(7) and give it their own interpretation in their relations with the United Nations. Therefore, the U.N. organization's external relations with its member states would be affected.

The problem with Watson's theory is that it cannot be tested in practice because we are in a stalemate situation. To use Article 2(7) of the U.N. Charter to shield member states from studying, investigating and condemning gross and flagrant

¹¹⁷ *Ibid.*, at 83.

¹¹⁸ See T.J.M. Zuijdwijk, "Petitioning the United Nations: A Study in Human Rights," 1982.

violations of civil rights in the territories of any particular member state is certainly contrary to the intent of the U.N. drafters, who have put in the Charter a provision stating that one of purposes of the establishment of the United Nations is to obligate its member states to observe and respect human rights. The language of the Charter has taken gross, flagrant and persistent violations of human rights out of the sphere of domestic jurisdiction; therefore, U.N. bodies are allowed to debate alleged violations of human rights and make recommendations.¹¹⁹

When interpreting Article 2(7) of the U.N. Charter, in light to the notion of sovereignty, two key issues, with regard to international protection of civil rights, must be answered: (a) Which matters are "essentially within domestic jurisdiction"? and (b) What U.N. action amounts to "intervention"?

2.7.1. *"Matters Which Are Essentially Within the Domestic Jurisdiction"*

It should first be noted that there exists a divergency in the interpretation relating to Article 2(7) of the Charter of the United Nations.

Organs of the American Bar Association (The ABA) have on occasions stated, in connection with proposed United States ratification of human rights treaties, that some human rights in

¹¹⁹ See S.H. Waldock, "General Course on Public International law," 106 *Recueil des Cours* (1962-V), at 187.

the USA are a matter of domestic, not international concern. A 1971 Senate Committee report stated:

"[I]n the past, the power of the United States under the Consitution to make treaties in the human rights field has been questioned on the grounds that the treatment by a state of its nationals is a matter of domestic jurisdiction. This was one of the points raised in opposition to the Genocide Convention by officials of the American Bar Association and by Senator Ervin."¹²⁰

In 1967, the ABA Standing Committee on Peace and Law Through the United Nations, in a report recommending against U.S. ratification of three human rights conventions,¹²¹ had said:

"[I]is the sense of the ABA that many human rights sought to be secured by draft covenants or conventions completed, or in the course of preparation, by the U.N. and its various organs, concern the relationship of the citizen to the government of his own country, and are accordingly "essentially within the domestic jurisdiction" and have no direct relationship to the external affairs of the United Nations."¹²²

The report referred to Article 2(7) of the U.N. Charter. In 1976, the ABA House of delegates reversed its earlier decision and recommended USA ratification of the 1949 Genocide Convention, following the recommendation of the ABA Section of

¹²⁰ Senate Committee on Foreign Relations, International Convention on the Prevention and Punishment of the Crime of Genocide, S. Exec. Rept. No. 92-6, 92nd Cong., 1st Sess., 4 May 1971, at 1-18, reprinted in Sohn and Buergenthal, "International Protection of Human Rights," at 981.

¹²¹ The Convention on the Abolition of Forced Labor, the Convention on the Political Rights of Women, and the Supplementary Slavery Convention.

¹²² See J.C. Tuttle, "Are the 'Human Rights' Conventions Really Objectionable?" 3 Int'l Law, 1969, at 385.

International law.¹²³

In contrast to the above views, former U.S. President Carter in a speech before the United Nations on March 17, 1977 stated:

"[A]ll the signatories of the United Nations Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment is solely its own business."¹²⁴

Professor Thomas Buergenthal has concluded, on the basis of his examination of U.N. practice, that discrimination is the magic word to overcome the hurdle of Article 2(7). In his view, the Charter provisions relating to human rights merely lay down the principle of non-discrimination in the enjoyment of those rights that the Universal Declaration proclaims to be fundamental.¹²⁵ He maintained in 1965 that "non-discriminatory but systematic and even large-scale denials of these (fundamental) rights by a state will not on the other hand, be regarded as justifying specific United Nations involvement in the face of objections under Article 2(7), and this notwithstanding the prevailing view that this provision bars only so-called dictatorial intervention."¹²⁶

Professor Ermacora concluded that the General Assembly had

¹²³ American Bar Association, "Summary of Action of the House of Delegates," February 16-17, 1976, at 24-25.

¹²⁴ Department of State Bulletin, vol. LXXVI, no. 1972, April 11, 1977, at 332.

¹²⁵ See T. Buergenthal, "The United Nations and Development of Rules Relating to Human Rights," 59 Proceedings American Soviet of International Law, 1965, at 133-134.

¹²⁶ *Ibid.*

drawn the following lines between domestic jurisdiction and international jurisdiction in the field of human rights:

"(a) It is almost unanimously assumed that the jurisdiction of State is variable. This is also true with regard to human rights in their relationship to this sphere of jurisdiction and its variability. There may be expansions or restrictions of the jurisdiction in general or in particular case.

(b) If the violation of human rights threatens the international peace and security the problem is under Articles 2(7) and 39, of the Charter, no more within the domestic jurisdiction of a State.

(c) The promotion of the respect of human rights by legislative work has become an object of the United Nations as well as of States. This is evidenced by the Charter, the Universal Declaration and the Conventions. Recommendations concerning the protection of human rights belong to the same category.

(d) The protection of human rights in general and in concrete cases remains essentially within domestic jurisdiction, in particular the safeguarding of economic, social and cultural rights. There are signs that the protection against violations of human rights is undertaken by the community of States if they are gross violations or consistent patterns, as formulated in recent United Nations resolutions.

(e) The promotion of the right to self-determination and the protection against discrimination in the meaning of the Convention on the Elimination of All Forms of Racial Discrimination is undertaken by the State and by the international organisations, by the latter in the form of supervision. Policies of discrimination are gross violations of human rights.

(f) Each case is decided *prima facie* by the organs of the United Nations competent in the matter according to the internal law of the organization.¹²⁷

In view of the precedents set by the organs of the United Nations concerning the promotion of respect for human rights,

¹²⁷ See F. Ermacora, "Human Rights and Domestic Jurisdiction," 124 *Recueil des Cours* (1968-II), at 436.

Professor Ermacora continues, the rights to self-determination and the protection of human rights in matters of discrimination as far as "gross violations" or "consistent patterns of violations" are concerned are no longer essentially within the domestic jurisdiction of States, and therefore the principle of non-intervention is not applicable.¹²⁸

The principle of non-intervention must be respected in all other human rights questions. Those "other human rights", as Ermacora puts it, still remain within the sphere of essentially domestic jurisdiction. They include the following categories of human rights:

(a) all problems of judicial or quasi-judicial protection of human rights in so far as this protection has not been delegated to international organs by special agreements;

(b) the promotion of social, economic and cultural rights in so far as the conditions for the enjoyment of these rights are not indirectly brought about by measures of technical assistance and in so far as the protection of these rights is not in the competence of specialised agencies;

(c) the establishment of capital punishment and its execution;

(d) the control and safeguarding of personal freedom;

(e) the treatment of criminal offenders and prisoners in so far as it has not been internationalised by the 1957 standard minimum rules;

(f) freedom of movement and right of asylum in so far as no international obligations have been undertaken by States according to special conventions, especially the 1951 Convention on the Status of Refugees;

(g) the realization of fair trial, in so far as no question

¹²⁸ See F. Ermacora, "Human Rights and Domestic Jurisdiction," 124 *Recueil des Cours* (1968-II), at 436.

- of crimes against humanity or war crimes are involved;
- (h) the right to privacy, the rights of the family and the right to secrecy of letters;
 - (i) freedom of religion and belief, of thought and conscience, in particular the relationship between the State and the Church;
 - (j) freedom of expression and freedom of information;
 - (k) freedom of association and the right of peaceful assembly, in as far as no trade union rights are involved, in respect of which the specialised agencies are competent;
 - (l) the status of women and of the family in so far as these matters are not ruled by special conventions;
 - (m) the grant of special protection for minorities; and
 - (n) the order of the institution of individual property.¹²⁹

Ermacora's clear-cut approach may give rise to some criticisms. Human rights is such a fluid concept so that the categorization of certain rights as pure matters within domestic jurisdiction is rather artificial. With the ongoing of international protection of human rights, more and more rights become international concerns. This is illustrated by the fact that more and more international conventions or covenants in relation to human rights protection have been made and have gone into effect. To allow states to do whatever they like toward their people within (a) to (n) regardless of these states' being obliged to observe and respect human rights under the U.N. Charter, is apparently incompatible with the U.N. drafters' intent, nor is it consistent with increasing voices demanding

¹²⁹ *Ibid.*, at 437-438.

enhancement of international protection of human rights in general and civil rights in particular. Another problem with Ermacora's approach is that he seems, intentionally or not, to ignore the role customary law can play in the field of international protection of human rights. A particular right may be internationalised not only by international conventions but also by international customary law. Like an international convention, international customary law can also take what used to be considered as a domestic matter out of domestic jurisdiction, and bring it into an international forum. For example, half of the rights which were described by Ermacora as "matters within domestic jurisdiction" twenty-five years ago have now become or are becoming, as earlier indicated,¹³⁰ customary law, which are no longer solely within domestic jurisdiction. These rights involved as obtaining customary norms are, from Ermacora's list, (c), (d), (e), (f), (g), (h) and (i): i.e., the right to life, liberty and security, the right to prohibition against torture, or inhuman and degrading treatment and punishment, the right to freedom of movement, the right to fair trial, the right to privacy, and the right to freedom of religion.

According to Zuijdwijk, it can certainly be said that the protection of human rights is until recently a matter which

¹³⁰ See supra 1.2.

falls essentially within domestic jurisdiction.¹³¹ An exception given by him is the doctrine of humanitarian interventions, which applies only occasionally to the situations in which the most outrageous violations of human rights have occurred so as to shock the conscience of mankind.¹³²

China has in many international fora explicitly manifested its position that human rights are matters which are essentially within its domestic jurisdiction, or its equivalent term of internal affairs. In November 1991, especially, China, in the form of Governmental White Paper, declared that

"[O]ver a long period in the UN activities in the human rights field, China has firmly opposed to any country making use of the issue of human rights to sell its own values, ideology, political standards and mode of development, and to any country interfering in the internal affairs of other countries on the pretext of human rights, the internal affairs of developing countries in particular, and so hurting the sovereignty and dignity of many developing countries. Together with other developing countries, China has waged a resolute struggle against all such acts of interference, and upheld justice by speaking out from a sense of fairness. China has always maintained that human rights are essentially matters within the domestic jurisdiction of a country. Respect for each country's sovereignty and non-interference in internal affairs are universally recognized principles of international law, which are applicable to all fields of international relations, and of course applicable to the field of human rights as well."¹³³

Some Chinese scholars have also reconfirmed the above Chinese

¹³¹ See T.J.M. Zuijdwijk, "Petitioning the United Nations: A Study in Human Rights," 1982, at 77.

¹³² *Ibid.*

¹³³ See Information Office of the State Council of the People's Republic of China, "Human Rights in China," 1991, at 83-84.

government's stand in their writings. Tian Jin, for example, states that "the international community...should promote and protect human rights on the one hand, and on the other hand, should not interfere in other countries' internal affairs under the pretext of protecting human rights."¹³⁴ "The human rights issue was also one of internal law from the beginning."¹³⁵ The stand of some Chinese scholars' is, however, somewhat ambiguous, and is subject to different interpretations. Professor Wei Min, from Beijing University, observes that

"[I]n fact, by international protection of human rights, we mean that sovereign states co-operate in, and commit themselves to, realizing some aspects of human rights and preventing and punishing violations of these rights in accordance with universally recognized principles of international law and through treaties....If there are no particular obligations specified by the recognized principles of international law or treaties and states do not undertake such obligations, protection of human rights is still a domestic matter."¹³⁶

One reading of the forgoing paragraph is that there does exist some universally recognized rules of international law in relation to protection of human rights either in the form of treaty or of custom. Therefore, protection of human rights is not always a domestic matter. Another reading may be that unless China has explicitly accepted certain international human rights

¹³⁴ See Tian Jin, "International Human Rights: Developments and Disputes," in Beijing Review (compiled), China: Issues and Ideas (3) China and Human Rights, 1991, at 11.

¹³⁵ See Fu Xuezhe, "Human Rights No Excuse for Interfering in Other Countries' Internal Affairs," *ibid.*, at 43.

¹³⁶ See Wei Min, "International Protection of Human Rights," *ibid.*, at 34.

treaties, protection of human rights of human rights remains a domestic matter. And his term of "explicitly consents to undertake protection of some aspects of human rights" as a condition to test "domestic jurisdiction" issue is equally vague. Does it mean an acceptance of international conventions or *opinio juris* as regards state practice in the field of international protection of human rights? Apparently, from the perspective of enhancing protection of human rights generally or civil rights in particular, it is the hope of the world community as a whole that Chinese scholars and even its government will realize the status of international customary law in the role of protecting human rights.

Professor Henkin has provided very forceful and convincing points with regard to domestic jurisdiction concerning human rights protection. The legal terms of domestic jurisdiction, like that of intervention, has a hard core of agreed meaning. Domestic jurisdiction is that which is not a proper subject of foreign or international concern; what is not, in plain words, anyone else's business. That which is governed by international law or agreement is *ipso facto* and by definition not a matter of domestic jurisdiction.¹³⁷ Certainly, any state that adheres to an international human rights agreement has made the subject of that agreement a matter of international concern. It has submitted its performance to scrutiny and to appropriate,

¹³⁷ See L. Henkin, "Human Rights and 'Domestic Jurisdiction'," in T. Buergenthal (ed.), *Human Rights, International Law and the Helsinki Accord*, 1977, at 22.

peaceful reaction by other parties, and to any special procedures or machinery provided by the agreement for its implementation.¹³⁸ Henkin has further observed that

"[A]s blanket objections to international concern with human rights, the claims of domestic jurisdiction and nonintervention have been long dead. Surely, there are some circumstances in which the condition of human rights is a legitimate concern of and a basis for appropriate action by other states or international organizations. Surely, there are some responses that international organizations or individual states can make to infringements of human rights that are not interventions or other unlawful interferences in the affairs of the violating state. If human rights were always a matter of domestic jurisdiction and never a proper subject of external attention in any form, provisions of the U.N. Charter, the Universal Declaration of Human Rights, the various international covenants and conventions, and countless activities, resolutions, and actions of the U.N. and other international bodies would be *ultra vires*; every government would be guilty of meddling and some also of intervention; and numerous nongovernmental organizations and millions of individuals would have laboured egregiously and in vain for decades."¹³⁹

The question arises as to whether a right has once been internationalized by a treaty or a convention or a covenant, the subject concerned is no longer solely within the domestic jurisdiction even for a non-treaty state. On the one hand, almost all states are now parties to the U.N. Charter and are bound by its human rights provisions. By adhering to the U.N. Charter, states expressly "pledge themselves to take joint and separate action in cooperation with" the U.N. organization to promote "universal respect for, and observance of, human rights

¹³⁸ See L. Henkin, "The International Bill of Rights: The Covenant on Civil and Political Rights," 1981, at 14-15.

¹³⁹ See L. Henkin, "Human Rights and 'Domestic Jurisdiction'," in T. Buergenthal (ed.), *Human Rights, International Law and the Helsinki Accord*, 1977, at 23.

and fundamental freedoms for all without distinction as to race, sex, language, or religion". The legal normative content of certain rights in the UN Charter can not be denied.¹⁴⁰ At least, member states are obliged to prevent, within their territories, occurrence of gross, flagrant and persistent violations of civil rights rights so as to endanger the world peace and security. Member states are prohibited from to conduct that constitutes racial discrimination as a state policy. Furthermore, *jus cogens* rights are as a matter-of-course not simply internal affairs.¹⁴¹ The generality of human rights provisions of the UN Charter has been detailed by the concrete content of the following human rights conventions or covenants like the International Covenant of Civil and Political Rights. The legal and normative force of the human rights provisions of the UN Charter has been reenforced and strengthened. At least, one argument may be forcefully made that the human rights provisions in the Charter together with its following international conventions or covenants and some important resolutions passed by international organizations have

¹⁴⁰ Some commentators argue that the terms of "pledge themselves" only indicate a general requirement of cooperation that are not legally binding. See L. Henkin, "Human Rights and 'Domestic Jurisdiction'," in T. Buergenthal (ed.), *Human Rights, International law and the Helsinki Accord*, 1977, at 26.

¹⁴¹ In rebutting South Africa's claim that UN organs' resolutions were contrary to Article 2(7) of the Charter, many representatives to the United Nations pointed out that the signing of the Charter and membership of the United Nations had made a great difference to the traditionalo conception of the domestic jurisdiction of states. G.A. O.R., 8th Sess., *Ad Hoc Pol. Ctte.*, at 101-102 and 107.

formulated certain customary norms, which are universally binding upon all states. The argument that unless a UN member state has accepted the International Covenant on Civil and Political Rights, all the civil right enumerated in it are matters which are purely domestic rather than international concern makes the UN human rights provisions lose their binding force completely, and ignores the importance of the UN human rights provisions with regard to formulation of customary law. In that sense, the question seems of little relevance since almost all states are now under some sort of treaty obligations to observe and respect human rights. Once a state is the UN member, it can no longer assert that it has under no treaty obligations to respect and observe human rights including civil rights even if in the situation that such a state does not join the following human rights conventions or covenants.

On the other hand, the generality of the human rights provisions in the UN Charter does not provide an adequate basis for us to draw the conclusion, without any doubt, that the entire corpus of human rights are no longer solely within domestic jurisdiction of member states any more. The attitudes of states toward to the subsequent human rights conventions or covenants, such as accepting, joining, reserving, staying out and rejecting the treaties, are very relevant. In this sense, the question is of practical significance. And to answer it, we should take a close look at the status of the right involved.

If the right in question has emerged as, or formulated into

customary law, the answer then is in the positive, i.e., it is certainly no longer solely within the domestic jurisdiction even for a third non-treaty state. From the residual point of view, what has not been regulated by either treaty or customary norms is still within domestic jurisdiction. A question remains, however, as to how much has been left for domestic jurisdiction since almost all states are parties to the UN Charter, since more and more states have joined various international human rights conventions or covenants,¹⁴² and since more and more rights have emerged and/or are emerging as to achieve the status of customary norms. Therefore, the arguments raised above by the current Chinese government and by some of Chinese scholars can not be used to shield the Chinese government from being criticized for not observing international obligation of protecting civil rights if it indeed violates the international standard, set either by *jus cogens* rules or by customary norms. The argument that nowadays all states virtually are subject to, in one way or other, international law as regards rights of their inhabitants is persuasive, especially when the content of rights is getting clearer and the scope more definite. More importantly, their repetition, intensity and universality have demonstrated that some specific rights have even obtained the status of *jus cogens*.

¹⁴² Up to January 1991, ninety-one states accepted the International Covenant on Civil and Political Rights and fifty-one states accepted the Optional Protocol to the International Covenant on Civil and Political Rights.

The expression "no longer solely within the domestic jurisdiction", of course, suggests that a right which is a matter of international customary law or *jus cogens* may still remain a matter of domestic jurisdiction. Contemporary international law indeed generally allows domestic jurisdiction of a right with such a nature. However, because the fact that human rights customary law and *jus cogens* arise from fundamental concepts about dignity for human beings suggests that the protection applies to citizens as well as to the nationals of other countries, international law regulates ways or results of domestic treatment of these civil rights, to make sure that domestic implementation meets international standards. Therefore, domestic failure of fulfilment of such an international obligation entails state responsibility, and other states or relevant international organizations are entitled to make claims.¹⁴³ As for civil rights, exercise of state sovereignty is very limited.

2.7.2. Interpretation of the Term "Intervention"

The term "intervention" has also caused considerable controversy. Lauterpacht maintained that the term "intervention" in the sense of Article 2(7) refers to dictatorial interference. He interpreted Article 2(7) as follows:

"[I]ntervention is a technical term of, on the whole, unequivocal connotation. It signifies dictatorial

¹⁴³ See *infra* Chapter 3, 3.5. Obligations *Erga Omnes* and Standing.

interference in the sense of action amounting to a denial of the independence of the State. It implies a peremptory demand for positive conduct or abstention---a demand which, if not complied with, involves a threat of or recourse to compulsion, though not necessarily physical compulsion, in some form.¹⁴⁴

...

Intervention is thus a peremptory demand or an attempt at interference accompanied by enforcement or threat of enforcement in case of non-compliance. Enforcement, in this connection, may mean either direct measures of compulsion or such indirect pressure as is associated with non-compliance with a legal obligation or with a pronouncement of an international authority having binding legal effect."¹⁴⁵

Having thus interpreted "intervention", Lauterpacht concluded that the General Assembly, the Economic and Social Council and any other competent organ of the United Nations "are authorized to discuss a situation arising from any alleged non-observance by a State or a number of States of their obligation to respect human rights and freedoms. The object of such discussion may be the initiation of a study of the problem under the aegis of the United Nations; it may be a recommendation of a general nature addressed to the Members at large and concerning in broad terms the subject of the complaint or it may even be a recommendation of a specific nature addressed to the State directly concerned and drawing its attention to the propriety of bringing about a situation in conformity with the obligations of the Charter."¹⁴⁶ On the basis of his interpretation of Article 2(7), Lauterpacht

¹⁴⁴ See H. Lauterpacht, "International Law and Human Rights," 1968, at 167.

¹⁴⁵ *Ibid.*, at 168.

¹⁴⁶ *Ibid.*, at 169.

condemned the statement by the Commission on Human Rights, subsequently confirmed by the Economic and Social Council in resolution 75(V), that it had no right to take any action upon complaints addressed to the U.N. about violations of human rights:

"[T]here is no legal justification for that statement....The organs of the United Nations are entitled and bound by the Charter to take cognizance of violations of human rights, to examine them, and, on the basis of such examination, to take all requisite action short of intervention."¹⁴⁷

Kelsen has disagreed with Lauterpacht and has maintained that by the term "to intervene", any activity of the Organization may be understood.¹⁴⁸ However, since each U.N. organ has to decide for itself whether a matter is or is not "essentially within domestic jurisdiction", discussion and investigation of the matter must be considered to be allowed so that it can decide whether the matter is indeed essentially within domestic jurisdiction.¹⁴⁹

Preuss also took issue with Lauterpacht.¹⁵⁰ He submitted that it was the intention of the framers of the Charter to prohibit the General Assembly from discussing or making recommendations upon matters within the domestic jurisdiction of

¹⁴⁷ *Ibid.*, at 170.

¹⁴⁸ See H. Kelsen, "The Law of the United Nations," 1951, at 772.

¹⁴⁹ *Ibid.*

¹⁵⁰ See L. Preuss, "Art. 2 para. 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction," 74 *Recueil des Cours* (1949-I), at 578.

any particular state. In his opinion the words "deal with" instead of "intervene" in Article 2(7) would have more accurately represented the intention of the majority of delegations at the San Francisco Conference.¹⁵¹ With respect to the effect of Articles 55 and 56 upon the domestic jurisdiction of the member states of the U.N., he denied that these provisions have transferred the protection of human rights into the international field and thereby override Article 2(7).¹⁵² Preuss emphasized the term "any state" in Article 2(7). On that basis he made a distinction between general recommendations, which are allowed, and specific recommendations, directed toward one specific country, which are not allowed.¹⁵³

For his interpretation of Article 2(7), Preuss also relies on the substitution of the term "essentially" for "solely" in Article 2(7), which he says was meant to reinforce the protection of the domestic sphere.¹⁵⁴ In his opinion the purpose of Article 2(7) is to prohibit the application, in the course of peaceful settlement, of every pressure against a state, within whose domestic jurisdiction the subject matter of a dispute has been determined to fall.¹⁵⁵ Thereby he puts the emphasis again upon the idea that a particular matter, such as the protection

¹⁵¹ *Ibid.*, at 583.

¹⁵² *Ibid.*, at 584.

¹⁵³ *Ibid.*, at 586.

¹⁵⁴ *Ibid.*, at 599-600.

¹⁵⁵ *Ibid.*, at 610.

of human rights, can only come within international competence if the situation brings about "international repercussions of so grave a character" as to justify the Organization in viewing it as no longer a matter within the domestic jurisdiction of the state concerned.¹⁵⁶

Goodrich, Hambro and Simons write that U.N. practice does not consider placing a matter on the agenda of a U.N. body as constituting "intervention"; the same appears to be true if an actual discussion of such a situation takes place. Like Kelsen, they reason that only after discussion can a decision be taken as to the competence of the organ. Therefore, they conclude, discussion on the merits of a case can hardly be avoided.¹⁵⁷ They find it difficult to give an opinion as to what is allowed beyond discussion. The usual steps after a debate are either the establishment of a commission of inquiry or the making of recommendation.¹⁵⁸ The reason for the difficulty in deciding whether certain steps amount to intervention is that in practice this question has been merged with the question whether or not a particular situation falls "essentially within domestic

¹⁵⁶ *Ibid.*, at 628.

¹⁵⁷ See L.M. Goodrich, E. Hambro and A.P. Simons, "The Charter of the United Nations," 3rd ed., 1969, at 67; Professor Higgins and Wright agree with them: R. Higgins, "The Development of International Law Through the Political Organs of the United Nations," 1963, at 69; Q. Wright, "Is Discussion Intervention?" 50 *Am.J.I.L.*, 1956, at 108.

¹⁵⁸ *Ibid.*, at 67-68.

jurisdiction."¹⁵⁹

Professor Higgins in her study of U.N. practice has concluded that study of a situation or the setting up of a commission of inquiry is allowed.¹⁶⁰ She also calls "probably ill-conceived" the idea that U.N. organs would commit "intervention" if they addressed a recommendation specifically to one state.¹⁶¹

Professor Ermacora seems to disregard the possibility that the General Assembly may have discussed matters and made recommendations thereon not because of the changing borderline between domestic and international jurisdiction, but because it does not consider discussion and recommendations as amounting to intervention.¹⁶²

Professor Leary, while sharing the view that certain U.N. actions relating to specific human rights problems do not constitute intervention, asserted that "it also appears to be clear from U.N. practice that certain other actions, even when concerned with specific violations of human rights, would

¹⁵⁹ *Ibid.*

¹⁶⁰ See R. Higgins, "The Development of International law Through the Political Organs of the United Nations," 1963 at 70; She points at the Report of the Committee on South West Africa (A/4926) and the Report of the Sub-Committee on the Situation in Angola (S/4993).

¹⁶¹ *Ibid.*, at 82.

¹⁶² See A.A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations," 25 I.C.L.Q., 1976, at 722-744.

constitute domestic intervention."¹⁶³ According to Leary, the sending of a fact-finding commission into a country without its permission would appear to be unwarranted intervention as would the use of force against a state in the absence of an authorized finding of a threat to peace under Chapter VII of the Charter of the United Nations.¹⁶⁴

China does not officially accept the application of the International Covenant on Civil and Political Rights on Chinese soil. Most Chinese writers on international law stress that the emergence of a growing body of rules on human rights within the corpus of modern international law does not confer rights directly upon individual human beings in China or any other country. Such rights must be created by appropriate domestic legislation. In general, Chinese scholars reject the notion that individuals can be subjects of international law with respect to human rights or any other purposes.¹⁶⁵ Moreover, any inquiry into the Chinese rights situation by a foreign government or international organization is regarded as intervention in

¹⁶³ See V. Leary, "When Does the Implementation of International Human Rights Constitute Interference Into the Essentially Domestic Affairs of a State?---The Interactions of Articles 2(7), 55 and 56 of the U.N. Charter," in J.C. Tuttle (ed.), *International Human Rights Law and Practice*, 1978, at 20.

¹⁶⁴ *Ibid.*, at 21.

¹⁶⁵ See Shen Baoxiang, Wang Chenquan and Li Zerui, "On the Question of Human Rights in the International Realm," *Beijing Review*, 1982, 25 (30): at 13-17, 22; see also Yu Xiao, "On International Human Rights," 3 *Legal Study* (in Chinese), 1980, at 54-56.

Chinese domestic affairs and, consequently, a violation of international law.¹⁶⁶

Professor Henkin's review on the issue of how to interpret the term of "intervention" is very forceful. He begins with the acceptance of the Lauterpacht's definition that "intervention" means dictatorial interference by force or threat of force in an effort to bring influence to bear on other governments. Then he turns to the point that, since human rights are a matter of international concern, discussion and recommendation in the terms of protection are not intervention within the meaning of Article 2(7) of the Charter of the United Nations.¹⁶⁷ Furthermore, he observes that

"[A]rticle 2(7) speaks only to intervention by the UN, not by member states, but most challenges to activities by states on behalf of human rights as 'intervention' are equally unfounded.¹⁶⁸

It is not intervention, or other interference forbidden by law, for a government to express views about, or even to criticize publicly, the actions of other governments which are distasteful to it.¹⁶⁹ A state's expression of criticism or distaste or its policies modifying relations of trade, aid, or other intercourse

¹⁶⁶ See R.R. Edwards, "Civil and Social Rights: Theory and Practice in Chinese Law Today," in R.R. Edwards, L. Henkin and A.J. Nathan, *Human Rights in Contemporary China*, 1986, at 52-53.

¹⁶⁷ See L. Henkin, "The International Bill of Rights: The Covenant on Civil and Political Rights," 1981, at 14.

¹⁶⁸ *Ibid.*

¹⁶⁹ See L. Henkin, "Human Rights and 'Domestic Jurisdiction'," in T. Buergenthal (ed.), *Human Rights, international Law and the Helsinki Accord*, 1977, at 22.

with governments because they violate human rights are not interventions but legitimate acts of self-interest that are a state's own affair and within its own domestic jurisdiction.¹⁷⁰

To try to ask or answer the question of what kinds of human rights are or are not matters which are essentially within domestic jurisdiction of states, as a preliminary question in deciding whether U.N. organs can observe, discuss, criticize, censure, scrutinize, investigate and recommend to the alleged violations of human rights, is not a good approach to enhance and promote international civil rights. This question can misleadingly block the way of effective international protection of human rights in general and civil rights in particular. Since human rights are the question of international concern, U.N. organs may, for the sake of improving international protection of human rights, act correspondingly with the belief that the violated rights are not *prima facie* within domestic jurisdiction. The rights protected by international conventions or covenants are not the matters within domestic jurisdiction of treaty parties. The rights protected by international customary law are surely no longer matters within domestic jurisdiction of any states regardless of the fact that they have not yet joined the conventions or covenants. Violations of the civil rights with *jus cogens* status are so outrageous and so obvious as to draw the world attention easily. With more and more states joining the International Covenant on Civil and Political

¹⁷⁰ *Ibid.*, at 25.

Rights, and with states' being more and more convinced that civil rights have formed into customary international norms, UN's attention and efforts will be drawn to civil rights. In this regard, U.N. organs' resolutions and even condemnation directed to the alleged violations should not be considered as "intervention" into domestic jurisdiction of member states.

There have been, of course, many gross violations of civil rights, to which U.N. organs have not reacted correspondingly. In an address to the Canadian Human Rights Foundation, the Secretary-General of the International Commission of Jurists summed it up by saying that:

"in all regions of the world serious violations of human rights are occurring daily....In a great arc extending from Latin America across Africa and Europe, the Middle East, the USSR and Asia, say from Chile to Korea hundreds of thousands of people are being held in jails and prison camps for years simply because of their political views and activities, often with no charges against them, no trials, no access to lawyers, little or no contact with their families and in atrocious conditions.¹⁷¹

Several examples can be given. There was a tragicomedy in Uganda where, according to the International Commission of jurists, at least 80,000 to 90,000 people were murdered in the first two years of President Amin's rule. That killing continued through the entry into force of the International Covenant on Civil and Political Rights.¹⁷² A similar lack of effective international action has followed virtually all of the many well-documented

¹⁷¹ See MacDermot, "The Credibility Gap in Human Rights," 3 Dalhousie L.J., 1976, at 262, 269.

¹⁷² See International Commission of Jurists Report, "Uganda and Human Rights," 1977.

violations of civil rights throughout the world, be it the savagery of the military government in Ethiopia or the enslavement and massacre by Paraguay of its Indian population.¹⁷³ In Burundi, 250,000 people were killed in what has to be regarded as a pure and simple case of genocide.¹⁷⁴ In Nigeria 500,000 were killed.¹⁷⁵ The non-reaction of UN organs does not signify that the UN's acquiescence concerning these civil rights was based on the view that they were solely within domestic jurisdiction of the violating states. The reasons are various. A major one, of course, is the political interest consideration. In no field of international law are politics more conspicuous than in human rights.¹⁷⁶ Professor Schachter puts it,

" '[P]olitics' in this context is used in two senses. The first sense concerns the governmental decisions on the formulation and adoption of principles, rules and procedures. In accepting the international instruments such as the Declaration and Covenants, in enacting national legislation, in adopting regulations and compliance mechanisms, the governments are predominantly motivated by their judgments of national interests the attitudes of influential élites, and to some degree underlying political philosophies and cultural beliefs. In a broad sense, these are political considerations. They are to be distinguished from such legal concerns as commitments under the United Nations Charter and other treaties or the weight of customary norms. These legal considerations may also

¹⁷³ See L. Chalfont, "The Double Standard of Human Rights," *The Times*, 9 May 1977, at 14, col.1.

¹⁷⁴ See Emerson, "The Fate of Human Rights in the Third World," 27 *World Politics*, 1974-75, at 219.

¹⁷⁵ *Ibid.*, at 219.

¹⁷⁶ See O. Schachter, "International Law in theory and Practice," 1991, at 345.

influence decisions---in some circumstances they may be decisive---but for the most part. I see them as subordinate to the determinants of a political character. This holds true,...generally for the creation and acceptance of international law. Politics, in this sense, carries no invidious implication.

A second sense in which the political aspect of human rights is evident relates to its application---more particularly, to the attitude and conduct of States in regard to violations of recognized rights by other States. The general impression is that governments by and large, react to such infringements of rights largely on the basis of political rather than legal considerations. They are not perceived to act 'objectively'. It is often said, especially in North America and Western Europe, that human Rights are invoked on the international plane unevenly and selectively, on 'a double standard'.¹⁷⁷

The individual victims being deprived of their civil rights by such violations, however, are the most frequently the double victims of both so-called domestic jurisdiction and the political interest consideration.

The practice of U.N. organs in terms of international protection of civil rights, however, are not that disappointing. Irrespective of what kinds of views and stands have been expressed one way or the other about the effect of Article 2(7), the fact remains that U.N. organs have addressed themselves to specific situations involving alleged violations of human rights. The General Assembly adopted resolutions in the so-called Russian wives' case, concerning the situation in Tibet, the situation in the Israeli-occupied territories in the Middle

¹⁷⁷ *Ibid.*, at 345-346.

East, the situation in Chile, and the one in South Africa.¹⁷⁸ It is true that the number of cases of alleged violations of human rights addressed by U.N. organs are very few due to complex factors. It cannot, however, be denied that there has existed a U.N. practice with regard to human rights issues. What has been done by U.N. organs has paved the way for future possibilities. In addition, the Economic and Social Council of the United Nations has adopted Resolution 1503, by which a new machinery for petitions has been established subject only to its rule of admissibility.

2.8. U.N. Practice Involving Civil Rights and Domestic Jurisdiction

The so-called "Russian Wives" case came up for discussion in the third session of the General Assembly of the United Nations in December 1948 on a request from the representative of Chile, under Article 14 of the UN Charter, to consider "the violation by the USSR of fundamental human rights, traditional diplomatic practices and other principles of the Charter." In the Sixth (legal) Committee, which discussed this question the Chilean representative complained of repeated violations by the Government of the former USSR of human rights by its laws and actions in preventing the Soviet wives of foreign nationals from

¹⁷⁸ These situations have been studied by F. Ermacora, "Human Rights and Domestic Jurisdiction," 124 *Recueil des Cours* (1968-II), at 411-414; R. Higgins, "The Development of International Law Through the United Nations," 1963, at 118-130; M.S. Rajan, "The United Nations and Domestic Jurisdiction," 1961, at 224-354.

leaving the USSR in order to live with their husbands in other countries; in particular, he complained of the refusal of the USSR Government to give an exit permit to his own daughter-in-law, a Soviet citizen, which he had applied for when he was Chilean Ambassador at Moscow. In doing so, he asserted, the Soviet Government had violated its obligations to respect human rights under the Preamble, Articles 1(3), 55 and 56 of the Charter, as well as Article 14(2) and 17(3) the draft Declaration of Human Rights (which was then under discussion). Chilean representative contended that respect for, and promotion of, human rights were not matters reserved exclusively for domestic jurisdiction but that they "clearly" came under international jurisdiction. He quoted the provisions of Articles 10 and 14 in support of the Assembly's competence to deal with the question on two grounds: firstly, questions relating to human rights "obviously came within the scope of the Charter" and, secondly, the question of concerned violation by a Member of the Purposes and Principles of the United Nations, constituting thereby a situation in which "general welfare and friendly relations among nations" had been impaired. He argued that the Assembly was competent to consider such a situation "regardless of origin." He characterized the Soviet justification of the restriction on the emigration of married women on the ground of national security as expressive of that Government's "feudalistic idea of sovereignty".¹⁷⁹ His position

¹⁷⁹ G.A., O.R., 3rd Sess., Pt. I, 6th Ctte., at 720-726.

was supported by several representatives (including those of countries who themselves had a similar grievance against the Soviet Union) on the twin grounds that the question involved violation of human rights and that it did not fall essentially within the domestic jurisdiction of the Soviet Union under the provision of Article 2(7).¹⁸⁰

The representative of the USSR, supported by East European allies, vigorously opposed even the discussion of the question on the ground that the Chilean proposal was a "flagrant and direct contradiction" of the Principle laid down in Article 2(7) safeguarding Member states from the "intervention" of United Nations organs. It was argued that the question concerned the domestic legislation of the USSR relating to marriage with foreigners as well as the right of its Government to regulate the emigration of its citizens---both of which were matters essentially within the domestic jurisdiction of the Soviet Union; and the question had nothing to do with human rights.¹⁸¹ The Polish representative asserted: "The question of the determination of nationality was generally admitted to be solely within the domestic jurisdiction of each state....furthermore, international law provided that it was for each state to grant or refuse to its citizens the right to leave their native country in order to emigrate....[Therefore] the measures taken

¹⁸⁰ *Ibid.*, U.K., at 734; U.S.A., at 738; Uruguay, at 744-745; Egypt, at 747; France, at 750.

¹⁸¹ *Ibid.*, 3rd Sess., Pt. I, Ctte., at 11, Plen. Mtgs., at 97-98 and 6th Ctte., at 743.

by the USSR Government in regard to its nationals fell exclusively within its domestic jurisdiction and were subject neither to the provisions of international law, not to the control of an organization such as the United Nations."¹⁸² Some maintained also that the question in fact did not relate to a bona fide complaint against the violation of human rights, but represented an attempt to defame the Soviet Union for political reasons.¹⁸³

The Plenary Meeting of the Assembly adopted a draft resolution recommended by the Sixth Committee which (285(III) of 25 April 1949) after referring to the provisions on human rights in the Preamble and Articles 1(3) and 55(c) of the Charter, as well as the Economic and Social Council resolution 154(VI) D and the provisions of Articles 13 and 16 of the Universal Declaration of Human Rights, declared "that the measures which prevent or coerce the wives of citizens of other nationalities from leaving their country of origin with their husbands or in order to join them abroad, are not in conformity with the Charter...and are likely to impair friendly relations among nations," and recommended that the USSR Government "withdraw the measures of such a nature which have been adopted."¹⁸⁴

In March 1949, the representative of Bolivia requested the

¹⁸² *Ibid.*, at 754-755.

¹⁸³ See, for instance, USSR, *ibid.*, at 772, Poland, *ibid.*, at 753; Yugoslavia, *ibid.*, 760.

¹⁸⁴ [1948-49] Y.U.N., at 327-333.

General Assembly to study, with reference to Article 1(3) and 55(c) of the Charter the legal proceedings against Cardinal Mindszenty, Roman Catholic Primate of Hungary. A few days thereafter, the representative of Australia requested the Assembly to consider an item entitled: "[O]bservance of fundamental freedoms and human rights in Bulgaria and Hungary, including the question of religious and civil liberty in special relation to recent trials of church leaders." The two items came before the second part of the third session of the Assembly, and in the course of the discussion of the General Committee on the question of inclusion of the items in the Assembly agenda, the Australian and Bolivian delegations agreed to sponsor a joint item combining the two requests. The Assembly included the joint item in the agenda over the opposition of some representatives-- particularly those of the USSR and its East European allies--- on the ground that it would amount to interference in the internal affairs of the two countries concerned. The question was referred for discussion to the Ad Hoc Political Committee which, on the basis of an Australian proposal, invited the Governments of the two countries to nominate their representatives to participate, without vote, in the discussion of the question. These invitations were, however, declined by both these Governments on the ground that the question, being concerned was not within the competence of the United Nations.¹⁸⁵ The charges against the two countries were that

¹⁸⁵ See Doc. A/Ac.24/57 and Doc. A/AC.24/58.

they had violated both the terms of the Charter and their respective Peace Treaties in regard to the observance of human rights by denying civil, political and religious liberties to their respective peoples, as well as by the denial of justice in the trials of certain church leaders. These charges were rebutted by Members from East Europe, who contested the competence of the United Nations to deal with the question.¹⁸⁶ After considerable discussion, the Assembly adopted a draft resolution recommended by the Ad Hoc Political Committee. The resolution [272(III) of 30 April 1949] noted that one of the Purposes of the United Nations is to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all without any distinction whatsoever and expressed "deep concern" at the "grave accusation" made against Bulgaria and Hungary of actions contrary to the Purposes of the United Nations as well as their obligations under Peace Treaties relating to the observance of human rights and fundamental freedoms. The Assembly also decided

¹⁸⁶ Article 2 of Part II of the Treaties of Peace with Bulgaria and Hungary (among other provisions of the treaties), reads: Bulgaria and Hungary

"shall take all measures necessary to secure to all persons under [their respective] jurisdiction, without distinction as to race , sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression of press and publication, of religious worship, of political opinion and of public meeting."

For texts of treaties with Bulgaria and Hungary, see United Nations Treaty Series, vol. 41, 1949, at 50-102 and 168-228.

to retain the item on the agenda of the fourth session.

In August of the same year, Australia proposed that an additional item---on the observance of human rights and fundamental freedoms in Romania---be added to the agenda of the fourth session in conjunction with the earlier item. As on the earlier occasion, an invitation from the Ad Hoc Political Committee to the Government of Romania to send a representative to participate, without vote, in the discussion on the combined item was declined by that Government, and for the same reason as given earlier by the Governments of Bulgaria and Hungary.¹⁸⁷ Discussion on the Romanian aspect of the question generally followed the same lines as that on Bulgaria and Hungary.¹⁸⁸ The long resolution recommended by the Committee, and adopted by the Plenary Meeting of the Assembly [294(IV) dated 22 October 1949], noted that the United Nations, "pursuant to Article 55 of the Charter", shall promote universal respect for, and observance of, human rights and fundamental freedoms for without any distinction whatsoever, expressed the continuing concern of the Assembly on the question and sought an advisory opinion of the International Court of Justice on the question, among others, whether there existed a dispute between certain signatories to the Peace Treaties and Bulgaria, Hungary and Romania,

¹⁸⁷ Doc. A/AC.31/L.4.

¹⁸⁸ Article 3 of Part II of the Peace Treaty with Romania is identical with that of the treaties with Bulgaria and Hungary. For the text of the treaty, see United Nations Treaty Series, vol. 42, 1949, at 39-92.

concerning the implementation of the terms of those treaties relating to the observance of human rights. In its advisory opinion of 30 March 1950,¹⁸⁹ the Court overruled the preliminary jurisdictional objections raised by some of the parties, particularly by the Governments of Bulgaria, Hungary and Romania that (firstly) the request for an advisory opinion was an action *ultra vires* on the part of the General Assembly which was "interfering" or "intervening" in matters essentially within the domestic jurisdiction of the three states, and (secondly) that the Court itself was not competent to give the opinion sought in view of the prohibition by Article 2(7) of the UN Charter on United Nations organs, including the Court, "to intervene" in such matters. The Court asserted its competence to reply to the request for its advisory opinion on the ground that the request was concerned with the interpretation of the terms of treaties, which matter, being a question of international law, could not be considered as one essentially within the domestic jurisdiction of a state. On the substance of the request for its opinion, the Court answered the question in the affirmative.¹⁹⁰

The situation in Tibet was legally more complicated. Chinese

¹⁸⁹ *Interpretation of Peace Treaties, Advisory Opinion*, ICJ Rep., 1950, at 65.

¹⁹⁰ *Interpretation of Peace Treaties (Second Phase), Advisory Opinion*, ICJ Rep., 1950, at 221.

troops had entered Tibet in 1959.¹⁹¹ At that time, however, China was represented in the United Nations by the Government in Taipei. A resolution adopted by the General Assembly in respect of Tibet would not be a resolution addressed to a non-member state but in really it would amount to just that. This may explain the careful language in the resolution which the General Assembly adopted on the situation. The language seems to be influenced by Article 2(6) of the UN Charter which provides that

"[T]h Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

Therefore, the resolutions adopted on Tibet tried to link the respect for human rights with international peace and security. The General Assembly did not address itself to the People's Republic of China, instead it affirmed "its belief that respect for the principles of the Charter of the United Nations and the Universal Declaration of Human Rights is essential for the evolution of a peaceful world order based on the rule of law" and called "for respect for the fundamental human rights of the Tibetan people and for their distinctive cultural and religious life".¹⁹²

¹⁹¹ It was an allegation that Chinese troops had invaded and occupied Tibet in 1959. There has been, however, a strong rebuttal by Chinese government that Tibet has always been part of China. See News Office of the State Council of the People's Republic of China, "On Sovereignty of Tibet and Its Human Rights Situations," White Paper of the People's Republic of China, People's Daily (Overseas Edition), September 23 and 24, 1992.

¹⁹² G.A.Res. 1353(XIV) of October 21, 1959, Y.U.N., at 69.

Again, the preamble is very interesting because it showed from what sources the General Assembly derives its authority to adopt this resolution. It recalled "the principles regarding fundamental human rights and freedoms set out in the Charter of United Nations and in the Universal Declaration of Human Rights" and considered "that the fundamental human rights and freedoms to which the Tibetan people, like all others, are entitled include the rights to civil and religious liberty for all without distinction". In 1961 the General Assembly dealt again with the situation in Tibet. On December 20, 1961, it adopted resolution 1723(XVI), in which it reaffirmed its conviction "that respect for the principles of the Charter of the United Nations and of the Universal Declaration of Human Rights is essential for the evolution of a peaceful world order" and renewed "its call for the cessation of practices which deprive the Tibetan people of their fundamental human rights and freedoms."¹⁹³ In 1965 the General Assembly passed a similar resolution.¹⁹⁴

Both the General Assembly and the Commission on Human Rights have dealt with the situation in the Israeli-occupied territories in the Middle East. In March 1969 the Commission on Human Rights set up a Special Working Group of Experts to investigate allegations concerning Israel's violations of the

¹⁹³ G.A. Res. 1723(XVI), paras. 1 and 2 of December 20, 1961, Y.U.N., at 139.

¹⁹⁴ G.A. Res. 2079(XX) of December 18, 1965, Y.U.N., at 193.

1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War.¹⁹⁵ The Commission on Human Rights, the Economic and Social Council and the General Assembly have all adopted resolutions regarding the situation in the Israeli-occupied territories.¹⁹⁶

With regard to the human rights situation in Chile after the overthrow of the Allende regime, the Human Rights Commission, the Sub-Commission and the General Assembly have all passed resolutions. The Commission even established an *Ad Hoc* Working Group to investigate the situation in Chile, which has submitted reports both to the Commission and the Assembly.¹⁹⁷

South Africa is of course the best known example of a country to whom specific recommendations were addressed because of a situation where human rights were allegedly being violated. The apartheid policy has been on the agenda of the General Assembly

¹⁹⁵ [1969] Y.U.N., at 555-556.

¹⁹⁶ See, e.g., ECOSOC Res. 1336(XLIV) of May 31, 1968 which endorsed Human Rights Commission Resolution 6(XXIV), [1968] Y.U.N., at 554-555, in which reference is made to the Universal Declaration of Human Rights, particularly the right of everyone to return to his own country. See also G.A.Res. 2546(XXIV) of December 11, 1969 which also referred to the Charter and the Universal Declaration of Human Rights, [1969] Y.U.N., at 514; G.A. Res. 2727(XXV) of December 15, 1970, [1970] Y.U.N., at 527.

¹⁹⁷ See Sub-Commission Res. 8(XXVIII), report of the Sub-Commission on the Twenty-seventh Session (E/CN.4/1160), at 53; G.A. Res. 3219(XXIX) of November 6, 1974, GAOR, XXIX, Supp. 31(A/9631), at 83; Commission Res. 8(XXXI), establishing the *Ad Hoc* Working Group, Commission on Human Rights, Report on the Thirty-first Session, ESCOR, XLVII, Supp. 4(E/5635), at 66; Commission Res. 3(XXXII), ESCOR, LX, Supp. 3(E/5768), at 57; G.A. Res. 3448(XXX) of December 9, 1975, GAOR, XXX, Supp. 34(A/10034), at 89.

as a separate item since 1952. South Africa has consistently claimed the defence of Article 2(7). In 1946, South Africa did propose to the General Assembly to refer the question of the treatment of the people of Indian origin to the International Court of Justice for an advisory opinion as to the legality of the action that was to be taken by the General Assembly in respect of South Africa.¹⁹⁸ This was refused by the Assembly. In the beginning South Africa's opponents stressed that South Africa's policy was contrary to the Charter and the Universal Declaration of Human Rights. Gradually the emphasis shifted and an attempt was made to brand the policy of apartheid as a threat to international peace and security. This characterization of the situation in South Africa would bring economic sanctions and international military action by the Security Council within the range of possibilities. In 1963 the Council adopted a resolution in which it expressed its conviction that the situation in South Africa was seriously disturbing international peace and security and called upon all states "to cease forthwith the sale and shipment of arms, ammunition of all types and military vehicles to South Africa."¹⁹⁹ That same year the Security Council called upon all states to cease forthwith the sale and shipment of equipment and materials for the manufacture and maintenance of

¹⁹⁸ Y.U.N., 1946, at 144-48.

¹⁹⁹ Security Council Res. 181 (1963) of August 7, 1963, Y.U.N., 1963, at 20.

arms and ammunition in South Africa.²⁰⁰ These two resolutions were not binding.²⁰¹ It is of importance to note that the Security Council in resolution 182 urgently requested "the Government of the Republic of South Africa to cease forthwith its continued imposition of discriminatory and repressive measures which are contrary to the principles and purposes of the Charter and which are in violation of its obligations as a Member of the United Nations and of the provisions of the Universal Declaration of Human Rights".²⁰² A similar clause appeared in Security Council Resolution 181 (1963); in that resolution the Security Council strongly deprecated "the policies of South Africa in its perpetuation of racial discrimination as being inconsistent with the principles contained in the Charter of the United Nations".²⁰³

The strongest action taken by the United Nations against South Africa as far is embodied in Security Council Resolution 418 (1977) of November 4, 1977. The Council invoked Chapter VII of the Charter, determined that "the acquisition by South Africa of arms and related material constitute[d] a threat to the

²⁰⁰ Security Council Res. 182 (1963) of December 4, 1963, Y.U.N., 1963, at 22.

²⁰¹ See eighth paragraph of Security Council Resolution 418 (1977) of November 4, 1977, reproduced in 14 U.N. Chronicle, No. 11 (December 1977), at 10.

²⁰² Security Council Res. 182 (1963) of December 4, 1963, Y.U.N., 1963, para.2., at 22.

²⁰³ Security Council Res. 181 (1963), Y.U.N., 1963, para. 1, at 20.

maintenance of international peace and security" and proclaimed a mandatory arms embargo against South Africa. The preamble of the resolution makes it clear that the arms embargo has been imposed because of South Africa's internal racial policies rather than its refusal to turn Namibia over to the United Nations. The General Assembly has produced a stream of resolutions condemning South Africa's policy of apartheid.²⁰⁴ In later resolutions South Africa's apartheid policy was branded "a crime against humanity".²⁰⁵

With reference to the contention of the South African representative that since the question related to South African nationals, it was a matter essentially within the South African domestic jurisdiction, the Chinese representative observed that the mere test of nationality did not determine whether a question was or was not one of domestic jurisdiction.²⁰⁶ Some delegations argued that the question was not essentially within South Africa's domestic jurisdiction since it involved a potential threat to international peace and security.²⁰⁷ It was also argued repeatedly and emphatically by every representative supporting United Nations action that Article 2(7) of the

²⁰⁴ See e.g. Res. 721(VIII) of December 8, 1953, GAOR, VIII, Supp. 17 (A/2630), at 6-7 and Res. 1761(XVII) of 6 November 6, 1962, Y.U.N., 1962, at 99.

²⁰⁵ G.A. Res. 2202 A(XXI) of December 16, 1966, Y.U.N., 1966, at 89-90; G.A. Res. 2922(XXVII) of November 15, 1972, Y.U.N., 1972, at 108.

²⁰⁶ G.A., O.R., 3rd Sess., Pt. II, 1st Ctte., at 290.

²⁰⁷ G.A., O.R., 7th Sess., Ad Hoc Pol. Ctte., at 48.

Charter was no bar at all to the discharge of Assembly's functions and authority expressly conferred on it by more than one of the other provisions of the Charter in order to promote respect for, and observance of, human rights and fundamental freedoms, and that the founders of the Organization could not have intended these provisions to be inoperative by virtue of Article 2(7).²⁰⁸

As a response to the events of 4 June occurred in Beijing, China, the United Nations Sub-Commission on the Discrimination and Protection of Minorities, a panel of human rights experts under the UN Human Rights Commission, passed the resolution of 29 August by 15 votes to 9. It stated:

The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities:
Concerned about the events which took place recently in China and about their consequences in the field of human rights
Requests the Secretary-General to transmit to the Commission on Human Rights information provided by the Government of China and by other reliable sources
Makes an Appeal for clemency, in particular in favour of persons deprived of their liberty as a result of the above mentioned events.²⁰⁹

This resolution was reported to be the first time the human rights record of one of the permanent members of the UN Security

²⁰⁸ *Ibid.*

²⁰⁹ Text of statement, GE 8153, supplied by the Department of Foreign Affairs and Trade, Canberra. For details of the discussion before the Sub-Commission, See A Report by the International League for Human Rights, "Business As Usual...? The International Response to Human Rights Violations in China," May 29, 1991, at 61-67; see also Nihal Jayawickrama, "Human Rights in China," in George Hicks (ed.) *The Broken Mirror: China After Tiananmen*, Oxford University Press, Hong Kong, forthcoming.

Council had been considered in any UN human rights organization. China was further taken to task by the International Labour Organization Committee on Freedom of Association and asked to supply detailed information on the allegations, particularly in respect of the treatment of leaders and members of the various Workers' Autonomous Federations.²¹⁰

The UN's attitude toward Iraq is another example to show that UN organs do not yield to the "domestic jurisdiction" claim from its member states especially when gross violations of civil rights have occurred. In a letter dated 2 April 1991 addressed to the President of the Security Council (S/22435), the Permanent Representative of Turkey to the United Nations stated, as a result of actions taken by the Iraqi army against the local population in northern Iraq, which constituted an excessive use of force and a threat to the region's peace and security, some 200,000 Iraqi citizens, many of them women and children, were currently massed along the Turkish border, and he requested that the Security Council be convened immediately to consider the alarming situation and to adopt the necessary measures to put an end to that inhuman repression being carried out on a massive scale.²¹¹ In a letter dated 4 April 1991 addressed to the President of the Security Council (S/22442), the Chargé

²¹⁰ Case No. 1500, Committee on Freedom of Association, ILO, Geneva, 9127n/v2, 13 November 1989.

²¹¹ United Nations Security Council, "Summary Statement by the Secretary-General on Matters of Which the Security Council is Seized and on the Stage Reached in Their Consideration," S/22110/Add.13, 25 April 1991, at 11.

d'affaires a.i. of the Permanent Mission of France to the United Nations requested that a meeting of the Security Council be convened urgently to discuss the serious situation resulting from the abuses being committed against the Iraqi population in several parts of Iraq, more particularly in the Kurdish-inhabited areas, which, by virtue of its repercussions in the region, constituted a threat to international peace and security.²¹² The Security Council met to consider the item at its 2982nd meeting, held on 5 April 1991, and, on the same day, reached resolution 688(1991), with 10 votes in favour, 3 against (Cuba, Yemen and Zimbabwe), and 2 abstentions (China and India).²¹³

The resolution 688,²¹⁴ which expresses grave concern about the repression of the Iraqi civilian population in many parts of Iraq, including most recently repression in Kurdish populated

²¹² *Ibid.*, at 12.

²¹³ *Ibid.*

²¹⁴ The resolution was passed in defiance of Iraqi government's opposition that

"[N]evertheless, we find, too, that all resolutions of the Security Council stress respect for the sovereignty and territorial integrity of Iraq and reject intervention in Iraq's internal affairs. But those very States continue to attempt to partition Iraq and to annihilate its people; and they continue to attempt to intervene in our affairs. The draft resolution itself is a flagrant, illegitimate intervention in Iraq's internal affairs and a violation of Article 2 of the Charter of the United Nations which prohibits intervention in the internal affairs of other States."

See S/Res/688 (1991), 5 April 1991, at 17.

areas, which led to a massive flow of refugees towards and across international frontiers and to cross border incursions threatening international peace and security in the region.²¹⁵ The resolution condemns the Iraqi actions towards Kurdish people, demands that Iraq immediately end this repression, insists that Iraq allow immediately access by international humanitarian organizations to all those in need of assistance in all parts of Iraq, requests the Secretary-General to pursue his humanitarian efforts in Iraq and to report forthwith, if appropriate on the basis of a further mission to the region, on the plight of the Iraqi civilian population, and in particular the Kurdish population, suffering from the repression in all its forms inflicted by the Iraqi authorities, and demands that Iraq cooperate with the Secretary-General to these ends.²¹⁶

When China abstained in voting,²¹⁷ Li Daoyu, the Chinese delegate, manifested China's position in following words:

" [W]e are concerned with the situation in Iraq and the huge influx of refugees into Turkey and Iran, as described in the letters from the Permanent Representatives of those two countries and we wish to express sympathy for the difficulties confronting Turkey and Iran as a result of that influx. However, this is a question of great complexity, because the internal affairs of a country are also involved.

According to paragraph 7 of Article 2 of the Charter, the Security Council should not consider or take action on questions concerning the internal affairs of any State.

²¹⁵ Security Council, S/Res/688 (1991), 5 April 1991.

²¹⁶ *Ibid.*

²¹⁷ S/22110/Add.13, 25 April 1991.

As for the international aspects involved in the question, we are of the view that they should be settled through the appropriate channels.

We support the Secretary-General in rendering humanitarian assistance to the refugees through the relevant organizations.

Based on the position I have just set out, we abstained in the vote on the resolution."²¹⁸

Obviously, this position is consistent with the China's view that human rights are matters which are essentially within domestic jurisdiction of states. Moreover, the abstention comes also from China's government concern about the application of doctrine of estoppel by other states.

Faced with the alleged grave and massive violations of human rights occurring in the territory of the former Yugoslavia, especially with alleged widespread and serious human rights violations occurring in Bosnia and Herzegovina, the Commission on Human Rights of the United Nations passed resolution 1992/S-1/1 of 14 August 1992, requiring a special rapporteur to prepare a report on the situation of human rights in former Yugoslavia.²¹⁹ In accordance with the resolution, Mr. Tadeusz Mazowiecki, the Special Rapporteur, submitted to the Commission on Human Rights the report, which confirmed the existence of alleged gross violations human rights in former Yugoslavia. "As a result of these violations a great number of people are suffering and have

²¹⁸ S/PV.2982, 5 April 1991, at 55-56.

²¹⁹ Economic and Social Council, "Commission on Human Rights: First Special Session Agenda Item 3," E/CN.4/1992/S-1/10, 27 October 1992, at 2.

lost their lives. Thousands more find their lives threatened and their human dignity violated."²²⁰ "The military conflict in Bosnia and Herzegovina, which is aimed at achieving 'ethnic cleansing', remains a matter of particular and most urgent concern."²²¹ The Rapporteur suggested that people there were suffering from inhuman and degrading treatment ²²² and that "[U]nless immediate action is taken, many of them will not survive the forthcoming winter."²²³

On December 1, 1992, the Commission on Human Rights of the United Nations concluded its second special session on the former Yugoslavia and adopted a resolution condemning violations of human rights occurring there, including genocide, death camps, killings, torture, disappearances, mass rapes and other acts or threats of violence.²²⁴ The resolution also condemned the ethnic cleansing being carried out, in particular in Bosnia-Herzegovina, and called upon all parties in the former Yugoslavia, and especially those most responsible, to cease violations of human rights and to take appropriate steps to apprehend and punish those guilty of perpetrating them.²²⁵ To be

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*, at 3-4.

²²³ *Ibid.*, at 2.

²²⁴ United Nations Information Service, Press Release HR/3256, 1 December 1992, at 1.

²²⁵ *Ibid.*

noted is China's position in the passage of the resolution. China did not resort to "domestic jurisdiction" claim; instead, it urged the parties concerned in Bosnia-Herzegovina to observe a cease-fire and cooperate with the international community to settle their conflict peacefully. China's delegation voted in favour of the resolution, despite the fact that it had certain reservations with regard to items in the text.²²⁶ The Security Council of the United Nations imposed an arms embargo on former Yugoslavia as a sanction for its violation of civil rights. On 3 December 1992, the arms embargo, in accordance with the Security Council, applied to all the Republics that were part of the former Yugoslavia.²²⁷

In the situations discussed above, United Nations organs have provided a forum for discussion, studied, investigated, sought information, appointed fact-finding commissions, passed resolutions, made recommendations, appointed a Good Offices Commission and another commission to study and report on the alleged violations of human rights.²²⁸ UN actions even have even included appointment of an individual mediator. These actions have been specifically, and by name, addressed to particular countries, and even non-members. The recommendations reached by UN organs concern the domestic legislation,

²²⁶ *Ibid.*, at 5.

²²⁷ United Nations Information Service, Press Release DH/1282, 3 December 1992, at 4.

²²⁸ The non-member states to the Covenant involved for these UN actions are Israel, South Africa and China.

administrative measures and actions of these countries affecting their own citizens. They have had as their object to condemn, or to get suspended, modified or abrogated the undesirable legislation, administrative measures and actions within these member and non-member states. In other words, short of taking compulsive measures (like investigation within the territories of the states and against their consent and opposition), United Nations organs have taken every kind of action that is permissible under the terms of the Charter and consistent with the avowed respect of the United Nations for the sovereignty and domestic jurisdiction of states. In doing all this, United Nations organs apparently considered that they were acting within the terms of the Charter and the powers conferred on them thereunder and that, what is important, they did not consider that these actions were inconsistent with the limitation of their jurisdiction by the provision of Article 2(7). These repeated actions, therefore, demolish the alleged inconsistency between the terms of the domestic jurisdiction principle and the provisions of the Charter relating to non-political activities of the United Nations, in particular those of Chapter IX in respect of human rights and fundamental freedoms---for, presumably, these actions do not, in the opinion of United Nations organs, constitute "intervention" within the domestic jurisdiction of the states concerned, in the legally technical sense of the term.

CHAPTER THREE

RESPONSIBILITY OF STATES FOR VIOLATIONS OF CIVIL RIGHTS

3.1. *State responsibility Results From Violations of International Obligations of Observance of and Respect for Civil Rights*

The rules of state responsibility are mainly customary international law and general principles of law. While some relevant treaty provisions are taken into consideration, the invocation, in appropriate cases, of the general principles of state responsibility enhances the efficacy of international civil rights. The draft articles on state responsibility adopted by the International Law Commission (ILC), the commentaries thereto and the reports of the Special rapporteurs often give a useful indication of customary law and of trends in the formation of *lex ferenda*. They provide a useful framework for further discussions. The Commission's work exemplifies the "teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law" (Art.38(1)(d) of the Statute of the International Court of Justice). Sources analogous to the writings of publicists, and at least as authoritative, are the draft articles produced by the International Law Commission.¹

¹ See I. Brownlie, "Principles of Public International Law," 1979, 3rd ed., at 26.

Professor Meron notes that "[T]reaty provisions concerning implementation and responsibility for breaches are not, in most cases, comprehensive and exclusive. Only rarely do such provisions constitute self-contained regimes. See T. Meron,

A State that has violated an international obligation, based on either a treaty obligation or on a customary law, of observing and respecting civil rights is in principle obliged to provide redress to those injured by the violation.² A State violating its obligation incurs responsibility when a causal connection between its action or omission and the result are shown.³ In other words, the general principle is that of objective responsibility (or strict liability) and there is no need to show fault in the sense of malicious intent or negligence on the part of the State officials responsible for the action or inaction.⁴

"Human Rights and Humanitarian Norms as Customary Law," 1989, at 138.

Villiger observes that the ILC's work "exerts influence on the legal opinion of States, courts and writers long before States have ratified the resulting conventions. Of course, the ILC drafts and other materials prepared within the ILC cannot amount to State practice, since the ILC members act in their independent capacity. Nevertheless, already the close ties between the Commission and States lend to these materials a special status going beyond that of studies of learned writers." M. Villiger, "Customary International Law and Treaties," 1985, at 79.

² See O. Schachter, "International Law in Theory and Practice," 1991, at 203; see also F.V. Garcia-Amador, L.B. Sohn and R.R. Baxter, "Recent Codification of the Law of State Responsibility for Injuries to Aliens," 1974, at 11.

³ Schachter, *ibid.*

⁴ See I. Brownlie, "System of the Law of Nations: State Responsibility (Part I)," 1983, at 38. In a case before the European Commission on Human Rights, the Italian Government maintained that it could only be liable for improper action on the part of the courts. On this point the European Commission found

"that liability of a member State of the Convention may be

Professor Schachter notes that there exist different opinions of other eminent authorities such as Lauterpacht, Verdross and Eagleton who have favoured the Grotian view that State responsibility rests on "the conception of States as moral entities accountable for their acts and omissions in proportion to the mens rea of their agents, the real addressees of international duties."⁵

Initially, fault was said to underlie what is now called State Responsibility for Injury to Alien. As the late Judge Lauterpacht noted "[i]t was Grotius who introduced to the conception of fault into this branch of international law."⁶ He added: "[T]here are in international law few examples of both theory and practice following so closely in the footsteps of the founder of international law as in the case of this private law

involved by the mere fact that the rights guaranteed under the Convention have been violated: in fact, it is the duty of the High Contracting Parties to ensure that their institutions are in a position to comply with the undertakings they have assumed under the terms of the Convention."

The notion of "a practice incompatible with" a human right convention is a particularly instructive one. See Strasbourg Digest, Vol. 4, at 415. See also *Ireland V. United Kingdom*, Eur. Court H.R., Series A, Judgement, 1978, at 159.

⁵ See O. Schachter, "International Law in Theory and Practice," 1991, at 203.

⁶ See H. Lauterpacht, "Private Law Sources and Analogies of International Law," 1927, at 135, citing H. Grotius, "De Belli ac Pacis," BK. II, ch. XVII, section 202, BK. II, ch. XXI, section 2, (Classics of International Law, ed. by F. Kelsey trans. 1925).

principle of culpability."⁷ By so doing, he rendered international law a "great historical service," since fault replaced "the Germanic doctrine of reprisals based on collective responsibility for wrongs done to a State or its subjects by a foreign State or its subjects."⁸ "Faults soon became the accepted rationale behind State Responsibility and remained so well into the present century."⁹ Jessup in 1948 maintained that "[i]n general, liability is predicated on fault (culpa)."¹⁰

Borchard, however, pointed out that there was no internationally accepted definition of the concept of fault ever since it had emerged.¹¹ He observed that

"Culpa or dolus involve mental states which are often difficult to prove, and international tribunals, by virtue of the treaty or protocol under which they usually sit, are not obliged to indulge in the refinements of reasoning necessary to make the distinctions of the theorists."¹²

Indeed, Borchard observed that "[i]nternational tribunals...hardly use the concept 'fault', though they continually apply the conception of 'wrongful act' to cover any

⁷ *Ibid.*, at 136.

⁸ *Ibid.*

⁹ *Ibid.*, at 137.

¹⁰ See P. Jessup, "A Modern Law of Nations," 1948, at 104.

¹¹ See Borchard, "Theoretical Aspects of the International Responsibility of States," 1 *Zeitschrift Fur Auslandsches Offentliches Recht und Volkerrecht*, 1929, at 225.

¹² *Ibid.*

violation of international law to the injury of an alien."¹³ Highly critical of the use of fault, he thought that to establish State Responsibility, "the failure to perform a duty should suffice, without a further attempt to prove a vague and uncertain 'fault'".¹⁴ He therefore preferred "to omit the term from any code and to confine the basis of states responsibility to 'wrongful acts or omission' by the State or its agents. As we can reach effective decisions in practically every case...without invoking the term 'fault', it seems unnecessary to encumber and confuse the subject with an additional concept which has no uniform interpretation or acceptance."¹⁵

Aréchaga also concludes that

"what is generally relevant is not the psychological attitude of the individuals acting as organ for the State, but the objective conduct of the State per se: a State is responsible for the violation of any of its obligations without the need to identify a psychological failure in any of its agents."¹⁶

The theory that fault in the sense of a subjective conception is required as a proper foundation of State responsibility does not accord with the main tendency in State practice nor with the recent position (Draft Articles 1-35 for State Responsibility of

¹³ *Ibid.*, at 225; see generally the debates on the question of fault in [1927] *Annuaire de L'Institut de Droit International* (1927-III), at 81-168.

¹⁴ *Ibid.*, at 226.

¹⁵ *Ibid.*, at 137-143.

¹⁶ See Aréchaga, "International Responsibility," in M. Sorensen (ed.): *Manual of Public International Law*, 1968, at 534-535.

1978) taken by the International Law Commission.¹⁷ That body, basing itself on Professor Ago's report on State responsibility,¹⁸ accepted the idea that the relevance of fault depended on the content of the "primary rule" prescribing the particular obligation in question. Under some primary rules a state may incur liability only where it is guilty of a breach of good faith or negligence. In other cases, the degree of

¹⁷ Historically the international law of the responsibility of states primarily addressed the treatment of aliens. The jurisprudence of state responsibility, state practice, scholarly writings, the early efforts of private associations, and even the League of Nations all remained preoccupied with the treatment of aliens. That conceptual framework was not significantly changed even after the Second World War. To be sure, the assaults on international peace and security and the atrocities committed during the war forced legal scholars to rethink their conception of what constituted unlawful acts of states beyond their treatment of aliens. But the responsibility of the states continued to be limited to its unlawful treatment of aliens when the International Law Commission and the Legal Committee of the General Assembly began codifying the law of state responsibility in 1953. For some years, the International Law Commission was criticized for an unduly narrow approach. At the fifteenth session, in 1963, the international Law Commission appointed Mr. Ago as Special Rapporteur for the topic of state responsibility. At the twenty-first session in 1969, the International Law Commission approved Mr. Ago's report and decided on a codification of the general principles of international law of state responsibility, without identifying the specific obligations. At the thirtieth session, in 1978, the International Law Commission communicated the first three chapters of part 1 of the draft articles to governments for their observations and comments. In 1980 Mr. Willem Riphagen, Special Rapporteur, presented his first report on the second part of the draft articles. The General Assembly then urged Governments to respond as fully and expeditiously as possible to the requests of the International Law Commission for comments and observation. See I. Brownlie, "System of the Law of Nations: State Responsibility (Part I)," 1983, at 10-21; see also S. Rosenne, "The International Law Commission's Draft Articles on State Responsibility: Part I, Articles 1-35," 1991, at 28.

¹⁸ See Ago Report, ILC. Comm.Y.B. 1971, Vol. 2, at 218-224, paras.61-75.

knowledge of state officials may be relevant to determining whether an act or omission constituted a breach of an obligation. Subjective factors, in short, may be necessary elements of specific obligation. However, to extend this into a general principle of responsibility would require an examination of the motives and state of mind of numerous officials in every case where international law rules have not been observed in fact. To introduce the element of subjective fault would impose great difficulties of proof and would greatly impair the value of a clear legal rule.¹⁹

The principle that any conduct of a State which international law characterizes as a wrongful act entails the responsibility of that State in international law is one of the principles most strongly upheld by State practice and judicial decisions and most deeply rooted in the doctrine of international law.²⁰ The Permanent Court of International Justice applied this principle on 17 August 1923 in its judgment, No.1, in the *S.S. "Wimbledon"* case,²¹ and in its judgments in the *Case concerning the factory at Chorzow*.²² In 1938, in its judgment in the *Phosphates in*

¹⁹ See O. Schachter, "International Law in Theory and Practice," 1991, at 203.

²⁰ YB Int'l L. Comm., 1977, Vol. II, at 173.

²¹ Case of the *S.S. Wimbledon*, P.C.I.J., Series A, No.1, at 15.

²² *Case concerning the factory at Chorzow* (Jurisdiction), Judgment No. 8 of 26 July 1927, P.C.I.J., Series A, No.9, at 21 and *idem.* (Merits), Judgment No. 13 of 13 September 1927, P.C.I.J., Series A, No. 17, at 29.

Morocco case, the Permanent Court held that when a State was guilty of an internationally wrongful act against another State international responsibility was established "immediately as between the two States".²³ The International Court of Justice, too, applied the principle in its judgment in the *Corfu Channel* case,²⁴ in its *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*²⁵ and in its *Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, in which it stated that "refusal to fulfil a treaty obligation involves international responsibility".²⁶ The International Law Commission (the ILC) also makes numerous references to arbitral awards which have repeatedly affirmed the principle of state responsibility.²⁷

A breach of an international obligation is regarded as one of the two elements of an internationally wrongful act.²⁸ This is

²³ 14 June 1938, P.C.I.J., Series A/B, No.74, at 28.

²⁴ *Corfu Channel* case (Merits), Judgment of 9 April 1949, I.C.J.Rep., 1949, at 23.

²⁵ I.C.J.Rep., 1949, at 184.

²⁶ I.C.J.Rep., 1950, at 228.

²⁷ Among these are: *Claims of Italian Subjects Resident in Peru* in 1901 (United Nations, Reports of International Arbitral Awards, Vol. XV, at 399, 401, 404, 407, 408, 409 and 411), *Dickson Car Wheel Company* case in 1931 (*Ibid.*, Vol. IV, at 678), and *Armstrong Cork Company* case in 1953 (*Ibid.*, Vol. XIV, at 163). See YB Int'l L. Comm., 1977, Vol. II, at 173-174.

²⁸ Another element is that a conduct consisting of an action or omission is attributable to the State under international law. This is seen as the subjective element. Art. 3 of the draft

what is called the *objective* element of the internationally wrongful act, the specific element which distinguishes it from the other acts of the State to which international law attaches legal consequences. The contrast between the State's actual conduct and the conduct which juridically it ought to have observed constitutes the very essence of the wrongfulness.²⁹

It is widely acknowledged in judicial decisions, practice and authoritative literature that the objective element which characterized an internationally wrongful act is the breach of an international obligation of the State. In its judgement of 26 July 1927 on jurisdiction in the *Case concerning the Factory at Chorzow*,³⁰ the Permanent Court of International Justice used the words "breach of an engagement". It employed the same expression in its judgement of 13 September 1928 on the merits of the case.³¹ The International Court of Justice referred explicitly to the Permanent Court's words in its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*,³² and in its advisory opinion of 18 July 1950 on the *Interpretation of the Peace Treaties with Bulgarian*,

articles on state responsibility, YB Int L. Comm., Vol. II, 1977, at 179; see also *infra* 3.3.

²⁹ *Ibid.*, at 181.

³⁰ P.C.I.L.Series A, No. 9, at 21.

³¹ P.C.I.J.Series A, No. 17, at 29.

³² I.C.J.Rep., 1949, at 184.

Hungary and Romania (Second Phase).³³ In State practice, the terms "non-execution of international obligation", "acts incompatible with international obligation", "breach of an international obligation" and "breach of an engagement" are commonly used to denote the very essence of an internationally wrongful act, and constitute a source of responsibility.

The violation of an international obligation that can be attributed to a State is sufficient to establish its international responsibility. Naturally, there are numerous rules where, as a premise for violation of an obligation, causing or material damage is expressly required. It is clear that in such cases a violation of an obligation can be in question only if material damage was caused, since only then does a violation of the obligation exist. The same applies to those cases where fault is explicitly made a premise for violation or the duty for making reparation. If damage or guilt or both were to be introduced by the primary obligation as a supplementary condition for the existence of a violation, this always would amount to a restriction of State responsibility.³⁴ In most cases, international obligations are formulated without any indication to material damages. Violation of an obligation, therefore, will be sufficient to establish State responsibility, if State responsibility means more than reparation of a damage

³³ I.C.J.Rep., 1950, at 228.

³⁴ See B. Graefrath, "Responsibility and Damages Causal Relationship Between Responsibility and Damages," 185 *Recueil des Cours* (1984-II), at 34.

caused by a violation of an international obligation.

There are many violations of international human rights law which cause no material damage, Thus, a State is internationally responsible without having caused any damage for not enacting a law it was obliged to enact (for instance under the International Covenant on Civil and Political Rights). The concept was base on the principle that

"every violation of a right is an injury. The extent of the material injury caused may be a decisive factor in determining the amount of the reparation to be made, but it is of no assistance in establishing whether a subjective right of another State has been violated."³⁵

International Law today lays more and more obligations on the State with regard to the treatment of its own subjects. For example we need only turn to the conventions or covenants on human rights or the majority international labour conventions. If one of these international obligations is violated, the breach thus committed does not normally cause any economic injury to the other States parties to the conventions or covenants, or even any slight to their honour or dignity (moral injury). Yet it manifestly constitutes an internationally wrongful act, so that if "damage" is an element in any internationally wrongful act, we are forced to the conclusion that any breach of an international obligation towards another State involves some kind of "injury" to that other State. But we can solve this dilemma by saying that the "damage" which is

³⁵ See Ago, YBILC 1970, II, at 195; Ushakov, YBILC 1981, I, at 142.

inherent in any international wrongful act is the damage which is at the same time inherent in any breach of an international obligation.³⁶ Damage is thus an element inherent in the breach of an international norm. Indeed, any breach of an international obligation involves some kind of injury to other States.³⁷ Professor Graefrath aptly observes that "it is the violation of the obligation and not the damage that entails the State's responsibility."³⁸ Brownlie observes that the nature of the harm determines the extent of liability for the acts and omissions of organs and individuals attributable to the State.³⁹ The ILC puts it

"[W]here such damage has occurred, it may indeed be a decisive factor in determining the consequences of a wrongful act. As such, it will be considered in the part of the draft devoted to the forms and extent of reparation. But it seems clear that, in this sense, 'damage' is not an essential condition for the existence of an internationally wrongful act, not an individual constituent element of that concept."⁴⁰

The ILC's approach to the question of damage supports both the

³⁶ YB Int'l L. Comm., 1973, at 183.

³⁷ The emerging state practice involving obligations *erga omnes* in the judicial and extra-judicial arenas is discussed on Tanzi, "Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?" in United Nations Codification of State Responsibility 1, 33 (M. Spinedi and B. Simma eds. 1987).

³⁸ See B. Graefrath, "Responsibility and Damages Caused: Relationship between Responsibility and Damages," 185 *Recueil des Cours* (1984-II), at 37.

³⁹ See I. Brownlie, "System of the law of Nations: State Responsibility (Part I)," 1983, at 132.

⁴⁰ YB Int'l L. Comm., 1973, at 183.

concept of obligations erga omnes presented in Barcelona Traction and the feasibility of ensuring the observance of obligations erga omnes through actions brought by a state to vindicate the human rights of persons who are not its nationals.⁴¹

3.2. *Obligation of Means and Obligation of Results*

The breach by a State of any international obligation incumbent upon it always constitutes an international wrongful act which may engage the international responsibility of the State that breaches the obligation. However, the obligations prescribed by international law are not all identical. The International Law Commission's draft article on state responsibility (Articles 20-21) reconfirms this position by classifying international obligations into "obligations of result" and "obligations of means".⁴² The concepts underlying

⁴¹ See T. Meron, "Human Rights and Humanitarian Norms as Customary Law," 1989, at 208.

⁴² Art. 20 of the International Law Commission's draft articles on state responsibility (part One) reads as follows:

"There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation."

Art. 21 of the International Law Commission's draft articles on state responsibility reads as follows:

"1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation

such obligations and the distinction between them derive from contemporary treaties; however, both older treaties and, perhaps to a lesser extent, customary law also contain norms which fit the pattern of obligations of means and obligations of result. Customary law characteristically addresses the object to be achieved, often without specifying the means to be employed in order to achieve it.⁴³

International obligations not only express duties pertaining to different sectors of inter-State relations and to matters of varying importance for the international community; they are also differently structured as regards determination of the ways and means by which the State is supposed to discharge them. There are international obligations which require the State to perform or to refrain from a specifically determined action. There are other cases in which the international obligation only requires the State to bring about a certain situation or result, leaving it free to do so by whatever means it chooses. Obligations of the first kind are sometimes called obligations "of conduct" or "of means", and those of the second kind

not in conformity with the result required of it by an international obligation but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation."

YB Int'l L. Comm., 1977, at 31, U.N.Doc.A/CN.4/SER.A/1977/Add.1 (Part 2) (1978)

⁴³ YB Int'l. Comm., 1977, at 11, 13, U.N.Doc. A/CN.4/SER.A/1977/Add.I (Part 2) (1978).

obligations "of result".⁴⁴

The concepts of obligations of means and of result are useful tools for interpreting human rights instruments,⁴⁵ analyzing the object and scope of specific norms, understanding what constitutes a breach of those norms, and determining the moment when the breach occurs. Characterizing a conventional obligation as one of means or of result naturally depends on the interpretation of the relevant instrument. Such characterization is more difficult with respect to customary law, where one must also ascertain both the existence of the customary norm and the definition of its content.⁴⁶

When commenting on obligation of conduct or means in Article 20 of the Draft Article on State Responsibility, the International Law Commission (the ILC) has aptly explained that

"[W]hat distinguished the first type of obligation from the second is not that obligations 'of conduct' or 'of means' do not have a particular object or result, but that their object or result must be achieved through action, conduct or means 'specifically determined' by the international obligation itself, which is not true of international obligations 'of result.'"⁴⁷

A typical provision containing an obligation of means requires

⁴⁴ *Ibid.*

⁴⁵ For example, in certain countries of the Council of Europe, the question has arisen whether the 1950 Convention of the protection of Human Rights and Fundamental Freedoms does or does not impose on the parties thereto an obligation "of conduct", namely, the obligation to enact certain legislation. *Ibid.*

⁴⁶ *Ibid.*, at 16.

⁴⁷ *Ibid.*, at 13-14.

the state to enact or to repeal certain types of legislative provisions, or to perform or refrain from performing specified administrative acts. Failure by the State's legislative organs to pass a law which the State, by treaty, has specifically undertaken to enact is itself sufficient to constitute a breach of an international obligation incumbent upon the State.⁴⁸ The duty to investigate, as provided for in the Optional Protocol to the International Covenant on Civil and Political Rights, is also an example of obligations of means. In a number of cases the Human Rights Committee has taken the position that:

"[I]t is implicit in Article 4(2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to the Committee the information available to it."⁴⁹

The ILC emphasized that such an obligation is directly breached by a State's failure to conform to the internationally required conduct. If, according to the ILC, as in the case of Article 10(1) of the International Covenant on Economic, Social and Cultural Rights, an international convention imposes on a State an obligation to recognize that the employment of children and young persons "in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law", this obligation is breached

⁴⁸ YB Int'l L. Comm., 1977, Vol.II, at 182.

⁴⁹ Human Rights Committee, Selected Decisions Under the Optional Protocol, UN Pub., 1984, A/39/40, at 162.

simply by the fact that a law providing for punishment of such practices has not been enacted, even if no specific instance of the employment of children in such work had been found in the country concerned.⁵⁰ Similarly, Article 2 of the International Covenant on Civil and Political Rights obliges a member state to enact legislation or necessary measures to implement the rights enumerated in the Covenant, and this obligation is breached simply by the fact that the provision in question has not officially been observed, even if no actual infringements have occurred.⁵¹

State practice and international jurisprudence confirm the validity of the above conclusion. Failure to enact legislation may of itself involve the international responsibility of the State if some agreement to which the State is a party expressly obliges the contracting parties to enact certain legislation. On the other hand in the absence of contractual provision of this kind, it is not failure to enact a law which entails the responsibility of a State, but rather the fact that this State is not in a position, by any means, to fulfil its international obligations.⁵² Professor Meron emphasizes that

"[I]n any event human rights goals clearly will be frustrated if states delay the implementation of their human rights obligations over an unreasonably long period

⁵⁰ *Ibid.*, at 16.

⁵¹ The ILC points out that initial freedom of choice of means to be used to fulfil the obligation is characteristic of most human rights. *Ibid.*, at 21.

⁵² *Ibid.*

of time by invoking successive measures aimed at reaching the result required."⁵³

Obligation of result, however, requires the State to ensure a particular situation---a specified result---and leaves it free to do so by means of its own choice. Such obligations are much more common in international law than in internal law, by reason of the specific nature of the subjects of international law. As the commentary to Article 20 makes clear, the commands of international law in many cases, especially where they have to be enforced through the State's internal system stop short at the outer boundaries of the State machinery. Often, out of respect for the internal freedom of the State, international obligations of this nature merely require it to achieve the result they seek without specifying the acts or omissions by which that result is to be achieved.⁵⁴ An example is given by the ILC is the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, in which the freedom of choice accorded to the State is implicit in the fact that the international obligation only specifies the result to be achieved, the text imposing the obligation making no reference at all to the means of achieving it.⁵⁵

There is also no lack in international law of obligations which, although not requiring recourse to a specified means,

⁵³ See T. Meron, "Human Rights and Humanitarian Norms as Customary Law," 1989, at 186.

⁵⁴ *Ibid.*, at 20.

⁵⁵ *Ibid.*

nevertheless indicate a preference for one means or another. Article 2, paragraph 2, of the International Covenant on Civil and Political Rights provides that:

"[W]here not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps in accordance with its constitutional processes and with the provisions of the present Covenant , to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

There can be no doubt that, in these cases, legislative means are expressly indicated at the international level as being the most normal and appropriate for achieving the purposes of the Covenant in question, though recourse to such means is not specifically or exclusively required. The State is free to employ some other means of it so desires, provided that those means also enable it to achieve the full realization of the individual rights provided for by the Covenant. All these examples are of cases in which the obligation leaves the State at least an initial freedom of choice of the means to be used to achieve the result required by the obligation.⁵⁶

The significance of distinguishing between obligations of conduct or means and obligations of result is in the determination of when and how the breach of each of these types of international obligation occurs.⁵⁷ According to Professor Meron, obligations of means and obligations of result do not

⁵⁶ YB Int'l L. Comm., 1977, Vol. II, Part Two, at 20-21.

⁵⁷ *Ibid.*, at 13.

compete with, but complement, one another.⁵⁸ He further notes that "joining obligations of result... with obligations of means...constitutes the most effective method of implementing human rights in a state's internal legal system."⁵⁹

The distinction between obligations of means and obligations of result is a useful interpretative tool for us to understand the issue of state responsibility rules. The ILC, however, overburdened this distinction by using it to outline the parameters of the requirement of exhaustion of local remedies.⁶⁰ Article 22 of the ILC's articles on state responsibility (part one) states that the requirement of exhaustion applies specially to obligations of result, which implicitly bars its applicability to obligations of means.⁶¹ This interpretation gives rise to problems. First, as the ILC also realises, "it is not always easy in practice to identify a given obligation as on 'of conduct' or 'of means', or one 'of result.'"⁶² Second, some international obligations, including some civil rights, have dual characteristics. For example, the obligation under the

⁵⁸ See T. Meron, "Human Rights and Humanitarian Norms as Customary Law," 1989, at 184.

⁵⁹ *Ibid.*

⁶⁰ See T. Meron, "Human Rights and Humanitarian Norms as Customary Law," 1989, at 186.

⁶¹ The *Commentary* makes the point expressly that the article (Article 22) is therefore worded so as to make it clear that the requirement of the exhaustion of local remedies applies only to obligations "of result". See 2 YB Int'l L.Comm. at 31, UN Doc. A/CN.4/SER.A/1977/Add.I (part 2) (1978).

⁶² *Ibid.*, at 12.

right to a fair trial is both one of conduct or means and one of result. The International Covenant on Civil and Political Rights, which takes account of the dual nature of rights, sweepingly applies to all rights. Thirdly, it is risky to conclude that human rights obligations are always ones of result simply because the exhaustion of domestic remedies is always required by international conventions or covenants. States are under international obligations not to use means which violate civil rights, even if the result is to protect other civil rights.

3.3. Attribution of State Responsibility for Violations of Interactional Obligations of Civil Rights

State responsibility must be based upon the acts or omissions of State organs which give rise to effects incompatible with the pertinent rule or standard of conduct whether deriving from treaty or some principle of customary law.⁶³ The international responsibility of a State is generated when conduct attributable or imputable to the State under international law constitutes a breach of the international obligations of the State. Article 3 of the ILC's draft articles on state responsibility provides that

⁶³ See See G.A. Christenson, "The Doctrine of Attribution in State Responsibility," in R.B. Lillich (ed.): International Law of state Responsibility for Injuries to Aliens, 1983, at 321-323; I. Brownlie, "System of the Law of Nations: State Responsibility (Part I)," 1983, at 132; see also F.V. Garcia-Amador, L.B. Sohn and R.R. Baxter, "Recent Codification of the Law of State Responsibility for Injuries to Aliens," 1974, at 21.

"[T]here is an internationally wrongful act of a State when: (a) conduct consisting of an action or omission is attributable to the State under interactional law; and (b) that conduct constitutes a breach of an international obligation of the State."⁶⁴

The attributable nature of an act of a State is regarded by the ILC as a *subjective element*, as opposed to an objective (an act constitutes a breach of an international obligation).⁶⁵ In its judgement in the *Phosphates in Morocco* case, the Permanent Court of International Justice explicitly links the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty rights of another State."⁶⁶ In the *Dickson Car Wheel Company* case in July 1931, the Mexico-United States General Claims Commission established by the Convention of September 1923 held that the condition required for a State to incur international responsibility is stated to be the fact... "that an unlawful international act be imputed to it..."⁶⁷

There is a rich literature concerning the attribution of an act to a state as an element of an internationally wrongful act of the state. The ILC's list includes Anzilotti, Sereni, Levin, Amerasinghe, Jiménez de Aréchaga, and "Restatement of the Law"

⁶⁴ YB Int'l L. Comm., 1975, at 181.

⁶⁵ YB Int'l L. Comm., 1973, at 179.

⁶⁶ *Phosphates in Morocco* case (preliminary Objections), 14 June 1938, P.C.I.J., Series A/B, No. 74, at 28.

⁶⁷ United Nations, Reports of International Arbitral Awards, Vol. IV, at 678.

by the American Law Institute.⁶⁸

As regards the *subjective element*, and more particularly the determination of conduct susceptible of being considered as State conduct, what can be said generally is that it can be either active (action) or passive (omission). It can even be said that cases in which the international responsibility of a State has been invoked on the basis of an omission are perhaps more numerous than those based on an action by a State, and whenever an international tribunal has found a wrongful omission to be a source of international responsibility, it has done so in terms just as unequivocal as those used on a case of active conduct.⁶⁹ For instance, the international responsibility of the State for an internationally wrongful omission was explicitly affirmed by the International Court of Justice in its judgment of 9 April 1949 in the *Corfu Channel* case (Merits).⁷⁰

The purpose of considering a particular internationally wrongful act attributable to a State, according to the ILC, is to indicate that it must be possible for the action or omission in question to be considered in international law as an "act of the State".⁷¹ The State is a real organized entity, but to

⁶⁸ YB Int'l L. Comm., 1973, at 179-180.

⁶⁹ *Ibid.*

⁷⁰ ICJ Rep., 1949, at 22-23.

⁷¹ YB Int'l L. Comm., 1973, at 180-181. See also G.A. Christenson, "The Doctrine of Attribution in State Responsibility," in R.B. Lillich (ed.): *International Law of State responsibility for Injuries to Aliens*, 1983, at 341-345.

recognize this "reality" is not to deny the elementary truth that the State as such is not capable of physical action. Conduct regarded as an "act of the State" can only be some physical action or omission by a human being or group of human beings. The Permanent Court of International Justices confirmed this by holding in the case of *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland* that "State can act only by and through their agents and representatives."⁷² Hence there exists a necessity of establishing when and how an "act of the State" can be discerned in a given action or omission.

The basic principles evolved by international law concerned with imputability is that a State is responsible neither for all acts or omissions taking place in its territory⁷³ nor for acts or omissions of private individuals not acting on the State's behalf.⁷⁴ However State is responsible for the acts or omissions of its internal apparatus or organization; i.e. its organs and agents. Article 5 of the ILC's draft articles on state responsibility (part one) provides that

"[F]or the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was

⁷² Advisory opinion No. 6, P.C.I.J., Series B, No. 6, at 22.

⁷³ *Corfu Channel* case (United Kingdom v. Albania), ICJ Rep., 1949, at 4 and 18.

⁷⁴ YB Int'l L.Comm., 1973, at 189.

acting in that capacity in the case in question."⁷⁵

Under international law, the conduct of bodies having the status of organs of State under the internal law of a State is, in principle, attributable to the State as an act of State. By describing an act of State as the conduct of an organ acting in its capacity as an organ of the State, Article 5 of the ILC's draft provides a tautological definition in lieu of a clear standard or criteria for distinguishing between action taken in an official's private capacity, which is not attributable to the State,⁷⁶ and action taken as an agent of the State, which is attributable to the State. Acts performed by an official in his or her capacity as an organ of the State or under the cover of official status are difficult to distinguish from acts performed as a private person, especially when the official breaches the State's internal law by, for example, committing murder or torture.⁷⁷

It is generally accepted that the position of an official in the internal hierarchy has no relevance to the question of State responsibility. This is the view adopted by Professor Ago in his Third Report⁷⁸ and by the International Law Commission in the

⁷⁵ YB Int'l L. Comm., 1973, at 191.

⁷⁶ *Ibid.*

⁷⁷ See T. Meron, "Human Rights and Humanitarian Norms as Customary law," 1989, at 156.

⁷⁸ YB Int'l L. Comm., 1971, at 249-253.

draft articles on the subject of state responsibility.⁷⁹ The thesis that there could be no responsibility for the acts of "minor officials" has been examined and decisively rejected by Eagleton in his monograph published in 1928.⁸⁰ Eagleton observes:

"[P]ractice does not justify the conclusion that no responsibility exists for injurious acts by inferior officials of the state: it merely reveals the fact that, due to domestic legislation, local remedies may more often be found against the acts of minor officials, and less frequently against those of superior officials."⁸¹

Although the overwhelming evidence of state practice and of arbitral jurisprudence supports this position, Eagleton's observation can not be read to mean that in practice international remedies may be more useful in dealing with higher officials since in the case of lower officials the doctrine of exhaustion of local remedies would be more likely to apply. The doctrine simply applies regardless of ranks of state officials, and international remedies are generally provided after the application of the doctrine. As a matter of practical sense international standards are generally related to consequences rather than the source of the harm, specially in the situation in which a specific obligation of means is involved. Moreover, the application of policies is normally in the hands of subordinate officials. In any case an administration is for

⁷⁹ *Ibid.*, at 193-198.

⁸⁰ See Eagleton, "The Responsibility of States in International Law," 1928, at 45-49.

⁸¹ *Ibid.*

legal purposes to be seen as integral and thus as a system of government. A minor official acting on behalf of the government is by definition a person whose acts and omissions are subject to the control of the state by way of command and authority. Within the common law the relevant concepts are found in the law of agency: ostensible or apparent authority and the doctrine of holding out.⁸²

In the draft articles on state responsibility of the International Law Commission it is accepted that the governing criteria are those prescribed by the "internal law of that State" (Article 5). In other words the standard of international law is directly related to the domestic law criteria of the status of organs of the state. The principle as stated, as Professor Brownlie puts it, may be accepted but only with certain modalities and reservations.⁸³ In the first place the "internal law of that State" is not to be seen in neat or formal terms. The legal order may comprise important elements of informal modification, especially in times of internal stress.⁸⁴ In particular states and at certain periods state authority has been delegated to local traditional and religious authorities. State functions have at other times been farmed out to private individuals, given by charter to private companies, or conferred

⁸² See I. Brownlie, "System of the Law of Nations: State Responsibility (Part I)," 1983, at 135.

⁸³ See I. Brownlie, "System of the law of Nations: State Responsibility (Part I)," 1983, at 135-136.

⁸⁴ *Ibid.*

on political organizations parallel to the state. Militia may be raised and co-opted by governments. Thus on many occasions what is an "organ of state" is essentially a question of fact not related to the formal and regular tests provided by a constitution, or other pre-existing local law.⁸⁵

Since the individuals comprising the organs of the State may act not only as organs of the State, but also as private individuals, the capacity in which they have acted in the specific case where their activity is impugned must be determined. International case-law and scholarly writings have developed several criteria. Examples include whether an agent of the State has employed or abused either the means or the coercive power placed at his or her disposal by the State, and whether an agent of the State has acted within the scope of his or her actual or apparent authority or functions.⁸⁶

The term "an organ of a State" is in fact very comprehensive. It may include heads of state and members of governments, diplomatic agents and consular officers, ministers, senior police officials, fishery protection officers, customs officials and many others of higher or lower rank in the state

⁸⁵ *Ibid.*, at 136.

⁸⁶ See L. Sohn and R. Baxter, "International Protection of Human Rights," 1973, at 247-249; T. Meron, "International Responsibility of States for Unauthorized Acts of their Officials," 33 *Brit.YB Int'l L.*, 1957, at 85; For other scholarly writings on attribution to states of *ultra vires* acts of state organs, see *YB Int'l L. Comm.*, 1975, at 66.

service.⁸⁷ In practice the separation of powers is not as neat as it is sometimes assumed to be. In general, therefore, it is the fact of state service which counts, together with the nature of the particular duty or standard of international law which is called in question.⁸⁸ In the *Massey Claim* the United States recovered an award of 15,000 dollars by reason of the failure of the Mexican authorities to take adequate measures to punish the killer of Massey, a United States citizen working in Mexico. The opinion of Commissioner Nielsen stated:

I believe that it is undoubtedly a sound general principle that, whenever misconduct on the part of [persons in state service], whatever may be their particular status or rank in the domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants.⁸⁹

In principle the armed forces, employed both for frontier policing and for the maintenance of public order, are agents of the state.⁹⁰ It is probably the case that a higher standard of prudence in their discipline and control is required, for reasons which are sufficiently obvious.⁹¹ Commissioner Nielsen,

⁸⁷ See I. Brownlie, "System of the Law of Nations: State Responsibility (Part I)," 1983, at 138-139.

⁸⁸ *Ibid.*

⁸⁹ United Nations, *Rep Int'l Arbitral Awards*, iv, 1927, at 159.

⁹⁰ See H. Accioly, "Principes Généraux de la Responsabilité Internationale d'Après la Doctrine et la Jurisprudence," 96 *Recueil des Cours* (1959-I), at 373.

⁹¹ See *Huber in the Spanish Zone of Morocco claims*, United Nations, *Reports of International Arbitral Awards*, 1925, at 617, 645.

in his opinion on the *Kling Claim*, said:

"[I]n cases of this kind it is mistaken action, error in judgment, or reckless conduct of soldiers for which a government in a given case had been held responsible. The international precedents reveal the application of principles as to the very strict accountability for mistaken action."⁹²

The issue of an armed forces attributable as an "organ of that State" is also dealt with in the proceedings brought by Ireland against the United Kingdom before the European Court of Human Rights. The narrative and historical parts of the Judgment delivered by the Court provide a picture of the composite and co-ordinated actions of the "security forces", which included both army and police, under the authority of the United Kingdom Parliament and the Secretary of State for Northern Ireland.⁹³

It is well settled that a State cannot plead the principles of municipal law, including its constitution, in answer to an international claim. This position has been confirmed by many scholars. For instance, Garcia-Amador forcefully states that

"[T]hese cases of responsibility are based on the familiar principle that a State cannot rely on its municipal law as an excuse for failing to perform its international obligations. In conformity with this principle, if its municipal law is incompatible with these obligations, in that it conflicts with them or fails to provide for their performance, the State will be internationally responsible for injuries caused to the person or property of aliens."⁹⁴

⁹² *Ibid.*, 1930, iv, at 579.

⁹³ Publications of the E.C.H.R., Series A, Vol. 25; Judgment of 18 January 1978.

⁹⁴ See F.V. Garcia-Amador, L.B. Sohn and R.R. Baxter, "Recent Codification of the Law of State Responsibility for Injuries to Aliens," 1974, at 21-22.

Although Garcia-Amador addresses the situation in which a State is under an international obligation in relation to the treatment of aliens, the statement is equally applicable to the case in which a State bears an international obligation to respect and to observe civil rights. Arbitral jurisprudence contains many examples of the responsibility of federal states for acts of agents of the constituent units of the federations concerned.⁹⁵ The former Permanent Court of International Justice stated, in the *Case Concerning Certain German Interests in Polish Upper Silesia* (1926):

"[F]rom the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures."⁹⁶

That a state should be liable for the defaults of its subordinate and provincial divisions of the administration is hardly surprising. The forms of administration are secondary. The key element is the role of the entity or official as a part of the administration of the state. It is the system of administration which counts and the part played within the system by the particular entity or official.⁹⁷ This approach has been

⁹⁵ *Youmans* claim, 1926, United Nations, Reports of Arbitral Awards, at 110; *Mallén* claim, 1927, *Ibid.*, at 173; *Pellat* claim, 1929, *Ibid.*, at 534. See further Ago, YB Int'l L. Comm., 1971, at 257-258.

⁹⁶ See Publications of the Permanent Court of International Justice, Collection of Judgments, series A, No. 7, at 19.

⁹⁷ See I. Brownlie, "System of the Law of Nations: State Responsibility (Part I)," 1983, at 141.

adopted by Professor Ago in his work as Special Rapporteur of the International Law Commission⁹⁸ and by Article 7 of the draft articles on state responsibility.⁹⁹

The legislature is an organ of the State and a vital part of the system of government. In any case the classification of the powers of an organ as "legislative" or otherwise is a matter of internal organization and local fashion.¹⁰⁰ In the case of treaty obligations, the acts and omissions of the legislature are, without more, creative of responsibility. If a covenant on human rights creates an obligation to incorporate certain rules in domestic law, failure to do so entails responsibility for breach of the treaty.¹⁰¹ In a number of instances the situation is simply one of incompatibility of the municipal law and the

⁹⁸ YB Int'l L. Comm., 1971, at 262.

⁹⁹ Article 7 reads as follows:

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.
2. The conduct of an organ of an entity which is not a part of the formal structure of the State of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

YB Int'l L. Comm., 1974, at 277.

¹⁰⁰ See I. Brownlie, "System of the Law of Nations: State Responsibility (Part I)," 1983, at 142.

¹⁰¹ *Ibid.*

requirements of the given treaty provision. Whether this incompatibility stems from the fault of the legislature, or the state of the relevant case law, or both, is immaterial.¹⁰²

As reflected in contemporary trends, State practice holds a State responsible for acts or omissions of all levels of government, including those in a federal system in which the central government may not have power to control the acts of local officials.¹⁰³ Vis-à-vis the international community, the State is responsible for such acts or omissions, whether at the central, provincial, or local level.¹⁰⁴ The federal concept of state action, as in American and Canadian constitutional law, might well extend the international responsibility of the United States or Canada to the conduct of private associations under

¹⁰² Case of Young, James and Webster, Publications of the European Court of Human Rights, Series A, Vol.44, Judgment of 13 August 1981, at 20.

¹⁰³ Article 6 of the Draft Articles states that the position of the organ in the organization of the State is irrelevant in determining responsibility. Article 7 clarifies the imputation of State Responsibility from acts of territorial governments comprising a federation. Commentary to Article 7 states the "unequivocal principle" that a State is responsible for acts and omissions of organs of territorial governments comprising a federation. Report of the International Law Commission on the Work of Its Twenty-sixth Session. See 2 Y.B. Int'l Comm'n., 1974, Part I, at 278.

Cases have held that responsibility for acts of territorial governments cannot be denied, "even in cases where the federal Constitution denies the central Government the right of control over the separate states or the right to require them to comply, in their conduct, with the rules of international law. Pellat case (*France v. Mexico*), 5 K. Int'l Arb. Awards, 1929, at 536.

¹⁰⁴ See Report of the International Law Commission on the Work of Its Twenty-sixth Session, Y.B. Int'l Comm'n, 1974, Part I, at 278-279.

duty to act by reason of receiving federal funds or under federal program control, or to function as governmental agents.¹⁰⁵ Complex tests are also developing to determine whether various acts or omissions constitute state action for the purpose of protecting civil rights. For instance, actions of private universities heavily funded by or functioning as an apparatus of government and of state-owned enterprises could be considered those of a government for constitutional purpose.¹⁰⁶ Such a question is of basic concern in a federal system where the government or central institutions in charge have only allegedly limited constitutional power over acts of officials at different levels. The states, which have a federal system, would be responsible for violation of customary norms of respecting civil rights by any organs or institutions which act as governmental agents.

The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials. The activities of courts may involve various international wrongs. Like the executive organs and the legislature the courts may be instrumental in the misapplication of standards of international obligations. McNair states:

¹⁰⁵ See, for example, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); compare *McKinney v. University of Guelph*, (1991) 2 C.R.R. 1 (S.C.C.).

¹⁰⁶ See *Monell v. New York City Social Servs.*, 436 U.S. 658 (1978), noted in 47 U. Cin. L. Rev., 1978, at 670; See also *Douglas/Kwantlen Faculty Assn. v. Douglas College*, (1988) 2 W.W.R. 718.

"...a State has a right to delegate to its judicial department the application and interpretation of treaties. If, however, the courts commit errors in that task or decline to give effect to the treaty or are unable to do so because the necessary change in, or addition to, the national law has not been made, their judgments involve the State in a breach of treaty."¹⁰⁷

In any case in certain circumstances a judicial officer may be charged under local law with the enforcement of the law and thus be empowered to order the execution of a warrant. The misuse of such authority, for example, by the use of unreasonable (or lethal) force to execute a void warrant, will generate state responsibility.¹⁰⁸

Article 10 of the ILC's draft articles on state responsibility provides that

"[T]he conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity."¹⁰⁹

Article 10 refers to acts which have already been identified as official acts, i.e. acts carried out by a State organ in its capacity as a State organ. It addresses the question whether all such acts are to be attributed to the State. The Article reflects the well-established principle of customary law that the conduct of a State organ is attributed to the State even if

¹⁰⁷ See McNair, "The Law of Treaties," 1961, at 346.

¹⁰⁸ See the Way claim, United Nations, Reports of Arbitral Awards, 1928, iv, at 400-401.

¹⁰⁹ YB Int'l L. Comm., 1975, Vol.II, at 61.

the organ has exceeded its competence or contravened its instructions according to the State's internal law. The ILC emphasized that

"as practice and international decisions become clearer and more consistent, modern international jurists have almost unanimously come to consider it as established that actions or omissions of organs of the State, irrespective of whether they conform or are contrary to the legal provisions governing their conduct, must be considered as acts of the State from the standpoint of juridical relations between States."¹¹⁰

The ILC thus clearly recognizes the principle that the conduct of a State organ functioning as such but acting *ultra vires* is attributable to the State.¹¹¹

Professor Ago also observes that

"the status of "official" or "organ" is not a conclusive determinant of responsibility. However, the status does create evidence of a *prima facie* responsibility and this is so even in the case of conduct which is contrary to the municipal law."¹¹²

It has long been apparent in the sphere of a domestic law that acts of public authorities which are *ultra vires* should not by that token create immunity from legal consequences. In international law there are other reasons for disregarding a plea of illegality under domestic law. Moreover, the lack of express authority cannot be decisive as to the responsibility of the state. Arbitral jurisprudence and the majority of writers support the rule that states may be responsible for *ultra vires*

¹¹⁰ *Ibid.*, at 66.

¹¹¹ *Ibid.*

¹¹² See Ago, Third Report, YB Int'l L. Comm., 1971, part I, at 233-234.

acts of their officials committed within their apparent authority or general scope of authority.¹¹³ In the *Caire Claim*, Verzijl, President of the Commission, said:

"[T]he State also bears an international responsibility for all acts committed by its officials or its organs which are delictual according to international law, regardless of whether the official or organ has acted within the limits of his competency or has exceeded those limits...However, in order to justify the admission of this objective responsibility of the State for acts committed by its officials or organs outside their competence, it is necessary that they should have acted, at least apparently, as authorized officials or organs, or that, in acting, they should have used powers or measures appropriate to their official character."¹¹⁴

Professor Meron uses the concept of "abuse of governmental means" to cover the cases involving acts committed outside the apparent scope of authority.¹¹⁵ "But this," according to Brownlie, "does not provide a firm basis for the decisions, and those he mentions can be explained in other, less coherent, terms."¹¹⁶

Article 10 of the draft articles on state responsibility avoids formulating any general criterion referring to "apparent

¹¹³ See Eduardo Jiménez de Aréchaga, "International Responsibility," in M. Sorensen (ed.), *Manual of Public International Law*, 1968, at 548. See the *Union Bridge Company* case, United Nations, Reports of Arbitral Awards, 1924, vi, at 138.

¹¹⁴ *Caire Claim*, United Nations, Reports of Arbitral Awards, 1929, v, at 516.

¹¹⁵ See T. Meron, "International Responsibility of States for Unauthorized Acts of Their Officials," 33 *B.Y.Int'l L.*, 1957, at 105-113.

¹¹⁶ See I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)*, 1983, at 147.

authority" or "general scope of authority". In its commentary, the International Law Commission canvassed various examples of a "manifest lack of competence".¹¹⁷ For the fear that it will create an "easy loophole in particular serious cases where its international responsibility ought to be affirmed",¹¹⁸ the ILC, as a consequence, did not provide a comprehensive list but formulated a principle in tautologous terms. While wishing to avoid a basis for avoidance of responsibility, refuge is taken in imprecision. The outcome is that professional advisers and tribunals will fall back on the principles of general international law in order to obtain assistance in applying the principle. The ILC has refused to do more than assert that there is some distinction between action by officials "in a private capacity" and action by officials "in an official capacity".¹¹⁹

The principle of international law attributing the authorized as well as unauthorized conduct of its organs to the state is important in all fields of international law, but acquires particular vitality in the protection international human rights in general and civil rights in particular. In the vast majority of cases, acts comprising the most egregious violations of human rights, such as torture, murder, or causing the disappearance of

¹¹⁷ YB Int'l L.Comm., 1975, ii, at 67-70.

¹¹⁸ The ILC is of the opinion that, "however worded, the limitation to exclude from qualification as acts of the State the actions of organs in situation of "manifest" lack of competence has no place in the rule defined in the present article (Article 10)." YB Int'l L.Comm., 1975, at 69.

¹¹⁹ YB Int'l L. Comm., 1975, at 69.

individuals, would also breach the internal law of the state where they were committed.¹²⁰ States in which such outrages against human dignity occur either deny the facts outright or characterize the violation as contrary to their own laws and policy. Under the principle attributing to the state the unauthorized acts of its organs, expressed in the ILC's Article 10, a defence of *ultra vires* would not exonerate the state from international responsibility for the violation.¹²¹

While recognizing that a plea of *ultra vires* provides no defence for breaches of norms governing the responsibility of states for injuries to aliens, including the violation of their human rights, the Restatement of the Foreign Relations Law of the United States, however, takes the position that the principle excluding the defence of *ultra vires* does not apply to the violations by a state of the customary human rights of its own nationals.¹²² The US Restatement accepts that a state is responsible for *ultra vires* breaches of treaty human rights.¹²³

¹²⁰ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 878, 889; *Forti v. Suarez-Mason*, No. C-2058 DLJ, ND Cal. 6 Oct. 1987, at 30.

¹²¹ See T. Meron, "Human Rights and Humanitarian Norms as Customary Law," 1989, at 158-159.

¹²² The Restatement (Third) of the Foreign Relations Law of the United States, Vol. 1, section 207 (c), comment d and Reporters' note 4, Vol. 2, section 711 (a), comments (a)-(c); section 702, comment b, Reporters' note 2.

¹²³ *Ibid.*, at section 702, comment b. This position is in accord with the approach adopted by the European Commission of Human Rights in *Ireland v. United Kingdom*, 1976 YB Eur. Conv. Hum. Rts., 512 (Eur. Comm'n f Hum. Rts).

Professor Meron criticizes the approach of the Restatement by saying that:

"[T]he Restatement's rule hinges on the distinction between nationals and aliens, rather than on the substantive rules of conduct implicated; i.e. human rights. The Restatement is silent regarding both the rationale and the authority for its special rule of non-responsibility for unauthorized violations of human rights. That this rule would adversely affect the effective protection of human rights is clear. This approach is especially difficult to reconcile with those norms of human rights which impose obligations of result on the state...[t]he ILC rules attribution were intended to apply across the board to all fields of international law, including both customary and conventional human rights law."¹²⁴

The ILC made clear in its commentary on Article 10 that

"under the system adopted by the Commission, no conduct of State organs or of the other entities mentioned in Article 10 is excluded from attribution to the State qua subject of international law".¹²⁵

More explicitly, Special Rapporteur Ago stated that the ILC should

"formulate a really general rule to cover all cases of violation of international obligations, and especially of the basic obligations of the State, whether they concerned security, peace, the sovereignty and the independence of States, or the protection of fundamental human rights."¹²⁶

The generally affirmed principle is that, under international law, the act of a private person not acting on behalf of the State cannot be attributed to the State and cannot as such

¹²⁴ See T. Meron, "Human Rights and Humanitarian Norms as Customary law," 1989, at 160.

¹²⁵ YB Int'l L. Comm., 1975, at 61.

¹²⁶ YB Int'l L. Comm., 1975, at 16, UN Doc. A/CN.4/SER.A/1975 (1976).

involve the responsibility of the State.¹²⁷ Article 11 of the draft articles on state responsibility also states that:

- "1. [T]he conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.
2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10." ¹²⁸

The strictly negative conclusion reached regarding the attribution to the State of the acts of private natural and legal persons and or the other persons does not imply, however, that the State cannot incur international responsibility for such acts on other grounds.¹²⁹ According to the ILC, it is enough to point out that such obligations exist. If, in a particular situation, the State or the entities mentioned in article 7 failed to take adequate protective measures and an attack by individuals took place, there would be an act of the State related to the acts of individuals---an act of the State constituting a breach of an international obligation of that

¹²⁷ The principle that the act of an individual cannot be attributed to the State as a source of the State responsibility is clearly proclaimed in the awards rendered at the beginning of the twentieth century (on 30 September 1901, to be precise) by the arbitrator Ramiro Gil de Uribarri who, under the Italian-Peruvian Convention of 25 November 1899, was entrusted with the task of ruling on the claim of Italian nationals residing in Peru. United Nations, Reports of Arbitral Awards, Vol. XV (UN Pub., Sales No.66.V.3), at 439. See also *Poggioli* case, *ibid.*, Vol. X (UN Pub., Sales No.60.V.4); the *British Property in Spanish Morocco* case, *ibid.*, Vol. II (UN Pub., sales No. 1949.V.1), at 636, 709 and 710.

¹²⁸ YB Int'l L. Comm., 1975, at 70.

¹²⁹ YB Int'l L. Comm., 1975, Vol.II, at 71.

State.¹³⁰ The purpose of paragraph 2 of Article 11 is to make it clear that the State can sometimes incur an international responsibility on the occasion of acts of a private person or of persons referred to in paragraph 1 of Article 11, but to specify at the same time that this responsibility derives, not from some kind of endorsement by the state of the acts of individuals, but from separate conduct attributable to the State under Articles 5 to 10 of the draft---conduct which is merely related to the acts in question. The acts of private persons or of persons acting in a private capacity then constitute an external event which serves as a catalyst for the wrongfulness of the State's conduct.¹³¹ The Inter-American Court of Human Rights suggested, in the case of *Velasquez Rodriguez*, that the acts of public authority which are imputable to the state do not exhaust all the circumstances in which a state is obligated to prevent, investigate, and punish human rights violations, nor the cases in which the state itself might be responsible for violations. A breach of human rights which is initially not imputable to a state, having been committed by either a private or by an unidentified person, can generate state responsibility not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it according

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

to the requirements of the American Convention.¹³² The critical question, according to Professor Meron, therefore, is whether the state has demonstrated lack of due diligence by allowing the act to take place either with its support or acquiescence or by not taking measures designed to prevent the act or to punish those responsible.¹³³

This issue is particularly important in terms of international protection of human rights. Professor Meron aptly puts it that:

"[A]lthough contemporary human rights law focuses on the duty of governments to respect the human rights of individuals, human rights violations committed by one private person against another (e.g. deprivation of life and liberty or the perpetration of acts of egregious discrimination) cannot be placed outside the ambit of human rights law if that law is ever to gain significant effectiveness.¹³⁴

Professor Meron seems to suggest in the above passage that all private conduct should be subject to international protection. This view, however, is such a big leap towards international protection of civil rights that most states are not yet ready to accept it. But for the purpose of enhancing international protection of civil rights, we can at least adopt the view that, though the principle of limiting responsibility to organs or agents of the state might be retained, this concept should be

¹³² Judgment of 29 July 1988, Inter-American Court of Human Rights, Ser. C, Decisions and Judgements, No. 4, paras. 172-173.

¹³³ T. Meron, "Human Rights and Humanitarian Norms as Customary Law," 1989, at 171.

¹³⁴ See T. Meron, "Human Rights and Humanitarian Norms as Customary Law," 1989, at 162.

interpreted liberally so as to cover any conduct in which the state can be held directly or indirectly imputable, including liability for a failure to control private abuses and for an unreasonable delay to provide remedies for the affected individuals.¹³⁵

In *Tel-Oren v. Libyan Republic*, Judge Edwards observed that "the trend in international law is toward a more expansive allocation of rights and obligations to entities other than state."¹³⁶ The ILC acknowledged this reality when, in a different context, it deplored "[t]he frequency with which at the present time the principles of international law...are set at naught by individuals or groups of individuals..."¹³⁷ Because the purpose of human rights is to protect human dignity, and because some essential human rights are often breached by private persons, the obligation of states to observe and ensure respect for human rights and to prevent violations cannot be confined to restrictions upon governmental powers but must

¹³⁵ For example, in the famous arbitration of the *Alabama Claims* (1872), the Tribunal held that the British Government was internationally liable for failing "to use due diligence in the performance of its neutral obligations" to prevent the injury. See C.G. Fenwick, "Cases on International Law," 2nd ed., 1951, at 708. In other cases, the (unlawful) act or omission giving rise to the responsibility of the State was not the State's failure to take prompt action to prevent the individual from committing the wrong, but its negligence or impotence in taking the necessary measures which any State ought to take to punish the act by prosecuting and imposing penalties on the wrongdoer. See *Janes Claim* (1926), *ibid.*, at 115.

¹³⁶ 726 F.2d 774, 795 (1984).

¹³⁷ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Rep., 1980, at 42.

extend to at least some private 'interferences' with human rights.¹³⁸ States should exercise due diligence to prevent violations by non-governmental actors; the standard of care required would depend on the character and the importance of the norm protected.¹³⁹ When prevention fails, states should resort to criminal proceedings against the perpetrator of human rights violations and should ensure that their internal law provides the victim with effective remedies against the responsible private actor.¹⁴⁰ The "to respect and to ensure to all individuals" clause of Article 2 (1) of the International Covenant on Civil and Political Rights implies the duty of states to ensure compliance by private persons with some of the Covenant's norms, or, at a minimum, to adopt measures "against private interference with enjoyment of the rights..."¹⁴¹ This interpretation is supported by the practice of the Inter-

¹³⁸ See Forde, "Non-Governmental Interferences with Human Rights," 56 Brit. YB Int'l L., 1985, at 253.

¹³⁹ See F.V. Garcia-Amador, L.B. Sohn and R.R. Baxter, "Recent Codification of the Law of State Responsibility for Injuries to Aliens," 1974, at 27-28.

¹⁴⁰ In the *Velasquez Rodriguez* case, which involved causing the disappearance of individuals, the Inter-American Court of Human Rights interpreted the obligation of Honduras "to ensure to all persons subject to [its] jurisdiction" the rights recognized in the American Convention of Human Rights as encompassing the obligation to punish the perpetrators of violations of such rights. Judgment of 29 July 1988, Inter-American Court of Human Rights, Ser.C, Decisions and Judgments, No. 4, para.166.

¹⁴¹ See Buergenthal, "To Respect and to Ensure: State Obligations and Permissible Derogations," in Henkin (ed.): *The International Bill of Rights*, 1981, at 72, 77-78; Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States," 32 Am. U.L.Rev., 1982, at 31-32.

American Court of Human Rights in application of Article 1 of the American Convention of Human Rights and of the European Commission and Court of Human Rights in application of Article 1 of the European Convention (which provides that the "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention") and other provisions of the European Convention on Human Rights.¹⁴²

Whether a particular human right stated in an international instrument must be respected not only by public but also by private actors depends on the interpretation of the provision, i.e. its language, context, purpose, and object. Because the object of human rights treaties is to ensure effective protection of human dignity, due weight must be given to the principle of effectiveness in construing human rights treaties. When a human rights treaty establishes an obligation of result, and that result may be frustrated by private action, the arguments for an interpretation reaching private action are compelling.

3.4. *Exhaustion of Local Remedies*

The "exhaustion-of-local-remedies" rule is a universally accepted condition for a State seeking redress on behalf of a

¹⁴² See generally A.A.C. Trindade, "The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights," 1983.

national denied rights under international law.¹⁴³ It applies to state applications in the same way as it does to individuals.¹⁴⁴ As the International Court noted, the policy underlying it is important: it aims to ensure that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system".¹⁴⁵ The principle of the exhaustion of local remedies is closely related to the development of international obligations regarding the treatment accorded by a State to foreign natural or juridical persons and the prevention on injury to such persons and their property.¹⁴⁶ International arbitration case-law clearly confirms this principle. In his award in the *British Property in Spanish Morocco* case, rendered in 1925, Max Huber, the arbitrator, held the requirement of the exhaustion of local remedies to be "a recognized principle of

¹⁴³ In its judgment in the *Interhandel* case (1959), the International Court of Justice took a definite position in the matter when it affirmed that: "[T]he rule that local remedies must be exhausted...is a well-established rule of customary international law". ICJ., Rep., 1959, at 27. See also F.V. Garcia-Amador, L.B. Sohn and R.R. Baxter, "Recent Codification of the Law of State Responsibility for Injuries to Aliens," 1974, at 72-73.

¹⁴⁴ See case of *Ireland v. United Kingdom*, Eur. Court H.R., Series A, Judgement, 1987, at 159.

¹⁴⁵ *Interhandel* case, ICJ Rep., 1959, at 27.

¹⁴⁶ *Mavrommatis Palestine Concessions* case, PCIJ., Series A, No. 2, 1924, at 12; *Panevezys-Saldutiskis Railway* case, PCIJ., Series A/B, No. 76, 1939, at 18.

international law";¹⁴⁷ in its decision of 1930 in the *Mexican Union Railway* case, the British/Mexican Claims Commission stated that the principle in question was "one of the recognized rules of international law",¹⁴⁸ in its award of 1956 in the *Ambatielos Claim* case the Greece/United Kingdom Commission of Arbitration described the requirement of the full utilization of local remedies as a rule "well established in international law",¹⁴⁹ and, in its decision of 1958, the tribunal set up by Switzerland and the Federal Republic of Germany for the Agreement on German External Debts affirmed that: "There can be no doubt that the rule of exhaustion of local remedies...is...a generally accepted rule of international law".¹⁵⁰ International jurisprudence is thus unanimous in recognizing the existence of the principle of the exhaustion of local remedies in general international law, independently of any special provisions embodied in treaty instruments. At the same time, it is a fact that all the specific cases considered by international courts in which they indicated that they recognized this principle are cases involving the breach or alleged breach of international obligations concerning the treatment accorded by a State in its

¹⁴⁷ United Nations, Reports of International Arbitral Awards, Vol. II, (United Nations Publication, Sales No. 1949.V.1), at 731 (translation by the Secretariat).

¹⁴⁸ *Ibid.*, Vol.V (Sales No. 1952, V.2), at 122.

¹⁴⁹ *Ibid.*, Vol. XII (Sales No. 63, V.3), at 118-119.

¹⁵⁰ International Law Reports, 1958-I, Vol. 25, 1963, at 42.

territory to alien or their property.¹⁵¹

The character of the principle of exhaustion of local remedies as one of general international law is also recognized by virtually all the learned writers who have considered the question.¹⁵² It is as a principle applicable under general international law that the condition of the exhaustion of local remedies was taken into consideration in the resolution adopted in 1956 by the Institute of International Law.¹⁵³ And it was on the same understanding that the principle stating this condition was included in the draft articles on state responsibility for injury caused in their territory to the person or property of aliens, adopted under the auspices of international organizations.¹⁵⁴ It is nowadays also believed that the local remedies rule applies to any international proceeding whether judicial, arbitral or conciliation.¹⁵⁵

The rule makes frequent references to the treatment of

¹⁵¹ YB Int'l L. Comm., 1977, Vol. II, at 32.

¹⁵² See, for example, I.L. Head, "A Fresh Look at the Local Remedies Rule," 5 Can.Y.B.Int'l L., 1967, at 142-158; A.A.C. Trindade, "The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights," 1983; C.F. Amerasinghe, "Local Remedies in International Law," 1990.

¹⁵³ See *Annuaire de l'Institut de droit international*, 1956 (Basel), vol. 46, at 364.

¹⁵⁴ YB Int'l L. Comm., 1977 Vol. II, at 34.

¹⁵⁵ See O. Schachter, "International Law in Theory and Practice," 1991, at 213.

aliens.¹⁵⁶ For instance, Eagleton notes that it is a recognized rule that an international tribunal will not maintain a claim put forward on behalf of an alien on account of alleged denial of justice unless the person in question has exhausted the legal remedies available in the state concerned.¹⁵⁷ The demanding requirement of developing international law in relation to protection of human rights generally and civil rights in particular, however, extends its application to those relations between the state and its own nationals.¹⁵⁸ The requirement that local remedies be exhausted before a claim against a state may be submitted to an international forum is stated in all of

¹⁵⁶ Even Article 22 of the draft articles on state responsibility addressed to the treatment of aliens only. It provides that

"[W]hen the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.

YB Int'l L. Comm., 1977, Vol.II, at 30. See also F. Dunn, "The Protection of Nationals," 1932; G. Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" 55 Am. J.Int'l L., 1961, at 863-891; R.B. Lillich, "International Law of State Responsibility for Injuries to Aliens," 1983.

¹⁵⁷ See Eagleton, "The Responsibility of States in International Law," 1928, at 95-124.

¹⁵⁸ See T. Meron, "Human Rights and Humanitarian Norms as Customary Law," 1989, at 171-182.

the principal human rights treaties. Individual victims of violations may submit their complaints before international fora against violating states. Article 5(2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights provides that

"[T]he Committee shall not consider any communication from an individual unless it has ascertained that:

...
(b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged."¹⁵⁹

The application of the principle of local exhaustion of remedies is required before complaints with respect to violation of international obligation of observing and respecting human rights are brought by states before international fora. Article 41(1)(c) of the international Covenant on Civil and Political Rights provides that

"[T]he Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the

¹⁵⁹ Other international human rights conventions also contain this principle, e.g. American Convention on Human Rights, Article 46(1)(a); European Convention on Human Rights, Article 26; African Charter on Human and Peoples' Rights, Articles 50, 56(5)-(6); International Convention on the Elimination of All Forms of Racial Discrimination, Article 14(7)(a); Inter-American Convention to Prevent and Punish Torture, signed 9 Dec. 1985, Article 8, OAS Doc. OEA/Ser. A/42(SEPT); Convention Against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 22(5)(b).

application of the remedies is unreasonably prolonged."¹⁶⁰ By giving the state an opportunity to redress an alleged breach of international human rights through its own apparatus and under its national law before the claim becomes admissible for consideration by an international authority, the rule aids the continuing process of acceptance of international human rights obligations by states. The ILC observes that

"[T]he real reason for the existence of the principle of the exhaustion of local remedies must always be kept in mind: it is to enable the State to avoid the breach of an international obligation by redressing, through a subsequent course of conduct adopted on the initiative of the result required by the obligation."¹⁶¹

The exhaustion requirement facilitates the balancing of human rights goals against both state sovereignty and the reluctance of states to accept third-party involvement in relations between government and citizens, which have traditionally been viewed as matters of national jurisdiction.¹⁶² Commentators have therefore considered exhaustion as "a reasonable rule which is predicated both on practicality and on due respect for the sovereignty of

¹⁶⁰ See further European Convention on human Rights, Article 26; African Charter on Human and Peoples' Rights, Articles 50, 56(5)-(6); International Convention on the elimination of All Forms of Racial Discrimination, Article 11(3); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 21(1)(c).

¹⁶¹ YB Int'l L. Comm., 1977, Part II, at 47.

¹⁶² YB Int'l L. Comm., 1977, UN Doc. A/CN.4/SER.A/1977 (1978) (remarks of Mr. Ushakov). See also *ibid.*, at 271: "[I]n the case of human rights...exhaustion of local remedies was still a matter for domestic jurisdiction, and ...it was a little too soon to require countries to accept compulsory international jurisdiction." (remarks by Mr. Jagota).

States".¹⁶³ Special Rapporteur Ago also notes that

"the minds most heedful of today's problems and of the difficulties in solving them realize that compliance with this essential requirement may well be the best guarantee of further substantial progress in the acceptance of new obligations with regard to human rights. In the circumstances, the Special Rapporteur considers that it would be injudicious to tamper with the existing general scope of the principle in the name of an alleged progressive development which others might regard as a step backwards in the matter of guarantees of equal sovereignty for all States."¹⁶⁴

When the ILC, in its Draft Articles for State Responsibility, specifies that the rule of exhaustion of local remedies does not apply to obligations of means, what is apparently in its mind is that domestic remedies are seldom available for the breach of treaty commitments to enact or to annual legislation. However, their availability in some countries should not be entirely ignored.

In other cases, however, an obligation of means contemplates administrative or police action in favour of an individual. It is entirely possible that the conduct of such authorities, when in breach of the state's international obligations, can be appealed to a higher administrative authority or to a court of law competent to revoke the initial decision. The rationale for excluding such cases from the requirement of exhaustion is not

¹⁶³ See de Zayas, Moller, and Opsahl, "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee," 28 Ger. YB Int'l L., 1985, at 24.

¹⁶⁴ Reberto Ago, Sixth Report on State Responsibility, YB Int'l L.Comm., 1977, part II, at 43, UN Doc. A/CN.4/SER.A/1977/Add.1 (Part 1) (1978).

clear. Whether exhaustion is required should not depend on the distinction between obligations of results and obligations of means, but primarily on the availability and effectiveness of remedies, and such considerations as the individual or massive character of acts impugned, and whether the case can be characterized as one of direct injury caused by one state to another. It would, therefore, appear that as regards the question of exhaustion of local remedies, the ILC's distinction between obligations of means and obligations of results appears unnecessary and perhaps even misleading.

The principle of exhaustion of local remedies is a flaw in international protection of human rights in general and civil rights in particular because of the "hesitations and delays" of violating states. Thus, the exhaustion of local remedies may be an obstacle to "a more direct, quicker and more effective form of protection of human rights".¹⁶⁵ The remark, of course, is based on the presumption that an international protection is more effective than domestic.

Customary international law, therefore, imposes a limitation on the application of the principle of exhaustion of local remedies. The ILC has delineated the general parameters of the exhaustion requirement, beyond which exhaustion is not required, concluding:

"(a) that a remedy should not be used unless it holds out real---even if uncertain---prospects of success. In other words, the individual concerned is under no obligation to

¹⁶⁵ *Ibid.*, at 42-43.

waste his time attacking, before a domestic court, a State measure which is, in fact, final. He cannot be required to use a remedy which would be a mere formality, as, for example, where it is clear from the outset that the law which the court will have to apply can lead only to rejection of the appeal (case of appeal against a measure in conformity with a law which cannot be set aside; of a court bound by a previous judgment rejecting a similar appeal or by a well-established body of unfavourable precedent; of proven partiality of the court, accede.); (b) that a remedy should not be used unless the success it may bring is not a merely formal success, but can actually produce either the result originally required by the international obligation or, if that is no longer possible, an alternative result which is really equivalent.¹⁶⁶

To be "available and effective" means that it is not only available to the person concerned but also sufficient, that is to say capable of redressing the complaints.¹⁶⁷ The jurisprudence of the Human Rights Committee, established under Article 28 of the International Covenant on Civil and Political Rights, has similarly established that exhaustion of local remedies is required only to the extent that local remedies are both effective and available.¹⁶⁸

The basic requirement is that the remedies be both available

¹⁶⁶ Yb Int'l L. Comm., 1977, part II, at 48.

¹⁶⁷ *Stogmuller* case, 9 Eur. Ct. HR (Ser.A) 42 (1969). See also *De Wilde, Ooms and Versyp* cases, 12 Eur. Ct. HR (Ser.A) 29 (1971), at 33.

¹⁶⁸ 39 UN GAOR Supp. (No. 40) at 117, UN Doc. A/30/40 (1984). The Committee held that an extraordinary remedy, such as seeking the annulment of a decision of the Ministry of Justice, does not constitute an effective remedy within the meaning of Article 5(2)(b) of the Optional Protocol. *Ibid. Teti Izquierdo v. Uruguay*, Communication No. R. 18/73, 37 UN GAOR Supp. (No. 40) at 179, 184, UN Doc.A/37/40 (1982).

and effective.¹⁶⁹ The availability rule implies that exhaustion is not required for those remedies that are not available. Availability implies, among other things, accessibility. Thus, exhaustion may not be required when, because of strong animosity towards the nationals of a particular country¹⁷⁰ or a particular religious or ethnic group, redress through local remedies appears impossible.¹⁷¹ There are also specific aspects of accessibility which are relevant to the limitations on the operation of the rule of exhaustion of local remedies. There may be remedies which, although available, are not in the circumstances applicable to the particular injury of which the individuals complain. International courts or organs have then tended to regard the remedy as not available. There are several cases which have come before the Human Rights Committee in which the remedy of habeas corpus was held not to be exhaustible because it was not available according to the law to persons arrested under prompt security measures in Uruguay.¹⁷² Thus, it is not the theoretical existence of a remedy under the law of the host or respondent State which makes it exhaustible, but

¹⁶⁹ YB Int'l L. Comm., 1977, part II, at 47; see also C.F. Amerasinghe, "Local Remedies in International Law," 1990, at 166-171, 235-240.

¹⁷⁰ *Ibid.*, at 43.

¹⁷¹ See T. Meron, "Human Rights and Humanitarian Norms as Customary Law," 1989, at 176.

¹⁷² See Communication No. 8/1977, HRC Selected Decisions at 48; Communication No. 28/1978, HRC Selected Decisions at 58-59; Communication No. 44/1979, HRC Selected Decisions at 77, 79.

rather whether according to that law it is applicable to the claimant's case. By the same token it would follow that it must be quite clear according to the law of the host or respondent State that the remedy in question is inapplicable to the claimant's case. On the other hand, in Communication No. 70/1980 the Human Rights Committee (the HRC) held that, where defence counsel who had been appointed by the host or respondent State advised that the extraordinary remedies of annulment and review were not available, this was sufficient to satisfy the limitation of unavailability.¹⁷³ This approach to unavailability must be regarded as very special. It warrants the conclusion that counsel's advice is conclusive on the availability of remedy, regardless perhaps of the factual situation, only where a person pursuing remedies has had to have such counsel appointed by the host or respondent State. It does not open the floodgates to the opinions as such of any counsel retained by a claimant. It is because the host or respondent State assumed the responsibility of appointing the claimant's or applicant's counsel that it is bound by his or her opinion. In this situation the doctrine of estoppel or the principle of good faith may more properly be invoked. Apart from such action on the part of the host or respondent State which prevents the claimant or applicant from access to remedies, such as refusing to allow him to have legal representation, there have been some cases brought before the Human Rights Committee in which the respondent State has

¹⁷³ HRC Selected Decisions at 131.

obstructed the course of justice and thus made remedies inaccessible. In Communication No. 29/1978 the HRC held that, where the defence lawyers had either been imprisoned or disappeared, remedies were not accessible, evidently because the failure to exhaust remedies was attributable to the obstructive actions of the respondent State.¹⁷⁴

The requirement cannot be imposed where domestic remedies are manifestly ineffective or where they do not exist, as for example, because of immunity of the State from suit.¹⁷⁵ The limitation arising from the positive requirement that the remedy be effective or adequate for the object of the claim or application implies that ineffective remedies need not be exhausted. In the case of *Finnish Ships Arbitration*, it was held that a claimant was not under an obligation to resort to an appeal which was obviously futile.¹⁷⁶ The rule which evolved in the *Finnish Ships Arbitration* was applied later by Judge Lauterpacht in the *Norwegian Loans* case, where the issue of non-exhaustion of local remedies was raised but not decided by the Court. The plaintiff State, France, argued that there were no remedies to exhaust, but Judge Lauterpacht in a separate opinion held that the Norwegian objection was good because it was not

¹⁷⁴ HRC Selected Decisions at 11-12. See also Communication No. 63/1979, HRC Selected Decisions at 102.

¹⁷⁵ See O. Schachter, "International law in Theory and Practice," 1991, at 213.

¹⁷⁶ *Finland v. Great Britain*, 1934, United Nations, Reports of International Arbitral Awards, at 1504.

clear that resort to the Norwegian courts would have been absolutely futile.¹⁷⁷ The application of the test of obvious futility has resulted in the dismissal of the objection that local remedies had not been exhausted in several kinds of cases. First, it has been held that where resort to the courts will result in the repetition of a uniform line of decisions adverse to the injured, the remedy is obviously futile.¹⁷⁸ The HRC supported this view when it held that in a common law jurisdiction such as Canada which recognizes the doctrine of *stare decisis*, the existence of a decision given by the highest court in the State which was binding on all courts rendered the exhaustion of internal remedies obviously futile.¹⁷⁹

Second, as in the *Finnish Ships Arbitration*, there is no need to resort to a court or body which has no jurisdiction over the issue raised by the injured. This is so whether it is a case of resort to a court of first instance or a court of appeal. However, in such a case this point must be strictly proved, as it was in the *Finnish Ships Arbitration*. In the *Panavezys-Saldutiskis Railway Case* the argument was raised that it would have been useless to take the matter to the Lithuanian courts because they would not take jurisdiction over an "act of state",

¹⁷⁷ ICJ Rep., 1957, at 39.

¹⁷⁸ *Finnish Ships Arbitration (Finland v. Great Britain)*, 1934, United Nations, Reports of International Arbitration Awards, at 1495, endorsed this principle. See also the *Johnson case (USA v. Peru)*, de La Pradelle-Politis, 2 RAI, 1878, at 593.

¹⁷⁹ See Communication No. 24/1977, HRC Selected Decisions, at 10.

since this was an act in performance of the Government's public function and not a matter "concerning a civil right" within the meaning of the Lithuanian Code of Civil Procedure. The Permanent Court of International Justice held that it was not satisfied that this was the case in the absence of a Lithuanian court decision on the point.¹⁸⁰ The difference between the two cases is that in the *Finnish Ships Arbitration* the law consisting of statute and common law was quite clear, while in the *Panavezys-Saldutiskis Railway Case* the law, as it stood, was not so clear and therefore the Court refused even to examine it. In the *Norwegian Loans Case* Judge Lauterpacht's view was similar, namely that the position was not clearly what the French Government made it out to be.¹⁸¹ In the *Interhandel Case*, the International Court of Justice took basically the same stand.¹⁸² The fact that in the *Panavezys-Saldutiskis Railway Case* the court refused to examine the issue must be explained by the fact that it was not at all clear on the face of it that the Estonian argument was a good one. In the *Finnish Ships Arbitration* the converse was the case and, therefore, the tribunal examined the law to find that the Finnish argument was a good one. Thus, it may further be asserted that unless it appears that there is a clear case that no tribunal has jurisdiction in the case in hand an international tribunal will not even examine the municipal

¹⁸⁰ [1939] PCIJ Series A/B No. 76, at 19.

¹⁸¹ ICJ Rep., 1957, at 39.

¹⁸² ICJ Rep., 1959, at 26.

law.¹⁸³

Third, where it is clear that a national law justifying the acts of which the injured complains would have to be applied by the local organs or courts, thus rendering recourse to them obviously futile, local remedies need not be exhausted.¹⁸⁴

Fourth, absence of independence of the courts has been held to exempt the injured or claimant from resorting to the courts. In the *Robert E. Brown* case, an injured party was excused from exhausting local remedies because the courts were at the time completely under the control of the Executive.¹⁸⁵ The HRC has taken a similar view in holding that where the judicial power was subordinated to the Executive by the issue of a decree, and independent and impartial justice could not be expected from the military courts, such local remedies did not have to be invoked.¹⁸⁶

Fifth, where the remedies available clearly will not satisfy the object sought by the claimant, they need not be resorted to because they are ineffective or obviously futile. There are

¹⁸³ *Finnish Ships Arbitration (Finland v. Great Britain)*, 1934, United Nations, Reports of International Arbitration Awards, at 1504. In the *Norwegian Loans* case, Judge Lauterpacht's view was similar; see ICJ Rep., 1957, at 39. In the *Interhandel* case, the ICJ took basically the same stand; see ICJ Rep., 1959, at 26.

¹⁸⁴ *Forests of Central Phodope case (Greece v. Bulgaria)*, United Nations, Reports of International Arbitral Awards, 1933, at 1405.

¹⁸⁵ *USA v. Great Britain*, *ibid.*, 1923, at 120.

¹⁸⁶ Communication No. 63/1979, HRC *Selected Decisions*, at 102.

several decided cases concerning the protection of human rights under the European Convention on Human Rights. Where the object of the claimant's action was to prevent his removal from a State's territory of the Convention, a court action which did not have suspensive effect was not a remedy that had to be exhausted because it was obviously ineffective for the object sought by the claimant.¹⁸⁷ It is evident that for the exception to operate on the ground that reparation is not adequate for the purpose of satisfying the international claim, the inadequacy of the remedy for the specific object must be proven beyond reasonable doubt.

Sixth, absence of due process of law in the legal system of the host or respondent State is a good excuse for not exhausting remedies. This ground is specifically referred to in Article 46(2) (a) of the American Convention on Human Rights and was also supported in the Institut de droit international.¹⁸⁸ In numerous cases, the Committee on Human Rights admitted individuals' petitions without resorting to the rule of exhaustion of local

¹⁸⁷ *Becker v. Denmark*, Application No. 7011/75, 4 *Decisions and Reports*, ECHR, at 227-228 and 232-233. See also *X v. Denmark* Application No. 7465/76, 7 *Decisions and Reports*, ECHR, at 154; *X v. Austria*, Application No. 6701/74, 5 *Decisions and Reports*, ECHR, at 78-79; *Zamir v. UK*, Application No. 9174/80, *Reports and the Commission*.

¹⁸⁸ 36(I) *Annuaire de L'Institut de Droit International* (1935) at 435, 45 *Annuaire de L'Institut de Droit International* (1954) at 28. See also Harvard Law School, *Research in International Law II. Responsibility of States* (1929) at 134.

remedies because of lack of due process or fair trial.¹⁸⁹

Undue delay in the administration of justice has been also held to be a good reason for not exhausting local remedies.¹⁹⁰ This exception may be closely related to the general exception based on obvious futility but it is better considered separately, as delay may not always signify that there is a clear indication that the claimant will not succeed after a lapse of time.¹⁹¹ The delay necessary to make a remedy ineffective in each case will vary, it not being possible to lay down a specific limit for all cases, since several circumstances including the volume of work of involved in a thorough examination of the case are related.¹⁹² In the field of human

¹⁸⁹ See *Laura Almirari Garcia v. Uruguay*, 25 July 1983, Selected Decisions of the Human Rights Committee under the Optional Protocol, UN2, CCPR/C/OP/2, at 126-130; *Ngalula Mpandanjila et al v. Zaire*, 26 March 1986, *ibid.*, at 164-168; *Katy Solorzano de Pena v. Venezuela*, 26 March 1986, *ibid.*, at 183-187; *X v. S*, 13 November 1987, *ibid.*, at 4; *Moriana Hernandez Valentini de Bazzano v. Uruguay*, 15 August 1979, Selected Decisions of the Human Rights Committee under the Optional Protocol, UN2, CCPR/C/OP/1, at 40-43; *Ana Maria Garcia Lanza de Netto v. Uruguay*, 3 April 1980, at 45-49.

¹⁹⁰ See, for example, *Eric Hammel v. Madagascar*, 3 April 1987, Selected Decisions of the Human Rights Committee under the Optional Protocol, UN2, CCPR/C/OP/2, at 179-183.

¹⁹¹ However, undue delay in the administration of justice is regarded as a denial of justice in itself and is certainly one which does not require any further exhaustion of remedies. In the *El Oro Mining and Railway Co.* case, it was held that a court's delay in taking action for nine years was sufficient to make it an ineffective remedy. See *Great Britain v. Mexico*, 1931, United Nations, Reports of International Arbitral Awards, at 191.

¹⁹² *Ibid.*, at 198. In the *Interhandel* case, although ten years had already passed since the institution of the action, the Court did not hold that there had been undue delay in the

rights protection, undue delay has been acknowledged to be a reason for excusing the applicant from exhausting remedies. In some conventions the exception is referred to explicitly. The UN International Covenant on Civil and Political Rights, in Article 49, the UN International Covenant on the Elimination of All Forms of racial Discrimination, in Article II, and the American Convention on Human Rights, in Article 46, all make reference to the exception to the rule of exhaustion of local remedies where there is unwarranted delay in the application of remedies.

Professor Meron has made an observation that the principle of exhaustion of local remedies applies to state complaints involving individual victims, not to state complaints alleging widespread violation.¹⁹³ His conclusion is based upon his citation of Article 21(1)(c) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and his reference to the interpretation by the European Court of Human Rights of Article 26 of the European Convention of Human

provision of a remedy. Dissenting Judge Armond-Ugon was of the view that, because a further unknown period would have to elapse before remedies were exhausted, ten years already having passed, such remedies were too slow and could not be called adequate or effective and could be dispensed with. There was clearly a difference of opinion on whether there had been undue delay in the case. However, although the Court does not seem to have rejected the view that delay can operate in the injured's favour, it would seem that it did not consider the lapse of time as sufficiently long and important to influence the decision. See ICJ Rep., 1959, at 6, 87.

¹⁹³ See T. Meron, "Human Rights and Humanitarian Norms as Customary Law," 1989, at 178-180.

Rights.¹⁹⁴ Similarly, the European Commission of Human Rights held that exhaustion is not required in the case of the "five [interrogation] techniques [which] constituted an administrative practice" challenged in *Ireland v. United Kingdom*.¹⁹⁵ More generally, exhaustion is not required when an application brought by a state concerns the compatibility with the Convention "of legislative measures and administrative practices, regardless of any individual or specific injury..."¹⁹⁶ The requirement of exhaustion as construed by the European Commission and Court thus has not been allowed to obstruct consideration of the most important complaints brought by states, which are those involving patterns of violations.

3.5. *Obligations Erga Omnes and Standing*

It will be recalled that the International Court of Justice in the *Barcelona Traction* case declares that in respect of obligations relating to "the basic rights of the human person", "all States can be held to have a legal interest in their protection; they are obligations erga omnes".¹⁹⁷ "Such

¹⁹⁴ *Ibid.*, at 179.

¹⁹⁵ Application No. 5310/71, 1972 YB Eur. Conv. Hum. Rts. 92, at 246 (Eur. Comm'n of Hum. Rts.)

¹⁹⁶ *Austria v. Italy*, Application No. 788/60, 1961 YB Eur. Conv. Hum. Rts. 116, 152. See also *Greece v. United Kingdom*, Application No. 176/56, 1958-59 YB Eur. Conv. Hum. Rts. at 182, 184.

¹⁹⁷ *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, ICJ Rep., 1970, at 32.

obligations derive from ...the principles and rules concerning the basic rights of the human person. Some of the corresponding rights of protection have entered into the body of general international law...others are conferred by international instruments of a universal or quasi-universal character."¹⁹⁸ According to Professor Meron's readings about the above prominent dictum, the International Court of Justice did not mean to bestow *erga omnes* obligation character upon all human rights but only on rights which have matured into customary or general law of nations.¹⁹⁹ Some international obligations, apparently, are so basic that they run equally to all other states, and every state has the right to help protect the corresponding rights. When a state breaches an obligation *erga omnes*, it injures every state, including those not specially affected. As a victim of a violation of the international legal order, every state is therefore competent to bring actions against the breaching state.²⁰⁰

The ILC subsequently attempted to clarify the Court's pronouncement. Although in international law a correlation between the obligation of one state and the "subjective right" of another always exists, the ILC found that "this relationship may extend in various forms to States other than the State

¹⁹⁸ *Ibid.*

¹⁹⁹ See T. Meron, "Human Rights and Humanitarian Norms as Customary Law," 1989, at 192.

²⁰⁰ *Ibid.*, at 191.

directly injured if the international obligation breached is one of those linking the State, not to a particular State, but to a group of States or to all States members of the international community."²⁰¹ When an obligation *erga omnes*, in whose fulfilment all states have a "legal interest", is breached, the breaching state's responsibility is engaged *vis-à-vis* all of the other members of the international community. Therefore, "every State must be considered justified in invoking---probably through judicial channels---the responsibility of the State committing the internationally wrongful act."²⁰² The Court's reference in *Barcelona Traction* to general international law and to universal or quasi-universal agreements suggests that a fundamental right must be firmly established in general international law, and that mere moral claims or policy goals, important as these may be, do not qualify as *erga omnes* obligations.

The *erga omnes* character of human rights obligations is also suggested by Article 5(d)(iv) of the draft articles on state responsibility (part two) proposed by the ILC's Special Rapporteur, Professor Riphagen, which states:

"[F]or the purposes of the present articles 'injured State' means... (d) if the internationally wrongful act constitutes a breach of an obligation imposed by a multilateral treaty, a State party to that treaty, if it is established that... (iv) the obligation was stipulated for the protection of individual persons, irrespective of their

²⁰¹ YB Int'l L. Comm., 1976, part II, at 76, UN Doc. A/CN.4/SER.A/1976/Add.1 (part 2) (1977).

²⁰² *Ibid.*, at 99.

nationality.²⁰³

The ILC's report to the UN General Assembly furthered the consolidation of the concept of conventional *erga omnes* obligations by emphasizing that, in the situations mentioned in Article 5(d)(iv), "no particular state party to the treaty could be considered to be the 'injured' State."²⁰⁴

While the 1984 text of the Riphagen draft of Article 5(d)(iv) concerned only obligations imposed by treaties, Riphagen did not deny the existence of customary obligations in the field of human rights whose violation injures all states. The ILC amended Riphagen's article in 1985 to clarify that the principle stated in it also applied to international customary law.²⁰⁵ The amended Article 5(2)(e)(iii), as provisionally adopted by the ILC, defined "injured State" as follows:

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, an other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that...
(iii) the right has been created or is established for the protection of human rights and fundamental freedoms...²⁰⁶

Scholars, however, are divided upon the question: whether *erga omnes* obligations provide States standing (*locus standi*) to make an international claim even for those who are not their nationals because of a State's violation of its international

²⁰³ YB Int'l L. Comm., 1985, part II, at 20.

²⁰⁴ YB Int'l L. Comm., 1984, part II, at 102.

²⁰⁵ YB Int'l L. Comm., 1985, part I, at 3, 5.

²⁰⁶ *Ibid.*, at 27.

obligations including observance of and respect for human rights. Sinclair observes that

"[I]n the broadest of all possible senses, it could be said that every State had an interest in all rules of international law being observed. The real question, however, was whether a State was qualified to present itself as an injured State in respect of damage not inflicted upon itself or any of its nationals...He personally remained unconvinced that the materials at the Commission's disposal were sufficient to justify the confident assertion that the concept of the injured State could be dispensed with in the case of a breach of an obligation *erga omnes* and that every State without exception could be regarded as having an equal legal interest in the matter."²⁰⁷

However, Sinclair does not challenge the right of a state to pursue claims of persons other than its nationals under multilateral human rights treaties. Professor Schachter, while recognizing some of the values of the notion of obligations *erga omnes*,²⁰⁸ expresses the concern that the concept of obligations *erga omnes* and the growing recognition in international law of a right akin to *actio popularis* will be abused by states to initiate politically motivated actions against other states, thereby prompting a greater reluctance by states to accept the

²⁰⁷ YB Int'l L. Comm., 1983, at 130, UN Doc. A/CN.4/SER.A/1983 (1984).

²⁰⁸ Schachter notes that "[I] see distinct advantages in applying the concept of obligations *erga omnes* to the limited category of principles mentioned by the Court and the International Law Commission... It (*erga omnes* obligations) does express a collective interest of the community in the rights of all persons irrespective of nationality and it suggests the need for a "guardian" of that interest who would act solely on the basis of the law and objective facts. It lends support to such proposals as that for a United Nations Commissioner of Human Rights to act on behalf of all States in matters of grave violations of basic human rights." See O. Schachter, "International Law in Theory and Practice," 1991, at 212, 345.

compulsory jurisdiction of the ICJ and intensifying the tendency of states to enter reservations to such acceptance.²⁰⁹ He then expresses his suspicion that States will hesitate to open a Pandora's box which would allow every member of the now numerous community of States to become a "prosecutor" in judicial proceedings on behalf of the human rights of all persons.²¹⁰ Professor Meron, by responding to both Sinclair's view and that of Professor Schachter's, makes the following two points. First, Standing to pursue interstate complaints of human rights violations is explicitly confirmed in many human rights treaties without any requirement of proof of material damage. The difference between standing under treaty obligations and customary law decreases as the number of parties to widely accepted treaties covering a broad spectrum of human rights increases. In this regard, the list of the ILC, which includes no requirement of material damage as an element of international wrongful acts, is referred to. Second, Schachter's fears have not been borne out by post-*Barcelona Traction* experience. In addition, Meron observes that the growing recognition of the competence of all states to bring such actions has a symbolic significance highlighting the deeply rooted community values attached to the universal protection of human rights, though states not directly affected still hesitate to bring claims

²⁰⁹ See O. Schachter, "International Law in Theory and Practice," 1991, at 208-213.

²¹⁰ *Ibid.*, at 345.

against those which violate human rights. The acceptance of standing based on obligations *erga omnes* will help to deter states from committing egregious violations of human rights.²¹¹ And Meron believes that contemporary international law permits states, whether or not directly affected, to bring at least some actions involving human rights violations before competent international judicial or quasi-judicial organs.²¹²

The new Restatement of the American Law Institute cites the obligations *erga omnes* as authority for concluding that the obligations under the customary law of human rights are owed to all States and accordingly every State has a legal interest and standing to seek remedies for violations whether or not the individuals affected were nationals of the complaining State.²¹³ The Restatement, however, defines as breaches of customary human rights only breaches committed as state policy, thus including significant breaches and excluding sporadic violations.²¹⁴

Professor D'Amato, apparently, agrees with the existence of standing under obligations *erga omnes*. This conclusion may be drawn from his logic that "[A]ll nations have the same set of entitlements; each entitlement has equal standing; human rights (part of international law) are entitlements and universal

²¹¹ See T. Meron, "Human Rights and Humanitarian Norms as Customary Law," 1989, at 196, 200.

²¹² *Ibid.*, at 199.

²¹³ ALI Restatement (Third), sec. 703, Reporters Notes 3.

²¹⁴ *Ibid.*

entitlements."²¹⁵ Human beings are paramount, not states; hence the question is not whether states will or will not enforce international human rights, but rather whether states are legitimate entities at all. The legitimacy of and derivative status of states depend upon the recognition of individual human beings. The human rights violator is...an enemy of all mankind, and jurisdiction to punish his violations is universal.²¹⁶

There have been, so far, no cases in which a State has been accorded standing in a judicial or arbitral proceeding to seek redress when a violation has occurred affecting a national of another country. It is, moreover, less clear whether the right of states not directly affected is limited to gross and systemic violations. Because of scarcity of practice, the customary law on this point is not yet settled. This phenomenon, however, does not mean that the question of obligations *erga omnes* and standing is of only theoretical and academic importance in terms of international protection of civil rights. International institutions other than world tribunals, in the process of providing protection, do have in their minds the significance of the *Barcelona Traction's* dictum when they consider the issue of standing though they do not necessarily manifest such considerations. This thesis argues earlier that international obligations of civil rights apply nation's treatment of its own

²¹⁵ See A. D'Amato, "International Law: Process and Prospect," 1987, at 89-109.

²¹⁶ *Ibid.*

citizens as well as of nationals. It would be inconsistent, therefore, to grant standing only to countries whose own citizens are affected. Such a rule would make it impossible to enforce those obligations that a state has toward its own nationals, since no one would have standings on the assumption that international law has not yet progressed to the point of granting standing to the individual affected in the absence of some provision such as the Optional Protocol to the Covenant. Although the principle of obligations *erga omnes* apply to all violations of international customary law of civil rights in theory, it will be mostly likely in practice that an international tribunal will be most likely to grant standing for violations of those rights with *jus cogens* status.

CHAPTER FOUR
INTERNATIONAL REMEDIES

4.1. Resolution 1503 of the United Nations and Possible Remedies

The United Nations has been receiving letters from individuals complaining about violations of human rights ever since its foundation in 1945. For many years, however, the Commission on Human Rights (the Commission) considered that it had "no power to take any action in regard to any complaints concerning human rights". This attitude was approved by the Economic and Social Council in 1947 and reaffirmed by the Council in 1959.¹ Various attempts to adopt a more positive approach were made, but were regularly countered by the argument, from the former Soviet Union and others, that consideration of individual complaints would constitute "intervention in matters which are essentially within the domestic jurisdiction of States", in violation of Article 2(7) of the Charter of the United Nations.²

Only in the 1960's were the proponents of examining petitions from individuals successful in establishing a machinery within the United Nations. They rode the waves of decolonization and

¹ See Resolutions 75(v) and 728(f). An excellent account of the history and development of the treatment of human rights petitions can be found in T.J.M. Zuijdwijk, "Petitioning the United Nations," 1982.

² See A.H. Robertson, "Human Rights in the World," 1989, at 74.

the anti-racial discrimination movement. The establishment of this new machinery was a masterpiece of diplomacy. The proponents of a general procedure to examine petitions complaining about violations of human rights co-operated with the strong forces of decolonization and the movement against racial discrimination. At the same time, they managed to insert language in the relevant resolutions which was general enough to allow for action against blatant violations of human rights other than racial discrimination and colonialism.³

In May 1970 the Economic and Social Council (ECOSOC) adopted the procedure for handling petitions proposed by the Commission on Human Rights. The new ECOSOC Resolution 1503 (XLVIII), of May 27, 1970, sets out in detail the procedure for dealing with communications complaining about violations of human rights.⁴

The procedure begins in a working group appointed by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. A working group consists of a maximum of five members of the Sub-Commission. For the composition of the Group, an equitable geographical distribution has to be taken into account by the Sub-Commission. The working group may meet only once a year for a maximum period of 10 days, immediately before the sessions of the Sub-Commission. The working group has a mandate to examine the petitions complaining

³ See T.J.M. Zuijdwijk, "Petitioning the United Nations," 1982, at 14-25.

⁴ Resolution 1503 (XLVIII) of May 27, 1970 ESCOR, XLVIII, IA (E/4832/Add. 1), at 8-9.

about violations of human rights and the replies from Governments, if any. The working group has the power to bring before the full Sub-Commission "those communications, together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission".⁵ The working group takes such a decision by majority vote.⁶

The members of the working group receive the confidential list of communications containing complaints from individuals about violations of human rights and fundamental freedoms together with any replies from the Governments concerned. The members of the working group have access to the communications but the anonymity of the authors of the communications must be maintained in accordance with ECOSOC resolution 728F(XXVIII), para. 2(b).⁷ In practice, this must mean that the working group receives copies of the communications received by the Secretariat with the names and addresses of the authors deleted. The Secretariat is directed in resolution 1503(XLVIII) to circulate to the members of the full Sub-Commission only those petitions which the working group has singled out.⁸

It is up to the full Sub-Commission to decide whether or not

⁵ Resolution 1503, para. 1.

⁶ *Ibid.*, para. 5.

⁷ *Ibid.*, para. 4(b).

⁸ *Ibid.*, para. 4(c).

to refer particular situations "which appear to reveal a consistent pattern of gross and reliably attested violations of human rights" to the Commission on Human Rights.⁹ This decision is to be made on the basis of petitions and replies of governments that have been referred to the Sub-Commission by its Working Group as well as "other relevant information". Thus, the Sub-Commission is not confined to looking merely at petitions.

Once a situation has been referred to the Commission, the Commission has two options: (a) it can itself study the situation and report with recommendations to the Economic and Social Council; and (b) it can set up an *ad hoc* committee to investigate the situation.¹⁰

Detailed rules are set out for such a special investigatory body. The investigation by an *ad hoc* committee can only be carried out if the following conditions have been met. First, the ordinary rule of international law applies that the domestic remedies must have been exhausted. Second, the situation under investigation should not relate to "a matter which is being dealt with under other procedures prescribed in the constituent instruments of, or conventions adopted by, the United Nations and the specialized agencies, or in regional conventions, or which the state concerned wishes to submit to other procedures in accordance with general or special international agreements state concerned is required". Third, the consent of the state

⁹ *Ibid.*, para. 6.

¹⁰ *Ibid.*, paras. 6(a) (b).

concerned is required for the investigation.¹¹

The Committee will draw up its own rules of procedure. It shall be subject to the quorum rule. It is expressly provided that the committee will have the power to receive communications and hear witnesses. The committee's proceedings shall be confidential.¹²

When the investigation is completed, the committee reports to the Commission on Human Rights "with observations and suggestions as it deems appropriate".¹³ After the Commission has received the report, it can report in turn with recommendations to the Economic and Social Council.

With the instruction by the Economic and Social Council to the Sub-Commission to draw up rules of admissibility at its twenty-third session (in 1970) for the purpose of accepting or disregarding certain communications,¹⁴ the Sub-Commission in 1971 adopted rules of admissibility, which completed the UN machinery for the examination of petitions.¹⁵

¹¹ Up to 1990, the Commission on Human Rights never recommended the use of an *ad hoc* fact-finding body under Resolution 1503. It is presumed that the consent requirement is the major concern of the Commission. See F. Newman and D. Weissbrodt, "International Human Rights: Law, Policy, and Process," 1990, at 119-120.

¹² *Ibid.*, paras. 7(a) (b) (c).

¹³ *Ibid.*, para. 7(e).

¹⁴ *Ibid.*, para. 2.

¹⁵ Resolution 1 (XXIV) of August 13, 1971, reproduced in Report of the Twenty-fourth Session of the Sub-Commission (E/CN.4/1070), at 50.

Under the rules adopted, the communications may originate from authors in any of four categories: (a) a person or group of persons who, it can be reasonably presumed, are victims of a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms; (b) a person or group of persons who have direct and reliable knowledge of such violations; (c) non-governmental organizations (NGOs) acting in good faith in accordance with recognized principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and having direct and reliable knowledge of such violations; and (d) individuals who have second-hand information about violations of human rights; they must provide clear evidence with their communications.¹⁶

Since some of the communications sent by NGOs to the United Nations amount to "resorting to a politically motivated stand", the Commission on Human Rights and the Economic Council in 1975 chastised some of NGOs *inter alia* for taking a politically motivated stand. ECOSOC resolution 1919(LVIII) in paragraph 5 reminds the Sub-Commission "of the conditions of admissibility of communications approved in its resolution 1(XXIV) and requests it to apply these criteria strictly".

Anonymous communications are absolutely inadmissible. The authors of a communication must identify himself, but the Secretariat is, of course, under an obligation to keep the

¹⁶ Resolution 1(XXIV), para. 2 (a) (c).

identity of the author confidential, in accordance with ECOSOC resolution 728F(XXVII).

Rule 3(a) requires that the communications contain a description of the facts, indicating the purpose of the petition and the rights having been violated. To indicate which rights were violated, it is desirable that reference be made to international instruments. The guide prepared by the International Commission of Jurists lists the following instruments: (a) Universal Declaration of Human Rights; (b) Convention of the Elimination of all Forms of Racial Discrimination; (c) UN Minimum Rules for the Treatment of Prisoners; (d) International Covenant on Economic, Social and Cultural Rights; and (e) International Covenant on Civil and Political Rights.¹⁷ From the practice of UN bodies such as the *ad hoc* working group of experts, it appears that these instruments constitute the main body of UN human rights law against which gross violations are measured.

Rule 3(b) makes inadmissible those communications which contain language which is "essentially abusive and in particular if they contain insulting references to the states against which the complaint is directed". However, after the authors delete such language, the communications can be declared admissible if the other criteria are met. This raises the question whether the

¹⁷ International Commission of Jurists, "Gross Violations of Human Rights," 1973, at 8. The guide indicates this is not an exhaustive list; also Glenda da Fonseca, "How to File Complaints of Human Rights Violations," 1975, at 23.

Secretariat has a duty to return such a communication to its author and inform him of the opportunity to amend the communication.

An interpretative difficulty may result from rule 3(c), which declares a communication inadmissible "if it has manifestly political motivations and its subject is contrary to the provisions of the Charter of the United Nations". A similar provision is contained in rule 1(a), which provides that "the object of the communication must not be inconsistent with the relevant principles of the Charter, of the Universal Declaration of Human Rights and of the other applicable instruments in the field of human rights". The drafters certainly did not want rule 3(c) to be interpreted so broadly as to turn down all communications since, strictly speaking, every communication complaining about violations of human rights is in a certain sense politically motivated due to the fact that it puts the individual in an accusatory role against his own or another government before a UN body. The International Commission of Jurists, therefore, cautions its readers that a communication "should reflect above all, a humanitarian concern regarding the rights violated".¹⁸

Rule 4(b) states the usual requirement under international procedures that domestic remedies be exhausted first, "unless it appears that such remedies would be ineffective or unreasonably prolonged". No precise limitation period for submission is

¹⁸ *Ibid.*, at 9.

included in the rules. All that is required is that a communication be submitted to the UN "within a reasonable time" after the exhaustion of domestic remedies.¹⁹

The main criterion determining admissibility is laid down in rule 1(b):

"(b) Communications shall be admissible only if, after consideration thereof, together with the replies, if any, of the Governments concerned, there are reasonable grounds to believe that they may reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in any country, including colonial and other dependent countries and peoples."

The problem with this criterion is, apparently, how to meet the "a consistent pattern" test. If this requirement were, theoretically, applied to each communication separately, communications from NGOs would have the best chance of being declared admissible, because NGOs normally have the resources to present a series of cases of violations of human rights whereas individuals would have difficulty establishing a pattern. In fact, "a consistent pattern" test is not hard to meet. With an advanced world media network, a general picture of the human rights situation in a particular state is pretty clear for the world community. An individual's communication complaining about gross violations of his right(s) presented as against this background situation may easily meet the test. The situation may be analogous to the one in which a supreme court in a state grants leave for hearing an appeal from a lower court's

¹⁹ Rule 5.

decision. In order to enhance protection of human rights, the admissibility test should be applied in favour of those individual complainants who, obviously, fall short of effective and sufficient domestic remedies.²⁰

The purpose of all communications is to obtain some kind of remedy. The most a petitioner can obtain under Resolution 1503 is a public recommendation by ECOSOC to the country concerned that it cease its violations of human rights.

The fundamental difference between the Resolution 1503 (XLVIII) procedure and the Optional Protocol procedure²¹ is that the former is concerned with the examination of situations, whereas the latter is concerned with the examination of individual complaints, i.e. particular instances of alleged violations of human rights.²² Other differences between

²⁰ For developments of applications of Resolution 1503, see T.J.M. Zuijdwijk, "Petitioning the United Nations," 1982, at 39-54.

²¹ Under the Optional Protocol to the International Covenant on Civil and Political Rights, the Human Rights Committee is established to receive and consider communications from individuals subject to the jurisdiction of a state party to the Optional Protocol who claim to be victims of a violation by that state of any of the rights set forth in the Covenant (By 16 August 1988, 42 States had accepted the competence of the Human Rights Committee by ratifying the Optional Protocol.). See B.G. Ramcharan, "The Concept and Present Status of the International Protection of Human Rights: Forth Years after the Universal Declaration," 1989, at 142-143.

²² This difference has been underscored by the Human Rights Committee in its second report to the General Assembly where the Committee dealt with the question of application of article 5(2)(a) of the Optional Protocol, which precludes the Committee from considering a communication if the same matter is being examined under another procedure of international investigation or settlement. The report states in this connection: "...The

Resolution 1503 procedure and the Optional Protocol procedure include the following: (a) the former is based on a resolution of a United Nations organ and its implementation is to a high degree dependent on a voluntary co-operation of States, whereas the latter is based on a binding international treaty under which States parties have accepted the application of a specific procedure for the examination of certain claims brought against them; (b) the former is applicable with regard to all individuals, whereas the latter is applicable only with regard to those states which are parties to the Optional Protocol; (c) the former embraces violations of all human rights as recognized in the Universal Declaration of Human Rights, whereas the latter is restricted to those civil and political rights which are protected by the International Covenant on Civil and Political Rights.²³

When Resolution 1503 procedure was set up many saw it as an important breakthrough and a move away from a neglect of individual complaints about violations of human rights which had been described by the Secretary-General as "bound to lower the

Committee has determined that the procedure set up under ECOSOC resolution 1503(XLVII) does not constitute a procedure of international investigation or settlement within the meaning of article 5(2) (a) of the Optional Protocol, since it is concerned with the examination of situations which appear to reveal a consistent pattern of gross violations of human rights and a situation is not 'the same matter' as an individual complaint". See General Assembly Official Records: 33rd session, Supplement No. 40(A/33/40), Report of the Human Rights Committee, paragraph 582.

²³ *Ibid.*, at 143-144.

prestige and authority not only of the Commission on Human Rights but of the United Nations in the opinion of the general public".²⁴

Criticism of the procedure has tended to focus on two of its prominent features: its confidential nature ²⁵ and its apparent lack of effectiveness.²⁶ Critics of the confidentiality of the procedure seem to assume that the best way to change behaviour is by confrontation, but in international affairs, as in personal relations, this is not the case. Significantly, confidentiality is a feature of the initial stage of proceedings under the European Convention on Human Rights and the United Nations Commission has a public procedure available in situations where it is appropriate. Moreover, although the procedure under Resolution 1503 is confidential, it is certainly not secret. Every communication is seen in summary by the forty-three government representatives on the Commission. Since the Commission is also informed of the government's response at each stage, it has been pointed out that "all decision-makers in the United Nations in the field of human rights are aware of the

²⁴ Report on Communications concerning Human Rights, Doc. E/CN. 4/165 of 2 May 1949.

²⁵ See R. Brody and D. Weissbrodt, "Major Development at the 1989 Session on the UN Commission on Human Rights," 11 Human Rights Quarterly, No. 4, November 1989, at 601.

²⁶ See H. Tolley, "The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications," 6 Human Rights Quarterly, 1984, at 433; see also "Disappointing Start to New U.N. Procedure on Human Rights," ICJ Review, 9 (1977), at 5.

available information on the human rights situation in the country concerned."²⁷ A procedure which was both confidential and secret would clearly be open to objection on the ground that governments would have no compelling reason to improve their practices. Under Resolution 1503 procedure, however, there is a sufficient degree of openness for the desire to avoid embarrassment to be significant.²⁸

This brings us to the second point, which concerns the effectiveness of the system. Here the criticism is that the procedure is cumbersome and slow and that this, together with the fact that the whole procedure is confidential, means that for long periods of time nothing appears to be happening and possible ignorance of recommendations made by ECOSOC.

Any procedure for protecting human rights ultimately must be judged by its results, and it is appropriate that Resolution 1503 should be assessed from this point of view. Before rejecting the confidential procedure as ineffective, however, we should be clear about what this kind of arrangement is meant to achieve. The objective is not, as is sometimes assumed, to register convictions against a state and then pass the decision elsewhere for enforcement. If this were so, criticism of the slowness and complexity of the procedure would certainly be

²⁷ See M.J. Bossuyt, "The Development of Special Procedures of the United Nations Commission on Human Rights," *Human Rights Law Journal*, vi, 1985, at 184.

²⁸ See F. Newman and D. Weissbrodt, "International Human Rights: Law, Policy, and Process," 1990, at 123-125.

justified. But this is not the aim. Rather the aim is to establish a dialogue with the government concerned and to make it clear, on the one hand, that if there is no improvement consideration of the case will continue, and on the other that co-operation will be rewarded.²⁹

Besides, the process under Resolution 1503 is not that confidential. Despite the confidential requirement set forth by Resolution 1503 language and considerable effort by responsible U.N. officials to keep the process secret, most authors of communications who participate in the meetings of the Sub-Commission and the Commission on Human Rights are able to obtain the relevant information. Some Sub-Commission members inform at least their own governments about the results of each step in the 1503 process---particular if their government has been accused of violating human rights. Once the members disclose anything, it is not surprising that word travels fast.³⁰

Since the object of the procedure is not to produce a judgement, but to maintain discreet political pressure, the complexity of the procedure is actually an advantage, for as a member of the Sub-Commission has observed:

Everything which induces a government to co-operate is particularly important because the efficacy of United Nations procedures in the field of human rights depends to a large extent, on the measure of dialogue which can be

²⁹ See F. Ermacora, "Procedure to Deal With Human Rights Violations: A Hopeful Start in the United Nations," 7 *Review des Droit de l'Homme*, 1974, at 670-686.

³⁰ See F. Newman and D. Weissbrodt, "International Human Rights: Law, Policy, and Process," 1990, at 121.

established between the United Nations and the government of the country concerned. The procedure is useful as long as it is a means of exercising pressure on the country concerned. By expressing regrets when communications are kept pending ...instead of being forwarded to the superior organ, human rights friends overlook the point that there is no real solution to the problem at the end of the procedure. The succession of steps composing the procedure is more influential than the actual step itself.³¹

Because the procedure is confidential it is, of course, difficult to know precisely what effect it has on governments' behaviour. As we all know, however, governments are sensitive to criticism on human rights matters, and generally aware of their human rights image in the contemporary world. As a result, procedures which have the effect of drawing attention to their shortcomings, whether publicly, as with the decision of the Human Rights Committee under the International Covenant on Civil and Political Rights, or in the more limited forum of the Commission on Human Rights, can all be regarded as useful.

Although it would be wrong to exaggerate the significance of Resolution 1503 procedure, we can conclude that it fulfils a modest but constructive role. Specially, three advantages of dealing with human rights complaints through this procedure may be identified. First, it provides a way of bringing abuses of human rights to the attention of international bodies in circumstances where this might not otherwise occur. Governments are often reluctant to take up human rights cases and the procedure under the Optional Protocol to the Covenant on Civil and Political Rights, which allows individuals to initiate

³¹ *Ibid.*, at 183-184.

proceedings, is binding on only a limited number of states. Anyone, however, can write to the United Nations³² and ask to have his case considered. There is naturally no guarantee that a complaint will be taken up, but it is generally reported that complaints which are numerous and serious are unlikely to be ignored. The second advantage of Resolution 1503 procedure is that once a human rights issue is on the international agenda, the government concerned may be persuaded to do something about it. The distinctive features of the confidential procedure are that, being confidential, it may sometimes be more effective than more dramatic methods and that, because it is so elaborate it provides a way of maintaining pressure on a government almost indefinitely. The third advantage is that dealing with the human rights situation in a country through the confidential procedure may make it easier for the Commission on Human Rights to take the next step and deal with it through its public procedure. Most of the Commission's public investigations of the situation of human rights in a particular country have been preceded by consideration of communications under the confidential procedure. Although, therefore, Resolution 1503 procedure may not in itself bring about a change of practice, it can sometimes

³² Communications alleging a violation of human rights are submitted for consideration under Resolution 1503 procedure may be sent to:

Centre for Human Rights,
United Nations Office at Geneva,
8-14 Avenue de la paix,
CH-1211 GENEVA 10
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prepare the way for the use of other procedures which may have the desired effect.³³ In Newman's and Weissbrodt's words, 1503 procedure derives its effectiveness from the Commission's ability to "mobilize shame".³⁴ It is most likely to have an impact when the investigated government is sensitive to international scrutiny and condemnation, when publicity or the threat of publicity is substantial, and when the Commission identifies concrete steps that must be taken if the government is to escape further scrutiny. A few countries appear impervious to U.N. condemnation but most are not. On several occasions governments have announced planned reforms during Commission or Sub-Commission meetings as concessions to escape further criticism. Most governments respond to requests from rapporteurs concerning specific cases; even when they deny allegations, their treatment of victims often improves.³⁵

4.2. Economic Sanctions as International Remedies

When the economic sanctions are employed as a means of providing international remedies for the injured individuals resulting from the state's violation of civil rights, they may take the form of isolating the violator state from access to the flow of outside resources and services, upsetting its economic

³³ See A.H. Robertson, "Human Rights in the World," 1989, at 77-78.

³⁴ See F. Newman and D. Weissbrodt, "International Human Rights: Law, Policy, and Process," 1990, at 129.

³⁵ *Ibid.*, at 129-130.

influence in third states, and hampering the efficient use of its internal resources. Among economic measures designed to sanction the violator state are commodity and financial controls.³⁶ Commodity controls seek to sever or regulate the trade both of the sanctioners and of third states with the violator state. They may involve the imposition of an embargo on direct exports from the sanctioners to the violator state and on direct imports by the sanctioners from the violator, and the prevention of reexportation or transshipment from third states of goods from the sanctioners to violator state or vice versa. An embargo on exports, whether total or selective, is calculated to weaken the violator state directly by withholding strategic and other critical supplies from it; and an embargo on imports (boycott) is designed to deprive the violator state of the foreign exchange needed for financing its purchases from abroad. Embargoes may be enforced and supplemented by ancillary controls on communications and transportation (land, sea, and air) lines and facilities, and by such other measures as blacklisting. Financial controls may take the form of halting the flow of capital to the violator state by such measures as the denial of grants (aid), loans, and credits and the suspension of payments. Other measures include blocking or freezing assets of the violator state. Like the import embargo (boycott), the measures of financial control are calculated to curtail the purchasing

³⁶ See generally, R. Lillich, (ed.): "Economic Coercion and the New International Economic Order," 1976; A. Lowenfeld, "Trade Controls for Political Ends," 1977.

power abroad of the violator state.³⁷ Economic sanctions also involve suspending or terminating economic and financial benefits such as government-to-government aid, trade preferences and loan facilities.³⁸

Target state responses to economic sanctions frequently invoke the norm of nonintervention in internal affairs to emphasize the illegality of economic sanctions under international law. Opponents to economic sanctions, by resorting to the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations,³⁹ which employs inclusive terms such as "for any reason whatever", "all other forms of interference", "any other type of measures", "advantages of any kind", and "without interference in any form", have argued that economic sanctions, as included apparently in the above category, are rejected by the rule of nonintervention into internal affairs.⁴⁰ These broad claims have been rejected by developed countries and been regarded as having

³⁷ See R.St. MacDonald, "Economic Sanctions in the International System," vol. VII, 1969, *Canadian Y.Int'l L.*, at 80-86.

³⁸ See generally, G. Hufbauer and J. Schott, "Economic Sanctions in Support of Foreign Policy Goals," 1983; "Economic Sanctions Reconsidered," 1985.

³⁹ GA Res. 2131(XX) (Dec. 21, 1965); see also GA Res. 2225(XXI) (Dec. 19, 1966).

⁴⁰ See L.F. Damrosch, "Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs," 83 *Am. J.Int'l L.*, 1989, at 6-13.

produced no new normative consensus.⁴¹

The previous chapter of this thesis proposed that the status of a right being violated under international law is a determinant for considering whether that particular right is under domestic jurisdiction (an internal affair). Protection of human rights, such as those of civil rights which have obtained customary norms under international law, therefore, are certainly international concerns rather than internal affairs. Economic sanctions for the purposes of promoting these rights can not be seen as applicable to the general expression of "noninterference in any form in internal affairs".

The past decades have witnessed the use and visibility of economic sanctions as international remedies, either unilateral or multilateral, for violations of civil rights that have been increasing. The developed countries are normally in the vanguard of this trend. In 1987-1988 alone, the United States escalated economic pressure against South Africa, Haiti, Chile, and Panama.⁴² UN economic sanctions against South Africa for its violation of human rights is another example.⁴³ It should be

⁴¹ *Ibid.*, at 32.

⁴² See Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (South Africa); N.Y. Times, Nov. 30, 1987, at A1, col. 5 (Haiti); 52 Fed. Reg. 49, 129 (1987) (Chile); Dep't St. Bull., No. 2134, May 1988, at 69-73; and *id.*, no. 2136, July 1988, at 75 (Panama).

⁴³ Security Council Res. 181 (1963) of August 7, 1963, Y.U.N., 1963, at 20; Security Council Res. 182 (1963) of December 4, 1963, Y.U.N., 1963, at 22; See W.B. Boudin, "Economic Sanctions Against South Africa: Problems and Prospects for Enforcement of Human Rights Norms," Virginia J. Int'l L.,

noted that, in a judgement that accepted Nicaragua's arguments on almost all other points, the International Court of Justice declined to hold that U.S. economic sanctions against Nicaragua violated the principle of nonintervention. Referring to the cessation of economic aid, the reduction of Nicaragua's sugar import quota and the imposition of a trade embargo, the Court stated that it had "merely to say that it is unable to regard such action on the economic plane as is here complained."⁴⁴ The Court gave no reasons for this conclusion, but possibly it was mindful that a contrary holding would in effect have obligated donor states or trading partners to continue preexisting aid or trade relations even with a state whose government had taken an unfriendly turn.

With respect to international protection of civil rights, there is an increasing trend not only toward the use of economic sanctions to promote civil rights objectives, but also toward acceptance of the legitimacy of such sanctions when employed for that purpose. The Restatement (Third) of Foreign Relations Law of the United States, for instance, indicates that a state does not violate international law when it shapes its trade, aid or other national policies to influence a state to abide by recognized human rights standards.⁴⁵ It is one thing for the

Wntr 1982, at 345-380.

⁴⁴ ICJ Rep., 1986, at 126.

⁴⁵ Restatement (Third) of Foreign Relations Law of the United States, 1987, sec. 703 comment f.

sanctioning states to impose economic sanctions against those who have violated their international obligations of implementing civil rights and quite another for them to use economic leverage to inflict gratuitous economic harm so as to cripple or undermine the economic foundations of sanctioned states simply for the purpose of mandatory sale of a different ideology. The latter should not be considered legitimate under international law. But one has to recognize that it may sometimes be difficult to distinguish the two different situations.

The effectiveness of economic sanctions as international remedies is, however, dependant upon many variables relevant to a particular context. Among the important factors affecting such effectiveness are the vulnerability⁴⁶ of the violator state to economic sanctions, the costs of such sanctions, capabilities for bearing costs, the requirements of coordination, and time factors. The relative vulnerability of the violator state to the impact of particular measures of economic sanctions is affected by such interrelated factors as the degree of its industrial development and the degree of its dependence upon foreign trade. A state that is highly industrialized may rely heavily upon foreign trade for markets or energy and other raw materials, or

⁴⁶ Professor Carter, when seeking reliable criteria for assessing the effectiveness of economic sanctions, suggests an adoption the criteria that are sensitive to the purposes of sanctions. See B. Carter, "Effects and Effectiveness of Economic Sanctions," in panel discussion, Proceedings of the American Society of International Law, 1990, at 206.

both, and thus may be particularly vulnerable to imposition of embargoes. A state with a larger agrarian sector may be only slightly affected by an embargo on food or raw materials, but its capabilities for maintaining internal order by coercion may be significantly weakened by the cutting off of its access to arms and strategic materials. Conversely, an arms embargo may be ineffective against a highly industrialized state. Further, it is possible for the violator state to offset the adverse effect or economic sanctions through its network of established or potential trading partners and through recourse to such remedial measures as stockpiling, substitutes, rationing of commodities, and reallocation of resources.⁴⁷ It may be noted, further, that economic sanctions are not without cost to the sanctioning states that employ them. The damage done to the violator state may ultimately be matched by a corresponding loss spilled over into the economies of the sanctioning states. Unless the burden is widely shared and sanctions are collectively applied, the costs may simply become prohibitive to the sanctioning states.⁴⁸ The efficiency of economic sanctions maintained for a protracted period of time against states capable of economic endurance

⁴⁷ See L. Chen, "The Legal Regulation of Minor International Coercion," 1964, at 143-152 (unpublished J.S.D. dissertation, Yale Law School Library), as cited by M.S. McDougal, H.D. Lasswell and L. Chen, "Human Rights and World Public Order," 1980, at 230, n212.

⁴⁸ Hufbauer and Schott have shown how it is to coerce other states with economic sanction," see G. Hufbauer and J. Schott, "Economic Sanctions Reconsidered," 1985, at 42-81. See also D. Baldwin, "Economic Statecraft," 1985, at 107.

gradually tend to diminish.⁴⁹ The consequence is that, since the wealth of the world is still largely controlled by particular nation-states, the general community cannot hope to employ the economic instrument effectively as a sanction against human rights deprivations without the cooperation of many nation-states. Since any use of the economic instrument is so deeply intertwined in the welfare of particular states, it is, further, extremely difficult to persuade states to undertake and coordinated economic sanctions to protect human rights. As Professor Oliver notes:

"[T]he effects of economic sanctions can be described as psycho-political in nature. They are always tension building in international relations. They cut to the quick as far as national prestige is concerned. They trigger delicate internal reactions in the target state and sometimes in the acting state."⁵⁰

He also observes that economic sanctions as used in pursuit of human rights in cases of Cuba, Rhodesia and North Korea are failures. He, therefore, draw the conclusion that

"[I] end with a view that sanctions are an extremely dangerous weapon that must be used with caution, and in the process of using them agonizing value choices often have to be made."⁵¹

The general difficulties with mobilizing effective economic

⁴⁹ See generally C. Brown-John, "Multilateral Sanctions in International Law, A Comparative Analysis," 1975; M. Doxey, "Economic Sanctions and International Enforcement," 1971; R.St.J. MacDonald, "Economic Sanctions in the International System," 7 Canadian Y.B.Int'l L., 1969, at 61-91.

⁵⁰ See C.T. Oliver, "Effects and Effectiveness of Economic Sanctions," in panel discussion, Proceedings of the American Society of International Law, 1990, at 211.

⁵¹ *Ibid.*

sanctions do not mean that the economic instrument is under all circumstances ineffective as an international remedy against human rights deprivations. Given a wide range of potential sanctioners and the intricate division of labour in the contemporary world, there is selective vulnerability that can be exploited by skilful management. In its amendments to the Foreign Assistance Act, the Congress has made it the policy of the United States to refuse "security assistance" (both military and economic) to "any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."⁵² While a blanket application of this provision may not produce desired results (or may even be counter-productive) in the short term, its long-term aggregate effect promises to be beneficial to the defense and fulfilment of human rights. Starting from this positive point of view, we should optimistically adopt Baldwin's communication approach.⁵³ He argues that imposing economic costs upon the target states is itself the goal of economic sanctions.⁵⁴ Baldwin further observes that the process of imposing economic sanctions is the process of the instrumental rather than expressive communication of information, which is calculated to advance the interests of

⁵² International Security Assistance and Arms Export Control Act of 1976, Public Law 94-329, sec. 301(a) (amending sec. 502B of the Foreign Assistance Act of 1961).

⁵³ See D. Baldwin, "Economic Statecraft," 1985, at 132-133.

⁵⁴ *Ibid.*, at 176, 263-264.

the sanctioning state.⁵⁵ Thus, sanctions may make the target's government feel shame or political isolation; they may serve as a threat of stronger action in the future; they may simply provide an occasion for the target state to reconsider its policy.⁵⁶ Psychological goals like these seem to have characterized sanctions against South Africa, as these measures have not been strong enough to coerce action through the economic costs imposed.⁵⁷ Therefore, the employment of economic sanction as an alternative for redressing human rights deprivations may facilitate enhancement of international protection of human rights in general and civil rights in particular.

⁵⁵ Baldwin quotes Thomas Schelling, one of the leading theorists of strategy:

[T]he essence of bargaining is the communication of intent, the perception of intent, the manipulation of expectations about what one will accept or refuse, the issuance of threats, offers, and assurances, the display of resolve and evidence of capabilities, the communication of constraints on what one can do, ...the creation of sanctions to enforce understandings and agreements, genuine efforts to persuade and inform, and the creation of hostility, friendliness, [or] mutual respect...."

Ibid., at 96-98 (quoting T. Schelling, "The Strategy of Conflict," 1960, at 5).

⁵⁶ *Ibid.*, at 63.

⁵⁷ See K.W. Abbott, "Coercion and Communication: Frameworks for Evaluation of Economic Sanction," 19 *N.Y.U.J.Int'l L. & Pol.*, 1986-87, at 791.

4.3. *Humanitarian Intervention as International Remedies*

4.3.1. *Intervention for Ideological Reasons not as Exceptions to Article 2(4) of the UN Charter*

It is useful, at the outset, to group together two conflicting view-points on the relationship between international law and the use of force. The spot light of controversy is on the key normative provision of the UN Charter--Article 2(4)--as the cornerstone of contemporary international law. The norm set forth in Article 2(4). provides as follows:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

Scheffer has made a distinction between the "traditionalism" and the "neorealism" in terms of construction about Article 2(4) of the Charter of the United Nations.⁵⁸

The "traditionalists" view this provision with deference to what they understand to be the original intent of the framers of the Charter. They find in that original intent the basis for a modern restatement of international law on the use of force. According to "traditionalists", the rules on use of force are not negotiable. They flow from the inherent character of the state system. A basic rule is that force will not be used to impose one state's will on another state. If that rule became

⁵⁸ See D.J. Scheffer, "Introduction: The Great Debate of the 1980s," in L.Henkin, et at (ed.): *Right v.Might---International Law and the Use of Force*, 1991, at 1-16.

optional or subject to renegotiation, the existing state structure would be in jeopardy.⁵⁹

The "traditionalists" draw the line between themselves and others, notably the "neorealists", on two key issues. First, they deny unilateral rights to use force under many of the circumstances favoured by the "neorealists". They point out, for example, that the neorealists' claim to a right to intervene unilaterally on behalf of democracy or against repression raises a host of subjective determinations. The "traditionalists" caution against a world in which every government can determine the right of intervention on the basis of its own definitions of "repressive" and "democratic." Any rule of intervention on behalf of democracy either would not be generally accepted or would be accepted only in terms defined by every government in its own way, thereby becoming both meaningless and dangerous. Second, the "traditionalists" deny that a principle of reciprocity, espoused by the "neorealists", should dictate whether the United States complies with rules on the use of force. The fact that the Soviet Union often fails to adhere to these rules does not necessarily justify abandoning them. If the United States followed the Soviet lead of noncompliance, there no longer would be any realistic need to state obligatory international law. We would enter a Hobbesian world.⁶⁰

⁵⁹ See D.J. Scheffer, "Introduction: The Great Debate of the 1980s," in L. Henkin, et al (ed.): *Right v. Might---International Law and the Use of Force*, 1991, at 4.

⁶⁰ *Ibid.*, at 8.

The "neorealists" view the current state of international law quite differently. For them, the world has changed. Article 2(4) originally fit into the larger scheme of peacekeeping, decision-making, and enforcement under the Charter. But the Charter mechanisms, especially collective self-defense, have decayed. It is clear, the "neorealists" argue, that the system did not work. The assumptions guiding the Charter's drafters in 1945 have changed dramatically. Political upheavals have radically altered international organizations. Technological progress has revolutionized international politics. No consensus exists between the superpowers that would make the United Nations really work. The neorealists do not go so far as to advocate abandoning Article 2(4). They believe that America's goal should be to give teeth to the article so that it may achieve the status of a legal norm. The problem at the United Nations is that the US views are different from those of the Soviet Union and many other member-states. The belief that by strict compliance with all of the provisions of the Charter, the United States will induce others to follow suit is fallacious, according to the "neorealists". The failure of that strategy is, they say, an empirical fact.⁶¹ They argue that the best method of inducing others to comply with the Article 2(4) is to make clear to adversaries that the United States will respond in accordance with the principle of reciprocity and that Article 51

⁶¹ See D.J. Scheffer, "Introduction: the Great Debate of the 1980s," in L.Henkin et al (ed.): Right v. Might---International Law and the Use of Force, 1991, at 10.

justifies reciprocity. If the United States fails to confront force with force and match intervention with counterintervention, the neorealists caution, the entire international legal order will be in jeopardy. The "neorealists" urge unilateral military intervention (direct or indirect) by the United States in response to former Soviet bloc intervention in other countries. They rarely suggest that the United State be inhibited in responding with force by the procedural requirements of the UN Charter or other multilateral charters. Peaceful means of settling international disputes, particularly through diplomacy, are balanced equally with the use of force. Although the neorealists invoke Article 51 to justify almost any use of force by the United States, collective self-defense is not a prerequisite to US intervention in conflicts that have no plausible direct impact on the nation's security. Second, the "neorealists" see the use of force as an effective instrument to further other principles that they believe are integral to the UN Charter: self-determination, human rights, and, above all, democracy.

This debate between the "traditionalists" and the "neorealists" actually was tested in a court of law with the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of American)*.⁶² While some "traditionalists" believe that the World Court strengthened the

⁶² Judgment on the Merits, 1986 ICJ Rep., at 14; also published in *International Legal Materials*, vol. 25 (September 1986), at 1023-1289.

classical rules on use of force with its 1986 decision in that case, others contend that the court threw a wrench into the long-running debate over Article 2(4) of the UN Charter that now will be difficult to dislodge.

The World Court premised its ruling against the United States on a distinction between "armed attack" and "use of force." It essentially held that under current international law, if a state intervenes in the internal affairs of another state by acts of force that constitute armed attack, there is a right to individual or collective self-defense. The legal rationale the US government used for assisting the guerrillas fighting the Sandinista government (contras)---collective self-defense under article 51---lacked the requisite justification: an armed attack by the Nicaraguan army against El Salvador. The Court ruled that if acts of force fall short of an armed attack under Article 51, then countermeasures (including forcible countermeasures but not armed counterattack) may be taken only by the victim state (El Salvador). Not only had the United States violated the rule forbidding third states from launching countermeasures, but American military and logistical support for the contras exceeded the limits of "forcible countermeasures" and constituted an illegal armed counterattack.⁶³

The "Reagan Doctrine"⁶⁴ is an expression of a belief in

⁶³ *Ibid.*

⁶⁴ It was not until October 25, 1988, during a speech at Fort McNair, Washington, D.C., that Reagan acknowledged the popular name attached to that doctrine:

"neorealism". In the 1980s, the "neorealists" significantly influenced American foreign policy. The challenge for the "neorealists" is the difficulty of convincing the rest of the world that the "Reagan doctrine" embodies a rule of international law.

That debate intensified by mid-1984, following three military interventions in which the United States participated directly. The first was the assault on the Caribbean island of Grenada in October 1983, launched in part to rescue American medical students at a time of near-anarchy, but also resulting in the overthrow of a pro-soviet regime. The second military intervention occurred in Lebanon, where in late 1983 American firepower was unleashed on targets around Beirut. The U.S. Marine Corps suffered some fatalities while trying to prop up a fragile government under siege by Muslim militia in a country occupied by the Syrian and Israeli armies.

In the third instance, the Reagan administration orchestrated covert assistance to guerrilla groups fighting to overthrow the Sandinista government of Nicaragua. This included support for

Around the world, in Afghanistan, Angola, Cambodia and, yes, Central America, the United States stands today with those who would fight for freedom. We stand with ordinary people who have had the courage to take up arms against Communist tyranny. This stand is at the core of what some have called the Reagan doctrine.

Remarks to the Students, Faculty, and Guests of the National Defense University, and the Signing of the Department of Veterans Affairs Act, October 25, 1988, Weekly Compilation of Presidential Documents, vol. 24, no. 43 (October 31, 1988), at 1368.

the mining of Nicaragua harbours and for attack on economic targets inside the country, leading Nicaragua to lodge numerous claims against the United States in the International Court of Justice.

On April 12, 1984, Jeane J. Kirkpatrick, the U.S. permanent representative to the United Nations, addressed the annual meeting of the American Society of International Law in Washington, D.C. She described a vision that would become the canon of the "Reagan Doctrine":

Clearly, unilateral compliance with the Charter's rules of nonintervention and nonuse of force are of no consequence to some who have been engaged in pursuing "national liberation" in our times, in Africa and Asia, in the Middle East and in Central America. Certainly this is not what the Charter requires of us. If there is to be a rule of law---and we are as committed to that proposition today as ever in our history and as any other nation in the world---that rule of law must be universally accepted, a day which we would welcome.

But we cannot permit, in defense not only of our country but of the domain of law...in which democratic nations must rest..., ourselves to feel bound to unilateral compliance with obligations which do in fact exist under the Charter, but are renounced by others. This is not what the rule of law is all about. As we confront the clear and present dangers in the contemporary world, we must recognize that the belief that the U.N. Charter's principles of individual and collective self-defense require less than reciprocity is simply not tenable.⁶⁵

The controversy over Article 2(4) of the United Nations Charter between "traditionalist and neorealist" position is to a great extent relevant to the conflict between the two super-

⁶⁵ Address by Jeane J. Kirkpatrick, "Proceedings of the Seventy-Eighth Annual Meeting of the American Society of International Law," Washington, D.C., April 12-14, 1984 (The American Society of International Law, 1986), at 67-68.

powers: the United States and the former Soviet Union. With the demise of the Soviet Union, the confrontation between the former two big states has considerably diminished. The dispute, however, is far from being solved.⁶⁶ In addition, the former U.S. Bush Government and the exiting Clinton Government have shown little sign of abandoning the previous "Reagan Doctrine", despite the downfall of the former Soviet Union. At least, the continued U.S. military presence outside its territories such as Iraq may suggest that U.S. policy has not changed fundamentally in relation to the interpretation of Article 2(4) of the Charter of the United Nations.

The "Reagan Doctrine" is contrary to the previous practice of the international system. During the early postwar decades, the international system took strong positions in support of the law of the Charter. It rejected the Arab states' claim that they were justified in using force to prevent the creation of the State of Israel. It strongly supported actions to meet the North Korean aggression against South Korea. It rejected claims of the Soviet Union that the Charter had no relevance for convulsions within the communist world such as the communist coups in Czechoslovakia in 1948 and Hungary in 1956, effected with the aid of Soviet troops. It rejected expanded notions of permissible force in self-defense, as by the United Kingdom and France against Suez in 1956.

⁶⁶ See B.M. Benjamin, "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities," 16 Fordham Int'l L. J., 1992-93, No. 1, at 120-158.

The UN Charter declared purposes and prescribed norms, and it laid down a blueprint for an organization that would pursue those purposes and enforce those norms. After more than forty years, it is universally recognized that the organization is different from that contemplated: in particular the Security Council has not been effective in enforcing the principles of the Charter outlawing the use of force, and efforts to have the General Assembly substitute for the Security Council have not been notably successful. But no responsible voice, surely no government, has suggested that the failures of the organization vitiated the agreement and nullified or modified the Charter's norms.⁶⁷ The Charter remains the authoritative statement of the law on the use of force. It is the principal norm of international law of this century.

The Charter reflected universal agreement that the status quo prevailing at the end of World War II was not to be changed by force. Even justified grievances and a sincere concern for "national security" or other "vital interests" would not warrant any nation's initiating war. Peace was the paramount value. The Charter and the organization were dedicated to realizing other values as well---self-determination, respect for human rights, economic and social development, justice, and a just international order. But those purposes could not justify the use of force between states to achieve them; they would have to

⁶⁷ See L. Henkin, "How Nations Behave," 1979, 2nd ed., at 137-139.

be pursued by other means. Peace was more important than progress and more important than justice. The purposes of the United Nations could not in fact be achieved by war. War inflicted the greatest injustice, the most serious violations of human rights, and the most violence to self-determination and to economic and social development. War was inherently unjust. In the future, the only "just war" would be war against aggressor--in self-defense by the victim, in collective defense of the victim by others , or by all. An effective United Nations system, or a court with comprehensive jurisdiction and recognized authority, might have answered these and other questions by developing the law of the Charter through construction and case-by-case application. In the absence of such authoritative interpretation, the meaning of the Charter has been shaped by the actions and reactions of states and by the opinions of publicists and scholars, Scholars have debated the ambiguities of the Charter; a government occasionally has sought to shape the law to justify an action it has taken. But governments generally have insisted on the interpretations most restrictive of the use of force: the Charter outlaws war for any reason; it prohibits the use of armed force by one state on the territory of another or against the forces, vessels, or other public property of another state located anywhere, for any purpose, in any circumstances. Virtually every putative justification of a use of force in the years since the Charter

was signed has been clearly condemned by virtually all states.⁶⁸

In principle, and in formal acts and pronouncements of states, the international system has maintained its commitment to the rule of the law of the Charter. It has insisted on the law and often has acted formally to condemn violations. But clearly the international system has not been sufficiently effective to deter, prevent, or terminate important violations. The Security Council was frustrated by big-power division. The General Assembly did not effectively assume the council's role.⁶⁹ The inadequacies of the system are dramatized by the failures of the United Nations, reflect inadequate commitment by influential states and divisive world political forces. Whether in cold war or détente, the conflict between East and West sometimes has taken forms involving violations of the Charter. The USSR insisted on maintaining its control in Eastern Europe, by force if necessary; it did not refrain from seeking to extend its influence elsewhere, sometimes by force. The United States has been determined to resist communist expansion, particularly

⁶⁸ Over the years since the Charter's adoption, even states that have perpetrated acts of force, when seeking to justify their acts, have not commonly urged a relaxed interpretation of the prohibition. Rather, they have asserted facts and circumstances that might have rendered their actions not unlawful. For example, in 1950, North Korea claimed that the South Korean army had initiated hostilities, permitting North Korea to act in self-defense; in Czechoslovakia in 1948 and 1968, and in Hungary in 1956, the former USSR claimed that its troops had been invited by the legitimate authorities to help preserve order.

⁶⁹ See L. Henkin, "Use of Force: Law and U.S. Policy," in L. Henkin et al (ed.): *Right v. Might--International Law and the Use of Force*, 1991, at 50.

penetration of the Western Hemisphere, and sometimes has succumbed to the temptation to act without regard to the law of the Charter.⁷⁰ Conflict and competition between the big powers has weakened also their willingness to help keep the peace generally. The political system remains committed to it in principle. Violations of the law have not been sufficient to destroy it, the institutions that work with it, or states' commitment to it. The influence of law is difficult to identify and assess, but the law, operating within the political processes of the international system, has helped deter, prevent, or terminate some wars and continues to provide strong support to forces opposing the use of force.⁷¹

The United States' recent use of force, including its invasion of Grenada, its bombing Libya and its activities involving mining Nicaraguan harbours and supporting rebellion by the contras, has been widely challenged.⁷² The U.S.'s reconstruction of the Charter law (the Reagan Doctrine) that it is entitled to the claim of right generally to use force to impose and restore "democracy," particularly where communism exists or threatens has been rejected even by most lawyers in

⁷⁰ *Ibid.*, at 51.

⁷¹ *Ibid.*, at 52.

⁷² *Ibid.*, at 53-54. The U.S. military roles of emancipating invaded Kuwait and stopping killings of Kurds in Iraq, however, have not met with criticism. See V.P. Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti---Revisiting the Validity of Humanitarian Intervention Under International Law---Part I," 20 *Denver J. Int'l L. & Pol.*, No. 2, Winter 1992, at 305-334.

the United States.⁷³ Henkin puts it in the following words:

Whatever its domestic appeal, the "Reagan Doctrine" as commonly understood is untenable in law, and the United States cannot lawfully pursue it. It may be permissible to intervene by limited force strictly for the purpose of protecting and liberating hostages when the territorial state is unable or unwilling to protect or liberate them; it is not permissible to overthrow a government to that end---as Vietnam did in Cambodia, and the United States in Grenada. International law provides no more basis for permitting the export of democracy by force than for permitting the export of socialism by force. As a matter of law, one cannot justify the U.S. action in Grenada or support for the contras and condemn the Soviet Union's role in Czechoslovakia. None of these is within the spirit of the Charter as conceived or as the United States interpreted it during its first thirty-five years. Distinguishing between them as a matter of law is hopeless in a world where many of the 160 states claim to be socialist and few of them have authentic democracy. It is not permissible under the Charter to use force to impose or secure democracy; or does the Charter contain a Monroe Doctrine exception that would permit the United States to use force to keep the Western Hemisphere free of communism. In the Nicaragua case, the International Court of Justice rejected the "Reagan policy," as it had the Brezhnev Doctrine. Its decision conforms to the views of most (almost all) states and most lawyers. Indeed, it conforms to the views that the U.S. government itself held until a few years ago. The United States might assert that it thinks the law is otherwise, but rejecting the majority view would not validate the new American view of the law and would not free the United States to act on its novel interpretation.⁷⁴

In Grenada and in Nicaragua, the United States apparently has been asserting the right to use force to impose or restore democracy, but presumably it would continue to oppose a rule that would permit other states to use force to impose their version of democracy or another ideology (socialism).⁷⁵

⁷³ *Ibid.*, at 53-55.

⁷⁴ *Ibid.*, at 56.

⁷⁵ *Ibid.*, at 59.

Clearly, it was the original intent of the Charter to forbid the use of force even to promote human rights or to install authentic democracy. Nothing has happened to justify deviations from that commitment. Human rights are indeed violated in every country. In some countries violations are egregious. But the use of force remains itself a most serious--the most serious--- violation of human rights. It should not be justified by any claim that it is necessary to safeguard other human rights. The claims that democracy justifies the use of military force by another state are no stronger. All the framers of the Charter purported to believe in democracy. They were hardly agreed as to what it meant, but they were agreed that force was not to be used against another state even to achieve democracy, however defined. Over forty years later states are still not agreed as to what democracy means, but they are still agreed that it is not to be achieved by force. The Charter would be meaningless if it were construed or rewritten to permit any state to use force to impose its own version of democracy. Such a view of the Charter would permit "aggression for democracy" against any one of 100-150 states by any self-styled democratic champion. That is not the law; it could not become the law; it should not be the law.

The "Reagan Doctrine", which scuttles the law of the Charter, is not a viable policy, because Article 2(4) is seen, according to Henkin, as

"... the fruits of the Second World War and the hopes, aspirations, and efforts of half a century. Rejecting the

Charter in effect would reject Nuremberg, and reestablish Adolf Hitler as no worse than anyone else. Such a move would be condemned by the whole world...The end of the rule of the Charter's law would not encourage cooperation among the peoples in the world. The law of the Charter is here to stay. For the years ahead the interpretation of that law that renders the prohibition on the use force most stringent is also here to stay.⁷⁶

The "Reagan's Doctrine", as applied to Latin America, would be seen as a return to "Yankee imperialism" and a rejection of the sovereignty of twenty states. ⁷⁷

Intervention for the purpose of promoting socialism is not accepted as an exception to the rule of non-use of force. The former President Brezhnev once asserted the right of any socialist state to intervene in another when socialism there was threatened. He said:

"[J]ust as, in Lenin's words, a man living in a society cannot be free from the society, a particular socialist state, staying in a system of other states composing the socialist community, cannot be free from the common interests of that community.

The sovereignty of each socialist country cannot be opposed to the interests of the world of socialism, of the world revolutionary movement...

Discharging their internationalist duty toward the fraternal peoples of Czechoslovakia and defending their own socialist gains, the U.S.S.R. and the other socialist states had to act decisively and they did act against the antisocialist forces in Czechoslovakia.⁷⁸

⁷⁶ *Ibid.*, at 58.

⁷⁷ *Ibid.*, at 59.

⁷⁸ International Legal Materials, vol. 7, 1968, at 1323-25.

The Brezhnev Doctrine has been generally condemned.⁷⁹ The USSR itself appeared to have disavowed it in the Helsinki accords.⁸⁰

Some have invoked a people's right to "internal self-determination" to support the use of force by one state to preserve or impose democracy in another. One suggestion, for example, is that Article 2(4) permits the use of force to "enhance opportunities of ongoing self-determination...to increase the probability of the free choice of peoples about their government and political structure."⁸¹ Some see this view as the foundation of the right to intervene by force in another state to preserve or impose democracy.

The claim has received no support by any other government. Like the use of force to impose or maintain socialism or any other ideology, the use of force for democracy clearly would be contrary to the language of Article 2(4), to the intent of its framers, and to the construction long given to that article by the United States.⁸²

At bottom, all suggestions for exceptions to Article 2(4)

⁷⁹ See N. Rostow, "Law and the Use of Force by States: The Brezhnev Doctrine," 7 Yale Journal of World Public Order, Spring 1981, at 209-243.

⁸⁰ Final Act, Conference on Security and Cooperation in Europe. "Declaration on Principles Guiding Relations between Participating States" (Helsinki, 1975).

⁸¹ See N. Michael Reisman, "Coercion and Self-determination: Construing Charter Article 2(4)," Am. J.I.L., vol. 78, 1984, at 642.

⁸² Oscar Schachter effectively demolished that suggestion in "The Legality of Pro-Democratic Invasion," Am.J.I.L., vol. 78, 1984, at 645, responding to Reisman.

imply that, contrary to the assumptions of the Charter's framers, there are universally recognized values higher than peace and the autonomy of states. In general, the claims of peace and state autonomy have prevailed.

States that have used force have sometimes construed the law so as to justify their actions or have defended against charges of violation by denying or distorting the facts or mischaracterizing the circumstances. States generally have condemned virtually every use of force in the decades since World War II. Explicitly or by implication they have adopted a most restrictive construction that has received authoritative support in major respects. In *Nicaragua* case, the International Court of Justice issued what is in effect its first judgment construing key elements in the law of the Charter.⁸³ It construed the prohibition in Article 2(4) broadly (as imposing strict limitations on the use of force) and the exception in Article 51 narrowly (as limiting the circumstances in which force may be used in self-defense). In effect, it rejected both the Brezhnev Doctrine and the Reagan Doctrine. The Court held, among others, the following: (a) The only exception to Article 2(4) is Article 51: force against another state that is not justified by a right of self-defense under Article 51 is in

⁸³ The court concluded that it could not decide the case under the Charter because of a reservation by the United States, and would therefore decide it only under customary international law. But the Court held that customary law and the law of the Charter were essentially congruent in relevant respects, in effect construing the Charter.

violation of Article 2(4).⁸⁴ (b) The court could not "contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system." And "to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State".⁸⁵ (c) The "use of force could not be the appropriate method to monitor or ensure" respect for human rights.⁸⁶ Earlier, in the 1949 *Corfu Channel* case, the International Court of Justice had stated:

[T]he alleged right of intervention as the manifestation of the policy of force, such as has, in the past, given rise to most serious abuses and such as cannot...find a place in international law...[especially when] it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.⁸⁷

A decision of the International Court of Justice is not binding on states other than the parties to the case, but judicial decisions are "subsidiary means for the determination of rule of law" (Article 38 of the Statute of the International Court of Justice), and decisions of the court are highly authoritative. The court's principal conclusions, representing the views of an

⁸⁴ ICJ Rep. 1986, at 14, para. 211.

⁸⁵ *Ibid.*, at para. 263.

⁸⁶ *Ibid.*, para. 268.

⁸⁷ *Corfu Channel Case*, ICJ Rep., 1949, at 35.

overwhelming majority of the judges, will doubtless be accepted by states generally and by the large majority of the legal community.

4.3.2. *Humanitarian Intervention as an Exception to Use of Force and as an International Remedy*

There still exists controversy as to the question of whether humanitarian intervention by use of force is allowed by the Charter and can be utilized as an international remedy for the injury resulting from the breach of individuals' rights by their governments.

Traditionally, it was asserted that, as an exception to the general prohibition on intervention, states had their right to intervene on humanitarian grounds to protect their own nationals or a third state's nationals in another state, or even the nationals of the state against which coercive measures were undertaken.⁸⁸ Most publicists writing in the late 19th century and at the turn of the 20th century supported this assertion on the assumption that if a state denied certain minimum basic rights to the people within its territory, any other state could remedy the situation by intervention.⁸⁹ In the words of one

⁸⁸ See Jean-Pierre L. Fonteyne, "The Customary International Law doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter," 4 Calif. W. Int'l L.J., 1974, at 214-226.

⁸⁹ See, e.g., Ian Brownlie, "International Law and the Use of Force by States," 1963, at 338 nn. 1-5 for citations to the works of these publicists. See also E.C. Stowell, "Intervention in International Law," 1921, at 53; E.C. Stowell, "A Restatement of Principles in Conformity With Actual Practice," 1931, at 349.

commentator, such intervention was, however, justified only "in extreme cases...where great evils existed, great crimes were being perpetrated, or where there was danger of race extermination."⁹⁰ Similarly, another commentator considers intervention permissible on the grounds of "tyrannical conduct of a government towards its subjects, massacres and brutality in a civil war, or religious persecution."⁹¹

Proponents of humanitarian intervention may point out that it has a limited purpose and does not impair the territorial integrity or political independence of any state,⁹² the intervening state withdraws after accomplishing its purely humanitarian aim, leaving the territory intact and the government independent. At the same time, it is claimed that intervention to protect human rights cannot be considered contrary to the purpose of the Charter of the United Nations, one of which is promotion of human rights. Professor Sohn, however, cites the instrument construing the UN Charter, which gives narrow interpretation of the Charter. The Declaration on Principles of International Law Concerning friendly Relations

⁹⁰ See A.S. Hershey, "Essentials of International Public Law and Organization," rev. ed., 1927, at 239.

⁹¹ See W. Hall, "International Law," 4th ed., 1895, at 302.

⁹² See Reisman, "Memorandum Upon Humanitarian Intervention to Protect the Ibos," (unpublished paper written with the collaboration of Professor McDougal, 1968, 15-16) in Lillich, Intervention to Protect Human Rights, 1969, 15 McGill L.J., at 212, n36.

and Co-operation Among States,⁹³ adopted unanimously by the General Assembly in 1970, makes clear that no state or group of states "has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other states." The prohibition against intervention "for any reason whatever" was designed to make clear that even the best possible reason, such as protection of human rights, does not justify unilateral intervention in the affairs of another state.⁹⁴ Fonteyne notes also that:

"few representatives on the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States explicitly claimed that intervention to remedy gross violations of human rights was lawful as an implicit exception to Charter principles prohibiting use of force and intervention."⁹⁵

A recurring claim, which has been made with some justification, is, however, that countries that engaged in humanitarian intervention were motivated more by a desire to establish spheres of influence or to obtain commercial advantages than by an altruistic motive to alleviate human suffering. In addition a familiar argument is that humanitarian intervention, being available only to major powers, created a

⁹³ G.A.Res. 2625(XXV), 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

⁹⁴ See L.B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States," 32 Am. U.L.Rev., 1982, at 9.

⁹⁵ See Fonteyne, "Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations," in R. Lillich (ed.): Humanitarian Intervention and the United Nations, 1973, at 216.

one-side relationship, without possibility of reciprocal action by the smaller powers.⁹⁶

Another argument against humanitarian intervention emphasizes the danger of abuse and partiality by the intervenors. Benn and Peters, in an influential work, capture that idea well:

"Within its own jurisdiction, a state has a claim to interfere with other associations as umpire, providing it does so impartially. But in international affairs, states are very rarely impartial, and their own interests are bound to weigh heavily in shaping their policies. When one state meddles in another's affairs, the nationals of the victim are rarely considered on the same footing as those of the interfering state. The latter treats them rather for its own end."⁹⁷

Brownlie observes that:

"it is nearly impossible to discover an aptitude of governments in general for carefully moderated, altruistic, and genuine interventions to protect human rights."⁹⁸

After conceding that "the will and consent of the governed is (or at least would be) a key principle for political legitimacy", Professor Schachter rejects humanitarian intervention because it "would introduce a new normative basis for recourse to war that would give powerful states an almost unlimited right to overthrow governments alleged to be

⁹⁶ See W. Hall, "A Treatise on International Law," 1895, 4th ed., at 302-309; E. Stowell, "Intervention in International Law," 1921, at 53-62.

⁹⁷ See S.I. Bennand R.S. Peters, "Social Principles and the Democratic State," 1959, at 361.

⁹⁸ See I. Brownlie, "Humanitarian Intervention," in J.N. Moore (ed.): Law and Civil War in the Modern World, 1974, at 226.

unresponsive to the popular will."⁹⁹

Opponents of humanitarian intervention also contend that the prohibition on the use of force, which is enshrined in Article 2(4) of the UN Charter, should be interpreted broadly and consistently with its plain language. Consequently, they argue, there is no scope for considering humanitarian intervention as a valid exception to the Article 2(4) norm.¹⁰⁰ Rodley observes that "the burden of [the ICJ's] message [in *Nicaragua v. U.S.*] is that the United States could not justify its military activities and, in the process, it has confirmed the view of those of us who argue that the doctrine of unilateral armed humanitarian intervention has no justification at law."¹⁰¹

In the U.N.era, unilateral humanitarian intervention remains highly controversial. Publicists generally view it with much scepticism. One proponent, Professor Teson has suggested recently that state sovereignty and prohibition of the use of force should be interpreted in a manner consistent with "other well-established principles---those that have to do with

⁹⁹ See O. Schachter, "The Legality of Pro-Democratic Invasion," 78 Am. J.Int'l L., 1984, at 647, 649.

¹⁰⁰ See, e.g., I. Brownlie, "International Law and the Use of Force by States," 1963, at 342; T. Frank and N. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force," 67 Am.J.Int'l L., 1973, at 299-302.

¹⁰¹ See N.S. Rodley, "Human Rights and Humanitarian Intervention: The Case of the World Court," 38 Int'l & Comp. L.Q., April 1989, at 327-328.

upholding a modicum of human dignity."¹⁰² He concludes:

"[T]he problem of the legal status of humanitarian intervention is not a problem of fidelity to international law. Rather, it is one of determination of the law and of proper balance between competing principles."¹⁰³

Teson states that "the true test is whether the intervention has put an end to human rights deprivations."¹⁰⁴ To adopt Teson's test means to allow states to intervene initially into any other states without consideration of the legality of the intervention under international law. Such a test, in fact, amounts to abolition of the world's contemporary legal system based upon of the rule of non-use of force as enshrined in and guaranteed by Article 2(4) of the Charter of the United Nations. Implementation of such a view in international law would make it very possible that an exception to Article 2(4) would become a general rule and a general rule of non-use of force would become an exception.

D'Amato, in support of U.S. unilateral use of force to intervene in Panama and to overthrow an alleged tyrannical government, offers a following analogy.¹⁰⁵ In the 19th century, as he puts it, United States courts refused to intervene when wives applied for judicial help against beatings inflicted by

¹⁰² See F.R. Teson, "Humanitarian Intervention---An Inquiry Into Law and Morality," 1988, at 200.

¹⁰³ *Ibid.*, at 245.

¹⁰⁴ *Ibid.*, at 106.

¹⁰⁵ See A. D'Amato, "The Invasion of Panama Was a Lawful Response to Tyranny," 84 *Am. J.Int'l L.*, 1990, at 516-524.

their husbands. Some judges repeated the saying, "A man's home is his castle." Most judges observed that the wife has an adequate remedy if her husband hits her---she can sue for a divorce. And nearly all judges opined that intrusion by the "heavy hand of the state" would provide a cure that was worse than the disease. Simple prudence, according to the judges, required a judicial policy of a abstention from domestic problems. And what was considered prudent rapidly became transformed into a "neutral principle"---that the law will not intervene in the home on behalf of either spouse. Courts now recognize that battered wives need and deserve judicial protection. Historians look back at the 19th century and speculate about how much brutality, how much horror, women had to endure at the hands of physically stronger spouses who treated them like chattel. And legal philosophers now realize that words found so abundantly in the old opinions such as "home" and "domestic" and "marriage" do not stake out lines of jurisdiction but, rather, beg the question of where and for what purposes there ought to be jurisdiction.¹⁰⁶ D'Amato's analogy may be challenged. It is very likely that one state, when acting unilaterally, may not be as impartial as a court. Furthermore, when one state uses force to intervene in other states, its action is generally more easily influenced by political factors than that of a court.

D'Amato offered as a test to consider whether the state

¹⁰⁶ *Ibid.*, at 517.

affected by the intervention is under the rule of a tyrannical ruler and whether the people of that state are helpless under the tyrannical rule and deserve, in morality and in law, aid from an outside power to remove the unlawful government that is brutalizing them.¹⁰⁷ Such a test may be "subjective", he argues, but there is no "objective" language in international law. According to him, all interpretations are necessarily subjective.¹⁰⁸ Such a test can not stand up to challenge. However subjective an interpretation may be, international law does set forth certain limitations on the interpretation. It can not be such as to nullify objectively peremptory norms of international law like the one of non-use of force.

One has to be aware of the fact that the views of Teson and D'Amato are somewhat similar to or at least parallel to the "Reagan Doctrine", which the preceding section has correspondingly addressed.

An observer must acknowledge the absence of a general consensus on the definition of humanitarian intervention, the set of criteria to judge its permissibility or impermissibility under international law, and the safeguards necessary to prevent its abuse. However, a limited use of humanitarian intervention, consisting of claims to rescue one's nationals or a third state's nationals, is generally regarded as permissible under

¹⁰⁷ See A. D'Amato, "The Invasion of Panama Was a Lawful Response to Tyranny," 84 Am. J.Int'l L., 1990, at 521-522.

¹⁰⁸ *Ibid.*, at 521.

international law, even though it causes a temporary breach of a state's territorial integrity.¹⁰⁹

Although Professor Henkin does not agree with the view that a state, under international law, can intervene by use of force for the purpose of promoting human rights, he would accept humanitarian intervention as an exception to the rule of non-use of force. He, however, notes that it should be strictly limited to what is necessary to save lives.¹¹⁰ As Professor Henkin says that

The exception, I believe, is not restricted to actions by a state on behalf of its own national. But it is a right to liberate hostages if the territorial state cannot or will not do so. It has not been accepted, however, that a state has a right to intervene by force to topple a government or occupy its territory even if that were necessary to terminate atrocities or to liberate detainees. Entebbe was acceptable, but the occupation of Cambodia by Vietnam was not. The U.S. invasion and occupation of Grenada, even if in fact designed to protect the lives of U.S. national, also was widely challenged.¹¹¹

According to Henkin, therefore, humanitarian intervention is only limited to the situation of liberating hostages.

Although the doctrinal debate on validity of humanitarian intervention continues in light of the normative ambiguities inherent in the concept, its definition, and its scope, certain tests must be applied for the purpose of its justification.

¹⁰⁹ U.N.Doc.S/PV. 1941 (1976).

¹¹⁰ See L. Henkin, "Use of Force: Law and U.S. Policy," in L. Henkin, et al (ed.): *Right v. Might---International law and the Use of Force*, 1991, 2nd ed., at 41-46.

¹¹¹ *Ibid.*, at 41-42; see United Nations General Assembly Resolution 38/7, November 2, 1983.

First, humanitarian intervention must be limited to situations in which deprivation of civil rights has shocked the conscience of humanity.¹¹² Second, the consensus among those who welcome the employment of intervention as a means of redressing the injuries has been reached that humanitarian intervention must be temporary, used only as a last resort, and can be justified only when it meets the twin criteria of necessity and proportionality.¹¹³

Due to the danger of being abused, another important requirement should also be added: it should not be conducted unilaterally but rather under multilateral or regional arrangement, for example, within the mechanism of and/or under the close surveillance of the United Nations, or according to regional agreement. Such a test can be logically drawn from the states' intent of collectively maintaining the world peace and security. When the map of Eastern Europe was redrawn after the First World War, responsibility for the protection of minorities was taken out of the hands of major powers and transferred to

¹¹² See L. Kutner, "World Habeas Corpus and Humanitarian Intervention," 19 Valparaiso U.L.Rev., Spring 1985, No. 3, at 594. In Hershey's words, such intervention was justified only "in extreme cases...where great evils existed, great crimes were being perpetrated, or where there was danger of race extermination." See A.S. Hershey, "Essentials of International Public Law and Organization," rev. ed., 1927, at 239. See also H.S. Fairley, "State Actors, Humanitarian Intervention and International Law: Reopening Pandora Box," 10 Ga. J.Int'l & Comp. L., 1980, at 59-60.

¹¹³ See V.P. Nanda, "The Validity of United States Intervention in Panama Under International law," 84 Am.J.Int'l L., 1990, at 496.

the League of Nations.¹¹⁴ One of the reasons, apparently, was the fear of its being abused in the hands of big powers.¹¹⁵ After the Second World War, a much broader multilateral system of protection was established by the United Nations. The words as used in the Charter of the United Nations, such as "to unite our strength to maintain international peace and security", "to employ international machinery", "to take effective collective measures", "to achieve international co-operation", "to be a centre for harmonizing the actions of nations", "collective self-defense", and "nothing in the present Charter precludes the existence of regional arrangements", can evidence that such measures as humanitarian intervention, which is alleged as an exception to the peremptory norm of non-use of force enshrined in Article 2(4), should be arranged, if at all, within the mechanism of the United Nations, and should be conducted, if at all, multilaterally under the close surveillance of the United Nations. Whether or not the United Nation decides to conduct humanitarian intervention depends upon its concern whether or

¹¹⁴ See L.B. Sohn, "The New International law: Protection of the Rights of Individuals Rather Than States," 32 Am.U.L.Rev., 1982, at 5.

¹¹⁵ In his famous 1919 letter to the Polish Government, Georges Clemenceau explained that the Great Powers would no longer use the right to intervene for political purposes; henceforth, the League of Nations would guarantee certain essential rights of minorities in Eastern Europe. See letter from Georges Clemenceau to Ignace Paderewski (June 24, 1919) (letter accompanying the draft of the Treaty between the Allied and associated Powers and Poland Concerning Protection of Minorities), reprinted in L. Sohn and T. Buergenthal, "International Protection of Human Rights," 1973, at 214.

not the violation endangers the world peace and security. When human rights violations do pose a threat to international peace and security, then the Security Council of the United Nations has authority to deal with them under its Chapter VII enforcement powers, which include the power to adopt binding economic or diplomatic sanctions as well as the power to decide upon forcible measures. It is true that the division of interests among states, especially big powers, in the United Nations may sometimes hamper the massive operation of humanitarian intervention. However, that is the way which the original drafters meant to be. At least, perhaps, that is the price which the world, after suffering from the scourge of the two world wars, must pay in order to maintain the world peace and security. Violations of human rights, even when massive and pervasive, do not necessarily threaten peace and security. Therefore, UN multilateral humanitarian intervention is perhaps the best available way to enhance human rights protection, and at same time, to prevent states from abusing it simply for ideological reasons.

With consideration of the application of the above criteria, the legality of US intervention in the Dominican Republic, India's intervention in East Pakistan (Bangladesh), Tanzania's intervention in Uganda, Vietnam's intervention in Cambodia, US intervention in Grenada, US intervention in Panama and US

intervention in Nicaragua are seriously challenged.¹¹⁶

The Kurdish situation in Iraq is very relevant in applying the above criteria. After the Gulf War,¹¹⁷ Kurds in Iraq discovered mass graves, torture chambers, and elaborate prison system that document the egregious civil rights violations perpetrated by Iraqi President Saddam Hussein's government.¹¹⁸ Approximately two million Kurds fled Saddam Hussein's terror;¹¹⁹ Turkey and Iran opened their borders to the fleeing refugees.¹²⁰ The United States, Great Britain, and France initially provided relief operations and later sent their armed forces to carve out "safe havens" for displaced Kurds in northern Iraq.¹²¹ As the Kurds were unwilling to return to their homes without a foreign presence to ensure their protection, Iraq consented to the stationing of United Nations guards in its

¹¹⁶ See V.P. Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti---revisiting the Validity of Humanitarian Intervention Under International Law---Part I," 20 *Denvor J.Int'l L. & Pol.*, at 305-330; V.P. Nanda, "The Validity of United States Intervention in Panama Under International Law," 84 *Am.J.Int'l L.*, 1990, at 494-503.

¹¹⁷ *Wounded Iraq*, *The Economist*, March 16, 1991, at 10; *Old Enemies Come Together Against the Common Foe*, *The Economist*, March, 16, 1991.

¹¹⁸ See C. Hedges, "Kurds Unearthing New Evidence of Iraqi Killings," *N.Y. Times*, December 7, 1991, at A1.

¹¹⁹ See, e.g., *Want Another War?* *The Economist*, April 13, 1991, at 12.

¹²⁰ *Ibid.*

¹²¹ See *Sanctuary for the Kurds*, *The Economist*, April 20, 1991, at 12; *Calvary to the Rescue*, *The Economist*, April 20, 1991, at 41,

northern territory. Earlier, the United Nations Security Council adopted a resolution¹²² demanding that Iraq "immediately end [the] repression" of the Kurds,¹²³ and insisting that Iraq "allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq...."¹²⁴ Informal "safe havens" were established where aid and refuge could be given to the Kurds. The enclave developed through the initial warning by the United States prohibiting Iraqi military maneuvers in the Kurdish areas north of the 36th parallel, followed by the movement of U.S. and other coalition forces in the region, and the establishment of refugee camps for the Kurds. The design was to provide assurance to the Kurds that the refugee camps were secure so that they would return to their homes.¹²⁵

The purpose of the foreign intervention in Iraq was to solely provide humanitarian relief to the Kurds and to protect them from the Iraqi army, and consequently to ensure that relief operations were not at risk. The operation would consist of temporary relief stations to encourage the Kurds to move to areas where they could be provided with food, clothing, and

¹²² See S/Res/688, April 5, 1991, reprinted in 30 I.L.M., 1991, at 858.

¹²³ *Ibid.*, Operative Paragraph 2.

¹²⁴ *Ibid.*, Operative Paragraph 3.

¹²⁵ See P.E. Tyler, "Bush Sees Accord on 'Safe Havens' for Kurds in Iraq," N.Y. Times, April 12, 1991, at A1, col. 3.

medicine.¹²⁶ The United Nations was to monitor the entire process so as to ensure that relief efforts would be undertaken in conformity with the purpose and spirit of Security Council Resolution 688.¹²⁷

Saddam Hussein's atrocities of massive killings of Kurds in Iraq shocked the conscience of the whole world. An estimated two million Kurdish people fled from Iraq because of their prior experience with the brutal use of chemical weapons on their villages by the Iraqi army and a history of oppression of the Kurds as an ethnic group by the Iraqi government. According to some estimates, starvation and exposure were claiming lives of over 1,000 Kurdish refugees daily.¹²⁸

The claim for humanitarian intervention on Kurds' behalf meets the test that there existed a severity of the deprivation of rights so as to shock the conscience of the humanity of the world. Urgent action needed to save lives. UN Security Council Resolution 688 insisted that Iraq allow immediate humanitarian access for relief purposes, and condemned the Iraq repression of the Kurds, which threatened international peace and security.¹²⁹

¹²⁶ See E. Sciolino, "New Activity by Military Purely Humanitarian, President Says," N.Y. Times, April 17, 1991, at A1, col. 3.

¹²⁷ See E. Sciolino, "Kurds Will die in Vast Numbers Without Swift Aid, Agencies Say," N.Y. Times, April 10, 1991, at A1, col. 4.

¹²⁸ See P. Tyler, "U.S. Scouting Refugee Sites Well Inside Iraq's Border," N.Y. Times, April 4, 1991, at A1, col. 4.

¹²⁹ See S.C.Res. 688, Operative Paragraphs 1 and 3, S.C.Res. 688, April 5, 1991, reprinted in 30 I.L.M., 1991, at 858.

The intervention in Iraq was not disproportional to the rescue purposes, nor were there any other alternatives to save Kurds' life other than the intervention.¹³⁰ The duration of the intervention lasted until July 15, 1991,¹³¹ which meets the test of being temporary.

The intervention in Iraq was collective in nature and was under a close monitoring of the United Nations. Its initiative came from the British Prime Minister, John Major, but the intervention took a collective form after consultations among the Security Council members.¹³² A European Community delegation met with President Bush in efforts to gain further support for the plan as a collective action.¹³³ The decision was made to establish a multinational force to provide the needed relief.¹³⁴

Security Council Resolution 688 expressed grave concern at the repression of the Iraqi civilian population, and the massive flow of refugees "threaten[ing] international peace and security in the region,"¹³⁵ and authorized humanitarian access and

¹³⁰ See V.P. Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti---Revisiting the Validity of Humanitarian Intervention Under International Law---Part I," 20 Denver J.Int'l L.& Pol., No.2, Winter 1992, at 332.

¹³¹ See J.M. Brown, "Last Allies Pull Out of North Iraq," Financial Times, July 16, 1991, at 6, col. 1.

¹³² See A. Riding, "Europeans Urging Enclave for Kurds in Northern Iraq," N.Y.Times, April 29, 1991, at A1, col. 6.

¹³³ See P.E. Tyler, "Bush Sees Accord on 'Safe Havens' for Kurds in Iraq," N.Y. Times, April 12, 1991, at A1, col. 3.

¹³⁴ *Ibid.*

¹³⁵ See S/Res/688, preamble.

assistance to the refugees and displaced Iraqi people.¹³⁶ Although the intervening force was not under U.N. auspices, there were consultations at the United Nations and considerable international support for the operation which drew over 20,000 troops from 13 countries.¹³⁷ Subsequently, the United Nations and Iraq signed an agreement, under which U.N. security guards would move into northern Iraq, allowing the U.S. and allied soldiers to withdraw.¹³⁸

4.4. *Summary*

Humanitarian intervention, when employed as an international remedy for violations of civil rights, should strictly meet the following requirements. Humanitarian intervention is an exception to the rule of non-use of force, it, therefore, should be utilized in very egregious violations of civil rights such as genocide, or massive killings. It is meaningless if use of force, which may entail massive killings, is simply to implement a civil right to fair trial. The employment should be in accordance with the rule of necessity and proportion. The last resort rule requires exhaustion of all other international remedies. Humanitarian intervention should be conducted, if at all, under the United Nations surveillance, and should be closely

¹³⁶ *Ibid.*, Operative Paragraphs 3-5.

¹³⁷ See J.M. Brown, "Last Allies Pull Out of North Iraq," *Financial Times*, July 16, 1991, at 6, col.3.

¹³⁸ See, e.g., "Security-Force Pact is Settled with Iraq, Official at U.N. Says," *N.Y. Times*, May 24, 1991, at A8, col. 6.

monitored. The sort of mechanism is the best available way to prevent humanitarian intervention from being abused.

Law without remedies is no law at all. International law, in this regard, is no exception to this maxim. Although international law, which acts unlike domestic law, has no single authority to enforce its implementation, international law does provide remedies for the injuries as a result of violation of civil rights by states. Whatever forms international remedies may take, the purpose of providing these remedies is to exert pressures upon violating states, forcing them to stop deprivations or providing relief to the injured. Humanitarian intervention, as one form of remedies, should be used very cautiously, and should meet the tests described above. Although its employment is so narrow as to be limited only to situations in which massive killings or genocide happens, possibilities of occurrence of such gross violations of civil rights require the world community to maintain it as a last and deterrent measure to save lives. It is true that economic sanctions work only in special circumstances. Their employment together with other remedies such as those under Resolution 1503, however, may operate to certain extent as a powerful leverage to communicate the world concern to violating states. It appears that, at present time, Resolution 1503 is appropriate in dealing with day-to-day violations of customary norms of civil rights, since almost all states are very concerned about their international reputation in relation to civil rights observance. States

normally do not want to lose face internationally. As a result, they are forced to correct their poor civil rights records, either immediately or gradually. To contribute to the success of the Resolution 1503 process, non-government human rights organizations such as Amnesty International may play an important role. One problem with Resolution 1503, however, is that neither international lawyers nor international organizations such as the Commission on Human Rights have made enough efforts to let as many individuals as possible know how to use this procedure to protect their rights. It is quite true that many individuals even have not heard of the existence of such an available remedy. Many more do not know how to initiate such a petition. If more individuals file the petitions before the Commission on Human Rights, there will be easier to meet the admissibility of "consistent pattern of gross and reliably attested violations of human rights". Consequently, there will be more successful cases before the Commission.

CONCLUSIONS

The scope of human rights is very broad. It includes civil rights, political rights, social rights, economic rights and cultural rights. This thesis, however, just focuses on the discussion of the status of civil rights. Although generally speaking states with different political, economic, social, cultural as well as legal systems have a different appreciation and evaluation of different rights, there exist, as cited by the International Court of Justice in *Barcelona Traction* case, some basic rights in whose protection all civilizations in today's world community can be held to have an interest. The words "natural", "inherent", "basic", "fundamental", "sacred", and "inalienable" are very commonly used in many international instruments as well as in domestic constitutions to describe the rights in this category which intimately associate with human dignity and worth.

This thesis research believes that majority of civil rights are the rights of such a nature, with a possible exception of the right to freedom of movement due to different state practices. Therefore, with regard to international protection of civil rights, to identify customary norms of these civil rights is very relevant. First, customary law norms are legally binding even upon those states which have not accepted or signed relevant human rights treaties such as the International Covenant on Civil and Political Rights. Second, violations of international obligations to observe customary norms of civil

rights entail state responsibility under international law. Third, the possible customary norm status of civil rights in international law allows not only the treaty parties, but also the non-treaty parties to have recourse to international remedies not provided for in the relevant treaties.

In order to find evidence of customary norms of civil rights, the thesis examines: (a) the nature of the right involved, for example, the fundamental right to protection against torture; (b) frequent recommendations of the rights in question in the United Nations resolutions and declarations; (c) World Tribunals' dictum in relation to international protection of civil rights; (d) subsequent practice of states after the Charter of the United Nations and the International Covenant on Civil and Political Rights went into effect, especially non-treaty states' constitutions and the references by their domestic courts to the Universal Declaration of Human Rights and to the International Covenant on Civil and Political Rights as having legally binding force. It should be noted that the thesis puts emphasis upon (d), since this is cited as the one of the tests of the transformation of certain treaty norms into customary norms as set by the International Court of Justice in *North Sea Continental Shelf* cases and it has been confirmed by many highly qualified publicists.

By applying the above tests, a conclusion drawn by this thesis is that majority of civil rights as enumerated in the Universal Declaration and the Covenant have obtained the status

of or are merging as customary law which are legally binding even upon nonsignatory states such as China.

The thesis, however, is very cautious not to go so far as to expand the customary norm status of civil rights to the entire corpus of human rights. It is still premature to draw the conclusion that all human rights enumerated in the Universal Declaration of Human Rights have already obtained the status of customary international law before a further exploration is made. Although many principles and rules developed from international protection of human rights in general are applicable to the situation of international protection of civil rights in particular, the converse may not always hold. For instance, the customary status of civil rights can not necessarily help us infer that all human rights are therefore have the same status as civil rights before a thorough survey is done in this area.

The notion of *jus cogens* as introduced into the field of international protection of civil rights is of significance, even after the customary status of a civil right has been confirmed. By definition, *jus cogens*, as opposed to *jus gentium*, are peremptory norms of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. First, *jus cogens* is a form of customary international law. Secondly, the peremptory, mandatory and compelling nature of *jus cogens* makes *jus cogens* rights stand

higher than those rights with ordinary customary norms. Thirdly, *jus cogens* especially requires state to take active measures to observe their international obligations. Fourthly, *jus cogens*, as opposed to some customary norms, permits no derogation even in urgent necessity. Fifthly, the persistent objector rule is inapplicable to norms of *jus cogens*. Sixthly, violations of peremptory norms of civil rights constitute international crimes, which is distinguishable to international delict. Seventhly, *jus cogens* avoids the last in time rule.

The tests of *jus cogens* are generally said to be whether the principles are of concern to all states and protect interests which are not limited to a particular state or group of states but belong to the community as a whole, and whether the rights are nonderogable. Applying the tests, the substantive *jus cogens* now generally recognized include prohibition of genocide, prohibition of massive killings, massacres, summary and arbitrary executions and killings of disappeared persons, prohibition of slave and slave trade, and prohibition torture, inhumane or degrading treatment or punishment of human beings.

To adjust the concept of sovereignty in an increasingly interdependent international community, many writers began to adopt a relative theory of sovereignty. The theory of relative sovereignty acknowledges the fact that the individual states are included in a pattern of relationships which necessarily imposes certain limitations upon their will to be autonomous. Contemporary international law imposes limitations on the

permissible scope of the internal and external actions of independent sovereign states. State sovereignty is also restricted by general and customary international law even within the territories of the state, including how the state sovereign treats its own people.

For the concerns of unavailability, ineffectiveness and insufficiency of domestic protection of civil rights, the international community as a whole needs an international protection mechanism as an alternative means to provide redress to the affected individuals. Although in some context compatibility exists, it seems clear that in other context incompatibility between the two rules: the rule of international protection of civil rights and the rule of state sovereignty, does exist. The topic of this thesis is, therefore, is very relevant.

In order to enhance international protection of civil rights and at the same time to preserve some form of state sovereignty, efforts are made to interpret Article 2(7) of the United Nations Charter: what are the key meanings of "essentially within domestic jurisdiction" and "intervention".

The generality of the human rights provisions in the UN Charter does not seem sufficient to draw the conclusion, without qualification, that all human rights are solely within domestic jurisdiction of member states to the United Nations. The subsequent state practices such as constitutional provisions reflecting the norms set by corresponding treaties such as the

Covenant are very relevant. The status of the right involved is also significant. If it has emerged as, or formulated into customary law, such a right is no longer solely within domestic jurisdiction even for a non-treaty state. From the residual point of view, what has not been regulated by both treaty and custom norms is still within domestic jurisdiction. Because civil rights, as has been shown, have emerged or are emerging as customary norms under international law, they are more international concerns rather than purely internal affairs.

The term "intervention" is controversial. The prevailing view, however, is that UN organs' actions, such as discussion, investigation, fact-finding and making resolutions in relation to a specific human rights problem in a particular member state, do not constitute "intervention" within the meaning of Article 2(7) of the Charter of the United Nations. The UN practice in this regard confirms the forgoing point.

To implement international protection of civil rights in accordance with international law, state responsibility for violation of an international obligation to respect and observe civil rights must be first established.

State responsibility must be based upon the acts or omissions of state organs which give rise to effects incompatible with the pertinent rule or standard of conduct whether deriving from treaty or some principle of customary law. The international responsibility of a state is generated when conduct or an omission attributable or imputable to the state under

international law. Because the purpose of civil rights is to protect human dignity, and because some essential human rights are often breached by private persons, states are under obligations to exercise due diligence to guarantee domestic observance of and respect for civil rights. Although the principle of limiting responsibility to state organs or state agents might be retained, this concept should be interpreted liberally so as to cover any conduct or omission in which that state can be held directly or indirectly imputable, including liability for a failure to control private abuses and for an unreasonable delay to provide remedies for the affected individuals.

Customary international law of state responsibility requires an application of the rule of exhaustion of local remedies before international remedies may be available. The current tendency of international protection of civil rights for an international institution such as the United Nations' Sub-Commission, however, is to bypass this limitation if a competent international organ finds domestic remedies "ineffective and unavailable".

Law without remedies is no law at all. International protection as a remedy is carried out especially when the world peace and security are endangered and egregious violations of civil rights shock the conscience of the entire world community. Because of lack of an authoritative supra-national enforcement institution in the contemporary world, international remedies,

compared with domestic remedies, are different in form. They include humanitarian intervention, economic sanctions and fact-finding processes under UN mechanism and other unilateral or multilateral measures. Humanitarian intervention is theoretically acceptable. Its practical use should, however, be very cautious since it is easily subject to abuses. Its use should be in situations in which the violation is so severe as to shock the conscience of mankind. Its use should be under the close supervision of UN organs. It seems that, at the present time, the Resolution 1503 remedy is appropriate to offer remedies for civil rights deprivations. This is specially true when most states nowadays are sensitive to their international reputation regarding their domestic civil rights records. The world opinion about the civil rights situation in a particular state does exert a consistent influence upon that state, and does force that state to improve its civil rights record.

The history of international remedies for deprivation of civil rights has suggested that the remedies are available not only in theory but also in practice. Although international law most frequently relies upon domestic implementation by states of civil rights, one can be optimistic about the enhancement of international protection of these rights in the future. Because in the world of today, "most of the states," as Professor Henkin has put it, "observe most of the law most of the time," so let us put our faith in international law and make our best efforts in promoting international protection of civil rights.

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