ates to take forcible measlations of human rights to is is extremely limited and ie requisite conditions of le 4(h) of the 2000 Consties) lays down 'the right of decision of the Assembly le 7.1] in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity').

18.9 MAY RACIAL GROUPS AND PEOPLES RESORT TO FORCE WHEN SELF-DETERMINATION IS FORCIBLY DENIED?

Although Article 2.4 only enjoins *States* to refrain from using force, arguably the corresponding customary rule addresses itself to any international legal subject, including national liberation movements. However, it would seem that gradually a customary rule has evolved providing for an exception to the broad scope of that customary rule banning force. It provides that, if peoples subjected to colonial domination or foreign occupation, as well as racial groups not represented in government, are *forcibly* denied the right to self-determination, such peoples or racial groups are legally entitled to resort to armed force to realize their right to self-determination.[30]

[30] That the rule has evolved is arguably evidenced, among other things, by the acceptance by consensus of the 1970 Declaration on Friendly Relations as well as by a string of subsequent GA resolutions (for example, resolutions 3314(XXIX) of 14 December 1974 on the Definition of Aggression, Article 7; A/7185 Revision 1, para. 60; A/7402, paras 6 and 61), as well as Article 1.4 of the 1977 First Additional Protocol to the 1949 Geneva Conventions (for references see A. Cassese, *Self-Determination of Peoples—A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), at 150–8, 197–8).

19

THE PROTECTION OF HUMAN RIGHTS

19.1 INTRODUCTION

Since 1945 the doctrine of human rights has been troubling and upsetting some, inflaming and thrilling others, whether individuals, groups, or non-governmental organizations, or members of cabinet, diplomats, or other State officials. At the State level, after the Second World War this doctrine has become, for some countries, one of the significant postulates of their foreign policy, of great use when blaming or denouncing other countries, or guiding their actions within international organizations. To other States this doctrine has turned out to be an incubus instead: it serves as a yardstick by which their behaviour is gauged and may be censured in international fora.

The arrival of human rights on the international scene is, indeed, a remarkable event because it is a *subversive* theory destined to foster tension and conflict among States. Essentially it is meant to tear aside the veil that in the past protected sovereignty and gave each State the appearance of a fully armoured titanic structure, perceived by other States only 'as a whole', the inner mechanisms of which could not be tampered with. Today the human rights doctrine forces States to give account of how they treat their nationals, administer justice, run prisons, and so on. Potentially, therefore, it can subvert their domestic order and, consequently, the traditional configuration of the international community as well.

On the whole, one can say that within the international community this doctrine has acquired the value and significance which, within the context of domestic systems, was accorded to Locke's theory of a social contract, Montesquieu's concept of the separation of powers, and Rousseau's theory of the sovereignty of the people. Just as these political ideas eroded absolute and despotic monarchy, democratizing the foundations on which kingdoms rested, so the doctrine of human rights has lent, and still lends, in the world community, tremendous impetus to respect for the dignity of all human beings, and also to the democratization of States.

Why then did States support and even advocate this 'theory' at an international level, knowing full well that it diverged radically from the political philosophy of State sovereignty and the basic principle on which the 'Grotian model' rested? What political and ideological motives induced certain members of the international community to propound ideas likely to undermine and disrupt their own authority?

19.2 TRADITIONAL INTERNATIONAL LAW

Traditionally, individuals were under the exclusive jurisdiction of the State of which they were nationals and where they lived. No other State could interfere with the authority of that State, which in a way had a sort of right of life and death over those individuals. Beyond national boundaries individuals could only be taken into consideration qua *citizens* of a foreign State. If they suffered damage abroad, their interests were safeguarded only to the extent to which their national State decided to exercise diplomatic protection (by approaching through diplomatic channels the State that had allegedly wronged one's nationals in their person or property, with a view to obtaining compensation for the damage caused and possibly punishment of the wrongdoers), or judicial protection (by bringing a claim on behalf of one's nationals before an international arbitral tribunal or court). Individuals were mere 'appendices' of the State to which they belonged, simple pawns in its hands, to be used, protected, or sacrificed according to what State interests dictated.

Gradually, however, a few exceptions, took shape. Treaties prohibiting the slave trade were concluded in the nineteenth century. Others banning both the slave trade and slavery as such were made in the twentieth century. Conventions were concluded after the First World War, under the auspices of the ILO, to protect the rights of workers. In the same period various treaties safeguarding religious, ethnic, and linguistic minorities were agreed upon. All these conventions and treaties, although founded to a great extent on humanitarian considerations, were also motivated by the self-interest of the contracting States.[1] Even so, it remains true that one of the motivations behind these three classes of treaties was the concept that certain groups or categories of individuals ought to be protected by international law for their own sake.

After the Second World War, international protection of human beings as such increased at a staggering pace. Individuals were no longer to be taken care of, on the international level, *qua* members of a group, a minority, or another category. They began to be protected *qua* single human beings. Furthermore, the international

[1] The pressure to put a stop to the trade in black slaves came in part from those European countries which no longer had colonial interests in the Americas and were consequently keen to end the flow of cheap manpower to other countries. In the case of ILO Conventions, guaranteeing uniformity of treatment to workers in all the major areas of the world prevented certain countries from taking unfair advantage in the international market of low labour costs at home (see also 7.6.2(c)). The treaties on minorities (with Czechoslovakia, Greece, Poland, Rumania, and Yugoslavia) as well as the peace treaties including clauses on minorities (those with Austria, Bulgaria, Turkey, and Hungary) were to some extent politically motivated: those European countries which had ethnic, linguistic, or religious affinities with groups living in other countries were eager for these groups to be respected and immune from undue hindrance and interference. What is even more important—as President Wilson pointed out at the Peace Conference on 31 May 1919, in an attempt to rebuff the opposition of States where minorities existed—the international protection of minorities aimed at safeguarding peace, besides attenuating the often harsh consequences of the territorial partitions effected in Europe by the Great Powers (see FRUS, *The Paris Conference 1919*, iii (Washington, D.C.: Government Printing Office, 1943), 406–8).

standards on the matter were no longer motivated, even in part, by economic interests, although they were often dictated by political considerations.

Why did things change so drastically? The main reason was the shared conviction, among all the victorious powers, that the Nazi aggression and the atrocities perpetrated during the war had been the fruits of a vicious philosophy based on utter disregard for the dignity of human beings. One means of preventing a return to these horrors was the proclamation at all levels of certain basic standards of respect for human rights. This view was propounded with greatest force by the Western Powers (in particular the USA), for the simple reason that their whole political philosophy and indeed, for some of them, the fundamental legal texts of their national systems were based on a 'bill of rights'. Therefore, it came naturally to them to project their domestic concepts and creeds on to the international community.

The victors adopted a two-pronged strategy. They pursued, on the one hand, the development of international criminal law to meet the immediate need of bringing to justice and punishing German and Japanese war criminals who had committed inhuman acts. On the other hand, they set out to elaborate a set of general principles on human rights designed to serve as guidelines for the UN and its member States, the intent being that they would be gradually implemented and elaborated upon through traditional normative means, that is to say, treaties.

These two approaches, although distinct, supplement each other. Both stemmed from the desire to punish those guilty of atrocities and, by the same token, prevent the recurrence of similar acts in future by setting standards to be observed even in peacetime.

19.3 THE TURNING POINT: THE UN CHARTER

As pointed out above, the lead was taken in 1945 by Western countries and chiefly by the USA. President Roosevelt, in his message to Congress of 6 January 1941, had already listed the 'four freedoms', which he saw as important goals of future US foreign policy:

> 'In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression—everywhere in the world. The second is freedom of every person to worship God in his own way—everywhere in the world. The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy, peaceful life for its inhabitants—everywhere in the world. The fourth is freedom from fear—which translated into world terms, means a world wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of aggression against any neighbour—anywhere in the world.'[2]

[2] See US Congress, *Hearings Documents*, 77th Congress, 1st Session.

The elevated concepts enunciated by Roosevelt were taken up in the Atlantic Charter of 14 August 1941 and subsequently amplified by the US delegation to the Dumbarton Oaks Conference in 1944. In the 'US Tentative Proposals for a General International Organization' of 18 July 1944, it was suggested that the GA of the UN should be responsible for

'initiating studies and making recommendations for ... the promotion of the observance of basic human rights in accordance with the principles or undertakings agreed upon by the States members of the International Organization'.[3]

It is apparent from this proposal that, once one moved from the proclamation of lofty principles at the political level to the adoption of treaty provisions, even the very State which had championed the inclusion of human rights among the matters under UN jurisdiction eventually proceeded with the utmost caution. Indeed, it took pains to spell out that the Organization should have limited powers only. In particular, the standards on human rights by which member States should be guided were to be first accepted by them through the traditional process of treaty making. The American restraint was clearly motivated by domestic reasons: there were constitutional problems, which the acceptance of international obligations on human rights might raise, but also, and more importantly, in the USA in 1945 various racist laws were in force—and continued in force until the 1960s. These laws might easily expose the US Government to international censure if internationally binding obligations on human rights were enacted through the UN Charter.

At the Dumbarton Oaks Conference (August–October 1944), the initial opposition of the UK and the USSR led the USA to water down its proposals even further. In fact the provision on human rights produced by the four Powers (the USA, the USSR, the UK, and China), was quite weak. However, when the San Francisco Conference (April–June 1945) began, the four sponsoring Powers were confronted with a spate of bold amendments, mostly emanating from Latin American countries. This, as well as the conversion of the USSR to the cause of human rights (it put forward specific proposals on the matter, particularly on non-discrimination and self-determination of peoples), led the four Powers to consider it advisable to strengthen their proposals.

In the course of the San Francisco Conference three alignments emerged. On the one hand, there was a group of vocal Latin American countries (chiefly Brazil, Colombia, Chile, Cuba, the Dominican Republic, Ecuador, Mexico, Panama, and Uruguay) plus a few Western States (Australia, New Zealand, and Norway) joined by such nations as India. These countries put forward amendments substantially calculated to lay down an obligation to respect human rights. The second group of States included major Western Powers which, though favourable to the promotion of human rights, opposed the attempts to expand the sphere of action of the UN and to lay down definite obligations to respect human rights. The USA took a lead on this score, by strongly objecting to the broadening of Article 56 (on member States' joint and

[3] See the text of the 'Tentative Proposals' as an appendix to R.B. Russel, *A History of the United Nations Charter—The Role of the United States 1940–1945* (Washington, D.C.: The Brookings Institution, 1958), 995–1006, at 997.

separate action for the promotion of economic and social co-operation) and also by insisting on the need to lay down a safeguarding clause protecting State sovereignty from undue interference from the Organization (the proviso that later became Article 2.7 on domestic jurisdiction). A third group, consisting of socialist countries (Byelorussia, Czechoslovakia, and Ukraine) led by the USSR, although substantially upholding the restrictive attitude of the second group just mentioned, distinguished itself by stressing the importance of the right of peoples to self-determination (a right which major Western countries, plus such colonial powers as Belgium, strongly opposed).

In addition, the USSR put forward proposals clearly showing that differences existed even in areas where there seemingly was agreement between East and West. Thus, for instance, when the four Great Powers met in San Francisco and discussed the proposal that the UN should promote 'respect for human rights', the USSR suggested that this should be followed by the words: 'in particular, the right to work, and the right to education'. The USA and the UK opposed this proposal, on the grounds that if it was specified which rights were to be protected, then others should be added—in particular freedom of information and freedom of religion. Similarly, when at San Francisco the report of 'Technical Committee 3' (charged with discussing matters relating to economic and social co-operation) came to be discussed within Commission II of the Conference, the Soviet delegate drew attention to the part played by the USSR in improving on the Dumbarton Oaks proposals and specifically mentioned the principle of respect for human rights. He only spoke of economic, social, and cultural rights, however.[4]

The upshot of the lengthy discussions at San Francisco was that the first group of States did not obtain any substantial gains, while the other two groups reached a compromise which, to some extent, accommodated their mutual demands. The compromise took shape in the following provisions: (1) there was *no specific obligation* to take separate action for the promotion, let alone the protection, of human rights (see Article 56); (2) the right of self-determination of peoples was proclaimed (Articles 1 and 55), but only as a guiding principle for the Organization and in the *emasculated version of self-government*; (3) the powers of the GA in the field of human rights, already very weak (they boiled down to *making recommendations* and *conducting studies*), were further limited by the proviso of Article 2.7 (on domestic jurisdiction); (4) the Charter provisions on human rights were inspired by the conviction that respect for human rights should only be furthered as *a means of safeguarding peace.*

19.4 TRENDS IN THE EVOLUTION OF INTERNATIONAL ACTION ON HUMAN RIGHTS

Faced with this normative framework, member States of the UN were to decide how to make use of the loose formulas of the Charter. Broadly speaking, two possible

[4] For the relevant statements on human rights made at San Francisco see in particular UNCIO, vol. 3, 296 ff.; vol. 8, at 56, 80–1, 85, 90–1. In particular, for the Soviet statement referred to in the text, see vol. 8, 56–7.

courses of action were open to them. Either they could confine themselves to using the GA as a 'regular diplomatic conference' and accordingly draft conventions or stimulate States to pursue certain objectives by addressing general recommendations to them, in keeping with a liberal construction of Article 2.7. Arguably, to have achieved this would by no means have been a poor performance: the mere fact of detailing and spelling out in international instruments the human rights and fundamental freedoms, for the promotion of which States should strive, would have constituted a major accomplishment.

Alternatively, a less moderate course of action was available. By placing a strict interpretation on Article 2.7 the Organization could go beyond the mere elaboration of international standards, and call States to account, at least in cases of massive infringements of human rights. To this effect, the UN could turn the GA into the 'conscience of the world', by endowing it with the role of watchdog, to forestall or castigate egregious deviations from basic standards on human rights.

In the following pages we shall see that the UN (and regional organizations) gradually took the second path.

The majority in the UN and consequently the prevailing political philosophy underpinning UN action changed in the course of time. One can pinpoint four different phases. The first stage, which dated from the adoption of the UN Charter to the late 1950s, was characterized by Western dominance. At the regional level this approach led to the adoption, within the Council of Europe, of the 1950 European Convention on Human Rights, a landmark in the evolution of the international protection of human rights. The second stage, which started with the strengthening in the UN of the socialist group in 1955 and its taking the lead of developing countries, had as its main feature the need for the West to come to terms with the other two groups, with the consequent striking of a number of important compromises such as the two Covenants on human rights of 1966. The third stage, which started around 1974 and ended around 1990, was marked by the prevalence of developing countries. It launched a new doctrine of human rights, which eventually gained the upper hand in many respects and aimed at supplanting or at least toning down, as much as possible, the views previously upheld by the GA. The present stage, which opened with the end of the cold war, has as its main feature the disappearance of three markedly differentiated groupings of States and the emergence of broad consensus on the need to consider respect for human rights a *sine qua non* for full international legitimation, that is, in order to participate in international intercourse.

19.4.1 STANDARD SETTING

(a) The Universal Declaration (1948)

The first step was the attempt by the UN GA to draw up an international document on human rights acceptable to all members of the international community: to States

as dissimilar ideologically and politically as the USA and the USSR; to nations with such different economic and political structures as the Western countries on the one hand and Ethiopia, Saudi Arabia, and Afghanistan on the other; to countries upholding differing religious philosophies, ranging from Christian (the nations of the West and Latin America), to Muslim (like Saudi Arabia, Afghanistan, Turkey, Pakistan, etc.), Hindu (like India), and Buddhist (like China).

It was therefore necessary to find the lowest common denominator, as regards the conception both of the relationship between State and individual, and of basic human rights. The attempt to forge a single, collective stand, a general 'philosophy' of human dignity, was successful, although agreement was only reached after lengthy discussions. The ensuing political document, the Universal Declaration of Human Rights of 10 December 1948, has two basic characteristics, one to do with its formal structure and the other with its content.

In formal terms, it is not legally binding, but possesses only moral and political force. In other words, it is simply a *recommendation* to States. About the content of the Declaration a little more needs to be said. On the whole, the view of human rights expressed in it is Western. More space and importance are allotted to civil and political rights than to economic, social, and cultural rights, and no mention at all is made of the rights of peoples. The position taken with regard to colonized peoples, who had been partially or completely denied their right to freedom, was purely formal. Nor did the Declaration say anything specific about economic inequalities between States (although today many commentators cite with increasing frequency Article 28 whereby 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized'). In addition, one could note that the Declaration did not consider the fact that some States, being underdeveloped, faced special problems when trying to guarantee certain basic rights, such as those to work, to education, to suitable housing, etc.

How did the West succeed in imposing its 'philosophy'? The socialist countries, though putting up a strong resistance to the fact that so little importance was being attributed to economic, social, and cultural rights, were in a minority. All they could do was abstain. Moreover, they had not yet fully worked out a clear strategy of their own. As for the Third World, it was at this stage to a large extent made up of Latin American countries with a Western outlook; the remaining countries simply did not have the strength or authority to stand up to the Western powers, which incidentally numbered among their delegates influential figures such as Eleanor Roosevelt and René Cassin.

In spite of its limitations, the Declaration was, however, of great importance in stimulating and directing the international promotion of human rights. It formulated *a unitary and universally valid concept of what values all States should cherish within their own domestic orders.* One particular category of States, the socialist countries, did not support it enthusiastically. Yet neither the latter nor developing nations regarded the Declaration as something from which they felt estranged—rather, they looked upon it as a document containing a valid core in need of completion.

Consequently their subsequent efforts were directed not at eroding, let alone jettisoning, the Declaration, but rather at filling its gaps.

On the whole the Declaration remains a lodestar, which has guided the community of States as they gradually emerged from the dark age when the possession of armies, guns, and warships was the sole factor for judging the conduct of States, and there were no generally accepted principles for distinguishing good from evil in the world community.

(b) International treaties

Even before the Universal Declaration was adopted States had basically agreed on the need to translate its general principles into legally binding instruments.

A twofold strategy gradually unfolded. First, it was felt necessary to spell out the general standards of the Declaration in legally binding instruments of *general purport*, that is, covering the whole range of human rights. This was to be done both at the universal and at the regional level, where the relative political, ideological, and economic homogeneity of States rendered the task less difficult. Second, treaties were to be worked out in *specific* areas, notably those considered by the majority of States as being of greater significance and more in need of urgent international legislation (such as genocide, racial discrimination, etc.).

Thus at the universal level the Covenant on Civil and Political Rights (with an Optional Protocol) and that on Economic, Social, and Cultural Rights were adopted in 1966. At the regional level the European Convention on Human Rights was adopted in 1950, the American Convention on Human Rights in 1969, the African Charter on Human and Peoples' Rights in 1981; in 1994 the Council of the Arab League (with a membership of 22 States) passed the Arab Charter on Human Rights (although this is not yet in force; see also the Draft Arab Charter on Human Rights, adopted on 5–14. January 2004 by the Arab Standing Committee for Human Rights; text online: **www.pogar.org/themes/reforms/documents/dacharter.pdf**).

The Covenants cover the whole range of fundamental rights. However, characteristically the right of property does not figure in either of them. Arguably, this was not due to the fact that the right was no longer considered a value worthy of international protection on a universal level, but rather to the inability of East and West to agree on the issue of compensation in case of expropriation. Be that as it may, this omission went along with the trend to erode and revise the international customary law which in the past had protected the private property of foreigners, requiring 'prompt, adequate, and effective' compensation in the case of expropriation or nationalization (see **24.8**).

In addition, for the first time in an international legal document we find the concept that formal or legal equality makes little sense if deep practical inequalities exist. This being the case, it appears right to give legal sanction to certain types of distinction when they come into being as a consequence of practical inequalities. Thus, Article 2.3 of the Covenant on Economic, Social, and Cultural Rights lays down that developing countries 'may determine' to what extent they 'would guarantee' the economic rights specified in the Covenant 'to non-nationals'. In other words, they are authorized to discriminate between nationals and foreigners, so long as (a) this is justified by the country's economic circumstances and does not amount to discrimination against citizens of a particular State, and (b) the refusal to award the same status to foreigners and nationals does not lead to serious violations of other human rights. Other treaties that contain provisions envisaging 'affirmative action' for groups discriminated against include the 1965 Convention on racial discrimination (see, for example, Article 1.4) and the 1979 Convention on discrimination against women (see, for example, Article 4).

A host of specific treaties was hammered out, particularly at the universal level. Suffice it to mention, among the most important, the Conventions on genocide (1948), on racial discrimination (1965), on discrimination against women (1979), on torture (1984), on the rights of the child (1989), and on migrant workers (1990) as well as the 2000 Optional Protocol on the Involvement of Children in Armed Conflict, and the 2000 Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

19.4.2 THE TENDENCY TO OVERRULE THE OBJECTION OF DOMESTIC JURISDICTION

Over the years the UN tended to reject the objection of State sovereignty put forward by a number of States, and discussed various questions concerning human rights. In general, however, these questions concerned large-scale, flagrant violations of human rights, rather than isolated cases. The UN justified its 'intervention' on the grounds that these violations constituted a threat to peace and to friendly relations between States. The line taken was warranted in the same terms as those used while drafting the UN Charter: respect for human rights as a means of securing peace, thereby dispelling misgivings that the Organization would suffer from a paralysing fear of trespassing on State sovereignty. This 'intervention' could take various forms: public discussion in a UN body, adoption of a resolution on the matter, the making of appeals, requesting the State concerned to stop the violations forthwith, or even recommending to member States that peaceful 'sanctions' should be taken against the delinquent State.

However, as a result of the growing network of international treaties and the establishment of the monitoring procedures to which we shall shortly refer, the conviction gradually took hold among UN members that 'intervention' in the affairs of individual States was fully justified, so long as *serious and large-scale violations* had been allegedly committed, regardless of whether they amounted to a threat to peace or to friendly relations between States.

To grasp the importance of this new trend and the sea change that has occurred, in the last few decades, in the relations between universal inter-State organizations and individuals living within member States and whose human rights are allegedly breached, one need only remember how the Council of the League of Nations reacted to the complaint of a German national of Jewish origin in 1933 (the *Bernheim*

case), and, more generally, to large-scale and harsh discrimination against Jews in Germany.[5]

19.4.3 EXPANSION OF THE TERRITORIAL SCOPE OF HUMAN RIGHTS OBLIGATIONS

States, when they undertake obligations in the area of human rights, tend to consider that such obligations apply to individuals subject to their jurisdiction in their own territory. In other words, they construe these obligations as having a strictly territorial scope. This, for instance, was the interpretation they inclined to place on Article 2 of the UN Covenant on Civil and Political Rights, whereby 'Each state Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.

[5] In 1933 Franz Bernheim complained to the Council of the League of Nations about the breaches by Germany of the German-Polish Treaty of 1922, protecting minorities in Upper Silesia (at the time belonging to Germany); in particular, he insisted on the fact that the anti-Jewish laws promulgated in Germany in 1933, and by virtue of which he (like all Jewish employees) had been sacked by a German firm, were contrary to the Treaty (see League of Nations, *Official Journal*, Year XIV, July 1933, at 833–935 and October 1933, *Special Supplement* no. 114, at 1–3 and 22). The German delegate asked that the complaint be dismissed because Bernheim had no link with Upper Silesia (League of Nations, *Official Journal*, Year XIV, July 1933, at 839). The Polish delegate noted that admittedly from a formal point of view the Council could only deal with the fate of Jewish minorities in Upper Silesia. Nevertheless, 'All members of the Council had . . . at least a moral right to make a pressing appeal to the German Government to ensure equal treatment for the Jews in Germany' (ibid., at 841). He wrapped up his eloquent speech by stating that 'A minimum of rights must be guaranteed to every human being, whatever his race, religion, or mother tongue' (ibid.). A Committee of Jurists was appointed. It found Germany in the wrong but decided to take note of an assertion made previously by the German delegate: if some blame had to be assigned to Germany, confined obviously to Upper Silesia, it could only derive from 'errors due to misconstructions of internal [German] law by subordinate authorities; these errors would be corrected' (at 842). On the strength of this affirmation the Council adopted a report inviting Germany to bring the violations to an end. It would seem that Germany made no follow-up to the Council's exhortation.

But the question of discrimination against Jews did not rest there. A few months later the question of whether in every modern civil State all citizens ought to enjoy equal treatment came up before a Committee of the League's Assembly. Germany insisted that this was an internal matter, while France took the contrary position, contending among other things that if a treaty protected minorities in one part only of a country, minorities were nonetheless to be protected in other parts of the territory of the country as well, for the treaty provisions must not be interpreted as excluding some categories of citizens from the benefits they granted (a clear reference to the *Bernheim* case) (League of Nations, *Official Journal*, 1933, *Special Supplement* no. 120 (Minutes of the Sixth Committee—Political questions), at 28). The German delegate retorted that 'the Jewish problem in Germany [was] a special problem *sui generis* and [could] not possibly be treated . . . simply like an ordinary minority question' (ibid., at 42). Although improved by the Greek delegate, N. Politis, the French proposal was rejected by Germany. Consequently, pursuant to Article 5 of the Covenant that required unanimity, the French-Greek proposal did not carry. Only three days after the rejection of that proposal, on 14 October 1933, Hitler announced Germany's withdrawal from the League, because other States were unprepared to grant 'true equality of rights' to it, and thereby put Germany in an 'undignified' position.

Respect for human dignity thus came up against its first stumbling block in Germany's firm stance that national sovereignty could not tolerate any international interference by an international body in internal affairs.

However, international bodies responsible for scrutinizing compliance with human rights standards have increasingly interpreted those obligations as also having an *extraterritorial scope*. Thus, for instance, in 1995 the UN Human Rights Committee, in commenting on the report submitted by the USA, noted that it could not share the view of the US Government that the UN Covenant on Civil and Political Rights lacked extraterritorial reach under all circumstances. 'Such a view [it went on to point out] is contrary to the consistent interpretation of the Committee on this subject that, in special circumstances, persons may fall under the subject matter jurisdiction of a State party even when outside that State territory.'[6] More specifically, in *Delia Saldías de Lopez* (on behalf of her husband *Sergio Ruben Lopez Burgos*) v. *Uruguay* the Committee had already ruled that Uruguay had violated the Covenant when its security forces had abducted and tortured in Argentina a Uruguayan citizen living there. It had noted that

> 'The reference in Article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion [that the Covenant also covered conduct of Uruguayans acting on foreign soil] because the reference in that Article is not to the place where the violations occurred, but rather to the relationship between the individuals and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred. Article 2.1 of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it . . . In line with this, it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory' (at §12.2–12.3).[7]

In an important case (*Loizidou* v. *Turkey—Preliminary Objections*), the European Court of Human Rights carried this doctrine even further. The question had arisen of whether the denial by Turkish armed forces stationed in Northern Cyprus, of the applicant's (a Cypriot) access to her property in Northern Cyprus was imputable to Turkey and consequently fell under Turkey's jurisdiction pursuant to Article 1 of the European Convention on Human Rights. The Court gave an affirmative answer, ruling that what mattered was that Turkey had effective or overall control over the armed forces stationed in an area outside its national territory (at §57). The Inter-American Commission of Human Rights spelled out this doctrine more forcefully in *Coard et al.* v. *US*. The question at issue was whether the USA could be held responsible for violating the 1948 American Declaration on the Rights and Duties of Man for allegedly holding incommunicado and mistreating 17 Grenadian nationals in Grenada in October 1983, when US and Caribbean armed forces invaded the island, deposing

[6] UN Doc. CCPR/C/79/Add 50 (1995), 19.

[7] See also *Lilian Celiberti de Casariego* v. *Uruguay* (at §5), *Montero* v. *Uruguay* (at §§10.1–10.3).

the 'revolutionary government'. In its report of 29 September 1999 the Commission replied in the affirmative.[8]

This case law (restated and confirmed by the ICJ in *Legal Consequences of the Construction of a Wall*, at §§108–111), is consistent with the object and purpose of human rights obligations: they aim at protecting individuals against arbitrariness, abuse, and violence, regardless of the location where the State conduct occurs.

It follows from the above that States are to respect human rights obligations not only on their own territory but also abroad, when they exercise there some kind of authority or power, whether the individuals subject to this authority or power have the State's nationality or are foreigners. In addition, by exercise of authority one should mean not only the display of sovereign powers (law making, law enforcement, administrative powers, etc.), but also any exercise of power, however limited in time (for instance, the use of belligerent force in an armed conflict).

19.4.4 MONITORING OF COMPLIANCE

(a) Universal level

Clearly, in general the best means of ensuring respect for a right is to back it up with legal guarantees to be administered by a court of law. I have, however, already mentioned that in the international community the judicial settlement of disputes is often rendered all but impossible by the lukewarm attitude of many States. In the case of human rights, opposition to international adjudication is even stronger. The need to strike a compromise between State sovereignty and the requirement that States comply with international standards on human rights led to the establishment of a number of monitoring mechanisms—which, as pointed out above (**14.8.2**), are much weaker than international adjudication.

The principal mechanisms created in this period at the *universal* level were of two kinds: those established by international treaties and those set up by UN resolutions.

Among the former, one should mention—at the world level—the procedures created by the 1965 Convention on racial discrimination (monitored by the Committee on the Elimination of Racial Discrimination), by the Covenant on Civil and Political Rights of 1966, with its Optional Protocol (the monitoring body is the Human Rights Committee), that established in 1986 on the strength of the 1966 UN Covenant on Economic, Social, and Cultural Rights (the Committee on Economic, Social, and Cultural Rights), the one set up under the 1979

[8] If noted that, 'Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a State's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one State, but subject to the control of another State—usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control' (at §37).

Convention on the elimination of discrimination against women (establishing a Committee with the same name, whose powers were strengthened by the 1999 Optional Protocol), by the 1984 Convention on torture (on the strength of which the Committee against Torture was established), the supervisory mechanism established by the 1989 Convention on the protection of the child (Committee on the Rights of the Child), and the Committee established by the 1990 Convention on the Rights of Migrant Workers and Their Families.

Normally, the Conventions just mentioned establish three supervisory procedures. (1) A procedure based on the examination of *periodic reports* submitted by States. (This is, of course, the weakest and it is no coincidence that it is the scrutiny applicable to all contracting States.) (2) The procedure for the examination of *inter-State complaints*, which a contracting State can set in motion against another party. (It can work only with regard to those States which, in addition to ratifying the Convention, have also accepted a special clause providing for the procedure. So far it has not yielded any major result, for obviously States refrain from engaging in reciprocal accusations.) (3) The procedure operating at the *request of individuals* or groups of individuals, who may file with the supervisory body a 'communication' setting out the violations allegedly perpetrated by a State. (Like the previous procedure, it is provided for in an 'optional clause', but it has proved effective, within the limitations inherent in any supervisory mechanism: see **14.8.2.**)

The monitoring mechanisms established by resolution are chiefly (a) those set up in 1967 by resolution 1235(XLII) of the Economic and Social Council (ECOSOC); (b) others set up in 1970 by resolution 1503(XLVIII) of the same body, and revised in 2000;[9] as well as (c) the system of country or thematic special rapporteurs, gradually

[9] The two procedures set up by ECOSOC are both complex and somewhat cumbersome. Both procedures depend upon several UN bodies such as the Sub-Commission on the Promotion and Protection of Human Rights (until 1999 called Sub-Commission for the Prevention of Discrimination and Protection of Minorities; it is composed of 26 experts nominated by governments and elected by its 'parent' body, the Commission on Human Rights), the Commission on Human Rights (consisting of 53 member States), and ECOSOC (made up of 54 States), plus possibly a Commission of Investigation. They operate as a result, or at the behest, of 'communications' (complaints) emanating from individuals or groups of individuals and deal with 'a consistent pattern of gross violations' only (that is, not with individual or sporadic infringements).

The procedure established in 1967 is *public*, for the discussion of the gross violations of human rights referred to in the 'communications' of individuals, is made in public sittings of the Commission on Human Rights, normally after receiving a report from the Sub-Commission. The Commission may eventually adopt resolutions deploring or condemning one or more particular States for their breaches of human rights.

In contrast, the procedure set up in 1970 and revised in 2000 is *confidential*: the 'communications' from individuals and groups alleging human rights violations, which set in motion the whole process, are not made public (unless ECOSOC decides to release them, which happens very rarely). On the other hand, the identity of the countries under examination is announced by the Chairman of the Commission at the end of each yearly session. The final outcome of the procedure is made public if and when the Commission decides to submit a 'situation' to ECOSOC. Normally the Sub-Commission, after screening, through a Working Group, 'communications' relating to gross and reliably attested violations of human rights, decides which situations deserve thorough consideration. It then submits a report to the Working Group of the Commission dealing with these matters.

evolved in the 1990s by the Commission on Human Rights;[10] and (d) the UN High Commissioner for Human Rights, established in 1993 by GA resolution 48/141.[11]

In order fairly to appraise the effectiveness of the aforementioned monitoring mechanisms, it must be appreciated that (a) they operate in an area where States, although they may have assumed international obligations, are not prepared to submit to international judicial scrutiny; and (b) this area covers matters that are politically extremely sensitive, and which may have international implications at the diplomatic, economic, or commercial level. Consequently, international bodies must tread gingerly, lest States might withhold co-operation, thus leaving them unable to act, except for the adoption of condemnatory resolutions. Hence, the various international bodies concerned avoid taking an accusatory approach, that is, they prefer not to engage in the attribution of responsibility to individual governments. Rather, they tend to opt for public exposure and pressure. (However, things are gradually changing in this respect; thus, for instance, the Working Group on Arbitrary Detention issues opinions which do in effect attribute 'responsibility' and various other rapporteurs increasingly tend to write their reports in a similar way.) More generally, they are inclined to take a '*conciliatory*' rather than a '*confrontational*' approach. Seen against this backdrop, the mechanisms under discussion may be considered to be reasonably effective in (a) focusing on countries or problems that deserve to be carefully scrutinized; (b) drawing the attention of States, international organizations, NGOs, and public opinion at large to some pivotal issues concerning human rights; (c) exerting pressure upon States with a view to inducing them gradually to improve their human rights record; (d) contributing to the creation of an international ethos requiring respect for at least some core human rights; (e) serving as a catalyst to the gradual elaboration of new international conventions or the adoption of general resolutions.

However, one should not ignore some major failings of these mechanisms: (1) They tend to be so conditioned, in their unfolding, by political and diplomatic considerations, that often their final result is rather weak, being couched in terms that are too general or too diplomatic. (2) The reports of the various working groups or individuals often fail to trickle down from the body of specialists or specialist organizations to public opinion at large. Consequently, a wealth of monitoring, information, and expertise is eventually little used outside some restricted circles within the UN.

[10] The *thematic procedure* deals both with gross violations and with individual infringements of groups of rights. The subjects for monitoring are often suggested by 'communications' from individuals and groups. The Commission, whenever it consider fit to undertake the examination of a particular theme ('a major phenomenon of human rights violations world-wide'), may appoint a Working Group, a special rapporteur or a representative, or an expert. Any of these may also undertake fact-finding missions in the countries concerned (with the countries' consent). In the event the Commission may pass recommendations to the States concerned as well as suggestions for remedying the breaches found.

The system of *country* or *thematic special rapporteurs* has gradually evolved to take account of special needs. Under this procedure the Commission on Human Rights entrusts either working groups of experts, or individual experts (variously designated as special rapporteurs, representatives, experts), or even the UN Secretary-General or the UN High Commissioner for Human Rights, with the task of examining, monitoring, and publicly reporting on the human rights situation in *a certain country* (e.g. Afghanistan, Cambodia, East Timor, the former Yugoslavia, Iraq, Burma/Myanmar, Occupied Arab Territories, Rwanda, Somalia, Sudan), or on *major human rights themes*, wherever the relevant problems might occur (for example, arbitrary detention; enforced or involuntary disappearances; extra-judicial, summary, or arbitrary executions; effects of foreign debt on the full enjoyment of economic, social, and cultural rights; the independence of judges and lawyers; internally displaced persons; mass exoduses; human rights of migrants; human rights and extreme poverty; religious intolerance; the right to restitution, compensation, and rehabilitation for victims of grave violations of human rights; torture; the adverse effects of illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights; violence against women, its causes and consequences; actions against human rights defenders; housing; the right to food, etc.). The relevant rapporteurs may not only use information from any reliable source, but also make on-site country visits (provided the States concerned are agreeable).

[11] The primary function of the *High Commissioner* is to play 'an active role ... in preventing the continuation of human rights violations throughout the world'. In substance, his or her role is to promote respect for human rights, in addition to providing advice, technical assistance, and co-operation. It would appear that so far, particularly after the initial period when the post was filled by a former diplomat, the High Commissioner has been significantly instrumental in drawing attention to gross violations, calling upon States to abide by international standards.

(b) Regional level

Regional supervisory mechanisms are more advanced. They are normally judicial bodies, such as the European Court of Human Rights (ECHR), the Inter-American Commission (IACHR) and the Inter-American Court of Human Rights (IACourtHR). In contrast, the African Commission on Human Rights and the Rights of Peoples (ACHR) is rather a monitoring body, lacking judicial functions. An African Court on Human and Peoples' Rights is provided for in the Protocol to the African Charter on Human and Peoples' Rights, of 9 June 1998, entered into force on 25 January 2004.

Among the various judicial bodies just mentioned, the ECHR is by far the most advanced. Under the 11th Protocol of 1994 (which considerably modified the previous system provided for under the 1950 European Convention on Human Rights), since 1999 the Court has been a full-time judicial body currently consisting of 42 (soon to become 45) judges. Each of the 45 member States of the Council of Europe parties to the Convention may refer to the Court any alleged violation of the Convention and its Protocols by another contracting State. In addition, any person, non-governmental organization or groups of individuals subject to the jurisdiction of any of the contracting States may address a petition to the Court claiming to be the victim of a violation of the Convention or the Protocols. The petitioner fully participates in the proceedings before the Court, on the same footing as the respondent State. However, judgments of the Court do not produce direct legal effects within the national legal system of the State concerned. They are only binding at the international level. Thus, if the Court finds that a State is in breach of one of the obligations deriving from the relevant international instruments, that State is internationally bound to make reparation within its own legal system. It may happen that the national legal system does not allow for this outcome, for example because the

breach has been brought into being by a national court through a final and irrevocable decision. In this case the Court shall afford just satisfaction to the injured person (normally this is done through the payment, by the responsible State, of a certain amount of money, as determined by the Court). If the State found responsible for a breach of the Convention or the Protocols fails to comply with the judgment (as has occurred in many cases),[12] the only 'sanction' available is provided for in Article 8 of the Statute of the Council of Europe.[13]

Despite indisputable organizational problems, the huge backlog, and the slowness in bringing about changes in the legal systems of the various member States, no one can deny that the Court is playing a pivotal role in Europe. It is promoting and seeking to ensure full respect for human rights in countries as diverse as the UK and the Russian Federation, France and Slovakia, Germany and the former Yugoslav Republic of Macedonia. The Court is gradually effecting a harmonization, in the vast area of human rights, of the various legal systems. It is thus contributing to the creation of an extensive region in Europe where arbitrary or discriminatory action by governments is being strongly curtailed. It is worth adding that the Court also has advisory jurisdiction and it exercised it for the first time in 2004 in *Commonwealth of Independent States.*

The Court's huge workload (some 70,000 cases) has prompted the member States of the Council of Europe to adopt Protocol no. 14 (13 May 2004), by which major changes are made to the European Convention on Human Rights. The principal ones are as follows: (i) the Court's articulation in judicial formations has been increased: under Article 6 the Court 'shall sit in a single-judge formation, in committees of three, in chambers of seven judges and in a Grand Chamber of seventeen judges'; under Article 7 a single judge, assisted by non-judicial rapporteurs, will decide upon so-called 'clearly inadmissible cases' submitted by individuals (currently this is done by committees of three); committees of three judges also have the same power, but in addition, under a simplified summary procedure, can pronounce on the merits of so-called 'repetitive cases', that is, cases concerning questions already 'the subject of well-established Court's case law' (Article 8); (ii) the standards of admissibility of cases have been changed, so as to add to already existing criteria (exhaustion of local remedies, six-month time limit, incompatibility with the Convention, manifestly ill-founded nature of the application, etc.) the criterion of whether or not an individual applicant 'has suffered a significant disadvantage' (Article 12); however, even where no significant disadvantage has been suffered, the Court will nevertheless go fully into the case and pronounce on the merits if (a) respect for human rights requires such examination, or (b) even if the applicant makes minor complaints, the case has however not been duly considered by a domestic court.

Changes have also been made to the term of office of judges (from the present six-year renewable term to a single, nine-year term; see Article 2), to the supervision of the execution of

[12] See for instances the decisions of the Council of Europe Committee of Ministers of 29 January and 29 March 2004 (CM/Dec/Dec (2003) 863 vol 1E and CM/Dec/Dec (2004) 871E, respectively).

[13] Under this provision: 'Any Member of the Council of Europe which has seriously violated Article 3 [on respect for the rule of law and human rights] may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such Member does not comply with this request, the Committee may decide that it has ceased to be a Member of the Council as from such date as the Committee may determine.'

the Court's judgments by the Committee of Ministers (Article 16); in addition provision has been made for the possible accession of the European Union to the European Convention on Human Rights (Article 17). Pursuant to Article 19 the Protocol shall only enter into force after ratification by all 45 States parties to the European Convention on Human Rights, and this can take some time.

In *America*, the Commission and Court are playing an important role, although the *judicial means* at their disposal are not so advanced as those of the ECHR.

The IACHR, the headquarters of which are in Washington DC, is an autonomous organ of the Organization of American States (OAS) consisting of seven members elected by the GA of the OAS. It applies the 1969 American Convention on Human Rights, ratified by 25 States out of the 34 member States of the OAS (contracting parties include Latin American and central American countries, plus Mexico; neither the USA nor Canada is a party to it). The Commission may receive individual petitions alleging human rights violations perpetrated by a member State of the OAS. (For those that are not parties to the Convention, the Commission applies the American Declaration of Rights and Duties of Man adopted in Bogotà in 1948.) If the petition is not held inadmissible, the Commission may carry out investigations, including on-site visits, and hold hearings. It then offers to assist the parties in negotiating a friendly settlement, if they so desire. It may prepare a confidential report, containing possible recommendations to the respondent State. After a certain delay, and if the State has not taken any action on the report, the Commission may decide either to take the case to the Court, or to prepare a second report (giving among other things, a period of time to the State to resolve the case). After the elapse of that delay, the Commission may make its report public.

The Court is composed of seven judges (elected by the States parties to the American Convention on Human Rights) and has its seat in San José (Costa Rica). Only the Inter-American Commission and the States parties to the American Convention may bring cases before the Court. Proceedings may only be initiated against States that both are parties to the Convention and have recognized the Court's jurisdiction. The Court is also endowed with an advisory jurisdiction: it may issue an Advisory Opinion at the request of a member State or of an organ of the OAS. The Court may also issue, at the request of any member State of the OAS, an opinion on the compatibility of one of its national laws with Inter-American international instruments on human rights.

In spite of numerous difficulties of all kinds, the Commission and Court have done a remarkable job so far. They have issued important decisions as well as, in the case of the Court, Advisory Opinions. Given the survival of some authoritarian States on the American continent and the endemic problems of democracy in Latin America, the contribution of the two bodies to progress, the rule of law, and respect for human rights should not be underestimated.

19.4.5 HUMAN RIGHTS, HUMANITARIAN LAW, AND LITIGATION BEFORE MUNICIPAL COURTS

In some countries national courts take over, in a way, the functions of governments (which, all too often, seem unmoved by grave violations) and substitute themselves for international enforcement agencies that either do not exist or have proved extremely ineffectual.

Thus, since no international body had passed judgment on whether or not the atomic bombing of Hiroshima and Nagasaki was lawful, and in addition the Japanese Government had eventually changed its mind on the matter (in 1945 if had protested, claiming that the bombing was contrary to the laws of warfare), in 1963 a group of survivors sued the Japanese Government before the Tokyo District Court. They claimed compensation, arguing that by the peace treaty of 1952 that Government had unlawfully waived its rights and claims and those of its nationals towards the US Government, including the claims to compensation for the illegal atomic bombing. The Court pronounced that bombing illegal, although in the final analysis it held against the complainants (this is the famous *Shimoda* case, at 1688 *et seq.*). In other cases domestic courts pass criminal judgment on individuals whom the territorial State failed to prosecute. The most important in this respect is the famous *Eichmann* case. In its judgment of 29 May 1962 the Supreme Court of Israel dismissed all the submissions of the appellant Eichmann who claimed that Israeli courts lacked jurisdiction over his alleged crimes because there was no territorial or personal link between those crimes and Israel.[14]

This judgment was in a way taken up by a US court in the *Yunis* case. Yunis, a resident and citizen of Lebanon accused of participating in the hijacking of a Jordanian airliner which resulted in the passengers (including several Americans) being held hostage, was brought to trial in the USA after being arrested by US authorities on the high seas. Yunis challenged the US courts' jurisdiction arguing that there was no nexus between the hijacking and the US territory (the aircraft never flew over US airspace and had no contact with US territory). In its judgment of 12 February 1988, the US District Court of the District of Columbia dismissed the defendant's motion and affirmed the jurisdiction of US courts. It held:

'Not only is the United States acting on behalf of the world community to punish alleged offenders of crimes that threatened the very foundations of world order, but the United States has its own interest in protecting its nationals' (at 903).

The country where national courts have taken the most vigorous action against crimes involving serious violations of human rights committed abroad is the USA, where individuals and courts have taken down from the shelves and skilfully dusted off an old statute passed in 1789. This is the Alien Torts Claim Act, under which 'The [US] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. The US courts have applied this statute to gross violations of human rights

[14] In its final remarks the Court held as follows:

'Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State Israel did not exist when the offences were committed' (at 304).

perpetrated abroad by State officials (or individuals acting in a private capacity) against foreigners, thus obliging the culprits to pay compensation for those violations.[15]

No one can deny the great significance of these US court decisions. In all these cases US courts filled the gap existing both at the international level (no international collective body took action, nor did other States intervene against the State to which the offending State officials belonged), and at the domestic level (no authority of the territorial State stepped in). Those courts therefore acted on behalf of the international community at large, to vindicate rights pertaining to human dignity. In so doing they proclaimed in judicial decisions some fundamental human values.

However, one should not be unmindful of the limits of this approach. First, these are *civil cases*, where the alleged perpetrator of serious crimes is only enjoined to pay compensation; no conviction is issued at the criminal level. Second, as these are cases involving civil litigation only, the sued person may be, and normally is, absent (it is sufficient for him to be served a suit when in the USA). Thus, no in-depth examination of evidence takes place. Third, this judicial trend has occurred in one country only. There is the danger for courts of this country of setting themselves up as universal judges of atrocities committed abroad, a sort of humanitarian imperialism that may give rise to perplexities. By itself, this trend might not arouse misgivings, if it did not go hand in hand with the tendency of the US Executive to take upon itself the task of policing the world.

19.5 HUMAN RIGHTS AND CUSTOMARY INTERNATIONAL LAW

A significant feature of international legislation, case law, and monitoring activity of the relevant UN organs is that they have had a huge bearing on the traditional configuration of the international community. The human rights doctrine has substantially shaken up that configuration, bringing about significant changes in many areas of international law.

First of all, *certain important customary norms have gradually evolved*, chief and foremost among them the norm forbidding grave, repeated, and systematic violations

[15] Since 1980 US courts have thus pronounced on torture in Paraguay (*Filartiga*), torture and racial discrimination for economic gain in Argentina (*Siderman*), torture, arbitrary arrest, and forced disappearance in Argentina (*Suarez-Mason*), arbitrary killing and summary executions in East Timor (*Todd* v. *Panjaitan* and *Doe* v. *Lumintang*), torture, summary execution, and forced disappearances in the Philippines (*Marcos*), atrocities in Bosnia and Herzegovina (*Karadžić*), torture and arbitrary detention in Haiti (*Avril*), torture in Guatemala (*Gramajo*), torture in Ethiopia (*Negewo*), terrorist bombing in Lockerbie, Scotland (*Abdel Basset Ali Al-Megrahi and Lamen Khalifa Fhimah*), torture in El Salvador (*Ford et al.* v. *García et al.*). In 2004, in *Sosa* v. *Alvarez-Machain*, the US Supreme Court upheld, subject to some qualifications, the legal significance of the US Statute used to react to gross violations of human rights abroad, normally the Alien Torts Claims Court.

of human rights (see **3.6**). Consistent practice and *opinio juris* or *opinio necessitatis* show that other rules now belong to the corpus of customary law: those banning slavery, genocide, and racial discrimination; the norm prohibiting forcible denial of the right of peoples to self-determination; as well as the rule banning torture. It should be noted that these rules not only bind all States belonging to the international community, whether they have ratified conventions on the subject or not; they also impose community obligations, as the ICJ stressed in the celebrated *dictum* in the *Barcelona Traction* case (at §33). Moreover, they have also acquired the status of *jus cogens* (see **11.4**).

In addition, since these customary rules impose community obligations (on this notion see above, **1.8.2**), there now exists a *legal entitlement* for any State or international organization competent in the area of human rights to request States where gross and large-scale violations of human rights are allegedly occurring to discontinue such violations. If they are not ended, States are authorized to take, in addition to diplomatic or economic steps amounting to retortion proper (see above, **15.4**), peaceful countermeasures (suspension or termination of treaties, withholding of economic assistance provided for in bilateral or multilateral treaties, etc.).

Individual countermeasures may be taken after the various means available within collective bodies have been exhausted, or have proved ineffective, or they may be taken with the authorization of an intergovernmental organization (see **15.5.1–2** and **17.4**). In contrast, it would seem that so far no customary rule has yet evolved to legitimize *forcible* countermeasures against massive and egregious infringements of human rights amounting to crimes against humanity (see **18.8**).

In practice, States tend to employ retortion more frequently than countermeasures proper. As instances one may recall the action taken since 1989 by the USA against Burma/Myanmar and referred to earlier (see **15.4**). Mention may also be made of the decision of the Italian Senate in 1999, upheld by the Italian Government,[16] to make economic assistance by Italy to Guatemala contingent upon Guatemala's implementation of the recommendations contained in the Final Report of 25 February 1999 of the Commission for Historical Clarification established through the Accord of Oslo of 23 June 1994 between the Government of Guatemala and the Guatemalan National Revolutionary Unity.[17] It would appear that, in view of the Guatemalan failure to comply with the Report's recommendations, the Italian decision was carried through, although Guatemala considered that it amounted to unlawful interference in its domestic affairs.[18]

Arguably, in addition to the rules referred to above, which have no doubt evolved in the world community, another customary rule is gradually crystallizing as a result of a

[16] See *Senato della Repubblica*, XIII Legislatura, 634th Seduta pubblica, *Resoconto sommario e stenografico*, 17 June 1999, in **http://notes3.senato.it/ODG-PU . . . /1dad.**

[17] See *Guatemala—Memory of Silence, Report of the Commission for Historical Clarification—Conclusions and Recommendations* (n. p., 1999).

[18] See C. Tomuschat, 'Vergangenheitsbewältigung durch Aufklärung: Die Arbeit der Wahrheitskommission in Guatemala', in U. Fastenrath (ed.), *Internationaler Schutz der Menschenrechte* (Dresden and Munich: Dresden University Press, 2000), at 173, n. 53.

host of UN GA resolutions, international treaties, as well as the increasing case law of the ICTY on rape and sexual assault; this is the rule banning gender discrimination. Probably also another general norm is currently in the process of coming into being: the rule that grants a *right to democratic governance* to all persons under the jurisdiction of a State.[19] However, for the time being, the right to democracy has not yet taken root either as a human right belonging to all the individuals living in a State, or as a legal entitlement accruing to any State, to claim respect for democracy by other States. At present, the notion of democracy is being used in international fora, on different scores. Thus, for instance, as we saw above (**4.3**) respect for democracy may constitute one of the criteria States adopt by for according or withholding recognition of new States. Similarly, that notion may be used in the UN in accrediting the representatives of the government of a State: as has happened in many instances (Haiti in 1992, Liberia in 1991–6, Afghanistan in 1996–8, Sierra Leone in 1997, Cambodia in 1997–8) the UN Credentials Committee has accredited, and entitled to participate in the UN GA as representatives of their respective States, the delegates of the

[19] This general norm was first propounded as a result of the 'codification' of existing practice, in the principle of internal self-determination laid down in the 1970 UN Declaration on Friendly Relations; at that stage it was however confined to granting the right to equal access to government to racial groups denied such access. A number of subsequent factors gradually expanded that notion: the increasing ratification by States of the UN Covenants (which confer the right to internal self-determination on the whole people of each contracting State); the signing by 53 States (in Europe, and the USA and Canada) of the 1975 Helsinki Declaration (which explicitly grants the right of self-determination to all peoples) and its follow-up Declarations adopted by the Conference on Security and Co-operation in Europe (CSCE, as it then was) and explicitly laying down a right to democracy or to democratic institutions as a goal to be pursued by all States; the attitude taken in 1991–2 by the European Community on the occasion of the break-up of the Soviet Union and Yugoslavia and, in particular, the great emphasis laid by the Twelve EC States (as they then were) on respect for democracy and the rights of minorities; the spread of democratic governance to many Latin American countries, coupled with the formal upholding of the principles of democracy by both these States and other developing countries in other continents; the adoption of resolutions on democracy by the UN GA (for instance, resolutions 50/172, and 50/185, both of 1996), by the UN Human Rights Commission (for instance, resolutions 1999/57 of 28 April 1999, 2000/47 of 25 April 2000, 2000/167 of 4 October 2000), by the GA of the OAS (for instance, resolution 1080 (XXI-O/91) of 5 June 1991). Mention should also be made of mechanisms and institutions set up within the UN, the OSCE or the OAS on the monitoring of elections, to ensure a democratic process.

All these factors are clear indications of an important trend: States are increasingly accepting the idea that the right to democratic governance (also termed, in less stringent terms, internal self-determination) should have a broad purport and consequently apply to the people of each sovereign State. The fact that pronouncements of States to the contrary are isolated seems to bear out the contention that customary law is in the process of emerging.

What is meant by democracy? Many non-Western States have opposed the Western model (See, for instance the statements made in 1999 by various States in the UN Human Rights Commission: India (*Summary Records*, 57th Meeting, E/CN.4/1999/SR 57, §7), Pakistan (ibid., §11), Cuba (ibid., §21), Russia (ibid., §29), Indonesia (ibid., §40), and China (ibid., §§41–2); see **http://www.unchr.ch/huridocda./**. See also the statements made by some States in the same organ, in 2000: Pakistan (*Summary Records* 62nd meeting, E/CN.4/2000/SR.62, §§11 and 43–5), Cuba (ibid., §§40–2 and 56), Sudan (ibid., §47), China (ibid., §§52–3), Swaziland (ibid., §54)). This opposition leads one to believe that only some features of that model are now widely accepted: *representative* governance based on *regular, free, and fair elections*, and accountable to the electorate; *respect for human rights; rule of law*. It would seem that instead the notion of a multiparty political system is not yet agreeable to many States and therefore has not become part of the emerging international notion of democracy.

government it considered democratic, even though that government was not yielding control over the population and the territory of the State.[20]

19.6 THE IMPACT OF HUMAN RIGHTS ON TRADITIONAL INTERNATIONAL LAW

The human rights doctrine has positively *influenced various fields of traditional international law*. It has helped to introduce a new paradigm in the international community, as the ICTY Appeals Chamber stated in 1995 in its seminal decision in *Tadić* (*Interlocutory Appeal*) (at §97).

Suffice it to mention here the impact on recognition of new States or governments (see **4.3**), international subjects (**4.1** and **7.3**), customary law (**8.2.3**), the structure of international obligations (**1.8**), reservations to treaties (**9.4**), termination of treaties (**9.7**), *jus cogens* (**11.2–9**), international monitoring of compliance with law (**14.8.2**), enforcement, including countermeasures (**15.3.1** and **15.5.2**), the administration of international criminal justice (**Chapter 21**), the laws of warfare or, to use a modern expression, the humanitarian law of armed conflict (**20.5**).

In all these areas the human rights doctrine has operated as a potent leaven, contributing to shift the world community from a reciprocity-based bundle of legal relations, geared to the 'private' pursuit of self-interest, and ultimately blind to collective needs, to a community hinging on a core of fundamental values, strengthened by the emergence of community obligations and community rights and the gradual shaping of public interests.

19.7 THE PRESENT ROLE OF HUMAN RIGHTS

The steady insistence on the need to respect human rights, by international law-making and monitoring bodies, and the impact these bodies have gradually had on States' behaviour, has produced a significant ripple effect. The whole international ethos has gradually, if almost imperceptibly, changed, so much so that some international supervisory bodies now consider warranted to depart from notions they themselves traditionally upheld. They currently consider it appropriate to place on those notions a much broader interpretation.

This trend has especially manifested itself in Europe and has in particular become apparent in the case law of the European Court of Human Rights. Indicative of this trend is the judgment

[20] For the necessary references, see also M. Griffin, 'Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy Through its Accreditation Process, and Should It?', *New York University J. of Int. Law and Pol.*, 32 (2000), 725–85, in particular 745 ff.

delivered in 1999 by the European Court in *Selmouni* v. *France*. There, the Court, sitting as a Grand Chamber, unanimously held that the serious ill-treatment of persons detained in police custody, that it had regarded in previous cases (for example, in 1992 in *Tomasi* v. *France*, at §§115–16), as manifestations of inhuman or degrading treatment contrary to Article 3 of the European Convention, was now to be termed torture, that is a much more serious breach of Article 3. The Court stated the following: '[H]aving regard to the fact that the [European Convention on Human Rights, of 1950] is a "living instrument which must be interpreted in the light of present-day conditions" ... the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. *It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.*' (§101, emphasis added).

Along these lines, the Court has modified, or even reversed, its jurisprudence in a number of other cases, all directed to enhance, more than in the past, the protection of human rights.[21]

In addition, the human rights doctrine has had the great merit of projecting domestic bills of rights on to the international stage, thereby pushing for the world-wide recognition of certain basic values hitherto only upheld within the national setting of a few countries. It also must be credited with prompting the UN to promote a deep sense of social justice and indignation against 'structural violence', in particular those historical situations (such as colonial or neo-colonial domination and apartheid, as well as poverty, malnutrition, and starvation in many poor countries) which have deprived whole groups or peoples of basic rights and freedoms. In other words, the UN has succeeded in moving from a static concept of human rights (conceived as a means of realizing international peace) to a dynamic doctrine which goes so far as to promote conflict and the disruption of the status quo for the sake of introducing social justice and respect for human dignity (this, as Röling correctly emphasized,[22] is what happened in the case of apartheid and former Rhodesia, where the UN willingly promoted rebellion against structural violence in the form of 'white rule').

It can be said that by now all, or nearly all, States agree on the following essential points. First, the dignity of human beings is a basic value that every State should try to protect, regardless of considerations of nationality, race, colour, gender, etc. Second, it is also necessary to aim at the achievement of fundamental rights of groups and

[21] See for instance *Borgers* v. *Belgium* (judgment of 30 October 1991, Series A, no. 214-A), where it would seem that the Court reversed its previous judgment in *Delcourt* v. *Belgium* (judgment of 17 January 1970, Series A, no. 11). See also *Labita* v. *Italy* (judgment of 6 April 2000), where the Court expanded the scope of Article 3 by holding that 'the lack of a thorough and effective investigation into the credible allegation made by the applicant that he had been ill-treated by wardens when detained' in a specific Italian prison, amounted to a violation of Article 3 (§§130–6). See further *M.C.* v. *Bulgaria*, of 4 December 2003, where the Count held Bulgaria in breach of Articles 3 and 8 of the European Convention, for it had failed to discharge its 'positive obligations' under these provisions to ensure that the alleged rape of a girl by two young men be duly prosecuted, in accordance with the requirements 'to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse' (at §§185–7).

[22] B. V. A. Röling, 'Peace-Research and Peace-Keeping' in A. Cassese, ed., *United Nations Peace-Keeping: Legal Essays* (Alphen: Sijthoff and Noordhoff, 1978), at 250–2.