

Collection
Science and technique of democracy, No. 42

**The Status of International Treaties
on Human Rights**

**European Commission
for Democracy through Law**

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on Human Rights**

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Council of Europe Publishing

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The European Commission for Democracy through Law (Venice Commission) is an advisory body on constitutional law, set up within the Council of Europe. It is composed of independent experts from member States of the Council of Europe, as well as from non-member States. At present, more than fifty states participate in the work of the Commission.

INTRODUCTORY ADDRESS
Mr Gianni BUQUICCHIO

Secretary of the Venice Commission

Your excellencies, Ladies and Gentlemen,

It is my great pleasure to welcome you all here, in one of the oldest European universities.

I would first of all like to thank the University of Coimbra and the Faculty of Law for their hospitality, and the International Association of Constitutional Law for its assistance and support in the organisation of this UniDem seminar.

In the late 90s, Vaclav Havel, at the time the President of the Czech Republic, said that two World Wars, the adoption of the Universal Declaration of Human Rights, the spreading of democratisation and the evolution of civilisation “have finally brought humanity to the recognition that human beings are more important than the State”.

In its decision in Tadić, the International Criminal Tribunal for the Former Yugoslavia’s Appeals Chamber echoed his words stating that “gradually the maxim of Roman law *hominum causa omne jus constitutum* est (all law is created for the benefit of human beings) has gained a firm foothold in the international community”¹.

And I think it is not excessive to say that it is today widely accepted that human rights must be respected everywhere in the world. The impressive development of international human rights law has led States to gradually accept the idea that massive infringements of basic human rights should be punished and that both States and those individuals who violate basic human rights – be they even heads of state - should be made accountable to the whole international community.

A development of human rights doctrine has also strongly and positively influenced various other fields of traditional international law. Suffice it to mention its impact on humanitarian law, on reservations to international treaties and their termination, on State succession, and *jus cogens*, which are some of the themes we will have the opportunity to discuss during these two days.

The international community’s commitment towards the protection and observance of human rights has also given and continues to give a significant impetus to the process of democratisation in Europe, as well as in other regions of

¹ Judgement of 2 October 1995, para. 97.

the world. Little by little, what was previously considered to be at the very core of national sovereignty – the constitutional texts and national legislation – has come to be scrutinized at international level thereby pushing for the wide recognition of certain fundamental values.

The first European organisation born in response to the tremendous human losses of the second world war, the Council of Europe, has been at the forefront of this process within European borders: in the last 15 years, no less than 21 new democracies have joined the organisation. Never before have so many countries undertaken fundamental changes aimed at introducing democracy in their systems of government; never before have so many countries asked for international assistance in building democratic state institutions and national legal systems able to ensure the observance of human rights and freedoms.

This process was a passionate although complex challenge which required considerable commitment and assistance ; in each single case, the enlargement of the organisation has been preceded by an extensive admission procedure, involving the fulfillment of a number of conditions by the applicant State. Naturally, central amongst these conditions have been the respect for and the enforcement of human rights and freedoms, and democratic principles. I am proud to say that the Venice Commission has strongly contributed to this process by performing an important monitoring function, at times intervening with discreet diplomacy to diffuse potentially dangerous tensions within member States.

The Venice Commission was created in 1990 precisely with the task of assisting the newly emerging democracies in Central and Eastern Europe with drafting new constitutional texts fully in line with the international standards, in particular those embodied in the European Convention of Human Rights. The Commission also provided assistance with drafting other legislation in the constitutional field such as legislation on constitutional courts, national minorities, political parties, electoral legislation, and other legislation with implications for national democratic institutions.

This link between a State's accession to an international organisation and the protection of human rights and democratic principles is not unique to the Council of Europe. It also exists for membership of two other major European organisations: the European Union and NATO. In this way, the frontiers of a new Europe in political, economic and security terms are more and more being defined by the standard of human rights protection.

Given this evolution of human rights doctrine and its impact on traditional international law and domestic legal systems, can we say that that international human rights treaties enjoy a "special status" ? In international as well as in domestic law ? And what should be the legal consequences of this "special status" of international human rights treaties ?

Your Excellencies, Ladies and Gentlemen, today, we find ourselves in a delicate moment in the development of international human rights law.

We will all agree that impressive headway has been made as far as norm setting is concerned, both at universal and at regional level. At the same time, looking at the real world and the state of observance and enforcement of human rights in practice, a more pessimistic horizon appears. News reports inform us daily about situations where human rights and freedoms are blatantly violated; about racism and the crimes it spawns, about intolerance and the excesses it breeds, about underdevelopment and the ravages it causes. What are the human rights standards that the international community should insist upon in such situations ? Within the existing human rights systems, is there or should there be differentiation between rights and freedoms ?

I look forward to this seminar as a great opportunity to provide reflexions and suggestions which should contribute to shape the future course of the human rights development and help us continue to fulfil our role in promoting human rights, or rather the respect of human rights.

**INTERNATIONAL HUMAN RIGHTS TREATIES:
A SPECIAL CATEGORY OF INTERNATIONAL TREATY?
Mr Alexandre KISS**

**President, European Council of Environment
Robert Schuman University
France**

Introduction

To answer the question raised by the title of this presentation, the term “treaty” needs as a first step to be defined. The 1969 Vienna Convention on the Law of Treaties (VCLT), which codified the rules governing this essential domain of international law, proposes a solution by stating that for the purposes of the VCLT ‘treaty’ means an agreement between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever their particular designation.

Such formulation excludes all other forms of rules which may or are intended to govern interstate relations, such as customary international law or the general principles of law listed by Article 38 of the Statute of the International Court of Justice, although it does not affect their validity. It seems still useful, however, to have a look at the historical evolution of international law in order to understand the current situation with regard to human rights treaties.

After the collapse of the efforts to institute a universal monarchy in Europe and the religious conflicts which followed, peoples and their princes had to find new general foundations for making coexistence possible among the different political entities which evolved into the modern States. Such foundations were found in the precepts of natural law, originally viewed as divinely based and subsequently seen as flowing from human reason and from the needs of society.¹ Later legal philosophy developed principles of natural law,² but the emergence of modern States claiming to be sovereign led many to consider that international law had to be based exclusively on their will, without necessarily recognizing common values based on principles such as those of natural law. Such legal positivism still had to accept the existence of limits and during the 19th century several common principles were recognized by multilateral treaties concerning humanitarian law in order to reduce the sufferings resulting from war, a step which imposed obligations on all belligerent states without being based on reciprocity. Other treaties adopted during the same period prohibited slave trade and tried to protect

¹ H. Grotius, *De Jure Belli ac Pacis*, 1625.

² S. Pufendorf, *Du droit de la nature et des gens*, 1672 ; E. de Vattel, *Du droit des gens ou principes de la loi naturelle appliquée à la conduite et aux affaires des nations et des souverains*, 1758.

women. A great step forward was made after World War I with the adoption of the Constitution of the International Labor Organization on June 19, 1919, recognizing a new solidarity between States for the benefit of workers of all nations, solidarity which was later expressed by the adoption of approximately 200 international labour treaties.

This very short look at the history of international law enables the progressive emergence of a growing solidarity among nations composing the society of sovereign states, often called today the international community to be acknowledged. Without necessarily restoring ideas of natural law, it shows the emergence and growing recognition of common concerns among States which, as a consequence, have to limit their freedom of action despite their pretension to total independence and exclusive sovereignty. An important step forward was made in this direction after World War II with the adoption of the UN Charter and the Universal Declaration of Human Rights proclaiming common values of humankind such as peace and fundamental rights and freedoms of all human persons flowing from their inherent dignity. Further progress led to the definition of the content of such rights and freedoms for all and for certain categories such as women, children and to the prohibition of certain acts such as torture or racial discriminations as well as to the establishment of structures and procedures which aim at ensuring the implementation of the duties thus accepted by States.

Do such agreements constitute a special category of international treaties? The historical development permits us to understand the re-emergence of common foundations for international life, which is not anymore constituted by a reference to natural law, but by necessity, recognizing the existence of common concerns of humankind. The protection of human rights is an essential part of such common concern, once their character of common value is recognized. Each individual is concerned by the respect of his or her personality and freedom. Such trend was reinforced by the creation of international institutions which can enforce respect for human rights conventions, including, for the most serious violations of human rights, international criminal jurisdictions.

The understanding that humankind has common values has given rise to a change in the very nature of a growing number of international treaties. Until the second half of the nineteenth century, most treaties were bilateral and contained equal and reciprocal benefits and burdens for each party. The new type of treaties proclaiming common values of humankind – peace, human rights, environment – and aiming at their protection do not grant reciprocal benefits to the parties, in the same way that trade or extradition treaties do, but instead impose obligations often referred to as “unilateral” because the primary beneficiaries of the obligations are either the world community (including the global commons) or persons or groups within the States parties themselves. Also, as early as the 1930s such a unilateral character led authors to speak of “traités contracts” for agreements based on reciprocity and “traités lois” obligatory for each contracting state in the interest of the world community, without any immediate advantage for it. Also, the term

“international legislation” has been used by a variety of ways by writers who employed it both in the sense of covering the process and the product of the conscious effort to make additions to, or changes in the law of nations and to describe the conclusion of lawmaking treaties on matters of general interest.³

Such considerations have been reinforced by the Advisory Opinion of the International Court of Justice on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide⁴:

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

Given the specificities which the International Court of Justice stresses, in addition to the moral foundations of human rights law and exploring the proper role of government, some scholars and human rights bodies have questioned whether human rights treaties constitute a “special regime” in which the customary rules of treaty law are modified in key respects.

Several issues in particular should be examined in this regard. One has a fundamental character: the definition and justification of the object of human rights treaties. Conventions adopted in the framework of the UN and generally deriving from the Universal Declaration of Human Rights certainly enter into this category⁵. International Labour Conventions may raise questions, the more so

³ Stefan Talmon, The Security Council as World Legislature, 99 American Journal of International Law, 175 (2005) who mentions as an example the work edited by Manley Hudson in 1931: “International Legislation, a Collection of Texts of Multipartite International Instruments of General Interest”. It can be added that such treaties may also adopt uniform technical standards such as the treaties and regulations adopted in the framework of the International Civil Aviation Organization or the World Trade Organization. Multilateral treaty-making is a major source of legal obligation with the advent of permanent international organizations.

⁴ 28 May 1951, I.C.J. Reports 1951, p.23.

⁵ UN Conventions in the Field of Human Rights as of 15 July 2005:

1. Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 U.N.T.S. 277

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2. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 21 Mar. 1950, 46 U.N.T.S. 271.
 3. Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137 .
 4. Convention on the Political Rights of Women, 31 Mar. 1953, 193 U.N.T.S. 135 .
 5. Convention on the International Right of Correction, 31 Mar. 1953, 435 U.N.T.S.191.
 6. Protocol amending Slavery Convention, 7 Dec. 1953, 182 U.N.T.S. 51.
 7. Slavery Convention, as amended, 7 Dec. 1953, 112 U.N.T.S. 51.
 8. Convention relating to the Status of Stateless Persons, 28 Sept 1954, 360 U.N.T.S.117.
 9. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 Sept. 1956, 266 U.N.T.S. 3.
 10. Convention on the Nationality of Married Women, 20 Feb. 1957, 309 U.N.T.S. 65.
 11. Convention on the Reduction of Statelessness, 30 Aug. 1961, 989 U.N.T.S. 175.
 12. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 10 Dec. 1962, 521 U.N.T.S. 231.
 13. International Convention on the Elimination of All Forms of Racial Discrimination, 7 Mar. 1965, 660 U.N.T.S. 195.
 14. International Covenant on Economic, Social, and Cultural Rights, 19 Dec. 1966, 993 U.N.T.S. 151.
 15. International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S.171.
 16. Optional Protocol to the International Covenant on Civil and Political Rights, 19 Dec.1966, 999 U.N.T.S. 171.
 17. Protocol relating to the Status of Refugees, 31 Jan. 1967, 606 U.N.T.S. 267.
 18. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 Nov. 1968, 754 U.N.T.S. 73.
 19. International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 Nov. 1973, 1015 U.N.T.S. 243.
 20. Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, 1249 U.N.T.S. 13.
 21. Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 10 Dec. 1984.
 22. International Convention against Apartheid in Sports, 10 Dec. 1985, G.A. Res. 40/64, 40 U.N. GAOR Supp. (No. 51) at 37. U.N. Doc. A/RES/40164 (1985).
 23. Convention on the Rights of the Child, 20 Nov. 1989, GA. Res 44/25.
 24. Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, 15 Dec. 1989.
 25. Optional Protocol to CEDAW establishing an Individual Communications Procedure, 6 Oct. 1999 GA Res. 54/4 of 6 Oct. 1999.
 26. Optional Protocol to the CRC on the Involvement of Children in Armed Conflicts, 25 May 2000, GA Res. 54/263.
 27. Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000, GA Res. 54/263.
 28. Optional Protocol to the Convention against Torture, 18 Dec. 2002, GA Res. 57/199.

since some of them are older than the Universal Declaration.⁶ Regional human rights treaties should not be forgotten: those adopted in the frame of the Council of Europe,⁷ texts prepared within the Organization of African Unity⁸ and conventions adopted within the Organization of American States.⁹ After having examined the terms in which these instruments refer to their ethical and legal foundations, problems of a more technical nature, such as that of reservations to and the denunciation of human rights treaties will be examined.

⁶ A publication of the Council of Europe : Human Rights in International Law, Collected Texts, 2nd edition, includes nine ILO conventions. Seven of these instruments can be considered as particularly relevant for this present study :

1. Forced Labour Convention (No.29), 28 June 1930, p.17.
2. Freedom of Association and the Right to Organize Convention (No. 87), 9 July 1948, p.28.
3. Equal Remuneration Convention (No.100), 29 June 1951, p.39.
4. Discrimination (Employment and Occupation) Convention (No.111), 25 June 1958.
5. Minimum Age Convention (No.138), 26 June 1973, p.50.
6. Indigenous and Tribal Peoples Convention (No.169), 27 June 1989, p.58.
7. Worst Forms of Child Labour Convention (No.182), 17 June 1999.

⁷ Among the human rights treaties reprinted in the book quoted in footnote 6 the most relevant for this study are the following:

1. European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 and its Protocols, p.231.
2. European Social Charter and its Protocols, 18 October 1961, p.256. Revision of the Charter on 3 May 1996 , p.291.
3. Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, 28 January 1981, p.319.
4. Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, p.329.
5. European Charter for Regional or Minority Languages, 5 November 1992, p.347.
6. Framework Convention for the Protection of National Minorities, 1 February 1999 p.362.
7. Convention on the Exercise of Children's Rights, 25 January 1996, p.371.
8. Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, 4 April 1997, p.380.

⁸ African Charter on Human and Peoples' Rights, 27 June 1981, op.cit., p.407; African Charter on the Rights and the Welfare of the Child, July 1990, op.cit., p.429.

⁹ American Convention on Human Rights, 22 November 1969, op.cit., p.453 and Additional Protocol on Human Rights in the Area of Economic, Social and Cultural Rights, 17 November 1988, p.476; Protocol to Abolish the Death Penalty, 8 June 1990, p. 485; Convention to Prevent and Punish Torture, 9 December 1985, p.487.

I Ethical and Legal Foundations of Human Rights Treaties

Several human rights treaties explicitly proclaim that they are based on ethical foundations. Regional human rights treaties, such as the American Convention directly refer to the “essential rights of man” which are

“not derived from one’s being a national of a certain state, but are based upon attributes of the human personality, and ...they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states¹⁰.”

The 1981 African Charter on Human and Peoples’ Rights also recognizes that

“On the one hand... fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples rights should necessarily guarantee human rights.¹¹”

Other instruments refer to peace as being the aim of the protection of human rights.

The Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination can be quoted as an example when it reaffirms that

“Discrimination between human beings on the grounds of race, color or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State.¹²”

This statement is echoed by the ILO Declaration on Fundamental Principles and Rights at Work adopted in June 1998 recalling that ILO was founded in the conviction that social justice is essential to universal and lasting peace.¹³

¹⁰ Op.cit., p.453. This statement is repeated with small changes in the preamble of the 1988 Additional Protocol on Economic, Social and Cultural Rights (op.cit., p.476). It echoes the preamble of the 1948 American Declaration of the Rights and Duties of Man recognizing that “juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness”. Op.cit., p.445.

¹¹ Op.cit., p.407.

¹² Op.cit., p.90.

¹³ Op.cit., p.71. The International Labor Organization was founded in 1919 and is the oldest organization concerned with human rights. The ILO focuses on those human rights related to the right to work and to working conditions, including the right to form trade unions, the right to strike, the right to be free from slavery and forced labor, equal employment and training opportunities, the right to safe and healthy working conditions, and the right to social security. The ILO also provides protections for vulnerable groups, having adopted standards on child labor, employment of women, migrant workers, and indigenous and tribal peoples. It seeks to guarantee these rights through the adoption of

Most human rights treaties refer to a general international instrument creating an international institution which framed their elaboration. This is the case of most human rights treaties drafted on the basis of the UN Charter as well as of those prepared within regional organizations which were established after the UN, such as the Council of Europe, the Organization of African Unity and the Organization of American States.

In the preamble to the Charter, the peoples of the United Nations have reaffirmed their “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,” and their determination “to promote social progress and better standards of life in larger freedom”. Article 1 of the Charter lists among the main purposes of the United Nations the achievement of international cooperation “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. Similarly, in accordance with Article 55 of the Charter, the United Nations has the duty to promote “universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. In Article 56, all members of the United Nations “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55”.¹⁴

These provisions define clearly the obligations of all members and the powers of the Organization in the field of human rights. While the provisions are general, nevertheless they have the force of positive international law and create basic duties which all members must fulfill in good faith. They must cooperate with the United Nations in promoting both universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Any refusal to participate in the United Nations program to promote the observance of human rights constitutes a violation of the Charter.

conventions (now more than 180) and recommendations containing core minimum standards, and additional flexible provisions that enhance the likelihood of ratification by states. The most important ILO conventions include the conventions on Forced Labor (No. 29) of 1930, Freedom of Association and Protection of the Right to Organize (No. 87) of 1948, Equal Remuneration (No. 100) of 1951, Abolition of Forced Labor (No. 105) of 1957, Discrimination (Employment and Occupation) (No. 111) of 1958, Indigenous and Tribal Peoples (No. 169) of 1989, and the Worst Forms of Child Labor (No. 182) of 1999.

¹⁴ The Charter of the United Nations also contains significant grants of power to various organs of the United Nations. Thus, the General Assembly has the duty to initiate studies and make recommendations for the purpose of “assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Responsibility for the discharge of the functions set forth in Chapter IX of the Charter (which includes Articles 55 and 56 mentioned above) is vested by Article 60 in the General Assembly and, “under the authority of the General Assembly in the Economic and Social Council.” In discharging this responsibility the Economic and Social Council may, according to Article 62, “make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all”; under Article 68, it has an obligation to set up a commission “for the promotion of human rights,” which is the only functional commission expressly provided for by the Charter itself and, under Article 64, it may make arrangements with the Members of the United Nations to obtain reports on steps taken by them to give effect to the recommendations of the General Assembly and of the Council.

On 10 December 1948, the Universal Declaration of Human Rights confirmed that the “peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom” and member States “have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms”. The principles proclaimed in the Universal Declaration give the definition of the content of human rights. As a matter of fact, most human rights treaties drafted under the authority of the UN proclaim to be based on the principles embodied in the Charter as developed by the Universal Declaration. Characteristic formulations can be found in the preamble to the 1953 Convention on the Political Rights of Women which expresses the desire of the Contracting Parties to implement “the principle of equality of rights for men and women contained in the Charter of the United Nations” in accordance with the Universal Declaration of Human Rights¹⁵. Another treaty related to the status of women, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women includes the same references.¹⁶

Other treaties drafted and adopted under the authority of the United Nations also refer to the obligations flowing from the Charter, but add explicitly that “human rights derive from the inherent dignity of the human person”¹⁷. These statements have a special importance since they are inserted in the preambles of the two Covenants of 1966. They can also be found in the same terms in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁸, while the 1989 Convention on the Rights of the Child omits the general statement on the origin of human rights but makes reference not only to the Charter and the Universal Declaration, but also to the International Covenants on Human Rights.¹⁹

The African Charter on Human and Peoples’ Rights, prepared within the Organization of African Unity also used the twofold approach.²⁰ Referring to the Charter of that institution it stipulates that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples” and recalls the fundamental character of human rights (see above). The African Charter on the Rights and Welfare of the Child adopted nine years later only refers to the two African Charters, that of the Organization of African Unity and that on Human and Peoples Rights.²¹

¹⁵ See footnote 5 Nr.4.

¹⁶ See footnote 5 Nr.20.

¹⁷ See footnote 5, Nr. 14 and 15.

¹⁸ See footnote 5, Nr. 21.

¹⁹ See footnote 5, Nr.23.

²⁰ See footnote 8.

²¹ See footnote 8.

The approach of the Council of Europe elaborating its system of human rights protection was rather different. While the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, which had basic importance, refers to the Universal Declaration, it adds that the aim of the Council of Europe is the achievement of greater unity between its members adding that “one of the methods by which that aim is to be pursued is the maintenance and further realization of human rights and fundamental freedoms” which are “the foundation of justice and peace in the world”.²² All other European conventions build upon the principles proclaimed by the European Convention on Human Rights without mentioning other motivations.²³

A specificity of two regional systems protecting human rights can be added. The American Convention on Human Rights, adopted in 1969, proclaims that “every person has responsibilities to his family, his community and mankind”, thus extending from states to individuals the scope of the obligations flowing from the necessity to protect human rights.²⁴ Previously the American Declaration of the Rights and Duties of Man, adopted in 1948 had already proclaimed that individuals also have duties in this respect and even lists such duties²⁵.

The African Convention also insists in its preamble on the duties which flow from the enjoyment of rights and freedoms on the part of everyone and its articles 27-29 list such duties. It is followed by the African Charter on the Rights and Welfare of the Child which declares that the promotion and the protection of the rights and welfare of the child also imply the performance of duties on the part of everyone and specially insists on parental responsibility.²⁶

Can these treaties having the same objectives, the international protection of human rights, a fundamental interest for humankind, be considered as forming a specific category of international agreements? This would mean strong similarities in their construction and in their practical functioning. How far can they be considered as imposing the same or at least comparable constraints on the states parties? An answer can be sought in exploring two practical aspects of such treaties after having established the common values and the common concern on which they are based. The first question in this context is whether the contracting states who have adopted them are entirely free not to apply all their provisions, which means that they can derogate from some of the obligations imposed upon them by making reservations. The second problem to explore is to find out

²² See footnote 7, Nr.1.

²³ See footnote 7, Nr 2 to 8.

²⁴ Article 32. See footnote 9.

²⁵ Op.cit., p.450.

²⁶ See footnote 8.

whether they are free to put an end to their participation in such treaties, which means that they can denounce them. These two points will be examined successively.

II. Reservations to Human Rights Treaties

The above quote from the Advisory Opinion of ICJ related to the Genocide Convention raises the problem of the compatibility or incompatibility of reservations with the object and the purpose of human rights treaties. As the Court points out

It must be clearly assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.²⁷

Thus the question must be asked whether reservations to human rights treaties should be allowed at all and if the answer is positive, which are their limits.

According to article 19 of the 1969 Vienna Convention on the Law of Treaties

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;*
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.*

According to article 21 of the Vienna Convention a reservation established with regard to another party modifies the relations between this party and the reserving state to the extent of the reservation. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

Some human rights treaties of fundamental importance such as the two UN Covenants, the African Charter on Human Rights and the 1990 African Charter on the Rights of the Child²⁸ do not include any provision on reservations. Others such as the 1999 Protocol to the UN Convention on Discrimination against Women,²⁹ the 1981 European Convention on Personal Data,³⁰ the 1987 European

²⁷ I.C.J., Reports 1951, p.26.

²⁸ See footnote 8.

²⁹ Article 17.

³⁰ Article 25.

Convention on Torture³¹ and the 1996 European Convention on the Exercise of Children's Rights³² explicitly prohibit reservations. ILO does not allow reservations to its conventions.

Still, numerous human rights treaties admit reservations without submitting them to conditions and this is especially true for the instruments concerning specific issues such as the 1953 UN Convention on the Political Rights of Women.³³ The 1969 American Convention on Human Rights simply states that it should be subject to reservations only in conformity with the Vienna Convention on the Law of Treaties.³⁴

Other treaties admit reservations declaring that they should not be incompatible with their object and purpose. The 1979 UN Convention on Discrimination against Women³⁵, the 1989 UN Convention on the Rights of the Child,³⁶ the 1988 Protocol to the American Convention on Economic, Social and Cultural Rights³⁷ can be mentioned as examples. The 1985 Inter-American Convention on Torture adds that reservations must concern one or more specific provisions which imply that they should not have a general scope.³⁸

While admitting reservations which are not incompatible with the object and the purpose of the Convention, several instruments add other conditions: not to inhibit the operation of any of the bodies established by the treaty. The 1965 UN Convention of Racial Discrimination, art. 20(2) can be mentioned as an example. On the contrary, article 28 of the 1984 UN Convention against Torture admits that each state may, at the time of its signature, ratification of the Convention or accession thereto declare that it does not recognize the competence of the Committee provided for by the Convention.

The 1950 European Convention on Human Rights provides that any state may, when signing the Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall, however, not be permitted. Any reservation made under this article shall contain a brief statement of the law concerned.³⁹ A comparable provision can be found in the 1997 European

³¹ Article 21.

³² Article 24.

³³ Article VII.

³⁴ Article 75.

³⁵ Article 28 (2).

³⁶ Article 51(1).

³⁷ Article 20.

³⁸ Article 21.

³⁹ Article 57.

Bioethics Convention.⁴⁰ The 1992 European Charter for Minority Languages admits reservations only to specific provisions designated by its article 21. Such provisions concern the promotion of minority languages.

It may be added that several human rights treaties include provisions which allow the contracting states to limit the territorial application of the concerned instrument by authorizing parties not to apply treaty provisions to certain parts of their territory. According to article 56 of the European Convention on Human Rights, any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the Convention shall extend to all or any of the territories for whose international relations it is responsible. Article 20 of the European Convention on Torture is comparable but it adds that at any later date the application of the Convention can be extended to any territory formerly excluded. The American and African regional human rights treaties are silent on this subject. On the contrary, such possibility is explicitly excluded by article 50 of the UN Covenant on Civil and Political Rights and article 28 of the UN Covenant on Economic, Social and Cultural Rights which declare that the provisions of the Covenants shall extend to all parts of federal States without any limitations or exceptions.

In the presence of such a variety of situations is it still possible to speak of “human rights treaties” as constituting a specific category of international instruments? In General Comment No 24, the UN Committee on Civil and Political Rights⁴¹ examined issues relating to reservations made upon ratification or accession to the UN Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant.⁴² It has deemed it useful to address the issues of international law and human rights policy that arise. The General Comment identifies the principles of international law that apply to the making of reservations and by reference to which their acceptability is to be tested and their purport to be interpreted.

It addresses the role of States parties in relation to the reservations of others. It further addresses the role of the Committee itself in relation to reservations and it makes certain recommendations to States parties for a review of reservations.

The General Comment states that the possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant none the less to accept the generality of obligations in that

⁴⁰ Article 36.

⁴¹ Articles 28 to 45 of the Covenant on Civil and Political Rights established a Human Rights Committee to which the states parties undertake to submit reports on the measures they have adopted which give effect to the rights recognized under the Covenant and the progress made in the enjoyment of those rights. According to article 40(4), in the context of the state reporting procedure the Committee can adopt general comments addressed to the State Parties in general, designed to provide guidance to them in discharging their reporting obligations under the Covenant. The General Comment has evolved into a type of quasi-judicial instrument in which the Committee spells out its interpretation of different provisions of the Covenant. Over time, General Comments have become authoritative guidelines for the interpretation and application of the Covenant.

⁴² 4 Nov. 1994.

instrument. Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. However, it is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being. The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19 (3) of the Vienna Convention on the Law of Treaties provides relevant guidance:

<http://193.194.138.190/tbs/doc.nsf/8e9c603f486cdf83802566f8003870e7/69c55b086f72957ec12563ed004ecf7a?OpenDocument-2%2F%20>

Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. A State may not reserve the right to deny fundamental rights by engaging in acts such as slavery, torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of persons of their lives, arbitrary arrest and detaining of persons, or denial of freedom of thought, conscience and religion, or permitting the advocacy of national, racial or religious hatred. While reservations to particular clauses may be acceptable, a general reservation to the right to a fair trial would not be. A State may not reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (article 2 (2)).

The Committee has further examined the question whether reservations can be made to all the clauses of the Covenant. It made a distinction between rights which can be suspended by a state party in time of public emergency threatening the life of the nation and reservations to the non-derogable provisions of the Covenant.⁴³ Some provisions are non-derogable because of their status as peremptory norms: without them there would be no rule of law - the prohibition of torture and arbitrary deprivation of life are examples. Neither could a State make a reservation to article 2, para. 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. A reservation that rejects the competence of the Human Rights Committee established by articles 28 to 45 of the Covenant in order to monitor the implementation of the Covenant would also be contrary to the object and purpose of that treaty.

The Committee believes that the provisions of the Vienna Convention on the Law of Treaties on the role of State objections in relation to reservations made by other states are inappropriate to address the problem of reservations to human rights treaties. It thus claims that human rights treaties are different. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of

⁴³ No derogation from Articles 6,7, 8 (paras 1 and 2), 11, 15, 16 and 18 may be made under Article 4 of the Covenant.

reservations to declarations on the Committee's competence under article 41. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have to a reservation made by States between States *inter se*. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. The Committee repeats the reference to "the special character of a human rights treaty", in asserting that the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task.

Another document throws light on the claimed specific character of the human rights treaties. In an Annual Report the International Law Commission⁴⁴ examined the problem of "The law and practice relating to reservations to treaties". Chapter II of the report dealt, on the one hand, with the question of the unity or diversity of the legal regime of reservations to treaties and, on the other, with the specific question of reservations to human rights treaties. In this regard, the Special Rapporteur sought to determine whether the rules applicable in respect of reservations to treaties (whether codified by the 1969 or 1986 Conventions or customary in character) were applicable to all treaties, regardless of their object, and particularly to human rights treaties.

The question concerns in the first place the unity or diversity of the legal regime(s) applicable to reservations and could be asked in these terms: do some treaties (for example, "normative" treaties: "codification" or human rights conventions or conventions establishing rules of conduct for all States in legal, technical, social, humanitarian and other fields) escape or should they escape the application of the Vienna regime because of their object? If so, to what particular regime(s) were those treaties subject or should they be subject in regard to reservations, setting aside other categories of treaty (limited treaties, constituent instruments of international organizations, bilateral treaties, etc.). While the term human rights treaties often encompassed several classes of treaties of a very differing nature and did not constitute a homogeneous category, such treaties did have certain essential features conferred on them by their "normative" character, designed above all to institute common international regulation on the basis of shared values. It is still important not to take too simplistic a view: such treaties may contain typically contractual clauses. According to the Report the "Vienna regime" is suited to the particular features of normative treaties: problems related to the "integrity" of normative treaties, problems with regard to the "non-reciprocity" of undertakings and problems of equality between the parties were not likely to prevent the "Vienna regime" from being applicable.

The Special Rapporteur also considered the implementation of the general reservations regime and, in particular, the application of the Vienna regime to human rights treaties. In practice, the basic criterion of the object and purpose of the treaty was applied to reservations to such treaties (including those cases where

⁴⁴ A/51/10 (1996), Ch. VI(B), paras. 102-138.

there were no reservations clauses). This basic principle was embodied in the texts of several human rights treaties and the practice of States: the particular nature of normative treaties therefore had no effect on the reservations regime.

Referring to machinery for monitoring the implementation of the reservations regime, the Special Rapporteur noted that additional forms of control carried out directly by human rights treaty monitoring bodies had developed since the Vienna Conventions. There were thus two parallel types of monitoring of the permissibility of reservations in this regard: traditional mechanisms (monitoring by the contracting States and, as appropriate, by the courts in the dispute settlement context) and the human rights treaty monitoring bodies. The role of the latter in respect of reservations had acquired genuine significance in the past 15 years both at the regional level (practice of the Commissions of the European and Inter-American Courts of Human Rights) and at the international level (the Committee on the Elimination of Discrimination against Women and, in particular, the Human Rights Committee).

A combination of the various means of verifying the permissibility of reservations exists with regard to human rights treaties (traditional monitoring by the contracting States in parallel with the control exercised by a monitoring body, when that body had been established by the treaty, in addition to other bodies, such as international jurisdictional or arbitral bodies, in the dispute settlement context, and even national courts).

By way of conclusion, the Special Rapporteur noted that reservations to treaties did not require a normative diversification; the existing regime was characterized by its flexibility and its adaptability and it achieved satisfactorily the necessary balance between the conflicting requirements of the integrity and the universality of the treaty. That objective of equilibrium was universal. Whatever its object, a treaty remained a treaty and expressed the will of the States (or international organizations) that were parties to it. The purpose of the reservations regime was to enable those wishes to be expressed in a balanced manner and it succeeded in doing so in a generally satisfactory way. No determining factor seems to require the adoption of a special reservations regime for normative treaties or even for human rights treaties. The special nature of these instruments had been fully taken into account by the Judges in 1951 and the “codifiers” of later years and had not seemed to them to justify an overall derogating regime.

III. Can Human Rights Treaties be Denounced?

According to customary international law as expressed by article 54 of the Vienna Convention on the Law of Treaties the withdrawal of a party may take place in conformity with the provisions of the treaty. As a rule, treaties include specific rules which determine the ways in which a contracting state can end its participation.

The importance of the international protection of human rights may raise the question whether treaties guaranteeing such rights can be denounced by each contracting party. As a matter of fact, most such treaties include clauses of

denunciation. According to article VIII of the 1953 Convention on Political Rights of Women, any state may denounce the convention by written notification to the Secretary General of the UN and the denunciation takes effect one year after the date of receipt of the notification.⁴⁵ Similar or comparable provisions can be found in other human rights treaties drafted under the authority of the UN: article 19 of the 1965 Convention on Racial Discrimination,⁴⁶ article 31 of the 1984 Convention against Torture,⁴⁷ article 52 of the 1989 Convention on the Right of the Child.⁴⁸ Regional human rights treaties include comparable provisions: article 26 of the 1981 European Convention on Personal Data,⁴⁹ article 22 of the 1987 European Convention on Torture⁵⁰, article 22 of the 1992 European Charter for Minority Languages,⁵¹ article 31 of the 1995 European Framework Convention on National Minorities,⁵² article 31 of the 1997 European Convention on Nationality⁵³, and also article 23 of the 1995 Inter-American Convention on Torture.⁵⁴ Some treaties allow total or partial denunciation, the latter affecting only certain of their provisions following the example of Article 25 of the 1996 European Convention on the Exercise of Children's Rights.⁵⁵ Article 37 of the 1961 European Social Charter prescribes that in the case of a partial denunciation the concerned state should remain bound by a certain amount of obligations flowing from the Charter.⁵⁶

The European Convention on Human Rights includes specific provisions in this regard. First, it allows its denunciation only after the expiry of five years from the date when a state became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe. Second, such a denunciation shall not have the effect of releasing the state concerned from its obligations under the Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.⁵⁷ A comparable provision is contained in article 78 of the 1969 American Convention on Human Rights⁵⁸.

⁴⁵ See footnote 5, Nr. 4.

⁴⁶ See footnote 5, Nr.13.

⁴⁷ See footnote 5, Nr.21.

⁴⁸ See footnote 5, Nr.23.

⁴⁹ See footnote 7, Nr.3.

⁵⁰ See footnote 7, Nr.4.

⁵¹ See footnote 7, Nr.5.

⁵² See footnote 7, Nr. 6.

⁵³ 6 November 1997, European Treaty Series and al, No.166.

⁵⁴ See footnote 9.

⁵⁵ See footnote 7, Nr. 7.

⁵⁶ See footnote 7, Nr.2.

⁵⁷ Article 58. See footnote 7, Nr. 1.

⁵⁸ See footnote 9.

Contrary to certain U.N. human rights treaties permitting states parties to withdraw from them after a period of time following notification, the UN Covenants contain no denunciation clauses. Their example was followed by the African Charter on Human Rights, by the 1990 African Charter on the Rights of the Child⁵⁹ and by the 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty.⁶⁰ Such situations fall within the scope of Article 56 of the Vienna Convention on the Law of Treaties, according to which

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

On 12 August 1997, the UN Committee on Human Rights adopted a General Comment on the matter stating that the International Covenant on Civil and Political Rights does not contain any provision regarding its termination and does not provide for denunciation or withdrawal.⁶¹ Consequently, the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. On this basis, the Covenant is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty. The Committee affirmed that the parties to the Covenant did not intend to admit the possibility of denunciation and it was not a mere oversight on their part to omit reference to denunciation, as demonstrated by the fact that article 41(2) of the Covenant permits a State party to withdraw its acceptance of the competence of the Committee to examine inter-State communications by filing an appropriate notice to that effect while there is no such provision for denunciation of or withdrawal from the Covenant itself. Moreover, the Optional Protocol to the Covenant, negotiated and adopted contemporaneously with it, permits States parties to denounce it. Additionally, by way of comparison, the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted one year prior to the Covenant, expressly permits denunciation. It can therefore be concluded that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation. The same conclusion applies to the Second Optional Protocol in the drafting of which a denunciation clause was deliberately omitted. Furthermore, it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant

⁵⁹ See footnote 8.

⁶⁰ See footnote 9.

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

The General Comment concludes that the rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the state party, including dismemberment in more than one state or state succession or any subsequent action of the state party designed to divest them of the rights guaranteed by the Covenant. The Committee thus concluded that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.

CONCLUSIONS

The last statement of the General Comment is of fundamental importance. By admitting reservations or denunciation human rights treaties may look like any other multilateral treaty. It cannot be forgotten, however, that outside the fact that they are not based on reciprocity, they concern not only the contracting states but also create for them precise obligations towards individuals, giving them a special status which enables them to complain in international fora of the treatment to which they have been submitted. The existence of such procedures and institutions intended to ensure the enforcement of human rights treaties stresses their specific character. Without going so far as recognizing new subjects of international law they create a new category in this field: internationally protected individuals and groups.

Despite the common foundation and nature of the human rights treaties, some considerations should not be forgotten. International treaties protecting human rights are instruments prepared, drafted and negotiated between States like any other agreement. This means that the conceptions and views of the negotiating States may be different and that the negotiators may try to make the others accept their proposals suggesting compromises if necessary and, as a counterpart, accept proposals made by others. Such considerations may play a role in the acceptance or refusal of reservations and clauses of denunciation.

The sixty-year history of treaties protecting human rights – universal and regional conventions with a general scope and numerous other instruments related to specific rights and freedoms – should not be forgotten either. After the very general proclamation by the UN Charter of the necessity to respect human rights, the definition of the rights by the Universal Declaration was followed first by a regional treaty, the European Convention, which was dependent on the functioning of the Council of Europe, then by two other regional conventions

drafted and adopted in very different historical and political contexts. This may make clear the reason for differences such as the possibility of derogation in critical circumstances, which is accepted by certain instruments but which is not the same from one convention to the other, or the affirmation of the duty of all humans to respect the rights guaranteed.

Finally, one of the general features which characterizes the overview of the current state of quite a few treaties related to human rights is the development in their implementation, especially in treaty systems where specific supervisory bodies, such as the regional courts and commissions of human rights have been created. Without the jurisdictions and committees established by different instruments and their practice our views on human rights in this field would be very different.

The question which this study examines should be given an affirmative answer: expressing an important aspect of common interest of humankind, human rights treaties constitute a specific category of international treaties and must be handled with as such, taking into account the interpretation the most favorable to individuals in the framework they established.

**HUMAN RIGHTS TREATIES
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Introduction

During the 1990s the Union of Soviet Socialist Republics (USSR), the Socialist Federal Republic of Yugoslavia (FRY) and the Czech and Slovak Federal Republic (CSSR) disintegrated into a large number of separate states. Among the many legal questions raised by this disintegration process was its effect on adherence to human rights treaties. The USSR, FRY and CSSR had all been parties to the main UN human rights treaties. Were the successor states emerging from these three states automatically bound by these treaties? Or were they free to adhere or not to adhere to them? While at first sight this may seem like a dry and technical subject it is in fact a fascinating case study contrasting the traditional, consensual nature of general international law with the new, autonomous nature of international human rights law.

The 1978 Vienna Convention on Succession of States in Respect of Treaties provides for the continuity of obligations in respect of *all* treaties that were binding on the predecessor state.² However, the Convention's approach in this respect has attracted little support from states and does not appear to reflect customary international law. The Convention entered into force only in 1996 and so far only 18 states have become parties to it (although, interestingly, this group includes many of the recent successor states).³ Contrary to the approach taken in

¹ I am grateful to Martin Scheinin for his comments and suggestions on an earlier draft. Any remaining errors are my own fault.

² Art. 31-35, Vienna Convention on Succession of States in Respect of Treaties, adopted 22 August 1978, entered into force 6 November 1996, 1946 UNTS 3, reproduced at 17 ILM (1978) 1488.

³ Current parties to the Vienna Convention on Succession of States in Respect of Treaties are Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Dominica, Egypt, Estonia, Ethiopia, Iraq, Madagascar, Saint Vincent and the Grenadines, Serbia and Montenegro, Seychelles, Slovakia, Slovenia, The Former Yugoslav Republic of Macedonia, Tunisia and Ukraine.

the Vienna Convention, most states favour a 'clean slate' approach in respect of treaty succession.⁴ In accordance with this philosophy, a successor state is entirely free to become or not to become a party to treaties adhered to by the predecessor state.

In an article published in 1996 I argued that human rights treaties form an exception to this general rule.⁵ Based on a review of the practice of states, international organizations and human rights treaty bodies during the first half of the 1990s I concluded that the inhabitants of a territory cannot be deprived of the rights previously granted to them under a human rights treaty as a result of the fact that another state has assumed responsibility for the territory. This continuity of obligations under human rights treaties, I argued, occurs automatically, *ipso jure*, and therefore does not require formal notification by the successor state. However, in practice confirmation by the successor state that it considers itself bound by the human rights treaties to which its predecessor was a party tend to be welcomed by the depositories and the supervisory bodies of human rights treaties because it helps to clarify any ambiguities that may exist.

Since 1993, the question of the continuity or otherwise of obligations arising out of human rights treaties has been addressed by a wide range of international authorities, including the UN Commission on Human Rights, the UN human rights treaty bodies and the International Court of Justice.

(1) In 1993, 1994 and 1995, the UN Commission on Human Rights adopted three successive resolutions, introduced by the Russian Federation and adopted without a vote, entitled 'Succession of States in respect of international human rights treaties'.⁶ In those resolutions the Commission referred to the 'special nature' of human rights treaties and their 'continuing applicability' to successor states. The resolutions called on successor states that had not yet done so 'to confirm to appropriate depositories that they continue to be bound by obligations under international human rights treaties'.

(2) The supervisory bodies of UN human rights treaties have adopted a series of general statements in support of automatic state succession in respect of the treaties within their purview. Most importantly, in 1994 the 5th meeting of chairpersons of human rights treaty bodies declared that:

⁴ For example, Austria, see H. Tichy, 'Two Recent Cases of State Succession – An Austrian Perspective', 4 *Austrian Journal of Public and International Law* (1992) 117, 123-124; The Netherlands, see A. Bos, 'Statenopvolging in het bijzonder met betrekking tot verdragen', 111 *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* (1955) 55; the United States, see *Restatement (Third) of the Foreign Relations Law of the United States* (1987), para. 210(3), Reporters' Note 4. In the same vein, for example: Brownlie, *Principles of Public International Law*, Oxford: Oxford University Press, 5th ed. (1998) 663; Cassese, *International Law*, Oxford: Oxford University Press, 2nd ed. (2005) 78; Shaw, *International Law*, Cambridge: Cambridge University Press, 5th ed. (2003) 875.

⁵ Kamminga, 'State Succession in Respect of Human Rights Treaties', 7 *EJIL* (1996) 469, 482-483.

⁶ Resolutions 1993/23, 1994/16 and 1955/18.

*... successor States were automatically bound by obligations under international human rights instruments from the respective date of independence and that observance of the obligations should not depend on a declaration of confirmation made by the Government of the successor State.*⁷

In the same vein, the Human Rights Committee, the supervisory body of the International Covenant on Civil and Political Rights observed in its General Comment on continuity of obligations:

*... once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession ... The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded to the Covenant to denounce it or withdraw from it.*⁸

(3) The International Court of Justice has so far avoided taking a position one way or the other although it was offered the opportunity to do so in the Bosnian Genocide case. In response to the argument of automatic succession in respect of human rights treaties made by Bosnia-Herzegovina⁹ the Court observed:

*Without prejudice as to whether or not the principle of “automatic succession” applies in the case of certain types of international treaties or conventions, the Court does not consider it necessary, in order to decide on its jurisdiction in this case, to make a determination on the legal issue concerning State succession.*¹⁰

In their separate opinions to this judgment only one individual judge expressed clear views on the issue of automatic succession in respect of human rights treaties. Judge Weeramantry argued that there was indeed a principle of automatic succession in regard to the Genocide Convention. Judge Higgins expressed sympathy for the idea in an academic article.¹¹

Based on the references in the judgement to the humanitarian nature of the Genocide Convention at least one author has suggested that the Court ‘appeared to endorse, tacitly, at least, the conclusion drawn by Bosnia-Herzegovina as to

⁷ UN Doc. E/CN.4/1995/80 at 4.

⁸ Human Rights Committee, General Comment No. 26: Continuity of obligations, 8 September 1997.

⁹ International Court of Justice, Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections) (Bosnia-Herzegovina v. Yugoslavia), judgment of 11 July 1996, par. 21.

¹⁰ *Ibid.*, par. 23.

¹¹ R. Higgins, ‘The International Court of Justice and Human Rights’, in K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, The Hague: Nijhoff (1998), 691, 696-697.

automatic succession'.¹² In my opinion, it would be inappropriate to draw such an inference. It should however be pointed out that in its recent advisory opinion on The Wall the Court demonstrated a tendency to closely follow the practice of the treaty bodies when interpreting human rights treaties.¹³ One might therefore speculate that, if obliged to make up its mind, the Court would follow the treaty bodies' line in favour of automatic succession.

(4) In the literature, the doctrine of automatic succession in respect of human rights treaties has generally been cautiously supported.¹⁴ However, while it is generally agreed that the doctrine is desirable, questions have been raised as to whether there is sufficiently evidence of state practice and *opinio juris* to make it into a rule of customary international law.

The strongest and most articulate criticisms have been raised in an article by Akbar Rasulov.¹⁵ He argued that '(t)he *opinio juris* currently held by the successor states strongly disfavours automatic succession'. He also pointed out that existing international practice is limited to East European and Central European states and that no general conclusions should therefore be drawn from it about the existence of a rule of customary international law. Finally, according to Rasulov the human rights treaty bodies have not been consistent in their attitude towards state succession. More specifically, he maintains that the doctrine of automatic succession in respect of human rights treaties is ultimately unpersuasive because:

(a) Human rights treaty bodies insist on confirmations by successor states thereby creating the impression that without such confirmations treaty obligations would not continue;

(b) Human rights treaty bodies accept that successor states often accede rather than succeed to human rights treaties thereby creating the impression that their guiding principle is not continuity of obligations but freedom of choice.

¹² M.C.R. Craven, 'The Genocide Case, the Law of Treaties and State Succession', 68 BYIL (1997) 127, 152.

¹³ International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, advisory opinion of 9 July 2004, par. 109-112 and 136.

¹⁴ M.N. Shaw, 'State Succession Revisited', 5 *Finnish Yearbook of International Law* (1994) 34, 84 (one is on the verge of widespread international acceptance of the principle that human rights treaties continue to apply within the territory of a predecessor State irrespective of a succession). P. Pazartzis, 'State Succession to Multilateral Treaties: Recent Developments', 3 *Austrian Review of International & European Law* (1998) 397, 414 (principle of obligatory succession to human rights treaties seems to be developing). B. Stern, 'Les questions de succession d'Etats dans l'affaire à l'Application de la Convention pour la prevention et la repression du crime de genocide devant la Cour internationale de Justice', in N. Ando et al. (eds.), *Liber Amicorum Shigeru Oda* (2002) 285, 297 (Il s'agit d'une règle en devenir, qui est encore controversée). F. Ruiz Ruiz, 'The Succession of States in Universal Treaties on the Protection of Human Rights and Humanitarian Law', 7 *International Journal of Human Rights* (2003) 42, 69 (presumption in favour of continuity of human rights treaties).

¹⁵ A. Rasulov, 'Revisiting Succession to Humanitarian Treaties; Is There a Case for Automaticity?' 14 *EJIL* (2003) 141-170.

The purpose of this brief paper is to reflect on Rasulov's scepticism in the light of more recent international practice. Without attempting an exhaustive survey I will concentrate here on practice under the European Convention on Human Rights and the International Covenant on Civil and Political Rights because the most thorough consideration of the underlying issues has occurred within the context of these two treaties.

Practice under the European Convention on Human Rights

Even sceptics agree that practice under the European Convention on Human Rights with regard to the former Czechoslovakia provides ample support for the doctrine of automatic state succession in respect of human rights treaties.¹⁶

On 1 January 1993, the Czech and Slovak Federal Republic dissolved into two independent states: the Czech Republic and the Slovak Republic. The CSSR had been a party to the European Convention on Human Rights since 18 March 1992. According to Article 66 of the Convention, only members of the Council of Europe could become parties to the Convention. On 30 June 1993, the Council of Europe's Committee of Ministers therefore admitted the two new states as members. At the same time the Committee decided that, in accordance with their express wishes, the two states were to be regarded as succeeding to the Convention retroactively, with effect from 1 January 1993, i.e. from their date of independence.¹⁷ The unorthodox procedure followed in this case apparently reflected the strong desire on the part of both the existing members of the Council of Europe and its two new members to ensure seamless continuity of obligations under the Convention.¹⁸

Subsequent official records confirm this interpretation. The chart of signatures and ratifications of the Council of Europe's Treaty Office lists the Czech Republic and Slovakia as having been parties to the Convention since 1 January 1993. A footnote mentions that the dates of signature and ratification listed are by the former Czech and Slovak Federal Republic. There is no reference to any notifications by the Czech Republic or Slovakia. In other words, the continuity of obligations in this case has indeed occurred *ipso jure*, without action on the part of the two successor states.

Consistent with the attitude adopted by the Committee of Ministers, the European Court of Human Rights has on numerous occasions considered individual petitions against the Czech Republic and against Slovakia for violations which occurred since 18 March 1992, i.e. the date on which ratification of the Convention and recognition of the right of individual petition by the former Czech and Slovak

¹⁶ Rasulov, at 165-167.

¹⁷ Council of Europe Doc. H/INF(94) 1.

¹⁸ See J.F. Flauss, 'Convention européenne des Droits de l'Homme et succession d'Etats aux traités: une curiosité, la décision du Comité des Ministres du Conseil de l'Europe en date du 30 juin 1993 concernant la République tchèque et la Slovaquie', 6 RUDH (1994) 1-5.

Federal Republic took effect.¹⁹ The standard formula employed in judgments of the Court describing the facts of such cases is: “The period to be taken into consideration began on 18 March 1992, when the recognition by the former Czech and Slovak Federal Republic, to which Slovakia [the Czech Republic] is one of the successor States, of the right of individual petition took effect.” This ‘purist’ approach to state succession allowing for accountability of conduct by the predecessor state apparently has not prompted any objections by the Czech Republic or Slovakia.

It is true that practice with regard to state succession under the European Convention on Human Rights has been limited to the case of the former Czech and Slovak Federal Republic. But in view of the firm precedents that have now been set by the Committee of Ministers and the European Court of Human Rights it seems highly unlikely that on future occasions a different course of action would be followed by these two institutions.

Practice under the International Covenant on Civil and Political Rights

Of the various human rights treaty bodies the Human Rights Committee, the supervisory body of the International Covenant on Civil and Political Rights has devoted most attention to the questions of principle raised by a succession of states. By the beginning of 1993, most states belonging to the former Soviet Union and Yugoslavia had either succeeded or acceded to the Covenant. At its session in March/April 1993 the Committee addressed the states that had not yet taken such action directly by declaring that:

all the people within the territory of a former State party to the Covenant remained entitled to the guarantees of the Covenant, and that, in particular, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, the “Former Yugoslav Republic of Macedonia”, Turkmenistan and Uzbekistan were bound by the obligations of the Covenant as from the dates of their independence.²⁰

The Committee added that reports under Article 40 of the Covenant accordingly became due one year after these dates and it requested that such reports be submitted to it.²¹ The Committee had earlier adopted a similar decision with regard to Bosnia-Herzegovina, Croatia, and the Federal Republic of Yugoslavia.²² The Committee therefore regarded the states in question as having succeeded automatically and treated them as such by insisting that they submit implementation reports.

¹⁹ See, for example, *Matter v. Slovakia*, par. 52; *I. S. v. Slovakia*, par. 36; *Nemec and others v. Slovakia*, par. 30; *Gajdusek v. Slovakia*, par. 51; *Chovancik v. Slovakia*, par. 18; *Benackova v. Slovakia*, par. 20; *Konecny v. Czech Republic*, par. 4; *Skodakova v. Czech Republic*, par. 30.

²⁰ UN Doc. A/49/40, par. 49.

²¹ *Ibid.*

²² *Ibid.*, par. 48.

The Committee's approach has been remarkably successful. By the end of the 1990s all the above mentioned states had either formally succeeded or acceded to the Covenant with the exception of Kazakhstan (see below).

While the Committee has reluctantly accepted that a successor state may opt to *accede* rather than *succeed* to the Covenant, it insists that accession take effect retroactively on their date when the state became independent.²³ This means that it regards Armenia (acceded in 1993), Azerbaijan (acceded in 1992), Georgia (acceded in 1994), Kyrgyzstan (acceded in 1994), Tajikistan (acceded in 1999), Turkmenistan (acceded in 1997) and Uzbekistan (acceded in 1995) not as parties from the customary three months after the receipt of the instrument of accession but as having been parties since 1991 when each of them became independent.

Although these states therefore acceded to the Covenant up to eight years after their independence the Committee's attitude that these notifications take effect retroactively to their date of independence has not been challenged.²⁴ However, the Committee has accepted that reports submitted by these successor states be labelled 'initial' reports. In other words, it has not insisted for example that reports by successor states of the Soviet Union be labelled 'fourth' reports because the USSR had submitted its 'third' report before breaking up in 1991. On the other hand, the Committee has insisted that reports by the successor states cover events since their independence and it has made a point of mentioning this in its concluding observations.²⁵ In the case of Azerbaijan, the Committee specifically recorded its appreciation that that country's delegation when addressing questions by members of the Committee 'did not deny accountability for events that occurred in the country after the date of independence but before the date of accession'.²⁶ The records reveal no objections to this attitude and the states in question therefore appear to have acquiesced in it. Some states have submitted reports that specifically covered the period since independence rather than merely the period since their accession.²⁷

There is, however, one *bête noire* among this group of states. Kazakhstan, a former republic of the USSR, became independent on 16 December 1991. Of the successor states that became independent in the early 1990s it is the only state that has so far failed to confirm its adherence to the Covenant. Interestingly, Kazakhstan's unique attitude has not served to undermine the doctrine of automatic state succession. Instead, it has enabled the Committee to show its teeth and to demonstrate the ultimate consequence of its approach. Accordingly, the

²³ *Ibid.*, note b.

²⁴ Raija Hanski and Martin Scheinin, 'The Work of the Human Rights Committee under the International Covenant on Civil and Political Rights and its Optional Protocol' in Hanski/Scheinin, *Leading Cases of the Human Rights Committee*, Turku/Abo: 2003, 8.

ee, for example, Concluding observations on the initial report of Armenia, UN Doc. CCPR/C/79/Add.100, Concluding observations on the initial report of Kyrgyzstan, UN Doc. CCPR/CO/69/KGZ, and Concluding observations on the initial report of Uzbekistan, UN Doc. CCPR/CO/71/UZB.

²⁶ Concluding observations on the initial report of Azerbaijan, UN Doc. CCPR/C/79/Add.38.

²⁷ Initial report by Uzbekistan, UN Doc. CCPR/C/UZB/99/1.

Human Rights Committee treats Kazakhstan as having become a party to the Covenant by way of succession and it lists the country as such in its annual reports. In a footnote in its annual report the Committee points out:

Although a declaration of succession has not been received, the people within the territory of the State – which constituted part of a former State party to the Covenant - continue to be entitled to the guarantees enunciated in the Covenant in accordance with the Committee's established jurisprudence.²⁸

In contrast, in the UN document entitled Multilateral Treaties Deposited with the Secretary-General, prepared by the Treaty Section of the UN Office of Legal Affairs, Kazakhstan is not listed as a party to the Covenant. The documents therefore reflect a fundamental difference of approach between the UN Office of Legal Affairs, which carries out depositary functions on behalf of the Secretary-General, and the Human Rights Committee, the body elected by the parties to supervise the implementation of the Covenant. While the Office of Legal Affairs has followed a passive approach consisting of recording the intentions of states, the Human Rights Committee has relied on a principled philosophy that is independent from the conduct of states.

In 2000, the Committee again requested Kazakhstan to present its initial report but no such report has so yet been received.²⁹ On 2 December 2003 Kazakhstan signed the Covenant but until now it has not followed this up with ratification. Contrary to earlier reports, it will ratify without any reservations.³⁰ This would be important because it would continue existing practice according to which new reservations by successor states are not permitted. None of the successor states that have acceded to the Covenant has entered any reservations. Arguably, this reflects the *opinio juris* that in view of the continuity of obligations which pertains a successor state is not entitled to make reservations that had not been made by the predecessor state

In spite of its innovative actions, the Human Rights Committee's attitude has been less radical than that of the European Court of Human Rights. Unlike the Court, the Committee has not always insisted on holding successor states explicitly accountable for unlawful conduct by the predecessor state. However, this may be partly due to the fact that the nature of the reporting procedure generally does not force treaty bodies to make specific determinations on a state party's obligations *ratione temporis*.

²⁸ UN Doc. A/59/40 (vol. I) Annex I, note d.

²⁹ *Ibid.*, par. 61.

³⁰ Kazakhstan News Bulletin, Vol. 5, No. 46, 3 November 2005.

Concluding observations

The approach taken by the supervisory bodies of human rights treaties in respect of state succession is not based on the provisions of their respective treaties but on general international law. This makes it possible to draw conclusions from this practice regarding the special nature of human rights treaties under general international law.

This special nature entails that the protection accorded by human rights treaties devolves with territory and is not affected by state succession. Successor states therefore remain bound by human rights treaties from their date of independence and this is not dependent on any confirmation made by them.

This regime represents a significant exception to the general rule of non-continuity of treaty obligations. In effect, it puts human rights treaties in the same league as treaties establishing boundaries and other territorial regimes. According to Articles 11 and 12 of the Vienna Convention on Succession of States in Respect of Treaties, treaties providing for territorial regimes are not affected by a succession of states. Unlike the principle on the continuity of obligations under treaties generally (provided for in Articles 31-35 of the Vienna Convention) the principle of the continuity of treaties on territorial regimes has attracted widespread support. In the *Gabcikovo-Nagymaros* case the International Court of Justice identified it as a rule of customary international law.³¹

Although only two human rights treaties have been surveyed in any detail in this paper the approach taken by the supervisory bodies is broadly consistent as evidenced by the 1994 joint statement by the chairpersons of UN treaty bodies.³² While the actual practice of the supervisory bodies has not been entirely uniform, inconsistencies relate to matters of detail and not to matters of principle.

Practice under the European Convention on Human Rights has been the most principled and far reaching. Within six months of the collapse of the Czech and Slovak Federal Republic the Council of Europe's Committee of Ministers reacted by deciding that the Czech Republic and the Slovak Republic were to be regarded as having succeeded to the Convention retroactively from their date of independence. The European Court of Human Rights followed suit by holding the two new states accountable for any breaches committed by the predecessor state.

The UN human rights treaty bodies have generally been more restrained in their attitude to state succession. They have accepted that successor states accede rather than succeed to their treaties and that there may be significant delays in this process; they have accepted that successor states submit implementation reports that are labelled 'initial' even if the predecessor state had already submitted one or more reports in the past; and have not held successor states accountable for

³¹ International Court of Justice, Case concerning the *Gabcikovo-Nagymaros* project (Hungary/Slovakia), judgment of 25 September 1997, par. 123.

³² *Supra* note 6.

breaches by the predecessor state. In other words, while they have firmly insisted on continuity of substantive obligations they have adopted a pragmatic approach towards achieving this result and they have not insisted on full continuity of accountability.

It may be argued that notifications by the successor state have a constitutive rather than confirmative character and therefore are incompatible with the *automatic* nature of treaty succession in respect of human rights treaties. The repeated calls upon successor state to 'confirm' their obligations under human rights treaties by political bodies such as the UN Commission on Human Rights and expert bodies such as the UN treaty bodies would support such an interpretation.

But in my view calls on states to 'confirm' their obligations do not serve such a constitutive function. For example, in 1977 the UN General Assembly called on member States to reinforce their support for the Declaration against Torture by making unilateral declarations by which they would agree to comply with the Declaration.³³ Thirty-three states made such declarations. It has never been suggested that by calling on states to make such declarations the General Assembly was in fact undermining the prohibition of torture under customary international law. On the contrary, human rights lawyers widely regarded the declarations that were made as reinforcing the prohibition.³⁴

Significantly, the three resolutions on state succession in respect of human rights treaties adopted by the UN Commission on Human Rights in which states were called upon to 'confirm' that they continue to be bound, also refer to the 'special nature' of human rights treaties and their 'continuing applicability' to successor states. Any constitutive nature of such confirmations would be difficult to reconcile with such language.

While the Human Rights Committee has reluctantly accepted that a successor state may opt to *accede* rather than *succeed* to the International Covenant on Civil and Political Rights, it insists that accession takes effect retroactively to the date when the successor state became independent.

The exceptional case of Kazakhstan, rather than serving to undermine the doctrine of automatic succession, has enabled the Human Rights Committee to demonstrate the ultimate consequence of the doctrine by treating Kazakhstan as a state party retroactively on its date of independence although Kazakhstan has failed to issue a notification to this effect.

It is true that international practice relating to succession of states in respect of human rights treaties has been limited to the 20-odd Central and East European states that gained their independence as a result of the collapse of the USSR, the FRY and the CSSR in the 1990s. Practice relating to Hong Kong and Macau, while fully consistent with the doctrine of automatic succession to human rights

³³ UN General Assembly Res. 32/64, 8 December 1977.

³⁴ See N.S. Rodley, *The Treatment of Prisoners under International Law*, Oxford: Clarendon Press, 2nd ed. (1999) 42-43, 61-62.

treaties, does not have the same evidentiary value because continuity of obligations in respect of these territories is based on bilateral agreements between China and the United Kingdom and Portugal, respectively. In view of the widespread support from states and the lack of opposition from successor states it would however be unduly restrictive to assume European regional custom only.

It is also true that the doctrine of the continuity of obligations under human rights treaties is driven primarily by the human rights treaty bodies, in particular the Human Rights Committee. Similarly, the continuity of treaties in the field of international humanitarian law is driven by the International Committee of the Red Cross and the continuity of treaties in the field of international labour law is driven primarily by the International Labour Office. It is uncertain whether successor states would have embraced the doctrine if they had been left to make up their own minds. But it is legally significant that the practice of the treaty bodies has not been objected to by states. This contrasts, for example, with the treaty bodies' practice relating to reservations which has been strongly objected to by some states.³⁵

In sum, it would appear that the doctrine of automatic succession in respect of human rights treaties is more than mere *lex specialis*. The doctrine is evidence of the special status of human rights treaties in international law. It demonstrates that obligations under human rights treaties not only enjoy a superior ranking in comparison to other international standards but that they are also permanent and inalienable. In other words, while states may come and go obligations under human rights treaties remain as they are. Charles de Gaulle's celebrated words *Les traités, voyez vous, sont comme les jeunes filles et comme les roses, ça dure ce que ça dure* are not applicable to human rights treaties.

³⁵ Compare the objections to Human Rights Committee General Comment No. 24 by the United States, the United Kingdom and France, reproduced in the Appendix of J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt out: Reservations and Objections to Human Rights Treaties*, London: British Institute of International and Comparative Law (1997).

**HUMAN RIGHTS TREATIES
AND THE VIENNA CONVENTION ON THE LAW OF TREATIES:
conflict of harmony?
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Introduction

This report discusses the relationship between the Vienna Convention on the Law of Treaties¹ and human rights treaties. Rather than being an in-depth scholarly study in the matter, the paper identifies alternative approaches in the issue and discusses their relative strengths and weaknesses. The paper is structured on the basis of five different approaches to the relationship in question. A brief concluding discussion follows their presentation.

2. A Textual (Positivist) Approach to the Vienna Convention as a Treaty Regulating the Law of Treaties

An extreme positivist position in relation to the Vienna Convention would be to take it literally as a treaty that regulates treaty relationships between states in accordance with its own provisions – nothing less and nothing more. The application of such an approach would, somewhat surprisingly, result in a situation where the role of the VCLT is quite marginal and at the same time destructive with respect to the functioning of human rights treaties. This is, firstly, because the total number of states parties to the VCLT (105) is smaller than the number of states parties to any one of the six major UN human rights treaties, the latter ranging from 141 (CAT) to 192 (CRC).² The VCLT would be

¹ Adopted, 23 May 1969, entered into force 27 January 1980, 1155 United Nations Treaty Series 331. Parties 21 December 2005): 105 (*Status of Multilateral Treaties Deposited with the Secretary-General*, <http://untreaty.un.org/English/>).

² The six treaties referred to are the International Covenant on Economic, Social and Cultural Rights (CESCR; 16 December 1966, entered into force 3 January 1976, 993 UNTS 3), the International Covenant on Civil and Political Rights, (CCPR; 16 December 1966, entered into force 23 March 1976, 999 UNTS 171), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD; adopted 21 December 1965, entered into force: 4 January 1969, 660 UNTS 195), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW; 18 December 1979, entered into force 3 September 1981, 1249 UNTS 13), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85), and the Convention on the Rights of the Child (CRC; 20 November 1989, entered into force 2 September 1990. 1577 UNTS 3). The recent addition to the family, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW; General Assembly resolution 45/158 of 18 December 1990,

applicable only in treaty relationships between states that also are parties to this convention. Hence, under a textual reading, the VCLT would not at all apply with respect to a fairly large number of states that are parties to human rights treaties. And with respect to states that are parties to the VCLT, the VCLT would not govern their treaty relationships with states that are not parties to the VCLT.

Secondly, article 4 of the VCLT contains a non-retroactivity clause according to which the convention applies only to treaties which are concluded by states after the entry into force of the VCLT with regard to such states. Consequently, the VCLT would not apply with respect to many treaty relationships under human rights treaties between states that as such *are* parties to the VCLT but ratified it later than their human rights treaties.

To illustrate the consequences of these observations, let's as an example take a look at the 11 states that in the English alphabet start with the letter "A".³ Due to the different ratification records of these states, there are at the time of writing (September 2005) 274 bilateral treaty relationships between these states under the six major human rights treaties. As four of the 11 states in question are not parties to the VCLT, and as many of the remaining seven states ratified the VCLT later than most of their human rights treaties, the VCLT is applicable with respect to less than 10 per cent of the total number of bilateral treaty relationships between the 11 states, to be exact in 22 relationships.⁴ Even with respect to the CRC which internationally entered into force in 1990, i.e. almost ten years later than the VCLT, the Vienna Convention is applicable only with respect to six bilateral treaty relationships although all of the 11 states in question are parties to the CRC and the total number of bilateral relationships is therefore 55.⁵

These consequences of the textual positivist approach demonstrate that it would be destructive not only for the coherence of human rights law but for public international law in general to apply the VCLT mechanically, in accordance with its own terms, in some but not all treaty relationships between states. This outcome demonstrates that a sensible relationship between human rights treaties and the VCLT only can be found by understanding the VCLT as something more – or something less – than a set of rules to be applied mechanically within the formal scope of application of the VCLT.

entered into force 1 July 2003) or Optional Protocols to various treaties are not taken into account here. For the number of States parties, see (*Status of Multilateral Treaties Deposited with the Secretary-General*, <http://untreaty.un.org/English/>, as updated 21 December 2005).

³ Afghanistan, Algeria, Albania, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria and Azerbaijan.

⁴ The number of bilateral relationships with respect to which the VCLT is applicable under each of the six treaties is as follows: CESCR 1, CCPR 3, CERD 0, CEDAW 6, CAT 6 and CRC 6.

⁵ Afghanistan, Angola, Antigua and Barbuda, and Azerbaijan are not parties to the VCLT. Albania, Andorra and Armenia ratified the VCLT later than the CRC. Consequently, the VCLT would be applicable with respect to the CRC in the relationships between Algeria, Argentina, Australia and Austria.

3. A Dogmatic Approach to the Vienna Convention as a Complete Codification of the Customary Norms on the Law of Treaties.

The non-retroactivity clause in article 4 of the VCLT was central in the above discussion. However, that provision is more complex than was implied in its mechanical application above. The clause reads as follows:

“Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.”

The clause itself speaks against a mechanical positivist application of the VCLT, by referring to rules that would be applicable independently of the VCLT. The formulation reflects a more general understanding of the VCLT as a *codification*, *approximation* or *illustration* of valid norms of customary international law in the field of the law of treaties. But if there is a close connection between the provisions of the VCLT and norms of customary law, what exactly is the nature of that connection? Are we speaking of a codification, approximation *or* illustration?

One possible answer is to take the view that the International Law Commission managed to codify, in a comprehensive and exhaustive way the customary norms on the law of treaties into the provisions of the VCLT which therefore are for their substance applicable with respect to all treaties between states, irrespective of whether a particular state is a party to VCLT, or in which order it happened to ratify its international treaties.⁶ Hence, the rules of the VCLT would be applicable with respect to any multilateral treaty, irrespective of the special characteristics of the treaty. The provisions of the VCLT which were formulated on the basis of a rich variety of practices, would form a straightjacket in relation to treaty law. Such a dogmatic approach to the VCLT as a complete codification of customary law might lead to the denial of any need to adjust the applicable norms of the law of treaties to the nature of each treaty. For instance, as articles 31-33 of the VCLT are silent on the relevance of any institutionalized practices of interpretation developed by an international monitoring body established through the treaty, such practices could be said to have no relevance for the interpretation of the

⁶ For a pragmatic, rather than dogmatic approach leading to the same outcome, see, e.g. Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press 2000, p. 10: “To what extent does the Convention express rules of customary international law? A detailed consideration of this question is beyond the scope of this book, but it is, with certain exceptions, not of great concern to the foreign ministry lawyer in his day-to-day work. When questions of treaty law arise during negotiations, whether for a new treaty or about one concluded before the entry into force of the Convention, the rules set forth in the Convention are invariably relied upon even when the states are not parties to it.”

treaty. And as articles 19-21 are silent on the legal effect of impermissible reservations, there might be a temptation to apply the provisions of article 21 which textually could be understood as referring only to permissible reservations,⁷ which respect to any reservation.

These expansive inferences rest upon the assumption that the VCLT would be a true codification of very firm rules of customary international law and that even textual lacunae could be filled by applying the provisions of the VCLT beyond their prescribed scope of application. Such an approach, which is here classified as dogmatic, represents a distorted view of international law and does not hold critical analysis. For instance, on the basis of the preparatory works of the VCLT it is quite clear that the adopted provisions on reservations and objections to reservations were never intended to govern the consequences of impermissible reservations,⁸ and that the rules of customary law in respect of reservations to multilateral treaties were unclear at the time the VCLT was drafted. What came to be reflected in the VCLT is the majority view of the International Court of Justice in its Advisory Opinion in the *Reservations to the Genocide Convention* case.⁹ That majority view, in turn, departed with reference to the “special characteristics” of the Genocide Convention from what was referred to as the “traditional concept”, namely the requirement of consent by all parties for the permissibility of any reservation to a multilateral treaty.¹⁰ If there was, at the time when the VCLT was drafted, customary law in the issue of the permissibility of reservations to multilateral treaties, the norm would have been that consent by all other parties is required for entering a reservation.

4. Human Rights Treaties as One of Many Special Regimes: Fragmentation of International Law

There are obvious reasons for why human rights lawyers are uncomfortable with a dogmatic application of the VCLT, and why they wish to call for a modified application of the VCLT rules which respect to human rights treaties, such modified application taking due account of the special characteristics of human rights law. Although the VCLT is written as a general treaty applicable in any treaty relationships between states under multilateral treaties, it contains many hidden assumptions that are not justified which respect to human rights treaties. Among the most relevant of such hidden assumptions are the following:

⁷ Textually, article 21 refers to reservations established “in accordance with articles 19, 20 and 23”, i.e., to reservations that under article 19 are permissible and are not, for instance, contrary to the object and purpose of the treaty.

⁸ Yearbook of the International Law Commission 1966, Volume II (A/CN.4/SER.A/1966/Add.1 p. 209).

⁹ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, Advisory Opinion of 28 May 1951. ICJ Reports 1951 p. 15. In this advisory opinion (p. 29), the ICJ stated by seven votes to five that a state that has entered a reservation which has been objected to by one or more of the parties of the convention can be regarded as a party to the Genocide Convention if the reservation is compatible with the object and purpose of the convention; “otherwise, that State cannot be regarded as being a party to the Convention”.

¹⁰ Idem. For the “traditional concept” based on the integrity of the treaty, see p. 22, and for the “special characteristics” of the Genocide Convention calling for a more flexible approach, see p. 23.

(a) The VCLT is written as if only states and state interests mattered: it deals with reciprocal treaty relationships between states where every right by one state has as its correlate a duty of another state. There are no third parties involved – except perhaps third states¹¹ – and therefore states can legitimately for instance modify a multilateral treaty in their bilateral relationship through an agreement that represents a practice that is contrary to the wording of the treaty.¹²

(b) The VCLT is written as if states would have the sole responsibility to monitor each others' compliance with the treaty. There are no courts or other monitoring bodies involved in the interpretation, monitoring or enforcement of a treaty. The VCLT regulates how states may react to each others' performance under a treaty but is silent on the role of any other actors.

Basing themselves on the fact that human rights treaties, although technically treaties between states, provide rights for third parties as beneficiaries, as well as on the existence of courts or expert bodies established under human rights treaties to monitor compliance with them, human rights lawyers call for a modified application of the VCLT rules which respect to human rights treaties. For instance, they may propose that monitoring bodies should have a say in assessing the permissibility and consequences of reservations. Or that the institutionalized practices of interpretation developed by a monitoring body established through a human rights treaty should affect the rules of interpretation under that treaty. Or that states should not be allowed to modify the treaty, with consequences for individuals as affected third parties, without following the amendment procedure prescribed by the treaty.

One conclusion drawn from this kind of uneasiness with the dogmatic application of the VCLT is to emphasize the *sui generis* nature of human rights treaties, describing them as a semi-autonomous or self-contained regime that operates according to rules that reflect its own characteristics and that as *lex specialis* deviate from (valid) rules of public international law as they are embodied in the VCLT. Similar conclusions may be drawn in relation to treaties on other branches of international law – such as environmental law or trade law, and what results is an erosion of the unity of public international law, also called fragmentation of international law.¹³

However, it is submitted here that human rights law should not be reduced to one of many branches of international law, and that human rights lawyers should not join in the chorus singing the song of fragmentation. Where human rights lawyers are not satisfied with the dogmatic application of the Vienna Convention, they tend to call for stronger normativity for human rights treaties than what dogmatic

¹¹ See, VCLT article 36.

¹² See, VCLT article 41.

¹³ The International Law Commission is currently working on the theme under the title “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, see International Law Commission, Report on the work of its fifty-sixth session (2004, A/59/10), Chapter X, and International Law Commission, Report on the work of its fifty-seventh session (2005, A/60/10, Chapter XI.

reading of the VCLT seems to offer. They strive some sort of “objective” binding force of human rights treaties that would be above the zero-sum game states are playing under the VCLT, permitting states to modify the rules of the game whenever two or more states agree to do so. It would be contrary to this aspiration for stronger normativity to accept that human rights law is just one of many areas where the unity of public international law must give way for some specific characteristics of a branch of international law. Under the fragmentation approach, the quest for stronger normativity under human rights law than the VCLT generally offers to treaties would, paradoxically, contribute to the weakening of international law in general.

5. Human Rights Norms as a Global Constitution: Constitutionalization of International Law

Many of the same arguments that human rights lawyers may offer as explanations for a trend of fragmentation may, however, also be presented to justify the opposite conclusion, namely a call for a more coherent and rigid structure of public international law. This approach would put forward the argument that human rights law is something more than just one branch of international law, namely a constitutional dimension of international law, representing objectively binding rules, that is, norms that are legally binding upon states irrespective of their continuing will to be bound. The European Court of Human Rights often refers to the constitutional nature of the ECHR,¹⁴ and on the universal level one could speak of human rights treaties as an embryonic form of a global constitution. The VCLT may remain applicable according to its own terms with respect to those multilateral treaties that merely govern reciprocal relationships between states, with no third parties affected. But its provisions are insufficient and inadequate¹⁵ for capturing the operation of human rights treaties that are more than just treaties between states, namely elements of an emerging global constitutional order.

¹⁴ The International Law Commission is currently working on the theme under the title “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, see International Law Commission, Report on the work of its fifty-sixth session (2004, A/59/10), Chapter X, and International Law Commission, Report on the work of its fifty-seventh session (2005, A/60/10, Chapter XI. See, for instance, Bankovic and Others against Belgium and Others, European Court of Human Rights, Grand Chamber inadmissibility decision of 12 December 2001: “The Court’s obligation, in this respect, is to have regard to the special character of the Convention as a constitutional instrument of European public order for the protection of individual human beings and its role, as set out in Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties” (§ 80).

¹⁵ “Inappropriate” and “inadequate” were the words used by the Human Rights Committee in its General Comment No. 24 on reservations: “17. As indicated above, it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee’s competence under article 41.

And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations...”

This kind of an approach of human rights law as a constitutional dimension of public international law may build its articulation partly with reference to the category of *jus cogens*, also recognized in the VCLT itself.¹⁶ However, the formal supremacy of *jus cogens* human rights norms which respect to treaty provisions incompatible with such norms is a narrow and extreme case of the constitutional nature of human rights norms. In a more general sense, the constitutional nature of human rights norms rests on their close substantive link to fundamental moral values and to their structure with third parties as beneficiaries. Ultimately, the argument about human rights law as a global constitution rests on the special nature of human rights as such, and instead of calling for formal and absolute supremacy as in the special case of *jus cogens*, it may manifest itself in softer forms that afford a special status to human rights law which respect to “merely” contractual treaties between states. For instance, the constitutional nature of human rights norms may in practice mean that they are applied as “horizontal” norms that govern the interpretation of concepts and provisions found in treaties, including in the VCLT. Rather than speaking of a formal hierarchy of sources that would claim supremacy to human rights *treaties* which respect to other treaties, the constitutional dimension of human rights norms is based in their substantive content and, hence, represents a constitution in the substantive, rather than formal sense.

By way of illustration, reference can be made to the notion of “object and purpose” in VCLT article 19. Which respect to reservations to human rights treaties this notion can be interpreted broadly and when combined with the principle of effective implementation of a human rights treaty this may lead to rather drastic consequences for states that choose to ratify human rights treaties but try to evade the resulting obligations by entering far-reaching reservations. Under a human rights treaty, a state may find itself in a situation where its reservation is declared impermissible¹⁷ and treated as severable¹⁸ from the state’s acceptance to be bound by the treaty, while the acceptance itself is understood to be irreversible.¹⁹ Consent

¹⁶ VCLT article 53.

¹⁷ Human Rights Committee, General Comment No. 24: “18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State’s compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task...”

¹⁸ Human Rights Committee, General Comment No. 24, para. 18 in fine: “The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.”

¹⁹ Human Rights Committee, General Comment No. 26: “5. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.” Although the general comment

by an individual state would no longer be an absolute limit to state obligations under human rights treaties but would when needed be pushed aside by an objectively binding “constitution”. If the above explanation is correct, that it is the substantive *norms* of human rights that possess a constitutional quality, the modification of the rules governing the permissibility and consequences of reservations to human rights *treaties* would relate to human rights norms enshrined in human rights treaties, not just any provision of a human rights treaty.

6. Reconciling the Vienna Convention and Human Rights Treaties

The author of this paper is attracted by the “constitutional” approach just described, at least as a critical tool for addressing the shortcomings of a state-centred conception of evolving international law. As this approach will result in “more law”, rather than the erosion of international legal order that is the consequence of the fragmentation approach, the constitutional approach is much more appealing from a substantive human rights perspective than the preceding one.

Nevertheless, the author is at the same time mindful of the fact that the constitutional approach may be too radical for many scholars of public international law, not to mention international or domestic judges or governments. Therefore its proponents run a risk of being marginalised in a broader discourse about the place of human rights in the world order. In order to avoid this risk, human rights lawyers need to strive for an approach that reconciles the rules of the VCLT with the special characteristics of human rights norms (or human rights treaties). Parallel to the elaboration of such a reconciliation approach, they may also resort to the critical nature of the constitutional approach as a justification for the need for a modified, instead of textual or dogmatic, application of the VCLT rules.

In short, the reconciliation approach is based on the acceptance of the VCLT as a *reflection* of norms of customary law, through positive treaty provisions the wording of which was formulated with one ideal type of treaties in mind. The drafters of the VCLT focused on inter-state relationships under a multilateral treaty that establishes no organ for its monitoring or enforcement and that merely regulates reciprocal relationships between states as rights-holders and obligation-bearers, with no affected third parties. Human rights lawyers can accept the full applicability of the provisions of the VCLT with respect to treaties that represent this ideal type of multilateral treaty.

However, when a treaty does not conform to all the described features of the ideal type, the rules of the VCLT do not represent a complete codification of rules of customary law but, rather, approximations of the applicable rules, subject to modified application whenever the specific characteristics of the treaty so require.

There are elements in the VCLT itself that appear to recognize that not all treaties conform to the ideal type of multilateral treaty which was the starting-point in

includes references to the VCLT, it includes no mention of article 54(b), providing for the right of a state to withdraw from a multilateral treaty with the consent of the other parties to the treaty.

formulating the provisions. The clearest examples are constituent treaties of international organizations. Article 5 provides a rule, according to which the VCLT “applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization”. And article 20 on acceptance of and objections to reservations includes para. 3 according to which a reservation to a treaty that is a constituent instrument of an international organization “requires the acceptance of the competent organ of that organization”.

Choosing a positivist mood, human rights lawyers could argue that at least some human rights treaties fall under VCLT articles 5 and 20 (3) as “international organizations”. For instance, the International Covenant on Civil and Political Rights has its own membership²⁰ and establishes its own organs with defined competences.²¹ Hence, any reservation would require acceptance by the Human Rights Committee which under the terms of the treaty appears to be the competent organ with respect to all functions that pertain to substantive interpretation of the human rights provisions in the treaty.

Alternatively, and still in the positivist mood, human rights lawyers could argue that most human rights treaties are treaties “adopted within an international organization” under the terms of VCLT article 5. As a consequence, one would turn to “relevant rules of the organization” as a basis for a modified application of the provisions of the VCLT in issues such as reservations, interpretation and termination.

Instead of these fairly straightforward answers the reconciliation approach under discussion in this section of the paper would take VCLT articles 5 and 20 (3) as reflecting a more general principle, the recognition to adapt the application of the VCLT to the specific features of a treaty. One would ask *why* the VCLT includes these two provisions with respect to constituent instruments of an international organization and whether the same justification applies with respect to some other category of treaties. According to literature, the justification for VCLT article 20 (3) lies in the essential need to preserve the integrity of an international organization.²² Judging by the preparatory works of the VCLT, the justification for article 20 (3) was primarily addressed through the existence of a common monitoring organ established through the treaty, rather than the notion of “international organization” as such.²³ The same arguments can very well be made with respect to human rights treaties which establish their own international monitoring organs and procedures, without a need to declare human rights treaties as falling, *stricto sensu*, under the notion of international organizations.

²⁰ ICCPR article 48.

²¹ ICCPR article 30 (3) (meeting of states parties), article 28 (Human Rights Committee).

²² Aust, *op. cit.* (footnote No. 6) p. 113.

²³ See, Yearbook of the International Law Commission 1966, Volume II (A/CN.4/SER.A/1966/Add.1), p. 207 where the argument is made that for the category of treaties in question the integrity of the instrument outweighs other considerations and it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable.

Another example of the reconciliation approach can be identified with respect to VCLT articles 57 and 58 which relate to the suspension of treaties. For instance in relation to the ICCPR these provisions should be read together with article 4 of the ICCPR, defining derogation as the specific form of suspension that is allowed under the treaty and prescribing both substantive limits and procedural requirements for states that wish to resort to derogation. VCLT article 57 (a) and article 58 (1) (a) explicitly refer to the provisions of the treaty as regulating suspension, and article 58 which allows for suspension by agreement of certain but not all parties to a multilateral treaty, includes in article 58 (1) (b) (ii) a safeguard clause according to which such suspension must not be contrary to the object and purpose of the treaty.

Further, although VCLT article 31 which contains the general rule of treaty interpretation makes no mention of the relevance of institutionalized practices of interpretation developed through treaty monitoring organs in the exercise of their functions, it includes in article 31 (3) (b) a reference to “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. On the basis of the preparatory works, it appears clear that this clause does not merely refer to explicit acceptance by all states parties to a multilateral treaty but covers also the tacit approval of a practice engaging only a part of the parties.²⁴ Hence, it would be legitimate to treat the outcomes of human rights treaty monitoring procedures, such as final views on individual complaints, concluding observations on state party reports, and general comments as codifications of earlier practice, as various forms of “subsequent practice” in the meaning of VCLT article 31 (3) (b) – at least in the vast majority of instances where no formal objection is made by states parties.

Concluding Discussion

In the preceding sections of this paper, the *positivist* approach, the *dogmatic* approach and the *fragmentation* approach to the relationship between the VCLT and human rights treaties were rejected. Instead, the author expressed sympathy for the two remaining approaches, namely the *constitutional* and the *reconciliation* approach. In the author’s view the reconciliation approach has a strong basis in international law, including a systematic reading and the drafting of the VCLT itself. The reconciliation approach is also more likely than the constitutional approach to meet acceptance beyond the circle of human rights scholars and human rights bodies, i.e. also within a broader discourse on public international law.

However, it is the view of the author that the constitutional approach has, in comparison to the reconciliation approach, two merits that justify its further consideration and elaboration. Firstly, this approach represents a critical potential with respect to a state-centred doctrine of international law. Secondly, there may be areas where reconciliation does not suffice, i.e. where human rights treaties

²⁴ Yearbook of the International Law Commission 1966, Volume II (A/CN.4/SER.A/1966/Add.1), p. 221-222.

under their own terms and read in the light of their object and purpose call for the application of such norms in the field of the law of treaties that cannot be reconciled with the provisions of the VCLT but where one must accept that a choice between the rules derived from human rights treaties and the provisions of the VCLT must be made.

One such area may be the potential severability of impermissible reservations. The reconciliation approach may very well allow such an interpretation of the VCLT, including in the light of its article 20 (3), that recognizes the competence of monitoring organs established under human rights treaties to address and determine, at least for the purpose of their own functions, the permissibility of reservations by states. However, the next step, declaring an impermissible reservation severable, and holding the state bound by the treaty without the benefit of the reservation, might prove more difficult to reconcile with the VCLT regime, also taking into account the majority view in the ICJ Advisory Opinion in the *Reservations to the Genocide Convention* case.²⁵

That said, it needs to be pointed out that the conclusion of severability has not been made merely by human rights scholars and human rights treaty bodies. Instead, it gets support also from the practice of at least certain states which, when objecting to reservations by other states, have concluded that the reserving state is to be considered a party to the treaty in question, without the benefit of the reservation. Before the adoption of General Comment No. 24 by the Human Rights Committee in 1994, objections pronouncing the severability of the reservation had under the ICCPR been made by a number of states with respect to reservations by the Republic of Korea (1991)²⁶ and the United States (1992).²⁷ And much earlier, the United Kingdom applied what is here called severability in its objections to certain reservations entered under the 1949 Geneva Conventions on humanitarian law.²⁸

²⁵ See footnote No. 9, above.

²⁶ Objection by the Czech and Slovak Federal Republic 7 June 1991: "... does not recognize these reservations [to articles 14 and 22] as valid. Nevertheless the present declaration will not be deemed to be an obstacle to the entry into force of the Covenant between the Czech and Slovak Federal Republic and the Republic of Korea." See, also, the objection by the Netherlands. Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/English/access.asp>

²⁷ The clearest examples of objections declaring severability are those by France and Italy. France 4 October 1993: "this United States reservation [to article 6, para. 5] is not valid, inasmuch as it is incompatible with the object and purpose of the Convention. Such objection does not constitute an obstacle to the entry into force of the Covenant between France and the United States." Italy 5 October 1993: "... this reservation is null and void since it is incompatible with the object and the purpose of art. 6 of the Covenant... These objections do not constitute an obstacle to the entry into force of the Covenant between Italy and the United States."

²⁸ See, Reservations to human rights treaties; Final working paper submitted by Françoise Hampson, Sub-Commission on the Promotion and Protection of Human Rights (2004), E/CN.4/Sub.2/2004/42, paras 16-17.

With respect to the practical relevance of the various competing approaches described in this paper it is interesting to note that two (France and the UK) of the three states (France, the UK and the USA)²⁹ that reacted to the Human Rights Committee's General Comment No. 24 by formally expressing their disagreement, had themselves on other occasions expressed the consequence of severability in their objections to reservations by other states. And many other states have, since the adoption of General Comment No. 24, supported the consequence of severability in their objections to reservations by some states. Such objections have been made with respect to reservations to the ICCPR or its Optional Protocols by at least Azerbaijan, Botswana, Guyana, Kuwait, Thailand, Trinidad and Tobago, and Turkey. Objections to these reservations, pronouncing severability as the consequence, were made by at least Denmark, Finland, Greece, the Netherlands, Norway, Poland, Portugal and Sweden.

To the extent that severability as a consequence of an impermissible reservation represents the constitutional approach, and breaks the limits of any reconciliation, in addressing the relationship between human rights treaties and the VCLT, there is considerable state practice also supporting the constitutional approach.

As a more general and perhaps less controversial conclusion it is submitted that the above discussion on different approaches to the relationship between the VCLT and human rights treaties calls for caution whenever reference is made to the VCLT in the application of human rights treaties. Does a human rights court or expert body, or a scholar, or a state or intergovernmental organization, refer to the VCLT selectively, i.e. only when it suits the purposes of the actor? And what is the exact way these actors refer to the VCLT in the context of a human rights treaty: is the proposed way of applying the human rights treaty in question "prescribed" by the VCLT, or is it merely a correct way to interpret the treaty itself, also "reflected" in how relevant norms of the law of treaties are formulated in the VCLT?

²⁹ See, Annual Report 1995 of the Human Rights Committee, A/50/40 vol. I pp. 126-134 (the United States and the United Kingdom) Annual Report 1996 of the Human Rights Committee, A/51/40 vol. I pp. 104-106 (France).

**THE TERRITORIAL SCOPE OF HUMAN RIGHTS OBLIGATIONS:
THE CASE OF THE EUROPEAN CONVENTION
ON HUMAN RIGHTS
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Introductory remarks

For more than half a century now the protection of human rights has transcended the boundaries of States, of their domestic constitutions and other internal legal regimes, and has acquired a solid international dimension. Numerous multilateral treaties are currently constituting a powerful panoply of protection of a multitude of human rights at a universal or regional level ; and there is little doubt that a number of fundamental rights have even escaped the constraints of conventional arrangements and have reached the status of general customary rules. Some of them (such as the prohibition of torture) are even considered to be peremptory rules of international law (*jus cogens*), not allowing any derogation from their normative contents.

It should still be underlined that in our current international landscape human rights are mainly protected through conventional rules creating rights for the individuals – or sometimes for collectivities – and consequently obligations for the States-parties to the corresponding agreements. These agreements may be either of a general character, namely designed to apply at the level of the international community as a whole, or they may have a regional nature, *i.e.* they apply *inter partes* among a number of States which belong to a specific geographical area of the world or partake to the same geopolitical culture, without necessarily strictly belonging of the same geographical area. It goes without saying that this *ratione loci* element does not determine automatically the subject-matter of the protected rights : both general and regional human rights arrangements may cover different categories of rights, starting from the so-called first generation rights (civil and political rights), and extending to newer generations of rights (e.g. environmental protection), or rights of specifically protected persons (minorities, women, children, etc.). In the category of general arrangements, there is an admirable production of international conventions initiated by the United Nations, while three geographical or geopolitical regions of the world have produced today – with a varying degree of frequency and success – regional agreements of human rights protection : Europe, the Americas and Africa.

The scope of applicability of these multilateral treaties is basically determined by their very nature as international agreements. Taking aside the interaction between treaty-law and customary-law, which may lead in certain circumstances,

and under certain conditions, to the emergence of customary rules of law transforming conventional rules to general rules binding on all states independently of their initial conventional source, rules of protection of human rights, stemming from general or particular agreements, follow the usual pattern of international law, namely that they are binding only to their parties, *inter se*. By its nature a general treaty, enjoying universal participation, has a wider field of applicability than a particular-regional one, in the sense that it covers more parts of the world than a regional convention does ; but still the obligations that the former creates, and which may be invocable by other States-parties or other subjects of international law (e.g. individuals), are limited to those States which have consented to its contents, in exactly the same way as happens in the case of particular-regional treaties. There is no indication in State practice that human rights treaties, *qua* treaties, may be opposed to a non-party and have a wider applicability scope than the one that its membership determines. The situation is radically different in the case of customary rules of human rights. These rules are generally invocable *vis-à-vis* any and every State from the moment that they acquire their customary status.

A State is, consequently, linked to a human rights obligation either through a general customary rule or through a treaty rule to which it has consented. The applicability of a human rights rule *vis-à-vis* a State, is one thing, its responsibility regarding its respect in specific circumstances is yet another. The binding character of a rule upon a State is a precondition for its applicability in these circumstances, but it does not suffice. The State must be also responsible for an alleged transgression of a rule ; and to be found responsible it must have acted within its jurisdiction, namely within the confines of its power.

The question which therefore arises is when or where a State has jurisdiction? It is common place that the State's jurisdiction is primarily territorial. International law accepts that there exist other bases of jurisdiction, such as nationality of individuals, flag, diplomatic and consular relations, passive personality and universality, but these grounds are limited and are circumscribed by the sovereign rights of the other States whose jurisdiction may be encroached with the jurisdiction of a State attempting to exercise it on an extra-territorial basis. Examples of such possible encroachment are abundant in international law : it is widely accepted, for instance, that a State's exercise of jurisdiction over its own nationals abroad is subordinate to the territorial jurisdiction of the State in whose territory these nationals reside ; or that a State cannot exercise jurisdiction on the territory of another State, without the latter's consent, etc.

The primacy of territoriality for a valid exercise of jurisdiction is also reflected in Article 2, para. 1 of the 1966 Covenant on Civil and Political Rights, which provides that [e]ach State Party to the present Convention undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Convention...¹.

¹ International Covenant on Civil and Political Rights, Part II, Article 2

It should, still, be underlined that the existence of the words “and subject to its jurisdiction” has allowed the Human Rights Committee, in applying the article in the circumstances of particular cases, to give flesh to an extra-territorial application of the obligations contained in the Covenant. As early as 1981, in the case of Lopez Burgos v. Uruguay, the Committee noted that the notion of jurisdiction also covers acts of States agents which had taken place outside the territory of the State.²

The territorial nature of jurisdiction is left open in the case of the 1978 American Convention on Human Rights, since its Article 1 simply refers to the obligation of States Parties to it “to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights, without any discrimination”.³ In a relatively recent case, Coard et al v. the United States, the Inter-American Commission of Human Rights found that it is

*“pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extra-territorial locus will not only be consistent with, but required by, the norms which pertain. [E]ach 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 a conduct with an extra-territorial locus where the person concerned is present in the territory of one State, but subject to the control of another State – usually the acts of the latter’s agents abroad...”*⁴

The most extensive case-law on this matter, namely the territorial or extra-territorial nature of jurisdiction can be found in the decisions of the organs of the European Convention on Human Rights, to which I shall now turn.

The case-law of the European Convention on Human Rights

The concept of jurisdiction, like all other concepts appearing in the provisions of the European Convention on Human Rights (hereafter “the Convention”) (torture, private and family life, etc), was not elaborated and defined by the Convention’s drafters.⁵ The task of determining its actual purview was left to the supervisory bodies – the European Commission of Human Rights, now defunct, and the Court – which, through their case-law have undertaken the labour not only of giving flesh to general, undefined terms, but also of adapting them to the realities of an ever changing European society. The Convention was designed, by its drafters, to

² See Doc. A/36/49.

³ American Convention on Human Rights, Article 1 (Obligation to Respect Rights), in Part I, Chapter 3.

⁴ Report No. 109/99, case No. 10.951, Coard et al v. the United States, 29 September 1999, § 37, Inter-Am.CHR).

⁵ Article 1 of the Convention provides that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention”.

work within the European legal space for a considerable span of time, and the indeterminacy of its concepts – coupled, of course, with the existence of the supervisory bodies – was a wise decision, allowing the Convention, as “a living instrument” to survive social and other mutations during the lengthy voyage across the uncharted map of a constantly changing humanity.⁶

The rule: the territorial character of jurisdiction

Before embarking on an examination of the case-law of the Strasbourg institutions, I propose a fleeting look at the choices made by the drafters of the Convention with regard to the notion of jurisdiction, as they appear in the preparatory work, but also in the very text of the Convention, read as a whole.

Insofar as the preparatory work is concerned, the text prepared by the Committee of the Consultative Assembly of the Council of Europe on Legal and Administrative Questions proposed a clearly territorial delimitation of a State’s responsibility *vis-à-vis* the Convention : the wording of what eventually became Article 1 provided that “member States shall undertake to ensure to all persons residing within their territories the rights...” The Expert Intergovernmental Committee, which reconsidered the draft, decided to widen the jurisdictional limits of the Convention, by replacing the reference to “all persons residing within their territories” with a reference to “persons within their jurisdiction”.⁷ Yet, as clearly transpires from the explanatory text which accompanied the proposal, the reason for this replacement was not the reference to “territory”, but the requirement of residence as a condition of applicability of the Convention in individual circumstances.⁸

The territorial nature of jurisdiction may also be detected in the very text of the Convention read as a whole. The Preamble, as such, does not contain conclusive elements as to the jurisdictional boundaries of the Convention, although it may be safely assumed that its “membership” was purported to be limited to the geographical, or, one may say, geopolitical confines of the European continent, or, better, to those European States which were “like-minded and have a common heritage of political ideals, freedom and the rule of law”. After all, its main goal was to achieve “greater unity between [the members of the Council of Europe]”.⁹ It should not be forgotten that the Convention was adopted at a historical juncture, where a number of western European States were seeking to identify themselves through their distinctive characteristics as democratic States respecting the rule of law in their internal orders – in contrast with socialist European States falling

⁶ In its judgment in the case of Tyrv. the United Kingdom (Series A, no. 26, pp. 15-16, § 31), the Court, for the first time “affirmed the principle of evolutive interpretation, namely that the Convention is a ‘living instrument’ which must be interpreted in the light of ‘present day conditions’...”

⁷ See the Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights (Vol. III, p. 260).

⁸ *Ibid.*

⁹ Final paragraph of the Preamble to the Convention.

under the auspices of the then USSR – and to create, in an incremental manner the necessary conditions for furthering their European political integration. In these circumstances, the Convention was not solely designed to afford individual relief to those suffering violations of their human rights, but also to be used, within the regional context, as an instrument for the integration of Western Europe's States. The aim was therefore “greater unity” within this regional context; and this regional context had an intrinsic element of territoriality.

What also seems to unequivocally reflect the will of the drafters regarding the limits of jurisdiction of the States Parties to the Convention is the text of the present Article 56 of the Convention, which deals with its territorial application. There it is provided that any State “may at the time of its ratification or at any time thereafter declare ... that the ... Convention shall ... extend to all or any of the territories for whose international relations it is responsible” (para. 1). Para. 4 of the same Article provides that any State which has made such a declaration “may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals...” It is clear that the fact that States felt the need to provide for a specific rule concerning the applicability of the Convention to territories outside the metropolitan area of a State Party, but under its political control, indicates the initial intention of the drafters to limit the territorial purview of the Convention. It is also of particular significance that the drafters felt the need to provide for a specific rule (in para. 4) to deal with the issue of the competence of the Court for such categories of territories.¹⁰

The “traditional” case-law

The Strasbourg institutions, during their fifty years of operation, have rarely been faced with the dilemma whether in the circumstances of a case there has been a question of territorial jurisdiction affecting their competence to rule on the merits. In the great majority of cases the applicants have complained of acts or omissions of States Parties in their territory and, hence, no issue of incompatibility of the Convention *ratione loci* has usually arisen. Only in very few instances applicants have indicated that wrongdoings of a State, in breach of the Convention, have occurred outside its territory, through acts or omissions of its agents. A first instance of the examination of the question of extraterritoriality may be traced as far back as 1974, when Strasbourg – more particularly the European Commission of Human Rights – dealt with the extraterritorial jurisdiction of a State Party and the consequent extraterritorial limits of the Convention's applicability : in the inter-State case of Cyprus v. Turkey, the European Commission of Human Rights stressed that the term “jurisdiction” “is not limited to the national territory of the

¹⁰ Para. 4 of Article 56 provides: “Any State which has made a declaration in accordance with para. 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their territory or abroad”.¹¹.

The position of the Commission, which seems to depart considerably from the position of the drafters of the Convention, relied mainly on the Convention’s purpose as a human rights treaty, and produced a test of extraterritorial jurisdiction, which has had lasting effects on the Strasbourg case-law; that of “actual control” (actual authority). This approach was later adopted and further developed by the Court in the case of *Loizidou v. Turkey*.¹². In *Loizidou* the main issue was whether the facts alleged by the applicant – her inability to have access to her possessions in the northern part of Cyprus – were capable of falling within the jurisdiction of Turkey, although they had occurred outside the latter’s national territory. The Court, both in its examination of the preliminary objections and in its examination of the merits answered the question in the affirmative. It held :

“Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration”.¹³.

In the judgment on the merits of the case the Court dealt further with the issue of imputability, and explained what it means with regard to the exercise of effective control to which it had referred in the decision on the preliminary objections :

“It is not necessary to determine whether Turkey exercises detailed control over the policies and actions of the ‘TRNC’ [“Turkish Republic of Northern Cyprus”]. It is obvious from the large number of troops engaged in active duties in northern Cyprus... that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case entails her responsibility for the policies and actions of the ‘TRNC’. Those affected by such policies or actions therefore come within the

¹¹ *Cyprus v. Turkey*, nos. 6780/75 & 6950/75 2DR125 pp. 136-137

¹² *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A, no. 510, pp. 23-24, §§ 62 *et seq.*

¹³ *Ibid.*

'jurisdiction' of Turkey for the purposes of Article 1 of the Convention. Her obligations to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus".¹⁴.

The Loizidou case endorses the position of the European Commission of Human Rights and introduces, in the context of extraterritoriality, the notion of "effective control" (instead of "actual" control as proposed by the Commission). The Court did not elaborate on this notion, but one may assume that by effective control it meant the capacity of a State to exercise power through its agents in an unhindered manner in a specific area outside its territory and, furthermore, for a period of time allowing for the "effective" deployment of this power.

Departure from the tradition

It appears from the position taken by the Strasbourg institutions that, from an early stage in the evolution of their case-law, a broad interpretation was given to the notion of jurisdiction under Article 1, allowing a review of the conduct of States Parties well beyond their national territory, subject to their exercising effective control over areas and people lying outside their borders. In these circumstances there was a presumption that the nature of the Convention as a human rights treaty, and the obligations on the States Parties to always act in conformity with the rules of the Convention, irrespective of territorial constraints, extended beyond the confines of the European continent and offered anyone under the authority of the States Parties the requisite protection; or, to put it in its proper context, the European "public order" in the domain of human rights constrained the States Parties to the Convention to behave in a uniform manner in protecting these rights irrespective of national frontiers and regional considerations.

The test of extraterritoriality anchored in the concept of "effective control", has recently been coloured in a different way through the position taken by the Court in two rulings, which may be construed as departing from the traditional approach developed mainly in the Turkish extraterritorial cases : the admissibility decision in Banković and Others v. Belgium and Others and the judgment in Ilaşcu and Others v. Moldova and Russia.

The Banković case concerns the air-strike by NATO on the main television and radio facilities in Belgrade during the Kosovo conflict, which killed sixteen people and seriously injured another sixteen.¹⁵ The applicants were all victims of the air bombing or close relatives of those who died, and the respondents were all member States of NATO, the organisation commanding the attack over Belgrade, while at the same time, being States Parties to the Convention. The applicants alleged that the NATO bombing constituted a violation of Articles 2 (right to life)

¹⁴ Loizidou v. Turkey (merits), judgment of 18 December 1996, Reports of Judgments and Decisions, 1996-VI, pp. 2235-36, § 56.

¹⁵ Banković and Others v. Belgium and Others, no. 52207/99, admissibility decision of 12 December 2001 (ECHR 2001-XII).

and 10 (freedom of expression), and that there was no effective remedy in the domestic order of the respondent States to protect them against these alleged violations, as required by Article 13 of the Convention.

What became the main issue before the Court and the centre of its interest in the circumstances of the case was whether the air-strike by NATO implied that the States Parties involved in the incident had had effective control over the territory and the people in it, and whether the alleged violations occurred within or outside the field of the States' competence under the Convention.

The Court declared the case inadmissible as being incompatible with the provisions of the Convention. In doing so it relied on the following main arguments.

By applying the tests of the "ordinary meaning" and "any subsequent practice", as provided for by the Vienna Convention on the Law of Treaties, to the relevant term "jurisdiction" under Article 1, the Court was satisfied that, from the standpoint of international law, the jurisdiction of a State was primarily territorial. Therefore, Article 1 must be considered to reflect this ordinary territorial notion of jurisdiction, other bases being exceptional and requiring special justification in the particular circumstances of each case.

The case-law of the Court demonstrates that its recognition of the exercise of extraterritorial jurisdiction by a Contracting State is exceptional : it has accepted it in circumstances when a respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent or acquiescence of the Government of that territory, exercises all or some of the public powers normally exercised by that Government.

The Court argued that the applicants' submissions were tantamount to considering that anyone adversely affected by an act imputable to a State Party, wherever in the world that act may have been committed or its consequences felt, was thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention. The applicants' approach did not explain the application of the words "within their jurisdiction", and it even went so far as to render those words superfluous and devoid of any purpose. Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text identical or similar to the contemporaneous Article 1 of the Geneva Convention of 1949.¹⁶

In answering the applicants' argument that failure to accept the jurisdiction of the respondent States would amount to a defeat of the ordre public mission of the Convention, the Court's position was the following :

¹⁶ *Ibid.*, §§ 71-75.

“The Court’s obligation ... is to have regard to the special character of the Convention as a constitutional instrument of European public order for the protection of individual human beings, and its role, as set out in Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties. It is therefore difficult to contend that a failure to accept the extraterritorial jurisdiction of the respondent States would fall foul of the Convention’s ordre public objective, which itself underlines the essentially regional vocation of the Convention system, or of Article 19 of the Convention which does not shed any particular light on the territorial ambit of that system.¹⁷”

In short, the Court concluded that, the Convention is a multilateral treaty operating in an essentially regional context, and notably in the legal space of the States Parties. The Federal Republic of Yugoslavia clearly did not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of the States Parties to it. Accordingly, the desirability of avoiding a gap in human rights protection has so far been relied on by the Court in favour of establishing jurisdiction only when a territory would normally be covered by the Convention.

A number of conclusions may be drawn by analysing Banković, which may, at the same time, answer the question whether or not this decision on (in)admissibility departs from the case-law generated mainly by the Turkish cases involving the northern part of Cyprus.

The first conclusion is that through the Banković decision the Court has come closer to the expectations of the Convention’s drafters to produce an instrument of a predominantly regional nature, based on territorial jurisdiction of States Parties. The key sentences to be noted from the decision in this respect is the one referring to the Convention as an instrument of European ordre public, which is not designed to apply everywhere in the world. A new element which has also been introduced by Banković concerns the purview of the concept of regionality. Indeed, the clear reference made by the Court to the regional character of the Convention is to be read in conjunction with the distinction it made between Loizidou and Banković insofar as competence ratione loci is concerned. The Court found that the extraterritoriality in Loizidou was justified by the fact that the northern part of Cyprus and its inhabitants were part of the territories and people who had been covered by the Convention, before the occupation by the Turkish forces ; while, presumably *a contrario*, the territory of former Yugoslavia had never been protected by it. Hence, it seems that the notion of regionality, as expounded by Banković, is not predominantly determined by geographical considerations (no-one appears to dispute that the former Yugoslavia was geographically part of Europe) but by geopolitical considerations, in the sense that “Europe” and “European” were defined on the ground of their participation in or belonging to the political family of the Council of Europe (and the legal order of

¹⁷ *Ibid.*, § 80

the Convention). A second conclusion that can be drawn concerns the concept of “effective control”. In Banković the Court implied that there was a distinction to be made between the extraterritorial control exercised by Turkey in northern Cyprus and the presence of NATO aircraft in Yugoslav airspace during the bombing of the radio and television station. Without entering into the crucial issue of the individual responsibility of the NATO members when they collectively decided to bomb the station, the Court merely stated that in Loizidou effective control of the territory was found to exist because of (a) the occupation of the territory and (b) the large number of Turkish forces engaged in active duty in Cyprus. *A contrario*, then, the instantaneous act of bombing and flying over Belgrade did not meet the requirements of effective control. In other words, it seems that effective control meant, according to Banković, the exercise of authority in a territory, taking place with a certain duration and having overall repercussions on matters of governance at local level.

A third conclusion that can be drawn is that the Court in Banković, although it reiterated its primary attachment to the territorial nature of jurisdiction, and the exceptional character of extraterritoriality in a regional context, did not hermetically shut the door to extraterritoriality, even in relation to a State Party’s conduct outside the regional- and geopolitical area of the Convention. In para. 73 of the decision it noted : “other recognised instances of extraterritorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board crafts and vessels registered in or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extraterritorial exercise of jurisdiction by the relevant State”.¹⁸. This *obiter dictum*, which follows on from the Court’s statement that it relied on public international law rules dealing with matters of jurisdiction – which, according to it, is primarily territorial – may bind it in future cases where a complaint comes before it concerning an alleged violation of the Convention outside the regional field of its applicability but involving a State’s agents in a foreign country – the “long arm of the State” – or incidents inside a craft or a vessel. One may find here, in this *obiter dictum*, the seeds of a possible future threat to the test of regionality, which may materialise through an “expansive” interpretation of this type of “jurisdiction”.

Yet this last conclusion is mere speculation. For the time being, it seems indisputable that the Court has followed international law only with regard to the general rule of territoriality of jurisdiction, but not with regard to its exceptions. Its attachment to the predominantly territorial element of jurisdiction reflects international law ; but when it comes to extraterritorial jurisdiction – which goes hand in hand with international responsibility – the Court, by developing the notion of regionality and effective control, has formulated its own concept of extraterritorial jurisdiction, to apply solely for the purposes of the Convention.

¹⁸ *Ibid.*, § 73.

A fourth and final conclusion that can be drawn is that the Court was careful not to overturn past case-law, but rather to qualify it by elaborating on the concepts of regionality and effective control. Its restrictive interpretation *vis-à-vis* its findings in the Turkish cases does not create problems of applicability of the Convention in its regional context, but clearly creates a *vacuum* outside these limits. In the circumstances of today's international relations, where the involvement of major powers – including medium-range European powers – in international or internal conflicts is a widespread phenomenon (either through United Nations decisions, or through autonomous and sometimes, from the standpoint of legality, disputable actions), the question of the limits of applicability of the Convention acquires particular significance. Reliance upon the regional character of the Convention seems to impose certain constraints on its application in areas outside the Council of Europe's domain, even, I would say, where effective control of a territory may be found to exist. This leaves the world with a considerable *vacuum*, which must be filled by other international instruments (other regional instruments being, by definition, excluded, the remaining weaponry encompasses other universal instruments, such as the Covenant on Civil and Political Rights, or agreements dealing specifically with international humanitarian law and the laws of war, such as the Geneva Convention or the new Rome Statute of the International Criminal Court) to the extent that they coincide *ratione materiae* with the protection offered by the Convention. Yet the different character of such instruments providing for a more limited possibility of individual petition or applying primarily at inter-State level may leave a lot to be desired for those who consider themselves victims of a violation by a State Party to the Convention but who are left, jurisdiction-wise, outside the scope of its protection.

At the other end of the jurisdictional spectrum lies the case of Ilaşcu and Others v. Moldova and Russia.¹⁹ While in the case of Banković the Court opted for a restrictive interpretation of Article 1 of the Convention, in Ilaşcu the Court applied a wide, extensive interpretation of the concept of jurisdiction.

The facts of the case which are pertinent to our discussion are the following : the case originated in an application by four Moldovan nationals who were convicted by the courts of the “Moldavian Republic of Transnistria” (the “MRT”), a separatist region of Moldova which proclaimed its independence in 1991 but not recognised by the international community. They submitted that their conviction and imprisonment had violated the Convention and that the Moldovan authorities were responsible under the Convention for the alleged infringements, since they had not taken any appropriate steps to put an end to them. They further asserted that the Russian Federation shared responsibility since the territory of Transnistria was and is under *de facto* Russian control on account of the Russian troops and military equipment stationed there and the support given to the separatist regime by the Russian Federation.

¹⁹ No. 48787/99, judgment of 8 July 2004.

The main issue before the Court was the question of jurisdiction, in a situation where Moldova did not control the Transnistrian authorities with regard to the acts committed by them against the applicants, but where the territory governed by the separatist regime was still formally part of the State of Moldova – a party to the Convention – and where the Russian Federation, firstly, had been involved in the arrest and detention of the applicants in 1992 and had handed them over to the Transnistrian police, and, secondly, had continued to give its support to the Transnistrian separatist regime throughout the period during which the latter acted in violation of the Convention.

The Court, in its judgment, dealt first with the general principles applying in questions concerning jurisdiction under Article 1 of the Convention. It started by reaffirming its position that the words “within their jurisdiction” must be understood to mean that a State’s jurisdictional competence is primarily territorial, but “also that jurisdiction is presumed to be exercised normally throughout the State’s territory”. This presumption may be limited in exceptional circumstances, “particularly where a State is prevented from exercising its authority in part of its territory. That may be due to military occupation by the armed forces of another State which effectively controls the territory concerned... to acts of war or rebellion, or to the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned”.²⁰.

In applying the general principles in respect of Moldova and the Russian Federation, the Court began by acknowledging that, despite the fact that after 21 July 1992 Moldova “tended to adopt an acquiescent attitude, maintaining over the region of Transnistria a control limited to such matters as the issue of identity cards and customs stamps”, the Moldovan Government, “the only legitimate government of the Republic of Moldova under international law, does not exercise effective authority over part of its territory, namely that part which is under the effective control of the ‘MRT’”.²¹.

Yet this crucial conclusion did not prevent the Court from observing :

“However, even in the absence of effective control over the Transnistrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its powers to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention”.

To continue :

“The Court considers that where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining de facto situation, such as is obtained when a separatist regime is set up, whether or not this is accompanied by a military occupation by another

²⁰ *Ibid.*, § 312.

²¹ *Ibid.*, §§ 329-330 (emphasis mine).

State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State.

Nevertheless such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory. The State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms guaranteed by the Convention.

Consequently, the Court concludes that the applicants are within the jurisdiction of the Republic of Moldova for the purposes of Article 1 but that its responsibility for the acts complained of, committed in the territory of the 'MRT', over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention"²².

On the basis of the concept of positive obligations which persist as obligations even in the absence of effective control over part of the territory, the Court proceeded to examine the position taken by the Government of Moldova to effect and to secure the release of the applicants through the means (diplomatic, political) still available to it. Having found that Moldova had ceased to exert any pressure on those responsible for the applicants' continuing detention in breach of Article 5 of the Convention, in any event after May 2001 (during the negotiations for a settlement of the situation in Transnistria, in which the Moldovan authorities had participated, without any mention of the applicants' fate being made and "without any measure being taken or considered by the Moldovan authorities to secure to the applicants their Convention rights"), the Court concluded that Moldova's responsibility was "capable of being engaged under the Convention on account of its failure to discharge its positive obligations with regard to the acts complained of which occurred after May 2001". Further, in examining the merits of the case it attributed a number of violations of the Convention to Moldova.²³

The situation regarding the Russian Federation, on the other hand, seems *prima facie* to conform more to the traditional approach of the Court on matters of extraterritorial jurisdiction. The Court considered that on the facts of the case, the "Moldavian Republic of Transnistria", set up in 1991-1992 with the support of the Russian Federation, "vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation". In these circumstances, the Court considered that "there is a continuous and uninterrupted link of responsibility on the part of the Russian

²² *Ibid.*, §§ 331, 333, 335.

²³ *Ibid.*, §§ 350-352.

Federation for the applicants' fate, as the Russian Federation made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998". As a result, the applicants "come within the 'jurisdiction' of the Russian Federation and its responsibility is engaged with regard to the acts complained of".²⁴ On the basis of this attribution of responsibility, the Court entered into the examination of the merits and found a number of violations of the Convention by the Russian Federation.

From the above analysis of the main points of the Ilaşcu judgment, it clearly transpires that we are faced here with a novel approach by the Court to the notion of jurisdiction under Article 1 of the Convention. With regard to the jurisdiction of the Russian Federation there is already a departure from the traditional approach as established through the Turkish cases. The Court in Ilaşcu complements the "effective control" test by adding two new elements : the "decisive influence" test, and the "survival through support" test. It must be underlined that the Court in Ilaşcu does not refer, when dealing with the jurisdiction of the Russian Federation, to the notion of "effective control", but replaces it with the notion of "effective authority". The term "effective authority" may denote a more lenient approach, compared to the strict requirements of the previous case-law, and appears to be a test more suitable to the circumstances of the case. The more lenient approach is further reinforced by the (alternative ?) test of "decisive influence", which seems to represent the *minimum* test acceptable to the Court in attributing jurisdiction to a State, and by the explanatory sentence of "survival through support", which may be also seen as a distinct alternative test to establish jurisdiction ("in any event"). As was insinuated some lines above, the Court, when faced with a situation where it was difficult to establish a clear-cut parallel between Russia's responsibility and that of Turkey in the Cypriot cases, preferred to depart from the traditional references and to adapt its approach to the realities of the situation. It should not be forgotten, moreover, that the Court was also influenced in its decision by the fact that, in the circumstances of the case, the Russian Federation was clearly responsible for the misfortunes of the applicants, their arrest, detention and surrender at the hands of the separatist regime at the beginning of that dramatic saga.

The situation is different with regard to Moldova's jurisdiction. The Court had to deal with a situation where it was clear from the facts of the case that the Moldovan authorities did not have any control whatsoever over the separatist region and its *de facto* regime. It is the Court itself which admitted, as we have already noted, that "[o]n the basis of all the information in [the Court's] possession ... the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, does not exercise authority over part of its territory, namely that part which is under the effective control of the 'MRT'."²⁵ The Court therefore accepted (a) that the separatist regime had effective control over the territory, and (b) that the Russian Federation also had effective control over the territory or its authorities, or at least exerted a decisive

²⁴ *Ibid.*, §§ 392-394. See, also, § 384.

²⁵ *Supra.*

influence upon them. In these circumstances, one could expect that the Court, by following its previous case-law, would be led to the finding that Moldova did not have jurisdiction in the circumstances of the case ; since the test of effective control, particularly as expounded in the Banković decision, is rather rigid and requires control of the area concerned and its authorities and the duration of such control for a considerable period of time. If these tests are applied, Moldova clearly did not have effective control, the real effective control being in the hands of the illegal local administration and its supporters (particularly insofar as the alleged violations of the Convention were concerned). It should not be forgotten that in the most recent inter-State case of Cyprus v. Turkey the Court found that Turkey was responsible because of its exercise of effective control in the northern part of Cyprus, while the Republic of Cyprus, being deprived of such control, did not have any responsibility for the wrongdoings affecting the rights of individuals in that region.²⁶.

Even if we apply the more lenient test, as applied by the Court in the case of the Russian Federation in Ilaşcu, namely that of “decisive influence” and the survival of the separatist regime by virtue of the military, economic, financial and political support given to it by the Russian Federation, it is still difficult to contend that the facts of the case show that the Moldovan authorities had at any stage of their relations with the separatist regime a “decisive influence” on it, or that they gave it support of the kind given by the Russian Federation. It is also clear that the test applied in the case of Assanidze v. Georgia,²⁷ where the Court found that the Georgian authorities encountered difficulties in securing compliance with the rights guaranteed by the Convention in some part of the territory, was not applicable in the circumstances of Ilaşcu. There is a clear distinction to be made between the factual situation in Georgia – where the authorities did not deny responsibility, after all, for the whole of the territory, and the central government had temporary difficulties in imposing its order – and the factual situation in Transnistria, where the separatist regime was firmly established in the territory and exercised full control over it.

Yet the Court circumvented the hurdles of effective control and went a step forward *vis-à-vis* the usual test applicable in the circumstances of this category of cases : even in the absence of effective control, the Court found that a State remained under a positive obligation to do its utmost to secure within the part of its territory no longer under its effective control the safeguards provided for in the Convention. This additional requirement is a totally novel one : nowhere in its previous case-law had the Court claimed that a State that had temporarily lost effective control over part of its territory, still had jurisdiction over it, on account of its positive obligations to continue to seek to ensure compliance with the Convention safeguards. In the analogous situation of the Republic of Cyprus, the

²⁶ No. 25781/94, ECHR 2001-IV.

²⁷ In the case of Assanidze v. Georgia (no. 71503/01, ECHR 2004), the main issue concerning the jurisdiction of the Court was whether, despite the fact that the central government had difficulties in imposing its will on the local authority of the autonomous republic, the Government of Georgia had jurisdiction in latter's territory. The Court found that the ‘Ajarian Autonomous Republic’ was indisputably an integral part of the territory of Georgia and subject to its competence and control. Hence in this case no argument relating to ‘effective control’ was raised.

Strasbourg institutions never raised the issue of the official State's compliance with these positive obligations. On the contrary, Strasbourg was firm in accepting that the loss of effective control by the State was tantamount to its being exonerated from any jurisdictional obligations.

The introduction of the "positive obligation" requirement, acting as a constituent element of the notion of "jurisdiction" within the meaning of Article 1 of the Convention, seems to raise a number of problems. No-one can deny, of course, that Article 1, by referring to the obligations of States to secure the rights and freedoms provided for by the Convention, does not necessarily refer solely to a State's duty to abstain from interfering with these rights and freedoms, but also, in certain circumstances, to its duty to act positively in order to protect these rights. The question still remains whether, in the event that a State does not effectively control part of its territory, and, indeed, that part of the territory is under the effective control of another entity, the State still has jurisdiction, more limited but still existing, "positively" obliging it to continue to ensure compliance with the Convention. And a further question also arises : even if we assume that there is jurisdiction of a limited purview, how can the boundaries of this jurisdiction be determined ?

In answering the first question, the immediate response that comes to the mind of a student of the Convention is that the application of the case-law of the Convention, through the "effective control" test, would lead to the following result: if a State does not have effective control of its territory and, conversely, another State or entity does, the first State has no jurisdiction. The extent of its obligations under the Convention depends upon the prior finding as to jurisdiction and, consequently, the question whether or not it has positive obligations to secure rights and freedoms is subordinate to the issue of jurisdiction : no jurisdiction means no obligations, passive or active.

The Court in the case of Ilaşcu took a different approach by incorporating the issue of positive obligations within the very notion of jurisdiction and by disregarding the test of effective control as a pre-condition for the establishment of jurisdiction. This is a clear departure from the case-law, as developed mainly through the Turkish cases, with a disputable logic and wisdom behind it.

But even if we accept that the notion of positive obligations may become a constituent part of the notion of "jurisdiction", this still does not answer the question of the extent of the jurisdiction that remains in the hands of a State that does not have effective control over part of its territory. It clearly transpires from the Ilaşcu judgment that the Court has developed a rather subjective test in determining whether Moldova faced up to its positive obligations, by calling into question its political tactics in effectively protecting the human rights of the individual applicants. Indeed, what happened in Ilaşcu was that the Court was not satisfied by the change in the policy of the Moldovan Government, who at a certain stage ceased to refer to the fate of the applicants and applied a different political strategy *vis-à-vis* the Russian Federation and the separatist regime. Yet one wonders whether a change of political strategy or tactics may automatically denote a loss of interest on the part of a government with regard to its obligations *vis-à-vis* victims of human rights violations, or whether it may also be construed

as a manoeuvre intended to produce results – which had not been produced through its previous policy –, potentially benefiting, *inter alia* the victims of violations of the Convention through other means. In other words, one wonders whether a change of policy from one of confrontation and direct reference to the fate of the victims to more subtle forms of negotiations for the return of the lost territory suffices for one to say that the State no longer pursues a course of action compatible with its positive obligations to protect human rights under the Convention.

Concluding remarks

Our analysis of the Strasbourg case-law on Article 1 of the Convention may give rise to a number of conclusions:

First of all, we may safely assume that a general statement can be drawn from the analysis and this is that there is settled, uninterrupted case-law in support of the territorial nature of jurisdiction under Article 1. Indeed, it has never been in doubt at any stage of the Convention's existence, that the jurisdiction of States under Article 1 is primarily territorial, all other forms of jurisdiction being exceptional. In this respect Strasbourg follows the general tendencies of public international law.

What is less absolute and safe to accept unconditionally is the extent of the territorial jurisdiction of a State within its internationally recognised boundaries - in other words, how the case-law of Strasbourg treats cases where, for a number of reasons, the formal government of a State does not control the whole of the territory, although from an international law point of view the uncontrollable area is still part of the State's territory. Previous case-law has suggested an answer to this problem by proposing a test of effective control : a State was and remained responsible for the whole of its territory as long as it retained effective control of the territory ; in a situation where another State or entity acquired such effective control, the State hitherto responsible ceased to have jurisdiction in the part of the territory which was in the hands of that other State or entity. These are the lessons which may be drawn by the Turkish cases in which there was a clear understanding that from the moment that Turkey acquired effective control of the territory of northern Cyprus, the Republic of Cyprus, although it remained the only legal entity recognised by international law as representing the whole of the territory of the State, was no longer responsible for violations occurring in its northern part, which was under Turkish occupation. It seems that Strasbourg agreed that there was no possibility of parallel effective control, the imposition of such control by one State or entity in part of the territory of a State excluding any control by another.

Yet, this clear-cut position appears to be called into question by recent case-law, and nuanced by the introduction of additional tests for the determination of jurisdiction. The Assanidze judgment did not depart from the traditional approach, because the Court found there that the Georgian Government was responsible for the whole of Georgia's territory, including the Ajarian Autonomous Republic, on the basis of the argument *inter alia* that the latter had

no separatist aspirations and that no other State exercised effective overall control of the region.

In the case of Ilaşcu things have, however, evolved. As we have already said, in the case of Moldova the Court incorporated the concept of “positive obligations” into the notion of jurisdiction and disregarded the constitutive element of effective territorial control as a pre-condition for the establishment of jurisdiction. This departure from the traditional case-law, coupled with a rather problematic finding on the extent of jurisdictional limits (the subjective test applied by the Court in the circumstances of the change in Moldova’s policy), might be considered as a jurisprudential novelty, which, to my mind, requires further elaboration, probably in future relevant cases.

Finally, when we come to extraterritorial jurisdiction, we are confronted with two decisions which deal with the test of “effective control” from a totally different angle. In Banković, the Court – further to its reference to the predominantly regional, geopolitical application of the Convention – applies the test of effective control in its strongest form, by making it clear that the two preconditions for its existence are a time element (duration) and the actual involvement of a State in the exercise of power outside its own territory. While in Ilaşcu, it takes a more flexible and diversified approach to the notion of “effective control”, based on the “decisive influence” and “survival through support” tests, which, of course, were not envisaged, not even as remote possibilities, in the relevant Turkish cases. It seems then that we are witnessing an evolution of the concept of “effective control”, which may incrementally bring about, through future cases, new conceptual approaches to the question of jurisdiction under Article 1 of the Convention.

**HUMAN RIGHTS TREATIES -
ARE THEY OR SHOULD THEY BE GIVEN
A SPECIAL STATUS IN INTERNATIONAL LAW?"
Mr Rui Manuel MOURA RAMOS**

**Vice-President of the Constitutional Court of Portugal
Professor of International Law
Law Faculty of the University of Coimbra
Portugal**

1. The presentations we have heard this morning and the contributions from the auditorium prompting further clarifications from our four speakers have provided us with some excellent food for thought in order to reply to the question on which we have been focusing: does international law grant – or if not, should it grant – a special status to human rights treaties?

2. In his presentation, Professor Kiss first of all pointed out that the protection of human rights is today one of the common major concerns that has emerged in current international society. He reminded us that this has been reflected in the treaties recognising these concerns, which impose obligations on states for the benefit of humankind and all those on whom they exert their authority. In his view, this special concern is confirmed in the ethical and legal foundations of these treaties, which often include references to human dignity, promotion of equality and fair and just social progress for all without distinction. Some of these treaties cover the duties of individuals towards their families, community and humanity in general. The second part of his approach was to focus on whether these common features have given rise to a particular regime, and to this end he analysed the system of reservations to these treaties, in order to highlight the specific nature of human rights treaties which has led some commentators¹ to maintain that it is inappropriate to use the regime established by the Vienna Convention for such treaties. The same conclusion was reached regarding the system for denunciation in the position set out in the United Nations Committee's

¹ For example, General Comment No. 24 by the United Nations Committee on Civil and Political Rights of 4 November 1994 which questioned the appropriateness, for such treaties, of the mechanism provided for in the Vienna Convention for testing the admissibility of reservations. [We had embarked upon this route over twenty-five years ago (see our study entitled "A Convenção Europeia dos Direitos do Homem. Sua Posição face ao ordenamento jurídico português", in *Da Comunidade Internacional e do Seu Direito. Estudos de Direito Internacional Público e Relações Internacionais*, Coimbra, 1996, Coimbra Editora, pp. 5-108 (92-97)]. However, the speaker also made reference to the position of the Special Rapporteur of the International Law Committee on the matter of reservations, who had concluded that there was no justification for a special regime for reservations in human rights treaties.

General Comment in 1997, which concluded that the fact that the drafters of the International Covenant on Civil and Political Rights made no mention of this option should be interpreted as a deliberate intention to rule out the possibility of denouncing the covenant.

3. While the conclusion of this first contribution (asserting that human rights treaties constitute a special category as they express a major common concern of humankind and should be interpreted in the context of the Vienna Convention in the way which is most favourable to the individuals whose rights they seek to uphold and protect) is somewhat normative, not necessarily reflecting yet the current situation of international law, the same cannot be said of the presentation given by Professor Menno Kamminga, our second speaker. Speaking on state succession with regard to human rights treaties, Professor Kamminga made it clear that in his view such treaties were indeed an exception to the “clean slate” approach, the established practice by states in this field, whereby the successor state is entirely free to consider itself bound or not by the treaties acceded to by the predecessor state. He based this assertion on the conclusion that the inhabitants of a territory cannot be deprived of the rights previously granted to them by a human rights treaty simply because another state had assumed responsibility for the territory in which they live. This idea that the obligations deriving from these treaties automatically continue *ipso jure* without the need for any formal notification from the successor state has been expressed on several occasions by the control bodies of these treaties, and it was to be seen reflected in the practice of the Committee of Ministers of the Council of Europe which required no explicit notification from the Czech and Slovak Republics, following the dissolution of Czechoslovakia, in order to consider the two new states Parties to the European Convention on the very day of that dissolution. The European Court of Human Rights has adopted the same approach in respect of these two countries and the UN’s Human Rights Committee followed a similar reasoning at the time of the dissolution of the former Yugoslavia and the former Soviet Union. The fact that this practice is based on general international law confirms the “special status” of human rights treaties, insofar as it is the specific nature of such a status that justifies the exception to the rule of the non-continuity of the obligations deriving from treaties. Just because there have been only a few examples cannot undermine the fact that this approach has indeed been acknowledged by the international community, and particularly as there has been no objection from the states concerned.

4. Professor Martin Scheinin’s contribution was much broader in focus, looking at the relationship between the Vienna Convention on the law of treaties and human rights treaties. Considering a number of approaches in turn, he dismissed the positivist stance whereby the scope of the text is judged in accordance with its own individual provisions, and the dogmatic approach which views the Convention as a complete codification of customary norms on the law of treaties. The view that this instrument is based on fundamental conceptions which are not appropriate to human rights could justify having a special regime for human rights treaties, different from the one generally accepted, which would lead to a sort of fragmentation of international law. However, although the speaker also dismissed this approach, he did not go quite so far as to advocate the opposite trend of seeing a constitutional dimension in international human rights law, whereby norms

would be legally binding irrespective of a state's continuing willingness to be bound by them. Rather, he sought to reconcile the rules of the Vienna Convention with the special characteristics of human rights treaties, viewing this instrument as reflecting the norms of customary law in treaty provisions whose wording had been drafted with one particular form of treaty in mind² but which would need to be adapted when applied to other treaties such as those in the field of human rights, which were of a different nature. In cases where reconciliation does not suffice³, ie where human rights treaties under their own terms and read in the light of their object and purpose call for the application of norms that cannot be reconciled with the provisions of the Vienna Convention, a choice must be made between the latter provisions and the rules derived from human rights treaties. In addition to stating his preference for this latter solution (a consequence of the constitutional approach) the speaker pointed out that there was considerable state practice supporting this approach.

5. For his part, Professor Christos Rozakis discussed the scope of the obligations deriving from human rights treaties in the light of the European Convention on Human Rights. Acknowledging first of all that a state is bound only by customary rules or treaty rules to which it has consented, he further pointed out that the state's responsibility presupposes that it acts within the limits of its jurisdiction. While such jurisdiction may primarily be territorial, it also covers the acts by the state outside the territory of that state, as confirmed by the case-law of the European Court of Human Rights. Accepting the territorial nature of jurisdiction as the rule, the Commission nonetheless held that it is not restricted to the national territory of the Contracting Party concerned, and the Court concurred in cases where "as a consequence of military action (...) it exercises effective control of an area outside its national territory". Effective control was understood as meaning the capacity of the state to exercise power through its agents in an unhindered manner in a specific area outside its national territory and for a period of time allowing for the effective deployment of this power. The importance of ensuring respect for European public order in the field of human rights in an extra-territorial context was recently further clarified by the Court which underlined that its recognition of the exercise of extra-territorial jurisdiction was exceptional, and that such cases must be restricted to the exercise of all or some of the public powers normally exercised by the government of the state in question. The Court also held that a State Party's responsibility, even where it does not have effective control over part of its territory, must be assessed in the light of the positive obligations to which it has subscribed. Moreover, a third party state would also incur responsibility if it exercised decisive influence over the territorial state to such an extent that the latter could not survive without the support of the other party.

² The speaker identified the common core of such treaties as applying to inter-state relationships under a multilateral treaty which establishes no organ for its monitoring or enforcement and which merely regulates reciprocal relations between states as right-holders or obligation-bearers, with no affected third parties.

³ The speaker was thinking of the question of inadmissible reservations.

6. Following the presentation of these reports and the lively discussion which follows, it is not possible to conclude that international law views international human rights treaties in the same way as other treaties. Several of the aspects of the legal regime referred to, such as denunciation, reservations and state succession, despite the efforts to secure for some of these norms a sort of extra-territorial application, may in reality be perceived as manifestations of the unease that would derive from the application pure and simple to human rights treaties of the regime established by the Vienna Convention. Naturally, therefore, we must conclude that the reason for this is the very nature, ethical foundations and almost constitutional status of these treaties in the international society in which we now live. Whether or not this special position is enough in itself to warrant a specific regime or whether one should try as far as possible to see such a regime as an adaptation of the one set up by the Vienna Convention is rather a problem of legal construction which we will not dwell upon in any great depth. What is undeniable for the moment, is the fact that this type of treaty is dealt with legally in a special way, whatever the extent of this special treatment. This is what we wish to stress at this point in order to reply in the affirmative to the question we have been discussing today, namely whether human rights treaties are given a special status in international law. As we shall see this afternoon, this affirmative answer has already been given by certain states when considering whether such treaties needed to be given special status in their domestic legal order, particularly at constitutional level.

**CONSTITUTIONAL SUPREMACY
OF HUMAN RIGHTS TREATIES
Mr José Manuel M. CARDOSO DA COSTA**

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1. Why this question?

It is not by chance that we ask ourselves whether human rights treaties (conventions, covenants, etc.) should be of equal or at least equivalent status with the rules of constitutional law in each contracting state's domestic hierarchy of law - that is to say whether, once signed, ratified and in force, such treaties should also be recognised as part of the constitution *per se*.

There is naturally a reason for asking a question of this kind, and, as is only understandable, it concerns the substance and scope of such treaties.

Firstly, it is quite clear, and even strikingly so, that human rights treaties in fact deal with a matter of relevance to one of the key aspects of each state's constitution, namely determination of the fundamental nature of the relationship in political society between the authorities and individuals (members of the community), which requires that, in the cultural and civilisational context of free, democratic constitutional systems of government, starting from recognition of the essential principle of respect for human dignity, the state should uphold, safeguard and possibly promote the rights forming the fundamental legal status of each human being and each citizen, in short everyone's right to "be a human being and a citizen." To borrow an ancient saying and give it its root meaning, the state exists *propter nos homines et propter nostram salutem* – which means that the state exists for us human beings, rather than that we human beings exist for the state.

Human rights treaties have their origin in the same concept and the same essential principle and - which brings me to the second point I wish to make - are merely the reflection of a heightened (and ardent) concern to ensure that the principles (rights) and obligations inherent in such values are accepted and effectively implemented in each state's day-to-day reality. What that aim in mind, the states formally enter into a mutual pact, which is indeed concluded at an international level but must be translated and implemented in each state's domestic system of law. In doing so, they simultaneously recognise, at the highest level and in a manner which should leave no room for doubt or ambiguity, both the "community" or "universality" of such values and rights and their transcendent nature (in relation to the will of the state).

At the same time, it is clear that the nature and the scope of the pact entered into by the states parties to a human rights treaty imposes obligations or conditions on them at a level which undeniably affects the most characteristic, fundamental aspects of the exercise of their sovereignty, not in their relations with other states but inside their very borders in their relations with citizens (and with foreigners within their territory). They have to contend - and this is the essential and most vital point - no longer with a *domestic affair* but with a matter of *international concern*.¹

Lastly, in the case of the most sophisticated of these treaties, guaranteeing their observance (that is to say respect for the rights enshrined in them) may also be a matter not simply for the domestic courts, but, at last resort, for an international organisation, and possibly even an international court.

If this is the substance, the nature and the scope of international human rights treaties, how can we fail to ask ourselves whether, in the domestic system of law, their effectiveness is not equal, or at least equivalent, to that of constitutional rules and principles?

2. Aims and scope of this study

It would certainly not be entirely unacceptable to address this issue from a purely theoretical standpoint, that is to say disregarding the tangible substance of each constitutional system. It might be pointed out that that would, in the end, take us back to the old dispute between the theories of “monism” and “dualism”, which, *inter alia*, dominated the literature on international law during the first half of the 20th century,² but which we would now, it might also be said, possibly subject to certain reservations, situate on a higher plane. One could even add, without any particular risk of error, that the situation described above itself calls for such an approach to the question.

Nonetheless, that is not the avenue I intend to take.

Formally, in terms of its foundation and origin, a human rights convention or covenant is still an international treaty like any other and accordingly subject, as regards its application to each state, to the procedure and conditions that the state itself lays down, notably at constitutional level, in respect of its international commitments and their potential impact in domestic law. Consequently, a purely theoretical approach to the problem not only raises difficulties but should, in any case, always be contrasted with the positive law - that is the legislation and practices - of each country in the field concerned, if the aim is to obtain a true

¹ To borrow the evocative terms used by J.C. Vieira de Andrade, “Os direitos fundamentais na Constituição portuguesa de 1976”, 3rd edition, Coimbra, 2004, pp. 30 et seq.

² See, above all, in Portuguese literature the edifying, still classic summary of the terms of the dichotomy produced in 1948 by Afonso Rodrigues Queiró, “Relações entre a ordem jurídica interna e a ordem jurídica internacional”, now included in “Estudos de Direito Público”, Vol. II, Coimbra, 2002, pp. 225 et seq.

picture of the legal status effectively conferred on human rights treaties in national law.

I shall accordingly follow another approach. Without disregarding the theoretical contribution's importance in the equation, but bearing in mind the above comments, I intend simply to sketch out - and merely in the roughest terms - the various types of response to the question to be found in different constitutional systems.

For obvious reasons, on adopting such an approach it is out of the question to consider all the known treaties on human rights, much less all the legal systems concerned. We shall accordingly confine ourselves, as is quite understandable, to the European Convention on Human Rights (doubtless the treaty that has had the greatest impact in terms of states' international commitments in this field and the most important, at least in our context) and to the constitutional systems of a number of states bound by the Convention, which can be regarded as particularly telling examples for our purposes, concluding with a reference to Portuguese law.

3. The types of situation

As already mentioned, an attempt to identify the types of situation that exist regarding the effective status of the European Convention on Human Rights in each member State's national legal system must take account, firstly, of the rules or principles of relevance to this issue expressly laid down in the respective state's law, in particular its constitutional law, and, secondly, of the prevailing judicial practice, above all that of the constitutional court (where applicable).

Bearing in mind these two complementary aspects, I think that mention must be made of three different ways of "incorporating" the Convention in member States' national law.

a. Constitutional status

The first possibility is officially giving the European Convention on Human Rights effective constitutional status in national law, which means that, as soon as it enters into force in respect of a state, it also becomes part of that state's constitution. Austria perhaps offers the most striking example of such an approach.

In Austria, although the basic constitutional text remains the *Bundes-Verfassungsgesetz* of 1920, the system of constitutional law is constantly being broadened beyond that instrument (including the reforms it has itself undergone over the years) and displays what might be termed a quite typical "polymorphism". One of the elements contributing to this "polymorphism", or one of its components, lies in the very fact that the Austrian Constitution, determining how international treaties are to be incorporated in national law, expressly (and in what I consider a quite innovative way) provides for the possibility, inter alia, of

giving an international treaty constitutional status, as a result of which it can, in particular, directly amend or supplement the constitution with immediate effect (see Article 50 of the *Bundes-Verfassungsgesetz*).

This is not the place to enter into details of the conditions and procedure laid down in the Austrian Constitution for such recognition of an international treaty. Suffice to say that the treaty's constitutional nature must be acknowledged upon its ratification by parliament. Since the European Convention on Human Rights was ratified by Austria in 1958, before the constitutional provisions' adoption (in 1964) and the establishment of the procedure, and accordingly was unable to benefit from constitutional status, that status was conferred on it retrospectively, so to say, undoubtedly on account of the Convention's nature and substance, and is today unreservedly accepted in Austrian legal doctrine and case-law.

The Austrian Constitutional Court draws the relevant conclusions from such recognition, namely - and this is where that recognition takes on its full significance and practical scope - the court treats the Convention and its provisions, like any other constitutional rule or principle, as a yardstick for determining the constitutionality of other items of legislation or measures taken by the public authorities which it is competent to review.³

The United Kingdom now also qualifies as an example of a state which confers constitutional status on the Convention, but in a way which may on the face of it seem unusual, or in any case entirely different from the solution adopted in Austria, or indeed in any other country of Europe.

As is common knowledge, the United Kingdom's particularity on the European constitutional scene is that it has no "written constitution" in the formal sense, but merely an uncoded constitution, incorporating many different sources, ranging from statute law to common law rules and mere constitutional conventions. The force of law of the corresponding "constitutional provisions" does not differ from that of their respective sources, and they can be amended in the same way (under formal or informal procedure). They derive their constitutional nature solely from their substance.

In those circumstances, there was already every justification for conferring on the Human Rights Act of 1998, which incorporated the European Convention on Human Rights into UK law, and hence on the Convention itself, at least the same status of (uncodified) constitutional law as certain other provisions, as befitted its substance. The fact that the status of international treaties in general does not differ from that of the Act of Parliament (statute law) incorporating them is of no import in this respect.⁴

³ See Austria's national report to the IXth Conference of European Constitutional Courts, by Peter Jann, in "Protection constitutionnelle et protection internationale des droits de l'homme : concurrence ou complémentarité?", vol. I, Paris, 1993, pp. 104 et seq., and also Sylvie Peyrou-Pistouley, "La Cour Constitutionnelle et le contrôle de la constitutionnalité des lois en Autriche", 1993, pp. 190 et seq.

⁴ See Wolfgang Graf Vitzthum, editor, "Völkerrecht", 2nd edition, Berlin-New York, 2001, p. 112.

However, into the bargain - and this is the most significant and perhaps unexpected aspect of the situation, since I believe it to be unprecedented in UK law - the Human Rights Act goes further by recognising the pre-eminence of the rights guaranteed in the Convention over both primary and secondary legislation. Not only does it require that both types of legislation be read and given effect, as far as possible, “in a way which is compatible with the Convention rights” (Section 3), but it also provides that in the course of proceedings a court may determine whether a legislative provision is compatible with a Convention right, and, if it finds to the contrary, may “make a declaration of that incompatibility” (Section 4).

In view of these provisions,⁵ it might even be said that the way the Convention is applied in the United Kingdom, going well beyond what would already follow from the singular nature of the United Kingdom's constitutional situation, is, in the final analysis, very similar to placing the Convention on an equal footing with a formal written constitution under the terms of that constitution itself.

b. Quasi-constitutional status

This may be deemed to cover situations where the European Convention does not formally qualify as constitutional law but nonetheless plays a role equivalent to that of the constitution, as a yardstick for review of domestic legislation, in particular Acts of Parliament.

That is the case in states where, firstly, international treaties incorporated in national law are recognised as overriding statute law (with the result that, in the event of a conflict of law, the courts must, at least in principle, give the treaty rules precedence over those of statute law, even where the latter is more recent) and, secondly, constitutional review of legislation in the strict sense is ruled out, at least to some extent. In such circumstances, constitutional review is in fact replaced by a review of consistency with the convention concerned. The latter is substituted (the particularly apt German term “Ersatz” springs to mind here) for the former. It is then possible to talk of the convention's “quasi-constitutional” status inasmuch as, through consideration of the convention's principles and clauses, the domestic law in question is, in the final analysis, also reviewed in the light of the fundamental principles of the state constitution, on account of the two instruments' virtually overlapping substance.

A striking example of this kind of situation is without doubt to be found in the Netherlands, where there is no constitutional court and the courts (including the Supreme Court) are expressly prohibited from questioning the constitutionality of Acts of Parliament but are, at the same time, required, again expressly, to guarantee the effectiveness and the pre-eminence in domestic law of self-

⁵ Their importance has been underlined, *inter alia*, in the paper presented by Richard Cornes, “Justicia constitucional en el Reino Unido : um mundo aparte del Continente?”, at the Madrid (Complutense) University summer school on “Las cuestiones básicas de la justicia constitucional”, El Escorial, 2005 (photocopied summary)

executing international commitments entered into by the state, a pre-eminence forcibly asserted in and very characteristic of the Netherlands Constitution and giving it a strongly “internationalist” slant (see Article 120, on the one hand, and Article 94, on the other hand).⁶

Another similar example is - it would seem - to be found in Switzerland. Despite the fact that, via the Federal Court, the country has long had a genuine constitutional court, it applies a system whereby constitutional review of legislation in the strict sense suffers a (well-known) exception, in that the Federal Court cannot review Acts of the Federal Parliament. However, as soon as Switzerland acceded to the European Convention on Human Rights (in 1974), in view of the supremacy which international law in principle enjoys there over national law, the Federal Court unhesitatingly began to review federal statutes in the light not of the constitution but of the Convention (the key precept underlying this approach is to be found in Article 191 of the Constitution of the year 2000, which in substance reproduces Article 113.3 of the former Constitution of 1874).⁷

c. Sub-constitutional status

Apart from the situations already described, all the other cases can, it would seem, be included in a single category, if the question is whether, in the state concerned, the European Convention on Human Rights is, in itself and without further measures, capable of having the same effect as the constitution, in particular from the standpoint of the means of guarantee. I shall accordingly refrain from drawing any other distinction between the states concerned and merely focus on the sub-constitutional status they accord to the Convention.

There are, it is true, differences between them, the chief of which, constantly to be borne in mind, is the way in which international treaties in general - and consequently the Convention (if it is not treated as an exception) - are incorporated in domestic law and on what level. I am naturally thinking of states' choice between adopting a “monistic” (and internationalist) approach or a “dualistic” one.

Where a state chooses to follow the latter approach to the full, the treaty's substance is “transformed” into national law by the legislation incorporating it in the domestic legal system and, in the hierarchy of domestic law, its provisions simply acquire the same status as that legislation. It is worth noting that, where no exception is made for the Convention on Human Rights, this approach merely gives it sub-constitutional status in domestic law, with all the corresponding consequences. This is still the case in Germany - at least according to the prevailing doctrine⁸ - with the result that, in accordance with the dualistic

⁶ See Constantjin A.J.M. Kortmann and Paul P.T. Bovend d'Eert, “The Kingdom of the Netherlands (An Introduction to Dutch Constitutional Law)”, Deventer, 1993, pp. 11, 117 et seq., 157 et seq.

⁷ See Switzerland's national report, by Claude Rouiller, in the volume cited in footnote 3, pp. 561 and 579.

⁸ See W.G. Vitzthum (footnote 4), pp. 133 et seq., and also Konrad Hesse, “Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland”, 20th edition, Heidelberg, 1996, p. 44.

approach, the *Bundesverfassungsgericht* neither takes the European Convention as a (direct) yardstick for reviewing the constitutionality of legislative provisions, nor regards its violation as a (direct) ground for lodging a complaint of infringement of the constitution (*Verfassungsbeschwerde*), the specific remedy provided for in German law to guarantee fundamental rights.⁹ From a strictly “formal”, structural standpoint, at least according to the prevailing, traditional doctrine, the same applies in Italy (where the question arises solely in matters of judicial review of legislation); however, a change, the nature and extent of which are still not clearly apparent, would seem to be dawning.¹⁰

However, where a state adopts a “monistic” approach, sometimes referred to as friendly to international law, international treaties will be incorporated in its domestic law as they stand, from their entry into force, and duly published. The tendency will be to recognise their supremacy over ordinary rules of national law (even more recent ones). Yet, that does not necessarily mean they are equivalent in status to constitutional rules and principles, nor that their supremacy is guaranteed on the same terms. Under such conditions, where no exception is made to this general doctrine in the case of the European Convention it will have “supra-legislative” status in the state concerned but will remain (as in the situation previously examined) of sub-constitutional rank. A telling example is France, where, despite Article 55 of the Constitution of 1958 (on the pre-eminence of treaties, subject to reciprocity), the Constitutional Council does not include the Convention and its provisions in the “constitutional corpus” (which moreover ranges beyond the wording of the Constitution itself), to which it confines itself when reviewing legislation referred to it.¹¹

d. The situation in Portugal.

Under Article 8, para. 2, of the Portuguese Constitution (the Constitution of 1976, as subsequently amended), rules of duly ratified or approved international conventions, shall, once published, be part of Portuguese national law for as long as they remain internationally binding with respect to the Portuguese state. This clause providing for “automatic” incorporation of international treaty law is consistent with an already longstanding tradition in Portuguese law, and its scope

⁹ See Paul Kirchhof, Germany's national report in the volume cited in footnote 3, pp. 48 et seq., and, more recently, Schlaich/Koriot, “Das Bundesverfassungsgericht”, 6th edition, Munich, 2004, pp. 267 et seq.

¹⁰ See Italy's national report in the volume cited in footnote 3, pp. 387 et seq. and 397 et seq., and Andrea Giardina, “La tutela internazionale dei diritti dell'uomo”, in Lucio Lanfranchi (ed.), “Garanzie costituzionali e diritti fondamentali”, Istituto della Enciclopedia Italiana, 1997, pp. 229 et seq.

¹¹ See Louis Favoreu and others, “Droit Constitutionnel”, 5th edition, Paris, 2002, pp. 120 et seq. and 167 et seq. Nonetheless, procedural guarantees of treaties' pre-eminence over ordinary law do exist, since the ordinary courts (whether general or administrative) have jurisdiction in cases where it is challenged. Although both the Court of Cassation and the Conseil d'État, after what appeared to be a somewhat timid initial approach, have assumed jurisdiction, it is not possible to identify the possible (or existing) implications for the European Convention.

is not disputed as regards the conditions of incorporation of such law in the national legal system. A specific Act of Parliament (or special law in the formal sense), additional to the law ratifying or approving the convention and intended to permit the state's international commitment, is not needed.

However, legal theorists are not unanimous as to the level on which conventions are incorporated in national law, notably in the light of the above-mentioned constitutional provision, since there is no other. It is unquestionably a "sub-constitutional" level, but whether they acquire "supra-legislative" rank or remain equivalent in status to statute law (or to be more precise the Act ratifying them) is a matter of controversy. This is not the place to say more on this subject, so I shall merely point out that there is a clear majority in favour of the first theory and that the Constitutional Court has subscribed to it in its leading decisions - at least implicitly (as have the general and administrative courts).

That alone would suffice to give the European Convention on Human Rights supra-legislative status in Portuguese law, but not constitutional or equivalent rank.

The general constitutional provision of Article 8, para. 2, is nonetheless not the only one to be taken into consideration; mention must also be made of Article 16, through which the Portuguese Constitution, in a manner not habitual in comparative constitutional law (to say the least), attaches particular importance to the "universality" of human rights. Para. 1 provides "The fundamental rights enshrined in the Constitution shall not exclude any other rights provided for in the applicable international laws or rules" and para. 2 "The provisions of this Constitution and of laws relating to fundamental rights shall be interpreted and applied in accordance with the Universal Declaration of Human Rights."

It is also not appropriate here to comment at length on the scope of these provisions. For our purposes, it need but be said that they are in fact not without relevance - in particular the first - to the status which is (or should) be attached to human rights conventions signed by Portugal, and especially the European Convention on Human Rights, in domestic law. Does this not amount to preferential constitutional treatment of those conventions, particularly the latter, and one which, in substance, confers genuine constitutional or equivalent status on the Convention on Human Rights (to focus merely on that instrument)?

This question has naturally been raised in legal writings and in the case-law of the Constitutional Court. However, in neither case, has the reasoning (yet) been taken so far.¹²

¹² On this subject see the author's "Le tribunal constitutionnel portugais et les juridictions européennes", in "Protection des droits de l'homme: la perspective européenne" (compilation in remembrance of Rolv Ryssdal), Cologne, 2000, pp. 208 et seq. (including bibliographical and case-law references). Regarding the scope of Article 16 of the Constitution, see J.C. Vieira de Andrade (footnote 1), pp. 40 et seq. (and the references cited therein). In particular, for a global analysis of the implications of Portugal's accession to the Convention, see Rui de Moura Ramos, "A Convenção Europeia dos Direitos do Homem", in "Documentação e Direito Comparado", No. 5, 1981, pp. 95 et seq.; and for a far more recent comparison, Rui Medeiros, "A Carta dos Direitos Fundamentais da União Europeia, a Convenção Europeia dos Direitos do Homem e o Estado Português", Lisbon, 2001.

According to legal opinion, Article 16.1 cannot fail (and perhaps has not failed) to dispel the doubts (which generally subsist in the light of the provisions of Article 8.2 alone) as to human rights treaties' supra-legislative status, in any case that of the European Convention; it can be said that, in view of this special constitutional clause, that status - at least - is not at all in question.

As for the case-law of the Constitutional Court, although it is not rare for the court to refer to the Convention's provisions, it has never gone so far - and this is the crux of the matter - as to recognise them as a direct, separate yardstick (alongside the rules and principles laid down in the constitution) for reviewing the constitutionality of legislation. Despite its importance, as the court has repeatedly found, the Convention is but an additional, subsidiary source, and possibly a source of inspiration. However, giving due consideration to certain lapses of language, or certain things left unsaid, in some more recent decisions, one is tempted to say that the court has not wished to leave this issue completely closed.¹³

Whatever the case may be, the Portuguese example is, as things stand today, no different, in essence, from those considered in the previous section.

4. Provisional conclusion

If an, at least tentative, conclusion can legitimately be drawn from the comparative law considerations gathered together here, it can but be that the European Convention on Human Rights is far from commanding general recognition as constitutional or equivalent law in the signatory states' domestic legal systems (despite some significant examples of such recognition, which must not be disregarded). The idea that the Convention in any case has "supra-legislative" status is perhaps more widespread.

This conclusion is nonetheless based on what might be termed simply a question of "form". Looking beyond that level, it must not be forgotten that the Convention exerts a constant influence on the interpretation and application of fundamental rights in the countries of Europe, as an additional, subsidiary source of law and inspiration for the national courts (in particular the constitutional courts). That it has such an influence would seem to be generally acknowledged, as has just been underlined with regard to Portugal. However, determining just how far that influence goes, and above all the place to be given in such matters to the case-law developed by the European Court of Human Rights in application of the Convention, is already beyond the bounds of my subject-matter.

¹³ In practice this question is of only relative importance, since the rights set out in the Portuguese Constitution are generally far more extensive than those enshrined in the Convention.

**EXECUTION OF THE JUDGMENTS
OF THE EUROPEAN COURT OF HUMAN RIGHTS:
LEGAL NATURE OF THE OBLIGATIONS OF THE STATES
AND EUROPEAN SUPERVISION OF NATIONAL
LEGISLATIVE CHOICES
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If we try to obtain a full picture of the international monitoring system based on the European Convention on Human Rights (ECHR), which is designed to be resolutely judicial, we need only look at the execution of the judgments on the merits handed down by the European Court of Human Rights (the Court) to be struck by the feeling that the system is unfinished.

A quick look at the origins of the Convention will make it easier to understand the reasons for this.

When, during the very first discussions in the Council of Europe Parliamentary Assembly in 1949, the question was raised as to the underlying purpose of the Convention on the drawing board (why was a legal instrument for the protection of human rights going to be prepared in Europe when those rights had already been enshrined since December 1948 in an instrument that applied to the international community as a whole?), the answer could not have been more succinct. While the universal principle of human rights had indeed been affirmed in the United Nations Declaration, it was liable to remain a dead letter without a judicial supervision system making it possible to apply sanctions. The ECHR sought, and still seeks, to assert that the ethical principle of human rights, if it is to be imposed on States, must necessarily be matched by punishment if a judicial body finds, at the end of proceedings that are themselves judicial, that the Convention has been violated.

While the right of individual petition and the establishment of courts are the bases of the European supervision system, little attention was paid initially to the result that should follow cases leading to the finding of a violation. The fact is that, as a rule, the problem of the effectiveness of international legal instruments safeguarding fundamental rights arises at a much later stage. How are decisions taken by the supervisory bodies to be enforced? In particular, in the case of judicial proceedings, as in the case of the ECHR, which has given rise to a proper European legal order in this field, how can it be ensured that decisions ascertaining violations are executed when they concern the compatibility of legislation with the provisions of the Convention?

The problem of the execution of the Court's judgments is largely related to these issues.

I. Problem of the execution of judgments and supervision of the compatibility of a national law in the context of the European public order stemming from the ECHR

The *travaux préparatoires* of the ECHR clearly show that the jurisdiction of the Court to hear cases was envisaged only as limited jurisdiction. It was made quite clear that the Court would not be competent to declare a national law (or even a court decision) void, particularly as the supranational Court would not have been able to consider the compatibility of such a law with the ECHR in the abstract, but only in so far as its provisions had been applied in a particular case to the detriment of the applicant, and within the limits of the application of those provisions.

These principles, which were set out when the ECHR was drawn up and are therefore supposed to reflect the States' intentions as regards the scope of the Court's jurisdiction, have been confirmed on numerous occasions by the Court itself. Clearly, however, the affirmation of these principles has not prevented the Court from going beyond the scope of the jurisdiction initially assigned to it. It has often stressed that the concrete examination it must carry out in order to assess a given situation does not prevent it from examining the general context of the matters to be dealt with – in other words, from also considering, when it assesses the application of the law to the case in question, the general framework laid down by national legislation.¹ This approach, occasionally punctuated with semantic precautions (“where possible”; “as far as possible”) sometimes reveals a feeling of unease. This seems to be due mainly to the role that the Court now sees itself as having, as the acknowledged guardian of a European public order relating to fundamental rights, and to the increasingly insistent expectations of the public, those who practise the law and all those, politicians and civil servants alike, who help to draft law and regulations. As far as principles are concerned, and in order to provide a strictly legal basis for its arguments, which must sometimes take account of the general context of a given situation, the Court may be prompted to specify that the ECHR also assigns it both an educational role and a role in providing an authentic interpretation of the provisions of the Convention. For instance, it held that its judgments served “not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties” (*Ireland v. the United Kingdom*, para. 154; *Guzzardi*, para. 86).

¹ There is one example among many: “The Court reiterates first of all that in cases arising from individual petitions the Court's task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised in the case before it” (*Amann*, para. 88).

This case law dates back a very long way and was repeated and elaborated on by the Court in a relatively recent judgment, in which it added: “Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.”²

If all this is to have some useful effect, as it must do in the ECHR system, in which the principle of effectiveness has been raised to the status of a principle of interpretation, this also means that the Court cannot ignore the implications of its eminently judicial role of hearing and determining cases and, therefore, the final and necessary stage of a judgment on the merits, which is that of execution.

Indeed, what point is there, when hearing and determining cases, in specifying how the law must be interpreted if there are no practical consequences, with the possible exception of financial compensation?

The question of the execution of the Court’s judgments cannot be addressed separately from the context in which the European supervisory system exists and the essential features of that system. There is therefore, or there should be, a very strong cause-and-effect relationship between the part concerning the law in a judgment ascertaining a violation of the ECHR, particularly when it stems from the enforcement of a national law the provisions of which are wholly or partly at variance with the Convention, and the part concerning just satisfaction and that containing the operative provisions, not least in the light of the nature of the European system as based on the case law of the Court and the practice and declarations of the Committee of Ministers of the Council of Europe (the Committee), which is responsible for ensuring that judgments are executed.

The problem of execution must therefore be considered in the light of the salient features of this system, namely the fact that the ECHR has established a European public order; that its provisions are set in a context of a constitutional nature; and that the role of the Committee is, at least as far as the execution of judgments is concerned, quasi-judicial in nature (despite the fact that it no longer has the decision-making power initially provided for).

A European public order. It is acknowledged that the ECHR has established a European public order in the true sense of the term. It was the European Commission of Human Rights that first made this assertion, nearly 40 years ago, in a way that is still strikingly inspired and concise.³ The key features of that order

² Karner v. Austria judgment of 24 July 2003, para. 26.

³ [T]he purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law” (Austria v. Italy, Yearbook, Volume 4, page 116).

are: the abandonment of the rule of reciprocity between States in the application of the provisions of the Convention and, accordingly, the affirmation of the objective, and not contractual, nature of the obligations taken on; and the independence of what is a general legal order common to the Contracting States vis-à-vis the legal systems specific to each State. The Commission's reference to the Statute of the Council of Europe seems to be no coincidence: the link it establishes between the ECHR supervisory system and the obligations taken on by member States can, as we shall see, help to set the issue of the execution of judgments back in the specific context of the Organisation's Statute.

A context of a constitutional nature. As stated in the Preamble to the Convention, the ECHR is designed to ensure the collective enforcement of human rights and fundamental freedoms. By virtue of the ideas that inspired them and the drafting technique used, its provisions therefore reflect the values that underpin the States' common heritage. "Context of a constitutional nature" therefore refers to the collective enforcement of fundamental rights on the basis of values shared by the community of States represented at the Council of Europe. And it is in this spirit that the Court's assertion that the ECHR is "a constitutional instrument of European public order (ordre public)" must be understood.⁴

The Committee, which is the body responsible for enforcing the ECHR, enjoys quasi-judicial prerogatives. As a rule, any court decision has to be executed. At international level this principle calls for special arrangements because it is not conceivable, at least at the Council of Europe, to resort to force to ensure that decisions taken by statutory bodies or Convention-based bodies are executed, even if they are decisions handed down by the Court. The means of pressure that supranational bodies can use, for that is in fact what it amounts to, are, in the final analysis, set in a political and diplomatic context. And that is the role that the ECHR assigns to the Committee, for the latter is responsible for the execution of judgments (Article 46 ECHR). Experience shows, however, that in carrying out its tasks the Committee in fact – as is borne out in the role it plays when legislative changes are required on the part of a State, following the finding of a violation – carries out an assessment of the reasons given in the judgment, which means that it has at the same time to examine, and hence in a sense interpret, the reasons set out in the judgment, which usually says nothing about the practical steps the State must take to comply with it.

As a result, the Committee assumes – and is recognised to have – quasi-judicial prerogatives.

This throws up an issue of prime importance which elicits two interconnected but opposing lines of reasoning and two concepts of legitimacy: that of a supranational system of justice wanted by the States and shared by them, in terms of both the content of the rights to be safeguarded and the rules governing the operation of the supervisory bodies (the Court and the Committee), and that of the national pillars of the individual states (the Executive, the Legislature and the Judiciary), which seem reluctant always to consider themselves effectively bound

⁴ European Court of Human Rights, *Loizidou*, Preliminary objections, para. 75.

by the international obligations deriving from Court decisions that are foreign to the State system, and whose lack of clarity and “disrespect” for national traditions are sometimes decried.

The very nature of the European supervisory system, considered as a public order and as relating to an instrument of a constitutional nature, obliges us to consider whether the current situation as regards the execution of judgments properly reflects the Council of Europe member States’ conception of a form of supranational justice designed to prevail, in one way or another, over national arguments and national legitimacy.

We shall now investigate, in turn, the legal nature of the obligations on States as regards the execution of the Court’s judgments and the scope of the Committee’s supervision of national legislation on the basis of those judgments.

II. Legal nature of the obligations on States as regards execution

All States Parties to the ECHR, ie all the Council of Europe member States, have assumed a specific obligation to respect human rights. This is clear not only from Article 1 ECHR, according to which “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention”, but also from Article 3 of the Organisation’s Statute, which provides: “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms [...]”. It is worth adding that, under Article 8 of the Statute, the Committee may request that a State that has “seriously violated Article 3” withdraw from the Organisation. This is more than a mere affirmation of principle: it is clear recognition of the fact that it is up to the Committee to ensure at all times that every State honours the solemn undertakings it has given.

Among these is the obligation to execute a judgment handed down by the Court. The State has a twofold obligation in this respect, as provided for in Article 46 ECHR.

Firstly, the State is obliged to recognise that the judgment which is handed down is binding: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.” (Para. 1) Incidentally, it is worth noting that the Convention uses the expression “undertake to abide by” and not “shall abide by”. Originally, this turn of phrase (“undertake to ...”) was also suggested for the drafting of Article 1 ECHR. As the Court pointed out in connection with the latter provision, the use of the imperative clearly reflects the intention to prevent States from temporising over the recognition of rights.⁵ Conversely, can the view be taken that as far as the binding nature of a judgment is concerned, the State, and hence indirectly the Committee, should be afforded a

⁵ “By substituting the words ‘shall secure’ for the words ‘undertake to secure’ in the text of Article 1 (art. 1), the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States” (Ireland v. the United Kingdom, para. 239).

degree of discretion? The practice followed by the Organisation's executive body would seem to suggest that this is the case.

Secondly, the obligation to comply with a judgment concerns only "cases" in which a State is the respondent party. There is therefore no *erga omnes* obligation on the other States to conform to a principle set out by the Court in a judgment that concerns only the respondent State. There is, however, nothing to prevent the Committee from drawing conclusions from such a judgment that apply to other States,⁶ by virtue of the general supervisory power afforded to it by the Organisation's Statute.

With regard to the execution of the judgment, Article 46 ECHR provides: "The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution." (Para. 2) This provision seems to imply that there is still something to be executed following the judgment and that the Committee is responsible for ensuring that it is indeed executed. If we left aside the subject of just satisfaction, which entails payment of a sum of money in compensation for the damage suffered, the execution ought to concern specific obligations incumbent on the State. This point will be addressed below.

Let us now look at the matter from the angle of Article 46 ECHR, a provision whose content has been clarified both by the Court's case law and by the Committee's practice.

The Court's case law has undergone a striking change in this respect. Two major principles have been affirmed. Firstly, a judgment finding a breach of the ECHR "imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach".⁷

Secondly, the State may have "to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in [its] domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects".⁸

Furthermore, the State remains free to choose the means by which it will discharge its obligation "provided that such means are compatible with the conclusions set out in the Court's judgment".⁹

Two remarks are called for here. According to its case law, general or individual measures are clearly directed at the applicant's personal situation and not necessarily designed to bring about a legislative change applicable to everyone. Secondly, the means chosen by the State must be "compatible with the conclusions set out" in the

⁶ That might find themselves in the same legal situation as that which prompted the Court to hold that there was a violation of the ECHR.

⁷ *Brumarescu*/Art 41, para. 19.

⁸ *Scozzari and Giunta*, para. 249.

⁹ *Ibid.*, para. 249.

judgment. While it is only natural that the judge of such “compatibility” should be the body responsible for supervising execution of the judgment, ie the Committee, the subject-matter of any supervision of compatibility may reasonably raise questions. What are the “conclusions set out in the Court’s judgment”? Are they the operative provisions? Clearly, the answer is “no”, given that, in virtually all cases, the operative provisions merely ascertain the existence of a violation and award financial compensation. So are the conclusions the legal arguments underpinning the finding? But in that case the scope of the Committee’s investigations would be considerably extended, in that it would be invested with extraordinary power that would leave the State faced with unknown factors, which would be difficult to reconcile with the principle of legal certainty inherent, as the Court itself asserts, in the ECHR system.¹⁰

In fact, the case law referred to above merely enshrined the practice that the Committee has, pragmatically and at the instigation of the Council of Europe Secretariat (Directorate General of Human Rights), developed since the mid-1970s. It is therefore the Court that seems to have followed in the wake of the supervisory body, which was constantly required, when it was called on to examine a judgment handed down by the Court, to fill a vacuum, given that there was no indication as to how the judgment should be executed.

The Committee’s practice is based on arrangements and a timetable that are now well established. The rules the Committee adopted for the application of Article 46, para. 2, ECHR, and in particular Rule 3,¹¹ specify the role it is called on to play. Three points need to be made here. Firstly, it is specified that the State concerned has the “discretion” to “choose the means necessary to comply with the judgment”. Secondly, the Committee examines whether the State has taken individual measures “to ensure that the violation has ceased and that the injured

¹⁰ Marckx, para. 58.

¹¹ Rule 3 Information to the Committee of Ministers on the measures taken in order to abide by the judgment

a. When, in a judgment transmitted to the Committee of Ministers in accordance with Article 46, para. 2, of the Convention, the Court has decided that there has been a violation of the Convention or its protocols and/or has awarded just satisfaction to the injured party under Article 41 of the Convention, the Committee shall invite the State concerned to inform it of the measures which the State has taken in consequence of the judgment, having regard to its obligation to abide by it under Article 46, para. 1, of the Convention.

b. When supervising the execution of a judgment by the respondent State, pursuant to Article 46, para. 2, of the Convention, the Committee of Ministers shall examine whether:

- any just satisfaction awarded by the Court has been paid, including as the case may be default interest; and, if required, and taking into account the discretion of the State concerned to choose the means necessary to comply with the judgment, whether

- individual measures (1) have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention;

- general measures

(2) <http://wcd.coe.int/ViewDoc.jsp?id=744279&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75-fn2#fn2> have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations.

party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention". Lastly, it is for the Committee to ensure that "general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations". This last point does raise some problems as regards interpretation. While it is easy to imagine individual measures, in the light both of the wording of Article 41 ECHR and of the fact that the individual application concerns a clearly defined situation that may have been damaging to the applicant, general measures, which essentially consist in the adoption of amendments to legislation and regulations, would seem to concern situations that have not, strictly speaking, been examined by the Court, which, as we have seen, cannot consider the compatibility of a national law in the abstract.

Clearly, we are in a new situation here, that of the monitoring by the Committee of the honouring of commitments entered into by States by virtue of their accession to the Council of Europe. What may seem strange is that this unique monitoring procedure should have been linked to and made part of supervision that should normally be based only on specific findings set out in the Court's judgment and on a detailed line of reasoning as to the purpose of the legislative and regulatory measures that need to be adopted.

A major new step was taken in 2004, further to discussions that took place and decisions that were taken to try to resolve the serious crisis in the workings of the Court, which is no longer able to respond to the demand for justice within an acceptable time. On 12 May 2004, the Committee adopted a Resolution (Res (2004)3)¹² inviting the Court to identify in its judgments, as far as possible, "what

¹² The Committee of Ministers, in accordance with Article 15.b of the Statute of the Council of Europe, Considering that the aim of the Council of Europe is the achievement of greater unity among its members, and that one of the most important methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reiterating its conviction that the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") must remain the essential reference point for the protection of human rights in Europe, and recalling its commitment to take measures in order to guarantee the long-term effectiveness of the control system instituted by the Convention;

Recalling the subsidiary character of the supervision mechanism set up by the Convention, which implies, in accordance with its Article 1, that the rights and freedoms guaranteed by the Convention be protected in the first place at national level and applied by national authorities;

Welcoming in this context that the Convention has now become an integral part of the domestic legal order of all states parties;

Recalling that, according to Article 46 of the Convention, the high contracting parties undertake to abide by the final judgment of the European Court of Human Rights (hereinafter referred to as "the Court") in any case to which they are parties and that the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution;

Emphasising the interest in helping the state concerned to identify the underlying problems and the necessary execution Measures;

Considering that the execution of judgments would be facilitated if the existence of a systemic problem is already identified in the judgment of the Court;

Bearing in mind the Court's own submission on this matter to the Committee of Ministers session on 7 November 2002;

Invites the Court:

it [considered] to be an underlying problem and the sources of this problem". A little more than a month later, the Court responded to this invitation in a case raising a legislative problem regarding compensation for members of the public who had been expropriated following the transfer to a foreign state of territories situated beyond the Bug River.

As the judgment in question was handed down by the Grand Chamber and adopted unanimously, it is essential to quote the relevant passages.¹³

"Before examining the applicant's individual claims for just satisfaction under Article 41 of the Convention, in view of the circumstances of the instant case and having regard also to the evolution of its caseload, the Court wishes to consider what consequences may be drawn for the respondent State from Article 46 of the Convention. It reiterates that by virtue of Article 46 the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII)".¹⁴

After noting that the violation had as its cause a situation concerning large numbers of people, some of whom had already submitted similar applications to the Court, the Court took the view that this was "not only an aggravating factor as [regarded] the State's responsibility under the Convention for an existing or past state of affairs, but also [...] a threat to the future effectiveness of the Convention's machinery".¹⁵ It therefore went on to say:

I. as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments;

II. to specially notify any judgment containing indications of the existence of a systemic problem and of the source of this problem not only to the state concerned and to the Committee of Ministers, but also to the Parliamentary Assembly, to the Secretary General of the Council of Europe and to the Council of Europe Commissioner for Human Rights, and to highlight such judgments in an appropriate manner in the database of the Court.

¹³ Broniowski judgment of 22 June 2004.

¹⁴ Above-mentioned judgment, para. 192.

¹⁵ *Ibid*, para. 193.

*“Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause. Such measures should therefore include a scheme which offers to those affected redress for the Convention violation identified in the instant judgment in relation to the present applicant. In this context the Court's concern is to facilitate the most speedy and effective resolution of a dysfunction established in national human rights protection. Once such a defect has been identified, it falls to the national authorities, under the supervision of the Committee of Ministers, to take, retroactively if appropriate (see *Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999-V, *Di Mauro v. Italy* [GC], no. 34256/96, § 23, ECHR 1999-V, and the Committee of Ministers' Interim Resolution ResDH(2000)135 of 25 October 2000 (Excessive length of judicial proceedings in Italy: general measures); see also *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX, and *Giacometti and Others v. Italy* (dec.), no. 34939/97, ECHR 2001-XII), the necessary remedial measures in accordance with the subsidiary character of the Convention, so that the Court does not have to repeat its finding in a lengthy series of comparable cases.”¹⁶*

This is a major development in the Court's case law, for in this case the Court took care to indicate clearly the result which the respondent State had an obligation to achieve in respect of both individual measures and general legislative measures. This is rightly reiterated in the operative provisions of the judgment, in which the Court, having found a violation of the ECHR:

“Holds that the [...] violation has originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the ‘right to credit’ of Bug River claimants;

Holds that the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1.”¹⁷

¹⁶ *Ibid.*, para. 193.

¹⁷ *Ibid.*, para.s 3 and 4 of the operative provisions.

Let us now consider the matter from the strict angle of the execution of a judgment in which the Court finds a violation in respect of a given situation. Article 41 ECHR (just satisfaction) provides as follows in such a case:

“If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

This provision, which is not brilliantly clear, calls for several comments in the light of the Court’s long-standing and recent case law.

A preliminary observation must be made. It has been asserted in the case law that the decision the Court is called on to take on the merits is “essentially declaratory”.¹⁸ It has been inferred, wrongly in my view, that this limits the task assigned to the Strasbourg Court to hearing and determining cases, in an abstract manner as it were, leaving it to the supervisory body (the Committee) to draw the necessary conclusions as regards execution, except in the case of any just satisfaction, the amount of which is indicated by the Court itself in its judgment. In fact, in using the word “declaratory”, the Court seems to have been concerned mainly with whether or not its judgment is retrospective as regards “legal acts or situations that antedate the delivery of the [...] judgment”.¹⁹

It should be noted from the outset that the letter and spirit of Article 41 ECHR seem to require the Court, in principle, to determine in each case whether, in the event of a violation being found, total or partial *restitutio in integrum* can be envisaged. It is only in the alternative that the Court, exercising final authority, assesses (“if necessary”) whether just satisfaction should be afforded in the form of financial compensation.

We know that, as the Court pointed out in one of the very first cases in which the matter was broached, the wording of this provision (formerly Article 50) was modelled on clauses found in a number of arbitration treaties.²⁰ These clauses were designed “to deal with the situation that a State, although willing enough to fulfil its international obligations, is unable to do so without changing its Constitution”. In such a case, these clauses “confer on the arbitral tribunal the power to transform this obligation into an obligation to pay to the injured party an equitable satisfaction of another kind”.²¹

¹⁸ Marckx, para. 58.

¹⁹ This seems fairly clear from the Court’s arguments in this connection in the Marckx judgment.

²⁰ DeWilde, Ooms and Versyp/Article 50, para. 20.

²¹ See the joint separate opinion of Judges Holmbäck, Ross and Wold appended to the above-mentioned judgment.

Now, one of the features of the approach taken by the Court during the first 30 years of its operation is that it gave virtually no consideration whatsoever to the possibility of *restitutio in integrum*. In numerous cases in which the applicants had called for the adoption by the respondent State of specific, sometimes legislative, measures, the Court replied that it did not have jurisdiction to give instructions to governments. This approach changed in the early 1990s in connection with situations concerning property rights. The Court sometimes stated that the best way of executing the judgment would be to return the disputed property to the applicant, but that, if this proved difficult, the State would be obliged to pay the injured party compensation.²² The Court has now gone further since, in comparable situations, it has also stated in the operative provisions what was previously to be found only in the part of the judgment concerning the law.²³

It is only recently that the Court seems to have become aware of the need to draw conclusions from its line of reasoning, by stating more or less explicitly what type of individual and legislative measures the State should take in order to give effect to the judgment.²⁴

The final point is that just satisfaction is possible only for the benefit of the “injured party”, which would seem to imply that *restitutio in integrum*, and hence also the administrative or legislative measures designed to achieve it, can apply only to the injured party and not to other people in the same situation.²⁵

In the light of the legal instruments, the Court’s case law and the Committee’s practice, what is the legal nature of the State’s obligations in respect of the execution of a judgment?

Clearly, this is not an easy question to answer because various factors must be taken into account: the logic of the system, a case-law interpretation that is not yet sufficiently coherent and stable and the Committee’s practice. If we confine ourselves to a strict interpretation of the relevant legal instruments – whereby execution can concern only the object of the dispute, as decided by the Court and in relation to which the latter has ruled on the question of just satisfaction within the meaning of Article 41 ECHR – one could reasonably conclude that, in the case of individual petitions, the obligation incumbent on the respondent State concerns only the execution of those parts of the operative positions that relate to the applicant’s personal situation.

Account must, however, also be taken of the Committee’s practice, which has been accepted by the States and which has considerably extended its competence from the execution of the judgment handed down by the Court, in particular when

²² Hentrich, Papamichalopoulos.

²³ Brumarescu/Article 41.

²⁴ Gencel, Assanidze, Broniowski, Ilascu, Somogyi, Sejdovic.

²⁵ The situation might be different in the case of inter-State applications when they concern alleged breaches relating to a general situation.

the Committee requests the respondent State to amend a particular aspect of its national legislation or practice which, according to the reasoning set out in the judgment, is not, in principle, in keeping with the obligations stemming from the ECHR.

Now, the legal basis for the Committee's action in the former case (examination of the applicant's personal situation) is, obviously, to be found in Article 46 ECHR. When, however, the Committee examines a question relating to the execution of a judgment which implies the adoption by the State of a general measure, it seems, rather, to be acting in the interests of the community of States.

The Committee (like the Parliamentary Assembly, moreover) combines general measures designed to prevent a repetition of cases in which a violation of the ECHR has been found with individual measures intended to execute the judgment, taking the view that in so doing it is acting in accordance with Article 46 ECHR. There seem to be reasons linked to the development of the protection system that explain the Committee's practice as regards general measures: under the old system, when the case was not referred to the Court (former Article 32 ECHR), the Committee derived from the text of the Convention broader decision-making powers than those that were, and still are, afforded to it under the said Article 46 ECHR as the body responsible for executing a decision handed down by the Court.

The conclusion that can be drawn from this is that these are different issues and that the powers of the Committee have a legal basis which is not the same in both cases. In the case of individual measures, its powers are based on Article 46 ECHR. In the case of general measures, which obviously serve a preventive purpose since they are designed to prevent similar violations of the ECHR from occurring, the legal basis seems to lie more in Article 3 of the Council of Europe Statute, taken in conjunction with Article 1 ECHR (obligation to respect human rights).

III. European supervision of national legislative choices

I think that what I have just said has prepared the ground sufficiently and highlighted the points I consider essential. As has been pointed out, it is not, as a rule, for the Court to declare a national law void, just as the judicial review it carries out when it hears a case does not give it any power to impose one legislative solution in preference to another. That is the conclusion we are obliged to reach if we simply look at the initial – and genuine – intention of the States, as it emerges from the *travaux préparatoires*. We know that the Parliamentary Assembly's initial proposal was that the Court judgment should be able to order the State "to annul, suspend or amend the incriminating decision".²⁶ This proposal was not accepted, however, and it was the wording of the current version of Article 41 ECHR that was inserted in the Convention.

²⁶ For the background, see the Collected Edition of the "Travaux préparatoires" of the European Court of Human Rights, Council of Europe, Volume I, The Hague, Martinus Nijhoff, 1975.

It therefore appears that not only can the Court not oblige the State to modify a statutory provision, but it is not empowered, either, to instruct it to follow specific course of action as regards the incriminating measure.

Nevertheless, the practice followed by the Committee for decades, reflecting as it does a sort of implicit consensus on the part of the States, and the Court's case law referred to above, which seems to have aligned itself with this practice, have undoubtedly changed the situation. What seems surprising is that neither Protocol No.11, which radically changed the supervisory system, nor Protocol No.14, which is in the process of ratification, considered updating a provision such as Article 41 ECHR which clearly no longer corresponds to the current state of affairs. It is perhaps necessary to wait for a complete reform of the protection system for this to be done.

In conclusion, in the light of the practice followed by the Committee and the timid changes in the case law of the Court, which have clearly opened the way, albeit a way that needs to be paved with more than good intentions, it can be argued that a Court judgment calling for the adoption of a specific legislative measure to redress the applicant's personal situation implies a legal obligation incumbent on the State in question to implement it, on the understanding that the instruction issued by the Court concerns only an obligation to achieve a result, the State remaining free to choose the means it considers most appropriate to this end under the Committee's supervision. This obligation is based not only on the interpretation that the Court now assigns to Article 41 ECHR but also, and more particularly, on the States' agreement to amend or incorporate national statutory provisions at the Committee's request, on the basis of the Court judgment. It is sufficient to consult the Committee's website on the execution of Court judgments to be convinced of this.

As things stand, the view can be taken that, on the one hand, it is incumbent on the Court to ascertain, in each case in which it finds a violation, whether *restitutio in integrum* is possible or not and, on the other hand, that if no instructions on the subject appear in the operative provisions of the judgment, it must be inferred that the question of the adoption by the State of an individual measure does not arise. In other words, the Committee's powers are limited by the judgment of which it is supervising the execution.

In the case of so-called general measures, which primarily entail legislating *erga omnes*, preventively, in order to prevent a case of the same nature as that in respect of which a violation has been found from arising, the conclusion seems less clear. Strictly speaking, it does not appear possible to infer from the legal instruments and the logic of the system, which is clearly based on the principle of subsidiarity, that there is any legal obligation, among the obligations assumed by Contracting Parties to the ECHR, in this respect. In particular, there can be no such obligation on the basis either of Article 41 ECHR, which concerns the applicant's personal situation, or of Article 46 ECHR, which refers to the judgment handed down in a specific "case".

For all that, it is clear that one cannot overlook the practice followed by States, given that, after the finding of a violation, they certainly have a moral obligation, coupled with a political obligation, to ensure that the national legal system complies with the major principles on which the community of European States has been built.²⁷ While it is established that the ECHR is part of Europe's constitutional system, it appears that, in the final analysis, responsibility for supervision of compliance with the Convention/constitutionality is shared between the Court, which, in hearing and determining cases, interprets the law, and the Committee, which is largely responsible – and will continue to be so unless the Broniowski case law comes to apply generally – for defining, in practice, the features of legislation to be imposed on the State by virtue of its obligations as a member of the Council of Europe.

It nevertheless remains to determine the extent of the obligation incumbent on the State, given that the Committee's action takes place in a sphere which is halfway between the political and the judicial sphere and in which the rules governing co-operation between States, which are still largely sovereign, take on particular importance.

IV. What about the openness of the system?

The question may seem surprising, but it is worth asking. The problem seems to concern only the procedure for the evaluation by the Committee, following a Court judgment, of a situation in which a national law is incompatible with the requirements of the ECHR. It therefore relates only to the so-called general measures.

There are two aspects to this question. The first concerns the very principle of supranational supervision by a judicial and/or political body of matters closely linked to the history and political and legal traditions of a State, while the second relates to the arrangements for supervision as it takes place at the Council of Europe.

With regard to the first aspect, what can be problematical is the fact that a State is obliged to modify its legal system, which is based on laws passed by a democratically elected parliament, on the basis of decisions taken by a judicial or political body that is not subject to any parliamentary scrutiny. This is not a new objection, for it has been raised on several occasions in connection with particular decisions of the Court.

As far as the judicial aspect is concerned, it can only be pointed out that this situation arises in the legal systems of all the Council of Europe member States, in which the judiciary, whether in the form of an ordinary court or the constitutional

²⁷ See, in this connection, the interesting separate opinion of Judge Zupancic appended to the Lucà judgment of 27 May 2001.

court, is, and must remain, independent. It is in the nature of things that legislative measures can be thwarted by court decisions, particularly when the constitutionality of laws is reviewed.

With regard to the role the Committee plays in supervising the execution of judgments, it should be pointed out that this is part of the rules of the game accepted by the States, which, by definition, are democratic and respect the rule of law.

The second aspect is more difficult to pin down and explain, for it concerns the practical means by which a decision is taken by a supranational supervisory body. While the arrangements relating to the judicial function of the Court are perfectly clear and transparent, those relating to the procedure before the Committee afford too much scope for intervention of an administrative nature in which a degree of (needed?) opaqueness seems to be the rule.²⁸ Admittedly, full details of the procedure before the Committee in response to the Court's decisions have already been disseminated and published on the Council of Europe's websites for many years. In particular, the agendas and conclusions of the Committee's meetings devoted to consideration of matters relating to execution of the Court's judgments are prominently displayed. The fact remains, however, that when it comes to implementing principles deriving from a judgment by means of a procedure which inevitably, as has been pointed out, takes on quasi-judicial proportions, the principal arrangements, including the contacts with the parties concerned, could usefully be clarified so as to ensure maximum openness.

The objection will be raised, with reason, that the Council of Europe already ensures, in this connection, as much openness as is compatible with the requirements of a procedure in which the main protagonists are States and that the amount of information accessible can serve as an example to other international

²⁸ This is how the procedure is described on the Council of Europe (Human Rights) website dedicated to the execution of judgments of the Court:

"(...)The Directorate General of Human Rights assists the Committee of Ministers in exercising this responsibility under the Convention. In close co-operation with the authorities of the state concerned, the Directorate considers the measures that should be taken to comply with the Court's judgment. At the Committee of Ministers' request, the Directorate offers its opinion and advice, which are based on the experience and practice of the Convention bodies. "

In accordance with its well-established practice, until the state in question has adopted satisfactory measures, the Committee of Ministers does not adopt a final resolution striking the judgment off its list of cases, and the state continues to be required to provide explanations or to take the necessary action. During the examination of the case, the Committee may take various measures to facilitate execution of the judgment. It may adopt interim resolutions, which usually contain information concerning the interim measures already taken and set a provisional calendar for the reforms to be undertaken or encourage the respondent state to pursue certain reforms or insist that it take the measures needed to comply with the judgment.

If difficulties are encountered in executing the judgment, the Directorate General of Human Rights often examines possible solutions in greater detail with the authorities concerned.

The Committee of Ministers may fully exercise its influence to persuade the state concerned to comply with the Court's judgments, not least by noting its failure to comply with the Convention and taking appropriate action. In practice, the Committee of Ministers very seldom needs to exert political and diplomatic pressure but functions rather as a forum for constructive dialogue, thus helping states find satisfactory solutions enabling them to execute the Court's judgments. "

organisations which are much more secretive. The objection seems all the more justified in that, as is quite clear from the procedures which have just been mentioned, there is no sign of any democratic deficit.

The question can still arise, however, in connection with a particular case on which the Court has ruled but whose examination has, as it were, been completed with a Committee resolution.

It is essential in that case that the Court should be given the jurisdiction, if necessary by means of an amendment to the ECHR, not only to hear and determine cases and indicate the purpose of the individual measures to be adopted by the respondent State, but also to specify, for the benefit of the community of States Parties, the key principles that should underpin the necessary legislative amendments.

Thus, if the Court did not see fit to make use of this power, the Committee would not have to take any decision concerning so-called general measures. This would nip any remaining opaqueness in the bud.

**INCORPORATION OF HUMAN RIGHTS TREATIES
INTO DOMESTIC LAW PRIOR TO THEIR RATIFICATION
Ms Gret HALLER**

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On 5 May 1992 the Parliamentary Assembly of the Council of Europe adopted and submitted to the Committee of Ministers a number of proposals as to how non-member States might make use of the machinery provided for in various Council of Europe conventions. The main thrust of the proposals was that the European Court of Human Rights and the Committee of Experts of the European Social Charter could provide opinions at the request of the countries concerned, and that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment might extend its remit to include these countries. The Committee of Ministers referred these proposals for opinion to the bodies concerned and to the European Commission of Human Rights.

In February 1993, with the war in Bosnia having taken a turn for the worse, the Assembly adopted, for the attention of the Committee of Ministers, a second, amended, proposal. The Committee of Ministers had already called for work to be set in train on the first proposal when the Assembly recommendation was submitted to it. Finally, on 9 March 1993 the Committee of Ministers adopted Resolution 93(6) preparing the ground for the establishment of institutions for the protection of human rights in countries not yet members of the Council of Europe

Shortly after its adoption, consideration was given to the idea of applying Resolution 96(3) in respect of Croatia, but that idea was then abandoned in favour of alternative legal forms. The first echo to the Resolution came from the Washington Agreement of 1 March 1994 which laid the foundations for the creation for the Federation of Bosnia and Herzegovina. This was the first time that international human rights instruments had been incorporated into a national legal system with a view to their direct application. However, this was largely theoretical: the establishment of the Court of Human Rights provided for in the Agreement had been put on hold pending the outcome of the invitation by the Federation made up mainly of Bosnian Croats and Bosniaks calling upon the Serbs to join them, which meant that it was necessary to wait and see how the situation might develop¹. However, participation by the Bosnian Serbs did not materialise and the war went on unabated for over a year with the Bosnian Croats

¹ Communication from the Committee of Ministers – Interim reply to Recommendation 1204(1993) and Recommendation 1219(1993) on establishing a mechanism for the protection of human rights in European States not members of the Council of Europe (Doc. 7113).

and the Bosniaks joining forces and winning back territory from the Bosnian Serbs. The Croat-Bosniak federation finally became one of the two components of the future State of Bosnia and Herzegovina.

As a result of the Dayton and Paris Peace Agreements concluded on 14 December 1995, the ECDH finally became part and parcel of the domestic law of the State of Bosnia and Herzegovina. This meant that the rights guaranteed by the Convention were directly applicable outside the member States of the Council of Europe. In the matter of discrimination, a whole series of other international law conventions were also directly applicable. The ECHR could not be ratified by Bosnia and Herzegovina as it was not a member State of the Council of Eur USA, Berlin 2002 (Italian translation: *I due Occidenti. Stato, nazione e religione in Europa e negli Stati Uniti*, Roma 2004) *Neue Zürcher Zeitung* of 15 October 1997ope, whose organs were consequently unable to take action in that country. However, Annex 6 of the Peace Agreement provided for two institutions particularly responsible for dealing with the application of international legal instruments, namely an Ombudsperson and a Human Rights Chamber.

Based on Resolution 93(6) of the Council of Europe, the Human Rights Chamber comprised six Bosnians and eight international members, the latter being appointed by the Committee of Ministers of the Council of Europe, while the Ombudsperson was appointed by OSCE after designation by the international community. I had the honour of being the first person to take up this post, hence the use of the term "Ombudsperson". Although answerable to the international authorities for an initial five-year period, which was later extended to eight years, these organs are both institutions of the State of Bosnia and Herzegovina. The Human Rights Chamber came under the ambit of the Council of Europe and the Ombudsperson under that of the OSCE, thus providing what might be termed a Council of Europe-OSCE joint venture. The two institutions came into operation at the end of March 1996.

The terms of reference of the Human Rights Chamber are comparable to those of the organs of the ECHR, in the form they took until Protocol No. 11 came into force. The Ombudsperson has a very broad remit including not only the publication of reports on individual applications along the lines of what used to be done by the European Commission of Human Rights, but also the traditional role of mediation and the publication of special reports on matters selected by the Ombudsperson *proprio motu*. However, in the initial phase, my office focused on the first of the above items. In 1996 the country was not yet ready for an ombudsperson of the traditional type, since, for informal mediation to be able to take place between complainants and the public authorities, it is necessary to have at least some degree of viable administrative procedures.

The Ombudsperson's activity largely concerned the somewhat formal processing of individual applications, along the lines of the European Commission of Human Rights, and the effect of this was to flesh out the combined role of the two bodies as set out in Annex 6, i.e. that of a Council of Europe-OSCE joint venture, in that, when processing such applications, the Human Rights Chamber and the Ombudsperson followed the procedures of the Strasbourg organs of the ECHR. A

further consequence of this was that it speeded up the incorporation of new international legal instruments into legal life in Bosnia.

It is interesting to note that many staff from international agencies on human rights assignments in Bosnia were at first unfamiliar with this highly legalistic approach of the two institutions set up under Annex 6, and with the direct application of the prevailing international law. This applied not only to Americans and Canadians, but also to Europeans, which is quite understandable, since this was the first time that the ECHR was being directly applied outside the membership of the Council of Europe through bodies specially set up for that purpose. What was surprising, however, is that numerous international officials on human rights monitoring duties sometime showed total ignorance of the Strasbourg machinery and the associated case-law. Indeed, many of them seemed unable to grasp the fact that norms of international law could be directly applicable and especially the corollary of that fact, namely the inapplicability of domestic legal norms at variance with them.

It seemed that some international officials failed to understand the European dimension of human rights protection, namely that slowly but surely, international protection of human rights is gaining strength. In the initial phase international organisations draw up declarations and policy statements that serve as a frame of reference for political action. In the following stage these policy statements are translated into international treaties, signed and ratified by States, but whose implementation - at least at international level - remains a political matter. In the third stage, a right of individual petition to a body, which then makes recommendations to the State concerned, is added to the treaties. Finally, in the fourth stage, there emerges a remedy of individual petition, leading to judgments which have binding force under international law.

What has happened in Europe may be termed the “judicialisation” of human rights protection. Until Additional Protocol n° 11 came into force, the Council of Europe was active in the third stage, during which the Dayton and Paris Agreements came into force. Since then, Europe has moved definitively on to stage four where all individual applications may lead to a judgment which is binding under international law. The OSCE continues to operate in stage one, which entails the attainment of common policy objectives. The rationale for this difference also lies in the fact that, for the OSCE, human rights are significant especially when failure to observe them threatens the stability of a region or a state. The activities of the two organisations in Bosnia and Herzegovina and in particular their co-operation in the context of this institutional joint-venture clearly demonstrated the different approaches taken by the two organisations.

Europe's leading position in implementing human rights is currently being drawn into the discussion about globalisation and deregulation. In an age of deregulation, the view prevails that, in the economic field, conflicts of interest are better resolved through short-term compromises than through full-scale settlements. This trend towards deregulation is even beginning to play a role in the human rights sphere and as a result what Europe has achieved in the political and legal field is under threat. This problem was already raised in 1997 – shortly after we had begun working in Bosnia and Herzegovina -, for example by Helmut Schmidt, the

former German chancellor : “Today, close on half a century after the Universal Declaration of Human Rights, the over-riding moral imperative it lays on the shoulders of Mankind and its 200 sovereign States is under threat, for the fact is that some Western politicians, especially in the United States, use the expression 'human rights' not so much as a rallying call, but rather as a war cry or an aggressive means of exerting pressure in the field of foreign policy, more often than not in a selective manner ...”².

However, as the effects of globalisation have long since spilled over from the economic into the cultural and political spheres, both culturally and politically Europe has found itself a player on the world stage. Hence the usefulness and even the need for European human rights circles to become aware of the differences and to keep a watchful eye on the different stages of development in human rights protection, as well as on the gradual process of consolidation underway throughout the world as a whole. Europe's achievement in the political and legal fields with respect to human rights lies in the removal of the protection of those rights from the sphere of day-to-day political bargaining between Governments, whose role is henceforth restricted to supervising the execution of judgments. In contrast with that prevailing in Europe, human rights protection in its earlier stages relies far more on deregulation or - to express it more correctly in historical terms - efforts in Europe have led to a higher degree of “judicialisation” of human rights, since the process of consolidation has basically been a movement from the political sphere to that of the law. What brooks no doubt is the fact that the politicisation of human rights in the international move towards improving their protection is a retrograde step. Europe has already seen off attempts to politicise human rights by another means, namely the enforcement machinery of the European Convention on Human Rights.

Another problem with regard to Bosnia and Herzegovina was the fact that most individual applications concerned the ownership of housing. The Dayton Agreement set up national structures along more or less ethnic lines and the return of refugees therefore appeared to be problem linked to individuals' willingness to return instead of a problem that should have been solved by the national authorities. As a result, all the obstacles to the return of refugees became a human rights problem³. The machinery set up under the Dayton Agreement finally played a role in the discussion on Bosnia and Herzegovina's official accession to the Council of Europe. The US Department of State made several representations to the Council of Europe asking it not to precipitate membership, claiming that the jurisdiction of the European Court for Human Rights could be detrimental to the work of the human rights protection machinery set up by the Dayton Agreement⁴. This well-known view illustrates the United States' rather strict rejection of international mechanisms.

² Helmut Schmidt in “Die Zeit” of 3 October 1997

³ For a more detailed analysis, see Gret Haller, *The limits of Solidarity, State, Nation and Religion in Europe and the USA*.

⁴ Berlin 2002 (Italian translation: *I due Occidenti. Stato, nazione e religione in Europa e negli Stati Uniti*, Roma 2004) *Neue Zürcher Zeitung* of 15 October 1997

It has since become obvious that the application of human rights machinery in non-member States of the Council of Europe will continue to be an exception - indeed Bosnia and Herzegovina will probably be the only case -, as, meanwhile, most central and eastern European countries have become member States of the Council of Europe.

**THE DIRECT APPLICABILITY
OF HUMAN RIGHTS TREATIES
Ms Eliska WAGNEROVA**

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Introduction

More than forty years ago the American Journal of International Law observed in its Editorial Comment that “[t]he continuing practice of making reference to international law in national constitutions has not produced any one form of wording that has found general adoption.” The Comment continued with the observation that [a]fter each World War of the present century there was a wave of an effort to include in national constitutions provisions whereby the law of nations would be made a part of municipal law.”¹

This observation applies specifically to international human rights treaties. At the beginning there is the 1945 Charter of the United Nations, then the 948 UDHR, the European Convention on Human Rights and Fundamental Freedoms (ECHR) which was signed in 1950 and entered into force in 1953 and drafting the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which entered into force in 1976. These all chartered a new course and opened a new chapter in the history of political thought.

Worldwide examples show how the adoption of international human rights treaties influenced domestic constitutional charters of fundamental rights, and eventually even inspired their very adoption into domestic constitutions.

It would seem that the most important role has been played by regional instruments. A Bill of Rights based on the ECHR became a standard feature of many Western European constitutions. With the democratization of Eastern Europe and with, in the 90's, liberated states wishing to enter the mainstream of European political, economic and social activity by securing membership of the Council of Europe, the constitutional protection of human rights in that region was significantly enhanced. A comprehensive Bill of Rights is now an integral part of the constitutions of each of those states.

¹ Wilson, International Law in New National Constitutions, 58 **AJIL** 432 (1964).

The entry into force in 1978 of the American Convention on Human Rights (ACHR) also influenced constitution-making in South and Central America (see, for example, the Constitutions of Chile (1980), of Columbia (1991), of Ecuador (1984), and of Honduras (1982)).²

On the African continent, the 1981 African Charter of Human and Peoples' Rights (AfCHPR) started the decade of the restoration of democracy in several states and the adoption of new constitutions containing justiciable Bill of Rights (see, for example, the Constitutions of Angola (1980), of Benin (1990), of Congo (1992), of Ethiopia (1991), of Ghana (1990), of Morocco (1992) and of South Africa (1993)).

Many of these constitutions made specific reference to the regional instrument. For example, the preamble to the 1990 Constitution of Benin reaffirmed "our attachment to the principal of democracy and human rights as defined in the AfCHPR, whose provisions make up an integral part of this Constitution and have a value superior to the internal law." Similar provisions can be found in the preambles of some other African states' constitutions, for example those of Congo (1992), Madagascar (1992), and Niger (1992).³

The drafting and adoption of the two human rights covenants and their entry into force in 1976 led many states parties to incorporate statements of fundamental rights into their national constitutions. Among them were the member States of the old Commonwealth whose early attempts to graft a Bill of Rights into given constitutional structures had either not succeeded or had earned only limited success. Probably the most prominent example is the Canadian one.

In 1960 a Bill of Rights was enacted in the form of ordinary statute, which remained in force for more than 20 years. It was nothing more than an aid to the interpretation of statutes. Only in 1982 the Canadian Charter of Rights and Freedoms, enacted in London at the request of Canada, offered that country a very modern and far-reaching Bill of Rights.⁴

Almost all post-ICCPR constitutions now contain a statement of fundamental rights inspired by the Covenant. It was in Hong Kong where the first attempt was made to incorporate in domestic law the rights as defined in the ICCPR. The Hong Kong Bill of Rights Ordinance 1991 was a mirror image of the ICCPR. And even the People's Republic of China, which was not then a party to either Covenant, enacted a law in 1990 which was intended to serve as the constitution of Hong Kong starting on July 1, 1997, and also incorporated the provisions of the two

² N. Jayawickrama, *The Judicial Application of Rights Law – National, Regional and International Jurisprudence*, (Cambridge University Press, 2002), p. 110.

³ *Ibid.*, at 110, 111.

⁴ *Ibid.*, at 111.

Covenants into the domestic law of Hong Kong (Art. 39 of the Basic Law of the Hong Kong SAR).⁵ The Court of Final Appeal of Hong Kong has held that the effect of Art. 39 was to give the provisions of the ICCPR and ICESCR constitutional force in Hong Kong SAR.⁶

The quoted case demonstrates clearly the principle according to which it is a matter of domestic law (mostly of constitutional law) to determine, and of domestic courts (in the European space, primarily of constitutional courts) to rule on, the status of international law generally, and on the status of human rights treaties in particular, and their effects in domestic law.

We can draw partial empirically-based conclusions from what has already been said: human rights treaties have significant influence on the catalogue of human rights contained in national constitutions and, on the contrary, it follows from the very nature of human rights treaties that they are the result of reflected experience. It concerns experience that individuals have had within individual States with the executive power exercised by various political regimes. The guarantors of rights arising from human rights treaties are the State and the international community, between which there exists there a relationship of responsibility; however, in relation to both entities, it is the individual who is entitled.

I. The Legal Force of International Treaties on Human Rights in the Domestic Legal Order: Monism versus Dualism

Certain authors draw a distinction between international law and domestic (or municipal) law on the basis of the formal grounds for their validity.⁷ They infer the validity of domestic law from the will of the domestic legislature; international law applies by virtue of the legal convictions that are common to mankind. In their view, domestic law is grounded on subordination, international law on coordination.

International law should therefore regulate the conduct of the subjects of international law (States) *inter se*. Domestic law regulates the legal relations of natural and legal persons subject to it, and then only within the confines of its own legal order.

Today, this conception in its pure form does not appear to be accepted in relation to international law generally, much less can it pass muster as regards the relationship of human rights treaties to domestic law. For example, as F. Sudre said,⁸ an international norm affects individuals, if it is “individualized” and if the

⁵ *Ibid*, at 113.

⁶ Hk SAR v. Ng Kung Sin, Court of Final Appeal of the Hong Kong SAR, (2000), 1 HKC 117, as quoted in N. Jayawickrama – See Note 2, p. 114.

⁷ I. Seidl – Hohenveldern, Public International Law [from the Czech translation, *Mezinárodní právo veřejné*], 1999, Codex Bohemia, p. 113.

⁸ F. Sudre, International and European Law of Human Rights [Mezinárodní a evropské právo lidských práv], MU Brno, 1997, p. 59.

States, when adopting it, expressed the intention to grant rights to individuals under international law.⁹ The international legal norms guaranteeing human rights contained in international conventions manifestly fulfill these conditions (see below for a discussion of what I mean by human rights).

Thus human rights treaties can guarantee to individuals rights which are in conflict with domestic law. Such conflict must be resolved, and it follows from the recognition that such a conflict exists and that there is a need to resolve it, that both systems form a normative unit. On this point, it is possible to concur with the advocates of legal monism. It appears that a moderate form of monism applies in the majority of European states, as well as elsewhere (see the Introduction).

In resolving the above-indicated conflict of two legal norms in particular States, an important role is played by the resolution in those legal orders (mostly in constitutions) of the issue of what legal force is accorded to human rights treaties. From this perspective, one can discern the following four approaches to international conventions on human rights in domestic constitutions, or legal orders generally.

1. Constitutions or domestic legal order accord, in varying degrees, legal force to particular sources of international law, while naturally there is no reference to human rights treaties as a separate category. The same legal force is accorded to them as is accorded to all international agreements. It can be said that from its formal source of law is deduced the significance of the content.
2. Some constitutions refer to human rights treaties as a separate category which are accorded a different (higher) legal force than other international agreements, as well as other sources of international law. These constitutions seem to place more emphasis on the content of such treaties than on the form in the sense of a source of law.
3. The constitutional prescription on the legal force of human rights treaties is modified by constitutional court case law.
4. Some constitutions remain entirely silent on the reception of international law into the domestic legal order and the issue of the legal force of particular sources of international law, including treaties on human rights, has been resolved by judicial decision.

1. Constitutions which distinguish between human rights treaties and other Agreement can be subdivided according to the legal force which they accord to international agreements. Sometimes these constitutions categorize treaties according to their content into those whose ratification requires the assent of parliament, which then lends to them the legal force of a statute, and into those „administrative” agreements, which have the legal force of sub-statutory legal enactment. Thus, in the practice of the former Czechoslovak Socialist Republic,

⁹ Neither is this opinion unproblematic, especially bearing in mind international custom, which States do not adopt, rather they form it through their practice.

for example, the ICCPR and ICESCR were qualified as treaties whose ratification did not require the assent of Parliament, so that these treaties were merely promulgated by a regulation of the Minister of Foreign Affairs.¹⁰ The German constitutional arrangement also distinguished between treaties with the force of law and administrative agreements; naturally, however, they reached a different conclusion than did socialist Czechoslovakia as to the proper categorization of human rights treaties.¹¹

In cases where human rights treaties acquire the force of law, their domestic law validity is then tied to principles, such as *lex posterior derogat legi priori*, and *lex superior derogat legi inferiori*. These treaties are subject to review by the Constitutional Court (both from the formal and material perspectives) in the form of review of the ratification law, by which they are adopted into the domestic legal order, with the possible consequence of their being declared invalid under domestic law. However, since such treaties remains valid under international law, states which fail in this way to fulfill their international obligations arising from such treaties must amend their legal order (Constitution).¹²

Under this model, human rights treaties have the force of law, and for this reason they cannot serve as referential grounds for the constitutional court. This is the case for the Federal Republic of Germany, as was demonstrated by the decision of the Second Senate of the Federal Constitutional Court (BVerfG) of 14 October 2004 (2BvR 1481/2004). Among other things, it stated in the decision that the federal legislature adopted the ECHR by an act in the form of a statute pursuant to Art. 59 para. 2 of the Basic Law (Constitution), by Act of 7 August 1952, BGBl. II, p. 685. The Constitutional Court had already in an earlier decision declared that the ECHR has within the German legal order the status of a federal statute.¹³ The Constitutional Court deduced that ordinary courts must observe and apply the ECHR in the same way as other federal statutory law, moreover by means of a “methodologically defensible interpretation”. The Constitutional Court stated that, in consequence of their incorporation into the hierarchy of norms, the guarantees afforded by the ECHR (including its protocols) are not, in the German legal order, direct constitutional referential norms for the Constitutional Court. It further explicitly stated that, for this reason, a complainant cannot (successfully) directly invoke in a constitutional complaint before the Constitutional Court the infringement of human rights contained in the ECHR. It made reference to its older and more recent case law and to scholarly literature.¹⁴

¹⁰ Article 42 of the then valid Constitution provided, among other things, that Parliament must give its assent to treaties of a political and of a general economic nature and to treaties, the execution of which requires a statute.

¹¹ See Art. 59 para. 2 of the Basic Law.

¹² See Note No. 7, p. 59, where the author cites the decisions of the Austrian Constitutional Court of 20 February 1952 and of 14 October 1961. The 27 April 2005 decision of the Polish Constitutional Court on the European Arrest Warrant perhaps also belongs in this group.

¹³ BVerfGE 74, 358 (370); 106 (120).

¹⁴ See point 32 of the analyzed decision.

Nevertheless, the Constitutional Court hastened to add that the guarantees of the ECHR influence the interpretation of the basic rights and the constitutional principles flowing from the domestic Basic Law. Both the text of the ECHR and the case law of the European Court of Human Rights serves, on the constitutional level, as an interpretive guideline for determining the content and the extent of impact of basic rights and public law principles contained in the Basic Law. Of course, it functions this way under the condition that such an approach does not result in the restriction or decrease in the protection of the basic rights under the Basic Law, an eventuality which the ECHR itself also excludes.

This judgment further adduces arguments on the Basic Law's openness towards international law (*Völkerrechtsfreundlichkeit*) and on the compatibility of the constitutional directive of state sovereignty with the Federal Republic's international law obligations. It concludes that the interpretation of the Basic Law as a whole leads to the conclusion that the Federal Republic of Germany is aiming to incorporate into the community of states as a peaceful member having equal rights in a system of public international law serving peace (point 33 of the mentioned decision).

Nonetheless, it is further asserted in the decision that, on the domestic level, the law of international agreements [apparently including human rights treaties as the given case concerned the ECHR – author's note] is not to be treated as directly applicable law, that is, without a statute subject to the consent of the German parliament under Article 59.2 of the Basic Law and is also not endowed with the status of constitutional law (point 34 of the decision).

In a further part of the decision, the Constitutional Court interprets the Basic Law such that it does not seek submission to non-German sovereign acts if such self-subordination would be removed from every constitutional limit and control. Therefore, the law of international agreements (all) applies on the domestic level only if it has been incorporated into the domestic legal system in the proper form and in conformity with substantive constitutional law (point 36 of the decision).

In the Constitutional Court's view, it is not in contradiction with the Basic Law's openness towards international law, if the legislative body, exceptionally, does not comply with the law of international agreements [evidently all, including human rights treaties – author's note], if that is the only way to avert a violation of fundamental principles of the Basic Law (point 35 of the decision).

It is clear from what has been stated above that for the Constitutional Court the formal legal force of international agreements is the starting point for considerations of applicability (although, in its reasoning, the Constitutional Court ties it in with further substantive, structural, and organizational constitutional principles); for the Constitutional Court the content of the treaty is not decisive for its direct applicability.

If we continue with our assessment of the ECHR's status in domestic law on the basis of the constitutional text, in Austria the ECHR had the status of an ordinary law at the time it was published in the Federal Law Gazette BGBl. 210/1958. It was accepted as such by the Austrian Constitutional Court since it had not

explicitly been referred to as amending the Constitution on the occasion of its sanction by the National Council (Nationalrat). It was only afterwards, in 1964, when the Constituent Assembly, by virtue of the 3 March 1964 Constitutional Act, accorded the ECHR constitutional status, that the ECHR was incorporated into domestic law at the constitutional level, with the consequences of heightened legal force.

If we compare the German and Austrian approaches not solely from the formal perspective, we would be justified in asking whether, despite formal openness to international law, the protection of human rights flowing from the ECHR is ascertained in Austria equally intensively as in the Federal Republic. The justification for such question follows from the Austrian reserve in relation to the doctrine of the substantive law-based state which, in contrast, is undisputably accepted in the Federal Republic. It also should not be overlooked that in Austria constitutional complaints cannot be filed against the decisions of ordinary courts, which is in sharp contrast to the broadly conceived constitutional complaint in the Federal Republic.¹⁵

Re 2) From its adoption (16 December 1992) until the revision effected by the „Euro-Amendment” on 1 June 2002, the Czech Constitution belonged to this type. In its original wording, Art. 10 provided that international conventions concerning human rights and fundamental freedoms which have been duly ratified and promulgated and by which the Czech Republic is bound are directly applicable and take precedence over statutes.

Human rights treaties were thus accorded a legal force higher than statutes; however, this provision did not resolve the issue of whether they had the same legal force as the Constitution, and the Constitutional Court never expressed an opinion on this point. It should be added, however, that the Constitution provided that these treaties were referential norms for the Constitutional Court (Art. 87 para. 1, lit. a) of the Constitution in the previous wording).

Still the Constitution did not explicitly designate who should determine, in concrete cases, whether or not an international agreement qualified as a human rights treaty. Since, however, Art. 39 para. 4 provided that the consent of three-fifths of all Deputies and three-fifths of all Senators present is required in order to adopt a constitutional act or to approve an international treaty under Article 10, it was evident that Parliament would in the future decide which international agreements should be considered a human rights treaty (naturally on the motion of the executive, not of the Constitutional Court).

The problem consists in the fact that not only treaties, such as the ECHR, which were undisputably human rights treaties, but also a greater and greater number of treaties such as, for example, the ICESCR were received into the domestic legal

¹⁵ In 1992 Austria adopted the „Basic Rights Complaint Act” [„Grundrechtsbeschwerdegesetz”] (BGBl. 1992/864), pursuant to which a person whose personal liberty has been infringed by means of a criminal judgment can submit a complaint of the violation of a basic right, and jurisdiction to hear such complaints is vested in the Austrian Supreme Court. This procedure cannot be used to seek protection of other basic rights.

order prior to the adoption of the Constitution. Thus, none of these treaties was subject to the formal procedure laid down in the Constitution. And since no other constitutional provision made reference to their classification, it was up to the Constitutional Court itself to determine what position it would take on them.

The Constitutional Court faced the indicated problem in a manner which shows signs partly of pragmatism and partly of undifferentiation. Pragmatism can be seen in the fact that, in its decision-making, the Court took as referential norms those provisions of international conventions, such as the ECHR and ICCPR, which undoubtedly guarantee human rights, yet without further reasoning as to why they were so used.¹⁶ Certain Constitutional Court decisions are distinguished by undifferentiation in that they take, as their referential criteria, even conventions on economic, social and cultural rights. That is, without further reasoning, the Court takes these rights to be human rights¹⁷ which, without more, the Constitutional Court considered as capable of coming into conflict with rights about which there is no doubt that they are human rights.¹⁸

It was not until the 14 March 2001 decision on a constitutional complaint (II. ÚS 304/98) that an attempt was made at least partially to cope with this problem. At the same time, however, it did not attempt to resolve the issue of whether the right under Art. 6 para. 1 of the ICESCR is indeed a human right. On the contrary, without more detailed reasoning, it simply declared the entire covenant to be a human rights treaty:

The Covenant on Economic Social and Cultural Rights ranks among the duly ratified and promulgated (No. 120/1976 Sb.) treaties on human rights and fundamental freedoms in the sense of Art. 10 of the Constitution of the Czech Republic (as the Constitutional Court also established, for example, in its decision, No. Pl. ÚS 35/93). In addition, its direct applicability and precedence over statutes follows therefrom. However, the “direct applicability” of an international agreement, which expresses the fact of its reception (incorporation) into Czech law, must be distinguished from the “direct effect” of that agreement’s individual

¹⁶ There are a large number of such decisions. I am citing examples of those decisions which are translated into English and accessible on the website of the Constitutional Court of the Czech Republic, www.concourt.cz, IV. ÚS 215/94 – Art. 6 ECHR, IV. ÚS 81/95 – Art. 4 para. 1 of the Seventh Protocol to the ECHR, IV. ÚS 98/97 – Art. 7, para. 2 ECHR.

¹⁷ For example, Judgment No. Pl. ÚS 3/2000 of 21 June 2000, which concerns Art. 16 of the European Social Charter. It is of interest that in the case of the European Social Charter, the Parliament refused to qualify it as a human rights treaty, that is, it gave its assent to it as it would to any ordinary international agreement. The Constitutional Court nevertheless treated it as a human rights treaty, as is clear from this judgment.

¹⁸ In my dissenting opinion to Judgment Pl. ÚS 16/04 of 4 May 2005, I expressed my views on the issue of the capacity of classical fundamental rights and of social rights (even if on the level of rights guaranteed by the domestic bill of rights) to stand in competition with each other. I concluded that social rights are not entirely capable of being referential norms in the case of abstract norm control, as they require a statute for their implementation, as is envisioned by the Czech Charter of Fundamental Rights and Basic Freedoms itself. That means that the ordinary legislature determines the content of those rights.

provisions in domestic legal relations. Not all provisions of international conventions under Art. 10 of the Constitution are also “directly effective”, rather only those which are appropriate and capable of being directly effective.

Article 6 para. 1 of the Pact provides that “The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.” The cited provision does not expressly introduce the right to engage in business, but that can clearly be deduced from a broadly conceived “right to work” and “right to gain one’s living by work” in its text. Art. 6 para. 1 of the Covenant does not contain directly effective provisions. It is addressed to the States Parties, and it speaks of “appropriate steps to safeguard this right”. Moreover Art. 6 para. 2 lays down examples of measures “to achieve the full realization of this right”. The right to engage in business, such as it is implicitly protected by the Covenant, is thus of an essentially programmatic character. It allows for variable content in the legislation in individual States Parties, as well as for the dynamic evolution of such content in the States Parties dependent on the dynamics of national economic and social development and in dependence on the actual needs to protect other economic and social rights. In other words, the Covenant does not guarantee the right to engage in business in a single, absolute and immutable form; on the contrary, it presupposes a concrete statutory framework for the protection thereof and the variability (dynamics) of such legislative measures, under the condition that its aim is “to achieve the full realization of this right”.

However valuable is the attempt to distinguish between self-executing (directly effective) and non-self-executing legal norms contained in international agreements, the issue of whether the ICESCR concerns human rights was not substantively argued. It was as if, in this regard, the Czech Constitutional Court tacitly accepted and followed at the line of the doctrines, cultivated in the former Czechoslovak Socialist Republic and in the entire Soviet Bloc, of three generations of rights, where doctrinal thinking on classic human rights was entirely lacking, and to a certain extent is still lacking even today.¹⁹ It is also quite evident that the European legal academia as a whole does not accept that economic, social and cultural rights are human rights, much less that human rights should be divided into generations;²⁰ on the contrary, it appears that this dissenting and critical approach has been gaining force in recent years.

¹⁹ Coincidentally it is K. Vasak, who is of Czech origin, who is credited with authorship of the concept of separating right into so-called generations. See K. Vasak, A 30 Year Struggle, in UNESCO-Courier 18 No. 1 (1977).

²⁰ Of all critics, for example např. K. Stern, The Concept of Human Rights - and Basic Rights, in The Handbook of Basic Rights in Germany and Europe [Die Idee der Menschen –und Grundrechte, in Handbuch der Grundrechte in Deutschland und Europa], p. 32 and following, or from other critical perspectives, K. Terraya, Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights, EJIL (2001), Vol. 12, No. 5, p. 924 and following. See also, Opinion of the Venice Commission No. 342/2005 [CDL(2005)077], point no. 17.

Otherwise the question of whether a certain right is self-executing can be posed even in relation to human rights contained in international conventions other than those of the second and third generation. In this respect, procedural rights are typically mentioned in the literature (for example, the right to appeal in criminal matters contained in Art. 2 of the 7th Protocol to the ECHR and in Art. 14 para. 5 of the ICCPR), if an institutional mechanism for ensuring such rights is lacking in domestic law.²¹ Certain authors see a further reason for denying direct applicability of the procedural rights contained in international human rights treaties in cases where the application of the human rights treaty results in domestic provisions being eliminated from the legal order (i.e. annulled in a norm control proceeding) due to their conflict with the human rights treaty.²² These authors base their views on the idea that, the elimination of a legal norm from the legal order due to its (often even only partial) conflict with human rights treaties, creates a situation that is even less favorable for the bearers of the human right in question, i.e. the individual. In their view, therefore, such an extensive interpretation of the former Art. 10 of the Constitution is flawed. They assert that if a certain provision of a human rights treaty is not self-executing, such provision cannot establish jurisdiction in any court to derogate from domestic law and, in any case, its applicational precedence cannot be realized in fact.

These indignant reactions were called forth by the Constitutional Court's Judgment No. Pl. ÚS 16/99 of 27 June 2001, in which the Court annulled the entire portion of the procedural code regulating the judicial review of administrative decisions. The Court decided to annul it due to the fact that this statute's provisions did not allow for the full review of administrative decisions; therefore, the Court came to the conclusion that these provisions were in conflict with Art. 6 para. 1 of the ECHR. Naturally, it delayed for 18 months this judgment's entry into effect (it was the longest such period of postponement in the Czech Constitutional Court's history) and thus afforded the government and Parliament ample time to take steps to cure the problem.

What follows from this is that it might be problematic merely to confer higher legal force on human rights treaties, unless further issues are resolved. In particular, it is necessary to resolve the issue of who or which body, and according

²¹ The Italian Constitutional Court's decision of 6 February 1979 can serve as an example. The Court, which had jurisdiction in the matter pursuant to a special statute on criminal proceedings on the bribery of ministers of the Italian government, concluded that Art. 14 para. 5 of the ECCPR, which guarantees the right to an appeal in criminal proceedings, could not be directly applied. The reason the Court did not consider this right as self-executing was the fact that there was no appellate instance that is authorized to review Constitutional Court decisions. It should not be the task of the judiciary to establish such an instance, rather it is the task of the legislature. The decision is cited in Z. Kühn, The Self-Executing Nature, Direct Applicability and Certain Theoretical Issues of the Application of International Agreements in Domestic Law, Lawyer [Samovykonateľnosť, priama účinnosť a niektoré teoretické otázky aplikácie mezinárodných smluv ve vnitrostátním právu, Právnik] No. 5/2004, p. 483.

²² *Ibid.*, at 485 and further Z. Kühn and J. Kysela, Is the Constitutional Always that which the Constitutional Court Says that it is? Journal of Legal Science and Practice [Je ústavou vždy to, co ÚS řekne, že Ústava je?, Časopis pro právní vědu a praxi], Issue No. 10 of 2002, p. 212 and following.

to which criteria, should determine if a treaty is a human rights treaty; it is equally necessary to create an acceptable doctrine of self-executing rights from human rights treaties.

3. This type of approach to human rights treaties can be clarified only through examples. Therefore I will attempt to outline the Czech example, with which I am naturally most familiar. With the adoption of the „Euro-Amendment”, referred to above, normatively there ceased to exist a separate category of „human rights treaties” which are endowed with a legal force higher than that of statutes. Article 10 of the Czech Constitution now reads:

Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.

From the formal perspective, human rights treaties also ceased to qualify as referential norms for the Constitutional Court. Also Art. 87 para. 1, lit. a) of the Constitution was modified.²³ This resulted in a constitutional situation which formally is analogous to that which presently applies, for example, in the FRG; the reality is entirely different, however. The ordinary courts, which are obliged to apply any international agreement (i.e. including a human rights treaty) in preference to statutes when they come into conflict, do so only quite exceptionally. On the other hand, the issue of a possible conflict between a human rights treaty and the Czech Constitution has as yet not been resolved. The case law discussed below well illustrates how the Constitutional Court has reacted to what is *prima facie* a normatively quite altered situation.

Its initial reaction was in a proceeding on abstract norm control on 25 June 2002 (Pl. ÚS 36/01) as follows:

The impermissibility of changes to the essential requirements of a democratic state governed by the rule of law [Art. 9 para. 2 of the Constitution] contains a directive for the Constitutional Court as well, by the terms of which no amendment to the Constitution may be interpreted in a sense, in consequence of which the already achieved procedural level for the protection of fundamental rights and basic freedoms would be restricted. . . . The constitutional enshrinement of the general incorporating norm, and thus the overcoming of the dualist conception of the relationship between international and domestic law, cannot be interpreted in the

²³ Paradoxically and quite disconnectedly, the Constitutional Court was at the same time endowed with a new competence, that of hearing petitions for rehearing, which was introduced by amendment to the Act on the Constitutional Court. § 119 para. 1 of that Act provides: Should the Constitutional Court have decided in a criminal matter in which an international court found that, as the result of the encroachment of a public authority, a human right or fundamental freedom was infringed in conflict with an international treaty, a petition for rehearing may be submitted against such decision of the Constitutional Court under the conditions set down in this Statute.

The Constitutional Court should, thus, open the road to the revision of its own decisions, in the case they resulted in an infringement of human rights guaranteed by human rights treaties, which, however, should allegedly not have been taken into consideration as a referential norm in the original decision on the constitutional complaints.

sense that it removed the referential point of view provided by ratified and promulgated treaties on human rights and fundamental freedoms for the Constitutional Court's assessment, with derogational effects, of domestic law. . . . For this reason the extent of the concept, constitutional order, cannot be interpreted solely with regard to Art. 112 para. 1 of the Constitution, rather also in view of Art. 1 para. 2 of the Constitution, and to include within its confines also ratified and promulgated international treaties on human rights and fundamental freedoms.

The Constitutional Court's approach was heavily criticized in the Czech legal academia.²⁴ The head of the Department of Constitutional Law at the Charles University Law Faculty wrote that the Constitutional Court lacks respect for the law and the constitutional text, for the legislature and the Constituent Assembly. He criticized the Constitutional Court that it misappropriated to itself the role of Constituent Assembly. „Despite the unambiguous intention of the Parliament to consider all international agreements in domestic law as having the same legal force and thus to abolish the special significance of human rights treaties, the Constitutional Court designated that precisely these treaties are a component of the constitutional order under Art. 112 of the Constitution, without Art. 112, which exhaustively defines the content of this concept, giving it any sort of authority to do so.”²⁵

In its decision of 15 April 2003 (I. ÚS 752/02), the Czech Constitutional Court expressed its views on the conflict of obligations flowing from different treaties, concluding that precedence must be accorded to treaties on human rights. That decision was issued in a proceeding on a constitutional complaint in which the Court reviewed whether the complainant's basic rights had been violated in a proceeding seeking his extradition. Among other things, it stated the following:

In the complainant's case, two international obligations of the Czech Republic stand in conflict. On one side is the obligation of the Czech Republic, as a party to the European Convention on Extradition (no. 549/1992 Coll.), in which it agreed to extradite all persons who are being prosecuted for a crime by the appropriate bodies of the applying party (Art. 1). On the other hand, the Czech Republic is also bound by the cited international agreements on human rights and fundamental freedoms. The Constitutional Court here states that in such a case it is appropriate to give priority to obligations from the agreements on the protection of human

²⁴ The massive amount and indignant nature of the criticisms is attested to by the titles of certain articles, for example, Judgment No. 403, like a Gauntlet Thrown Down by the Constitutional Court to the Constituent Assembly, or the title of the article cited in Note 22.

²⁵ V. Pavlíček, The Sovereignty of Statutory Law in the EU, in *Statutes in Continental Law [Svrchovanost zákona v EU, in Zákon v kontinentálním právu]* (ed. A. Gerloch, and P. Maršálek, Eurolex Bohemia, Prague, 2005). Otherwise this very author often in his writings defends the primacy of statutes in the sense that they are the product of the will of a democratically elected legislature. In other words, from his writings the antagonistic perception of democracy on the one hand and liberalism (in the sense of human rights) on the other is quite evident. Apart from positivism in the sense of intensive textualism, as well as in the sense of excessive formalism, this aspect as well are phenomena well known not only in the Czech Republic, but perhaps in other post-Communist States as well. This reality also has to be taken into account as well when considering the direct applicability of human rights treaties.

rights. The priority of the obligations from agreements on the protection of human rights, in the event of conflict between obligations under international agreements, arises primarily from the content of these agreements, in connection with Art. 1 para. 1 of the Constitution, under which the Czech Republic is a state governed by the rule of law. The respect and protection of fundamental rights are defining elements of the substantively understood state governed by the rule of law; therefore, in a case where a conventional obligation protecting a fundamental right exists side by side with a conventional obligation which tends to endanger that same right, the first obligation must prevail. Although after amendment of the Constitution (Constitutional Act No. 395/2001 Coll.) agreements on the protection of human rights no longer form an independent category of legal norms with priority in application under the previous wording of Art. 10, nonetheless they are a special group of norms, and at the same time represent a reference point of view, both for the abstract review of norms under Art. 87 para. 1 of the Constitution, and for proceedings on constitutional complaints. In this respect the Constitutional Court does not agree with the opinion of the Minister of Justice, indicated by his statement on the constitutional complaint. The Constitutional Court holds the opinion expressed in the judgment, the legal conclusion of which the Minister of Justice disagrees with, that no amendment of the Constitution can be interpreted to the effect that it would result in restricting an already attained level of procedural protection of fundamental rights and freedoms (Pl. ÚS 36/01, published under no. 403/2002 Coll.). The scope of the concept of constitutional order therefore cannot be interpreted only with regard to Art. 112 para. 1 of the Constitution, but in view of Art. 1 para. 1 and 2 of the Constitution, it is necessary to include in it ratified and promulgated international agreements on human rights and fundamental freedoms, for the reasons given above.

The fact remains that, even following amendment to the Constitution, the Constitutional Court still does not draw any distinction between self-executing and non self-executing rights, and has not even resolved, in a decision of principle, the issue of what human rights are. In a proceeding on abstract norm control, held on 5 February 2003 (Pl. ÚS 34/02), the Constitutional Court issued a quite problematic judgment in which it stated that the Charter of Local Autonomy, even though it is not directly applicable, is a genuine international agreement which binds the contracting parties. On the strength of a broad conception of the constitutional order (Art. 112 para. 1 in conjunction with Art. 1 para. 2, as amended), which is open to international law, the Constitutional Court is authorized to adjudge whether Czech statutes are in conformity with the Charter. Neither the framework character of the Charter, nor the special character of the collective rights contained therein hinders its use as a benchmark for the abstract control of the constitutionality of statutes.

This judgment is also problematic due to the fact that, although it makes reference to the above-cited judgment of 25 June 2002 (Pl. ÚS 36/01), it goes beyond the objective expressed therein, which is to maintain the level of rights achieved. Of course, it is difficult to speak of a level of rights that has been achieved in respect of an international convention which provides for obligations for the State alone, and solely in the form of a goal which is meant to be attained progressively.

It follows from what has been said above that the approach whereby Constitutional Court jurisprudence (case law) provides a corrective to the normative text, even if very accommodating to international treaty law, can be very problematic, unless this jurisprudence is structured in the sense meant in the conclusion stated at the close of point 3.

Re 4) It can be said that where neither the Constitution nor the legal order contains any normative prescription concerning international law, that is, naturally it does not resolve even the issue of the legal force in the domestic legal order, it becomes a matter for judicial decision-making

Thus, for example, the legal order of the State of Israel does not resolve the issue of the incorporation of international law into the domestic legal system. However, in one of the early decisions of the Israeli Supreme Court,²⁶ that court adopted a broadly monistic approach which could be interpreted to the effect that all international legal norms are incorporated without any further distinction (that is, without regard to their content, also without regard to the source of international law in which they are contained). In substantiating its authority to apply international law, the court based its reasoning on the absolute independence of the State of Israel. By achieving that independence, the new State had also acquired that access to international law and customs which all states enjoy by virtue of their sovereignty, and enriched its legal system by the accepted principles of the law of nations. In reality, this decision solved the applicability of customary norms. A month after the Stampfer decision, the Supreme Court clarified its position on the applicability of international law in the Samra case.²⁷ This politically very delicate case, regarding Arab villages which came under the jurisdiction of Israel on the basis of an international treaty (Israeli-Jordanian General Armistice Agreement), concerned the applicability of international treaties. In rejecting this claim the Court adopted the common law approach that treated only customary law, and not international treaties, as binding law. The Armistice Agreement, being a treaty, could not be invoked in Israeli courts. And this fundamental distinction between customs and treaties is still the law today.

The rationale of this distinction is found in the separation of powers doctrine. Since in Israel the government is empowered to conclude and ratify treaties, the claim goes, the automatic incorporation of treaties would mean granting the government the power to introduce norms into the Israeli system, thereby bypassing the legislature. In criticizing the validity of this argument, it has been noted that the same line of thought should have required the court to disregard customary law, which is also the outcome of governmental action or inaction.

²⁶ Stampfer v. Attorney General, 23 ILR 284, 289, as quoted in E. Benvenisti, *Judicial Misgivings Regarding the Application of the International Law: An Analysis of Attitudes of National Courts*, in: *EJIL*, Vol. 4 (1993), No. 2, pp. 159 – 183.

²⁷ *Custodian of Absent Property v. Samra*, at al., 10, *Judgments* 1825 (1956), 22 ILR 5, cited as in note 26.

Since only customary international law may be invoked before the Israeli courts, a crucial issue is what evidence is required in order to establish the existence of such a custom. In two cases that related to the issues of statelessness and freedom of religion²⁸, the Supreme Court took a rather broad interpretation of international custom, and drew within its ambit multilateral agreements such as CCPR and declaration like UDHR.

In the Abu Aita case²⁹ the Supreme Court stated: “From the nature of the matter, customary international law refers to accepted behaviour which has merited the status of binding law: General practice, which means a fixed mode of action, general and persisting, which has been accepted by the vast majority of those who function in the said area of law. The burden of proving its existence and status is borne by the party propounding its existence. The views of an ordinary majority of states are not sufficient, the custom must have been accepted by an overwhelming majority at least.”

Under this model, heightened responsibility is placed on the courts to resolve conflicts between the observance of the standards of international law (especially those of human rights guaranteed by international conventions) and the interests of the State's citizens, including their interest in basic safety. It is open to question whether this model is the most appropriate.

I. Horizontal Effect of Fundamental Rights

An issue that must also be taken into account in this context is the extent of the scope of application of fundamental rights. To what area of the law and what types of relationships do they extend? The traditional approach is that they function solely as safeguards of individual autonomy vis-à-vis the state, so that they apply only to public law and relationships involving an individual and the State. This type of application is referred to as the vertical effect of fundamental rights. More recently there has been a trend toward extending the reach of the fundamental rights further, to include the private law sphere of relations between individuals. This extension is referred to as the horizontal effect of fundamental rights.

This trend poses the question - to what extent can individual conduct be seen as subject to the prohibitions of the fundamental rights? If one views the fundamental rights as sacred, as representing the most important values of society, it might seem deceptively simple to respond that relations in that field are equally subject to the fundamental rights. But such an approach is seen as raising the danger of undermining the individual autonomy which it is the function of fundamental rights to protect. The pure form of this approach is generally rejected

²⁸ Curtz and Latushinski v. Kirschen, 21 (2) Judgments 20 (1967), 47 ILR 212; The American European Beth-L Mission v. Minister of public Welfare et al., 21 (2) Judgements 325 (1967), 47 ILR 205, cited as in note 26.

²⁹ Abu Aita et al., v. Commander of the Judea and Samaria Region et al., 37 (2) Judgments 197, at 238-239, cited as in note 26.

due to the clear adverse consequences to individual autonomy – e.g., it would allow individuals to be sued for discrimination if they do not treat all others equally, clearly an unacceptable outcome as it would involve the infringement of other fundamental rights, inter alia, the freedom of association and the right of privacy and family life.

The horizontal effect problem arises whether we are dealing with the application of fundamental rights in a constitutional charter or whether in applying an international human rights treaty. In fact, much depends on the legal doctrine concerning fundamental rights in particular states; to the extent it accords a horizontal effect to them, it tends to extend the same effect to treaties on human rights. Naturally, the latter instance is exclusive for countries where such treaties have a status greater than law or even constitutional status (e.g., Austria and, according to some views, the Netherlands). About the only instance in which this horizontal effect problem issue does not arise is in countries which do not have a charter of fundamental rights and do not directly apply treaties, although the instances of that are shrinking all the time. The prototype of this case was the U.K., but the adoption of the Human Rights Act 1998 has changed the situation there considerably, as the voluminous literature on this development demonstrates [see, for example, Hunt, M., *The 'Horizontal Effect' of the Human Rights Act*, Public Law 1998, 423; Buxton, R., *the Human Rights Act and Private Law*, 116 *Law Quarterly Review* 48 (2000); Markesinis, B., *Privacy, Freedom of Expression, and the Horizontal Effect of the Human rights Bill: Lessons from Germany*, 115 *Law Quarterly Review* 47 (1999) (making a comparison with the situation in Germany)].

There are various approaches to this problem. The first is the traditional approach, to restrict the effect of fundamental rights strictly to public law. This is still the generally accepted approach, but gradually is losing ground. The other extreme is the total horizontal effect – to acknowledge that fundamental rights can be applied directly against individuals, i.e., that one individual can sue another for violation, for example, of freedom of expression. The only clear example of a country where such a horizontal effect is found is Ireland, where the courts have developed constitutional torts [see, e.g., *Lovett v. Gogan*, [1995] I.L.R.M 12, (in which the Irish court found that the plaintiff's fundamental right to earn a living could be asserted directly against a competitor who was operating without a license)]. One would expect, however, that even while recognizing the possibility for individuals to sue each other for violation of a fundamental right, there are still limitations inherent in the nature of the right in question (e.g., the right to judicial protection would seem to apply only vis-à-vis the State) and the countervailing fundamental right interests of the individual against whom a particular fundamental right is asserted (however, in the above-mentioned Irish case, the defendant's corresponding right to earn a living appeared not to be upheld).

The general approach of states that do accord a horizontal effect to fundamental rights is to moderate it by according only a "indirect" effect to them. In other words, an individual cannot sue another individual directly for violation of fundamental rights, but the fundamental rights can "influence" private law in other ways. In particular, in private law litigation the fundamental rights must be taken into account as basic values when interpreting the meaning and scope of private

law provisions. In continental law countries, such as Germany and the Czech Republic, this can occur in the context of abstract norm control by means of a constitutionally conforming interpretation of a particular private law provision [see, e.g., judgment of the Czech Constitutional Court, Pl. ÚS 41/02, published in the Bulletin on Constitutional Case Law of the Venice Commission, Vol. 2004/1]. More commonly such “influence” occurs in the context of constitutional complaint proceedings, where ordinary courts are faulted for not sufficiently taking into account the impact of fundamental rights on private law [this type of “indirect” horizontal effect can be traced back to the 1958 Lueth Case before the German Federal Constitutional Court, 7 VBerfGE 198 (1958), and has been consistently reaffirmed, recently, for example in a 2001 case on family law issues (German Law Journal, Vol. 2, No. 6, 1 April 2001)]. In common law countries (other than Ireland, of course) the issue arises most often in the context of the judicial development of common law. The traditional power of courts gradually to develop the common law to keep up with societal values includes the duty to take into account the values inherent in fundamental rights when considering changes to common law rules.

II. Concluding remarks

As was stated in the introduction, human rights treaties have constituted a source of inspiration for national constitutional catalogues of human rights. In connection therewith, at times (sometimes later), constitutions began to resolve the issue of the direct domestic law effects of international treaties, including human rights treaties. At this level, contemplations on human rights treaties play out only from the position of their external expression in the form of sources of law. Of course, this is a purely positivistic way of approaching the issue, and the response to questions raised in the context of this approach are necessarily limited by positivism itself. At the same time, it is quite evident that the field of human rights is concerned primarily with the effective protection of those rights, and the formally conceived issue of sources, in which these rights are merely declared, appear rather as subsidiary. It seems that the issue of the direct applicability of human rights, regardless of the source in which they are contained, is an issue more closely connected with the domestic tradition of the approach to the interpretation of law than with formal constitutional directives. And it is clear that especially the Central European region especially has been deeply afflicted by legal positivism (quite often in the form of normativism), which prefers to devote attention to the formal sources and the relations between them, rather than devoting attention to the content of human rights.

As is stated in the preceding text, however, the domestic applicability of human rights treaties can take on a large number of forms, which in and of themselves (and not viewed formally) indicate nothing about the level of human rights protection in the particular state. This aspect of the issue must be borne in mind as well when further consideration is given to the topic discussed at this conference.

**THE STATUS OF INTERNATIONAL TREATIES ON HUMAN RIGHTS
AND THEIR INFLUENCE ON NATIONAL LEGISLATION
AND PRACTICE IN GEORGIA
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I Introduction

The Constitution of Georgia of 1995 has introduced a number of innovations into the Georgian legal system. Among these changes is the determination of the role of international treaties in the national legislation. The Constitution has determined that international treaties, to which Georgia is a party, become part of national legislation and are, therefore a source of national law, which natural and legal persons may directly invoke before national institutions, including courts, to protect their rights and interests. International treaties are granted a higher legal status than Georgian laws (except for the Constitution and the Constitutional Agreement). At the time of the adoption of the Constitution, this was regarded, on the one hand, as a significant innovation which, it was hoped, would have a positive influence on the national legislation and judicial practice and, on the other hand, a demonstration of the respect by a newly independent country of international law and universal values.

Although the legislation established a solid basis for the application of international treaties at the national level, their application by state institutions, including courts, remains relatively sporadic.

This article analyses the reasons for the sporadic application of international treaties by Georgian courts, examines the factors hindering the application of these treaties by the courts and considers measures to be adopted in order to establish the practice of applying international treaties at the national level.

The Georgian legislation governs the status of international treaties in the national legislation without making any distinction between human rights and other treaties. Since the influence of human rights treaties are particularly significant, this article will focus on them, paying particular attention to the European Convention on Human Rights (hereinafter "the Convention"). Since the legal status of the Convention in Georgia is no different to that of any other international treaties, many of the opinions, critical remarks or conclusions expressed with regard to the application of this Convention, are equally applicable to other international treaties.

While this article will focus on the Georgian experience, it argues that this experience is not a unique one and that a number of Central and Eastern European

states share the same experience in establishing the practice of the direct application of international treaties on human rights at the national level. Therefore, many conclusions drawn on the Georgian situation may be extended to a number of Central and Eastern European states.

II. Legal Force of International Treaties on Human Rights in Georgian Legislation

Although neither international law in general nor the Convention in particular obliges states to recognise the Convention as part of their national legislation, all States Parties to the Convention have done so. States have approached this in various forms: some have automatically incorporated the Convention into their national law, others needed to pass appropriate national measures in order to do so.¹

Georgia has recognised the Convention as part of its national legislations, as have other European states. In Georgia, the rights and freedoms provided in the Convention may be invoked by natural and legal persons before the courts or administrative bodies.

The legal status of international treaties in the legislation of Georgia is determined by several legal acts:²

a) Paragraph 2 of Article 6 of the Constitution, an *“international treaty or agreement of Georgia, if it does not contradict the Constitution of Georgia or the Constitutional Agreement, has superior legal force over domestic legislation”*;

b) the Law on Normative Acts refers to Article 6 of the Constitution with regard to the status of an international treaty in the Georgian legal system. Under Article 4 of the Law, an international treaty to which Georgia is a party, is a law of Georgia;³

c) the Law on International Treaties is of particular significance. Paragraph 1 of Article 6 of the Law states that *“an international treaty to which Georgia is a party, forms an inseparable part of the Georgian legislation”*.

Being recognised as part of legislation, an international treaty to which Georgia is a party such as the Convention, does not lose its link with international law. An international treaty remains a source of international law. It continues to operate at

¹ J. Polakiewicz, The Status of the Convention in National Law, in: Fundamental Rights in Europe: The European Convention of Human Rights and its Member States (1950-2000), R. Blackburn & J. Polakiewicz (Eds.), 2001, 36.

² K. Korkelia, The Role of the Court in Applying International Treaties, An Individual and the Constitution, N1, 1998, 103.

³ 29 October, 1996. See Articles 1 and 19.

the international level and gives rise to international obligations. These obligations are not only on an international level, but also on a national level, as laws of Georgia.⁴

Therefore, Georgian legislation clearly determines the legal status of international treaties among its laws. International treaties of Georgia, including the Convention have higher legal status than domestic legislation, except for the Constitution and the Constitutional Agreement.

While legislation clearly determines the legal status of international treaties among the laws of Georgia, in practice the courts and administrative bodies may encounter difficulties relating to legal conflicts between an international treaty and domestic legislation. The prevention of legal conflict relating to an international treaty is particularly difficult. An international treaty, although it becomes a law of the state, remains a part of international law. Since the rules on the operation and termination of international treaties are governed by both national law and international law, Georgian courts and administrative bodies should meet the requirements set by both national law and international law alike.

The likelihood of a legal conflict between the Constitution and the Convention is small because the standards of the Convention were taken into consideration at the time of the drafting of the Constitution.⁵ This is confirmed by various provisions of the Constitution, including para 3 of Article 22 and para 4, Article 24 the wordings of which are almost identical to those of the Convention.

However, it would be unrealistic to exclude the possibility of a legal conflict between the Constitution and the Convention. A court may find a conflict between the Constitution and the Convention in examining a specific judicial case.

Under Georgian legislation, if a general court during the examination of a specific case, concludes that there is sufficient ground to find that the Convention may be regarded as incompatible with the Constitution, it should discontinue examining the case and apply to the Constitutional Court, which is competent to determine the constitutionality of international treaties. The Constitutional Court, in such a case, may determine whether or not the Convention is compatible with the Constitution.

If the Constitutional Court finds that the Convention is compatible with the Constitution, the doubt expressed by the general court that the Convention may be incompatible with the Constitution, will cease to exist and the general court will be given an opportunity to renew the examination of the judicial case concerned.

⁴ R. Ryssdal, Norwegian Problems of Compliance with the Convention and Norwegian Perspectives on Incorporation of the Convention, in: Aspects of Incorporation of the European Convention of Human Rights into Domestic Law, J.P. Gardner (Ed.), 1993, 31.

⁵ V. Gaul, Elaboration of the Constitution and its Adoption in Georgia (in Georgian), 2002, 374. At the time of elaboration and adoption of its Constitution, Georgia was not a party to the Convention.

However, if the Constitutional Court establishes that the Convention is unconstitutional, under para. 5 of Article 23 of the Law on the Constitutional Court, it is competent to declare the Convention or its specific provision void for Georgia. In such a case however, the Constitutional Court should take into consideration international obligations of the state and should not make a decision that violates the state's international obligations.

In declaring an international treaty void, the Constitutional Court should take into account the Vienna Convention of the Law on Treaties (1969), which recognises two forms of termination of international treaties: annulment and denunciation. As the Vienna Convention does not recognise the possibility of declaring an international treaty void due to its unconstitutionality, Georgia may not invalidate the Convention on such a ground. But Georgia has the right to denounce the Convention under the conditions provided in the Convention itself.

Despite the possibility of denouncing the Convention, in practice such a decision seems unlikely, is not excluded. In case of the establishment of unconstitutionality of the Convention by the Constitutional Court, it is impossible to avoid a legal conflict between the Convention and the Constitution in the period of time needed for the denunciation of the Convention to take effect.

Thus, as a result of the decision of the Constitutional Court, Georgia will be unable to annul the Convention without violating it. Therefore the denunciation of the Convention, despite its legal possibility, is extremely unlikely to happen.

The conflict between the Constitution and the Convention may be resolved by amending the relevant provision of the Constitution and not by declaring the Convention void⁶ Furthermore, Georgian legislation does not exclude amending the Constitution for grounds stemming from an international treaty.

As regards cases in which the court has no doubt that the Convention may be regarded as incompatible with the Constitution, Georgian legislation solves this issue in the following way: if the court, while examining the judicial case, considers that an international treaty is not compatible with the Constitution, the court decides the case in accordance with the Constitution.

Therefore, it may be concluded that if the incompatibility of an international treaty with the Constitution is obvious for the general court, it should apply the norm prescribed by the Constitution, i.e. the legal conflict between the Constitution and an international treaty is resolved in favour of the Constitution. Giving priority to the Constitution in case of a legal conflict between the Constitution and an international treaty will presumably cause a violation of the international treaty concerned.

⁶ S. Marcus-Helmons & P. Marcus-Helmons, Belgium, in: *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States (1950-2000)*, R. Blackburn & J. Polakiewicz (Eds.), 2001, 186.

As far as the legal conflict between domestic legislation and the Convention is concerned, many legal problems which may arise in case of a conflict between the Constitution and the Convention will not arise in case of a conflict between domestic legislation and the Convention. The reason being that unlike the hierarchical relationship between the Constitution and an international treaty, in case of an incompatibility between domestic legislation and an international treaty, the latter is given priority.

If the issue of the incompatibility between the Convention and the legislation arises before the general court in examining a specific case, nothing prevents the court from applying the Convention.

With respect to the hierarchical relationship between the Constitutional Agreement between the Georgian State and the Georgian Apostolic Autocephalous Orthodox Church and the Convention, pursuant to the amendments made to the Constitution, the Constitutional Agreement is given higher legal status than an international treaty.

The conclusion of the Constitutional Agreement with the Georgian Orthodox Church should not in itself be understood as discrimination against other religions. Such discrimination is prohibited by both Georgian legislation and international treaties. The conclusion of such an Agreement with the Georgian Orthodox Church, which played a special role in the history of Georgia, may be justified from a historical point of view.

III. Application of International Treaties on Human Rights in the Practice of Georgian Courts

The mere recognition of the Convention as a part of Georgian legislation is not sufficient in itself to create the practice of applying the Convention in national courts and administrative bodies. The measures taken at the legislative level, although they establish the legal basis for applying international treaties domestically, do not guarantee the application of international treaties, including Convention, by the national courts and administrative bodies. In addition to the measures adopted on the legislative level, it is necessary to take practical steps in order to establish the practice of applying international treaties at the time of examination of the cases by national courts.⁷

There is no doubt that the judiciary plays a crucial role in putting into practice laws, which create the basis for applying international treaties at the national level. Whether the provisions of the Constitution and other laws on the recognition of international treaties as legal acts of Georgia will be implemented in practice and whether international treaties on human rights, including the Convention, will positively contribute to the establishment of international (European) legal standards for the protection of human rights, depends on the role of the judiciary.

⁷ P. van Dijk, Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary: the Dutch Case, in: Fortschritt im Bewußtsein der Grund- und Menschenrechte, Festschrift für Felix Ermacora, M. Nowak, D. Steurer & H. Tretter (Hrsg.) 1988, 639.

The will of the courts to apply international treaties in deciding judicial cases will shed light on whether or not the will of parliament, on the recognition of international treaties as part of the legislation and their direct effect, is duly reflected in practice.⁸

There are various reasons for national courts not to apply international treaties. In general, in almost all countries in which at present courts regularly apply the Convention, some time was needed to establish the practice of applying the Convention. This is shown in the practice of many states, including those which adopted solid legislation on the application of international treaties at the national level from the outset. For almost all states which became parties to the Convention and recognised the Convention as a part of their national legislation, some time was needed to change the approach by their national courts in applying the Convention from a negative to a positive one.⁹

In states that recognised the Convention as a part of their national legislation, the form in which it is applied in judicial cases by national courts vary. National courts may give the Convention either a main or subsidiary role. National courts may apply the Convention (as well as international treaties in general) mainly in the following three ways:

- a) as a means of interpreting of domestic legislation;
- b) in case of a legal conflict with domestic legislation;
- c) as the only legal basis for a decision on a case.

If the Convention governs a dispute, a Georgian court may invoke the Convention in any case. The court may also base its decision on a domestic law and the Convention.

If a court decides a case on the basis of legal standards of a similar content as that of the national law and of the Convention, the application of the Convention plays an insignificant role. If the legal standards of the law and the Convention are similar, even if the court does not apply the Convention and bases its decision only on the law, its decision will not be different from the decision which it would have made if it had applied the Convention. In other words, if the judicial decision made as a result of the application of the law would be similar to the decision made on the basis of the Convention, the role of the application of the Convention will be of minor importance. In such cases, a court applies the Convention along with the law, it merely wishes to confirm the accuracy and fairness of its decision by showing that it was guided not only by a domestic law, but also by international standards on human rights protection.¹⁰

⁸ G. Danilenko, *The New Russian Constitution and International Law*, 88 *American Journal of International Law* 1994, 470.

⁹ C. Nørgaard, *The Implementation of International Human Rights' Agreements within a Domestic Legal System*, in: *The Relationship Between International and Domestic Law: Proceedings of the UniDem Seminar* (1993), 1993, 17.

¹⁰ G. Danilenko, *Implementation of International Law in CIS States: Theory and Practice*, 10 *European Journal of International Law* 1, 1999, 62.

Thus, the application of the Convention is important in cases where, as a result of such an application, the court adopts a decision which it would otherwise not be able to adopt. In other words, the legal effect of the application of the Convention is an added value only if, as a result of its application, the court secures the protection of the rights of a person with higher legal standards than would be guaranteed on the basis of only domestic legislation. Therefore, whether it is important to apply the Convention along with domestic legislation in a specific judicial case may be determined by answering the following question: by applying the Convention together with domestic legislation will a Georgian court adopt a decision which it would otherwise not be able to adopt without the application of the Convention?

If a party to a case invokes the Convention and the case-law of the European Court of Human Rights (hereinafter “the European Court”) in support of their position, the court should analyse the case in the light of the arguments presented. The court, in its decision, may either discard the arguments presented, support them or deny a certain interpretation of the Convention as presented by the party. The position of the party to the case with regard to the interpretation of a specific norm may differ from the interpretation of the court. In its decision, the court should express its opinion on whether or not the Convention and the case-law of the European Court may be applied and should provide a reason for why it does or does not apply to the case concerned.¹¹ The requirement of providing reasons for a decision of the court does not mean that the court should discuss in detail in its decision all arguments made during the judicial proceedings. Such a requirement would be unreasonable. However, if a party to a case argues its position by invoking two laws (for example, a law and the Convention) the court should examine both in its decision.

Therefore, the court may not simply ignore the party’s arguments based on the Convention without providing a reason for why it may not be applied to a specific case. It will certainly increase the burden on judges, but this burden is justified on account of the principle of fairness, the expression of which is the provisional reason for a judicial decision.

The study of the practice of the general courts of Georgia makes it clear that there has been an increasing trend in applying international instruments. The application of international instruments started in 1999/2000, after the Georgian Constitution (1995) provided a legal basis for this. The period from 1995 to 1999/2000 may be regarded as a transitional period for the application of international instruments. Starting from this period, the negative approach to the application of international instruments gradually changed to a positive one.

The general courts apply not only international treaties on human rights, but also treaties which do not govern the protection of human rights. About thirty cases that apply international treaties, which are not related to human rights, have been identified.

¹¹ R. Maruste, Status of the European Convention on Human Rights in the Estonian Legal System, in: *Protecting Human Rights: European Perspective: Studies in Memory of R. Ryssdal*, P. Mahoney, F. Matscher, H. Petzold & L. Wildhaber (Eds.), 2000, 879.

Ten cases dealing with human rights have been identified in the practice of the general courts (these international treaties do not include the Convention). In these cases, the courts mainly applied the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

Apart from international treaties, the general courts also apply legally non-binding (recommendatory) acts. There have been ten such cases, to which the courts mainly applied the Universal Declaration of Human Rights.

The Convention is the international instrument that is most applied by the courts. There have been more than forty cases involving this Convention.¹²

The practice of applying the Convention and its protocols should be welcomed and there is a gradual increase in applying the Convention each year.

As regards the application of the Convention with respect to the categories of cases (civil, criminal and administrative), the analysis of the total number of judicial cases makes it clear that the majority of cases are civil cases. The Convention is applied with approximately the same intensity to administrative cases. Under existing practice, the Convention is applied relatively rarely to criminal cases.

If the practice of applying the Convention is analysed by judicial instances, it is applied mostly by the Supreme Court of Georgia. From the total number of cases involving the Convention, the Supreme Court applied it in 32 cases. The Tbilisi Regional Court also refers to it on a regular basis. It applied the Convention in 5 cases. Unfortunately, the situation with regard to applying the Convention is extremely unsatisfactory in other general courts of Georgia.

If those court cases in which the general courts applied the Convention are analysed, it is clear that the influence of the Convention on judicial decisions is insignificant. In most cases the court applies the Convention together with the domestic legislation. The general courts examine domestic legislation followed by a mention of a relevant article of the Convention (in the best case, the court cites it). As a result, the court concludes that the rules established under domestic law and the Convention are similar and the court decides a case on the basis of the two legal instruments.

Since Georgian courts could adopt a decision by applying only domestic legislation, which it adopted on the basis of applying both the law and the Convention, it may not be concluded from this that the application of the Convention made a significant or any impact on judicial decisions.

The analysis of the decisions in which the Convention was applied sheds light on the trends regarding the form of its application.

¹² K. Korkelia, Application of the European Convention on Human Rights in Georgia, 2004, 129 et seq.

As in the courts of other European states, Georgian courts most frequently apply the Convention as a means of interpretation of domestic legislation. The courts examine a legal dispute on the basis of both domestic legislation and the Convention (and the case-law of the European Court), but first and main form of the Convention's application is to ensure the correct interpretation of domestic legislation.

The second form of the Convention's application is in case of a legal conflict with domestic legislation. However, no such case has yet been identified in the practice of Georgian courts.

With regard to the third form of application of the Convention, which provides for its application as the only legal basis for deciding a case, one such case has been identified: the Supreme Court in its decision of 10 May 2001, applied the Convention as the only basis for deciding the case.¹³

In the majority of judicial decisions in which the Convention has been applied, the courts applied the Convention (and the case-law of the European Court) on their own initiative.¹⁴

There have been several cases in which the Convention has been applied at the initiative of the party to the judicial proceedings. In these cases, the party to the judicial proceedings invoked the Convention and the court applied the relevant article of the Convention (in some cases, the case-law of the European Court) in deciding the case. Unfortunately, in two cases the court did not even mention the Convention in its decision.

With regard to the practice of providing reasons for the decisions of general courts of Georgia on the basis of the Convention, it may be concluded that the situation is still unsatisfactory. In the majority of these cases, judicial decisions do not provide sufficiently detailed reasons with regard to the Convention.

Nevertheless, the study of the practice revealed several cases in which the court examined the party's grounds based on the Convention in sufficient detail during judicial proceedings. In these cases the court analysed the case on the basis of arguments of the party and explained why it did or did not apply the relevant provision of the Convention. Such decisions are more convincing for the party to the judicial proceedings including the party against which the decision was adopted, than the decision which contains only a "dry" reference to the Convention.

¹³ Judgment, N8(1), 10 May, 2001, Decisions of the Supreme Court of Georgia on Criminal Cases, N5, 2001, 268.

¹⁴ K. Korkelia, Application of the European Convention on Human Rights in Georgia, 2004, 137 et seq.

Significant conclusions may be drawn from the practice of the Constitutional Court of Georgia. From the outset of its activity in 1996, the Constitutional Court of Georgia applied international treaties in numerous cases¹⁵ including international treaties of various types and legal nature: both international treaties dealing with the protection of human rights and those dealing with other issues.¹⁶

The Constitutional Court applied international treaties on human rights in about ten cases (the Convention is not included in these international treaties). The Constitutional Court mainly applies the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The Constitutional Court also applies international instruments of a recommendatory nature. Seven cases of applying such instruments have been identified. In most cases it applies the Universal Declaration of Human Rights. The practice of applying the Convention is gradually developing and there have been about ten such cases.

As regards the influence of international treaties, including the Convention, on the decisions of the Constitutional Court, it may be concluded that it is still not significant since in most cases the court would have made the same decision if it had not applied international instruments. The Constitutional Court primarily applies international instruments to confirm that the legislation of Georgia protects human rights in a similar manner to that provided in the international instruments concerned.

At the same time, the specificity of applying international instruments by the Constitutional Court as a judicial body of constitutional control should be mentioned. With regard to the protection of human rights, the Constitutional Court should apply international instruments mainly to provide the correct interpretation of the Constitution and of other domestic legislation.

As regards the initiative of applying international treaties on human rights, including the Convention, the analysis of the decisions of the Constitutional Court makes it clear that it frequently applies the Convention on its own initiative to decide a case. Such a practice should be encouraged and further developed.

The Constitutional Court also applies international treaties on human rights at the initiative of a party to judicial proceedings. There have been several cases where a party to the proceedings based its position on an international treaty, and the court applied this international treaty to decide a legal dispute. Despite this positive trend, there was unfortunately a case where a party to the proceedings based its position on the Convention and on the Constitution, but the Court did not examine the grounds invoked under the Convention in its decision.

¹⁵ B. Zoidze, Human Rights and the Practice of the Constitutional Court of Georgia (in Georgian), *An Individual and the Constitution*, N2, 2004, 60.

¹⁶ K. Korkelia, *Application of the European Convention on Human Rights in Georgia*, 2004, 143 et seq.

As regards the reasoning of decisions by the Constitutional Court on international instruments, the judicial practice needs to be further developed. As already mentioned, under the legislation on the Constitutional Court, the court should provide reasons for its decision. In general, it should be mentioned that if a party to proceedings invokes international instruments to defend its position, the Constitutional court, in its decision, should express its position on whether or not such an international treaty may be applied. The Court should explain why it applies or does not apply these norms for deciding the case. The Court may not simply ignore arguments based on an international treaty. In the majority of cases in which international treaties on human rights were applied, the judicial decisions did not provide sufficient explanations with regard to these treaties. Although the practice of the Constitutional Court requires further development with regard to providing reasons for judicial decisions on the basis of international treaties, several cases have been identified where the Court based its decisions with respect to international treaties on human rights in sufficient detail.

IV. Application of the Case-law of the European Court of Human Rights in the Practice of Georgian Courts

Lawyers, including judges, in particular in the countries with a continental legal system, frequently ask the following question: which legal act determines that national courts should apply the case-law of the European Court?

Raising such a question due in part to the mistaken view of the role of the case-law of the European Court. The authors of the question invoke the analogy of the Convention and ask the following question: if the application of the Convention at the national level is determined by a specific law (for example, the Constitution or a special law), on the basis of which the Convention is recognised as part of the national law, which law of the state regulates the need to apply the case-law of the European Court at the national level, including at the time of judicial examination of a case?

In general, the parties to the Convention determine the need to apply it at the national level in various forms. In some states, a legislative act determines that national courts should apply the case-law of the European Court. In the majority of European states it is the practice of national courts that determines the need to apply the case-law of the European Court.

Although under the Convention the judgments of the European Court are legally binding only for the states parties to the case, national courts of European states still apply the case-law of the European Court from a pragmatic point of view. The parties to the European Convention, including national courts draw principal

attention to the fact that the European Court, as a supervisory organ of the Convention, makes an authoritative interpretation of the Convention, which explains its application at the national level.¹⁷

When the European Court renders a decision on a specific case, it interprets the meaning of the rights and freedoms provided in the Convention.¹⁸ By adopting a specific decision, the European Court sets the legal standards, the significance of which reach beyond the specific case.¹⁹ Pursuant to the interpretation reflected in its case-law, the European Court sets legal standards on human rights protection.²⁰

National courts realise that without the analysis of the case-law provided by the European Court, it is very difficult to determine properly the meaning of the rights stated in the Convention and therefore, to apply the provisions of the Convention properly.²¹ Many provisions of the Convention are generally worded. The meaning of the provisions of the Convention is expressed in the case-law of the European Court²², which also defines the sphere of application of the provisions of the Convention and its protocols²³.

Therefore, national courts apply the Convention in the light of the case-law of the European Court and the human rights standards of the Convention.

A study of the practice of Georgian courts confirms that there are several cases of the general courts in which the case-law of the European Court has been applied.²⁴ Even a brief overview of the practice makes it clear that the view of lawyers, including judges, on the role of the case-law of the Court is gradually changing.

In one of the first judicial cases (2001), in which the issue of the application of the case-law of the European Court was examined, a Georgian court did not realise the role of the case-law of the European Court.²⁵ An analysis of the subsequent

¹⁷ E. Klein, Should the Binding Effect of the Judgments of the European Court of Human Rights be Extended? in: *Protecting Human Rights: The European Perspective, Studies in Memory of R. Ryssdal, P. Mahoney, F. Matscher, H. Petzold & L. Wildhaber* (Eds.), 2000, 705.

¹⁸ J. Polakiewicz, The Application of the European Convention on Human Rights in Domestic Law, 17 *Human Rights Law Journal*, N11-12, 1996, 407.

¹⁹ *Ireland v. the United Kingdom*, 18 January 1978, Series A, no. 25, para. 154.

²⁰ J. Polakiewicz, The Implementation of the CONVENTION and of the Decisions of the Strasbourg Court in Western Europe: An Evaluation, *The Domestic Implementation of the European Convention on Human Rights in Eastern and Western Europe* (eds. E. Alkema, T. Bellekom, A. Drzemczewski et al.), 1992, 154.

²¹ Committee of Ministers of the Council of Europe, Rec(2002)13, 18 December, 2002.

²² J. Polakiewicz, The Application of the European Convention on Human Rights in Domestic Law, 17 *Human Rights Law Journal*, N11-12, 1996, 407.

²³ J. Polakiewicz, The Execution of Judgments of the European Court of Human Rights, in: *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States (1950-2000)*, R. Blackburn & J. Polakiewicz (Eds.), 2001, 72-73.

²⁴ K. Korkelia, Application of the European Convention on Human Rights in Georgia, 2004, 189 et seq.

²⁵ Decision of the Chamber on Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia, N3k/599, 22 February, 2001.

decisions makes it clear that the judicial practice of applying the case-law of the European Court of Human Rights is progressing. The practice interpreting the rights and freedoms on the basis of the case-law of the European Court and deciding a judicial case is increasing.²⁶

In one of the decisions in which the case-law of the European Court was applied, the Tbilisi Regional Court expressly held that the standards established by the case-law of the European Court sets out and enumerates the means of the norms of the Convention. With this decision, the Regional Court confirmed the need to applying the case-law of the European Court along with the Convention in examining judicial cases.²⁷

While the practice of applying the case-law of the European Court is undoubtedly a positive development, an analysis of the practice of Georgian courts confirms that not all courts have realised the need to apply the case-law of the European Court together with the Convention. It may be concluded from the analysis of one of the judicial cases that where the court applied the Convention but did not apply the case-law of the European Court, the Convention was not interpreted by the Georgian court in the same manner by the European Court.²⁸

As regards the form of applying the decisions of the European Court, the following should be pointed out: it is not sufficient for a national court to invoke in its decision only the designation of the case it has applied., it has also to explain why it applied the case concerned and, if necessary, the court may even cite the relevant part of the case, which directly relates to the legal dispute under consideration. A decision will be much more convincing, if the court refers to a specific case of the European Court on which the interpretation of the rights concerned is based.

In general, the case-law of the European Court is mainly applied by the Supreme Court and the Tbilisi Regional Court, although it is noteworthy to mention that a decision of the first instance court has been identified which also applied the case-law of the European Court.

As far as the application of the case-law of the European Court by the Constitutional Court of Georgia is concerned, there is an increasing number of cases in which the Court refers to the case-law of the European Court. Such a practice has been established since 2003 when the Constitutional Court applied the

²⁶ Decision of the Chamber on Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia, 22 June, 2001, in: *Leading Cases on Protection of Human Rights (2001), 2002*, 76-79; Decision of the Chamber on Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia, N3k/376-01, 18 July, 2001, in: *Leading Cases on Protection of Human Rights (2001), 2002*, 79-82.

²⁷ Decision, N2/a-25-2002, 3 July, 2002, Tbilisi Regional Court's Chamber on Civil and Entrepreneurial cases (unpublished).

²⁸ Decision of Marneuli District Court, N3/9-2002, 13 May, 2002 (unpublished); See also decision of the Chamber on Civil, Entrepreneurial and Bankruptcy Cases of the Supreme Court of Georgia, N3/413, 24 March, 2000, *Decisions of the Supreme Court of Georgia, part I, I, N8, 2000*, 373-376.

cases of the European Court to two cases on which it based its position.²⁹ These cases provided the legal basis for the establishment of the practice of the Constitutional Court in applying the case-law of the European Court. Taking into consideration the crucial role of the Constitutional Court in reinforcing constitutional justice, it may be assumed that the practice of applying the case-law of the European Court will gradually develop further.

V. Measures to Promote Practice of Application of the International Treaties on Human Rights the National Level

In order to ensure the application of international treaties on human rights, including the Convention, at the national level in particular by courts, it is not sufficient to declare such treaties a part of national law, but it is also necessary to take practical measures to raise awareness of international and European human rights standards.³⁰

The practice of Georgian courts made it clear that mainly two types of obstacles hinder the application of the Convention and the case-law of the European Court when deciding judicial cases: one is based on information and the other is psychological.

An ineffective information (educational) system greatly hinders the application of the Convention by the courts.³¹ If the judge and the party to legal proceedings have insufficient knowledge of the Convention, they will not apply it.

In order to establish the practice of applying the Convention, training measures should be provided, with a view to improving the training programmes of both higher education institutions and the representatives of legal professions.³² Besides international law courses, law faculties should also introduce a course on international human rights law during which students should study the protection of human rights both at the universal and regional levels. Such faculties should also consider the introduction of a special course on the European system of the protection of human rights. The programme should cover the rights protected by the Convention, the operation of the European Court and the conditions for applying the Convention at the national level.

²⁹ Decision on the case: the Citizens of Georgia: F. Beriashvili, R. Jimsherishvili and Public Defender of Georgia v. the Parliament of Georgia, N2/3/182,185,191, 29 January, 2003, in: An Individual and the Constitution, 202; Decision on the case: 1. Citizen A. Rizhamadze v. the Parliament of Georgia; 2. Citizen N. Mumladze v. the Parliament of Georgia, N2/6/205,232, 3 July, 2003.

³⁰ Para. 14(iii), Resolution I, Institutional and Functional Arrangements for the Protection of Human Rights at National and European Level, Ministerial Conference and Commemorative Ceremony of the 50th Anniversary of the Convention, H/Conf(2000)1, Rome, 3-4 November 2000, 2.

³¹ Recommendation Rec(2004)4 of Committee of Ministers of the Council of Europe to Member States on the European Convention on Human Rights in University Education and Professional Trainings.

³² Para. 14(iv), Resolution I, Institutional and Functional Arrangements for the Protection of Human Rights at National and European Level, Ministerial Conference and Commemorative Ceremony of the 50th Anniversary of the Convention, H/Conf(2000)1, Rome, 3-4 November 2000, 2.

It is reasonable to elaborate the basic programme on international human rights law for higher education institutions of the country. Such a programme will assist professors and lecturers in elaborating their study programmes. As regards the methodology, the study programmes should be elaborated in such a way as to allow participants to acquire not only theoretical knowledge, but also develop practical skills for applying international treaties. The programme should demonstrate that international law on human rights (as well as international law in general) is the field of law which will have a strong influence on their practical work.

The examination (testing) programmes for the candidates intending to become judges, their assistants and advocates of Georgia need improvement. These programmes should take into consideration both theoretical and practical issues. Subjects to be included in examination (testing) programmes should be conditional on whether the knowledge of such subjects will be useful in their practical work.

It is also important that the examination (testing) programme of prosecutors cover international standards on human rights, in particular those of the Convention. Prosecutors should be aware of criminal procedural standards established by the European Court and apply them in their practice.

Training courses on the Convention and the case-law of the European Court should be organised for serving judges, assistants to judges, advocates and the legal specialists working in this field. Besides being able to increase their knowledge on the Convention, they should be given the opportunity to familiarise themselves with the development of the case-law of the European Court.

While training courses on human rights are of great significance, the need for training the trainers, who should lead the training courses on international human rights law, including the Convention, should not be overlooked. It is clear that if the trainers are not properly trained, it is difficult to expect them to prepare qualified legal personnel to effectively apply the Convention and the case-law of the European Court in their practice.

It is also important that not only texts of the Convention and its protocols be made available in the national language, but also, and in particular, the case-law of the European Court in the national language.

With regard to the availability of the case-law of the European Court in Georgia, the situation is gradually improving, although it is still unsatisfactory. The case-law of the European Court is published in varying periodicity by both state and non-state (non-governmental) institutions. The Supreme Court periodically publishes material on the case-law of the European Court. The contribution by the Constitutional Court in raising awareness on the case-law of the European Court should be emphasised. Since 2000 it has regularly published important cases of the European Court.

The Convention and the case-law of the European Court should be made readily available for anyone dealing with the protection of human rights, in particular judges and advocates. Interested persons should have the opportunity to follow the developments of the case-law of the European Court, including new interpretations of the provisions of the Convention and its protocols.³³ The case-law of the European Court may also be made available by electronic means (Internet; computer database).

VI Influence of the Convention and the Case-Law of the European Court on the Legislative and Executive

International treaties on human rights and in particular, the Convention influence not only the judiciary, but also the legislative and executive.

In general, the influence of the Convention and the case-law of the European Court on the legislative branch is significant as it is the main branch is responsible for the adoption of domestic legislation governing the protection of human rights.³⁴ Such an influence is reinforced by the need to bring national legislation in line with the Convention's standards.

The legislative should ensure that both legislation in force and draft laws are in compliance with the Convention and the case-law of the European Court.³⁵ By doing this, the legislative would, on the one hand, prevent conflict between legal norms and the Convention's standards and those of the national law already in force and on the other hand, avoid adoption in the future of such national legislation, which conflicts with the Convention's standards. Some European states already follow such a practice.³⁶ This practice has also been established in Georgia recently. The Regulation of the Ministry of Justice of Georgia in which the Office of Government Agent is set up, provides that the Ministry prepare, on one hand, proposals on the compatibility of the existing legislation with the Convention and on the other hand, draft laws.³⁷

Parliament should secure the compatibility of the Convention and the case-law of the European Court with both legislation in force and draft laws. The control of the compatibility of domestic legislation with the Convention and the case-law of

³³ A. Drzemczewski & M. Nowicki, Poland, in: *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States (1950-2000)*, R. Blackburn & J. Polakiewicz (Eds.), 2001, 676.

³⁴ G. Gauksdóttir, Iceland, in: *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States (1950-2000)*, R. Blackburn & J. Polakiewicz (Eds.), 2001, 407.

³⁵ J. Polakiewicz, *The Status of the Convention in National Law*, in: *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States (1950-2000)*, R. Blackburn & J. Polakiewicz (Eds.), 2001, 50.

³⁶ A. Arabadjiev, Bulgaria, in: *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States (1950-2000)*, R. Blackburn & J. Polakiewicz (Eds.), 2001, 198; K. Ioannou, Greece, *ibid*, 361; D. O'Connell, Ireland, *ibid*, 436; D. Spielmann, Luxembourg, *ibid*, 533-535; Y. Özdek & E. Karacaoğlu, Turkey, *ibid*, 877 et seq; V. Vadapalas, Lithuania, *ibid*, 510.

³⁷ Regulation of the Ministry of Justice of Georgia, Article 20, para. e.

the European Court should be made on a regular basis. Taking into consideration that the Convention has been recognised as a 'living' instrument, it is necessary that for parliament to provide regular control over domestic legislation to ensure its compliance with new interpretations of the rights under the Convention. If it ensures the compatibility of domestic legislation with the Convention and the case-law of the European Court, the violation of the Convention may be due to an application of domestic legislation which conflicts with the standards of the Convention.

By applying the case-law of the European Court, parliament may also fill legislative gaps. These gaps may be revealed as a result of an analysis of the developing case-law of the European Court.

The Convention and the case-law of the European Court may also have an influence on the activities of the government. Namely, the Convention and the case-law may have an influence on the laws of the executive and administrative practice. The influence is that the executive branch should take into consideration the Convention and the case-law of the European Court while preparing draft laws in order for these laws to be compatible with them. Since the Convention is part of Georgian legislation, the administrative bodies should be guided by human rights standards of the Convention. These bodies should not issue administrative acts conflicting with the Convention's standards.

VII. Conclusion

The establishment of the practice of applying international treaties on human rights, including the Convention at the national level depends on the will of the state, its legislative, executive and in particular, judicial branches. The Convention may have an influence, on legislation and practice of the state and strengthen the system of human rights protection in Georgia. To have such an influence the measures aimed at establishing the practice of applying the Convention are to be taken in the state.

The application of the Convention and the case-law of the European Court by the Georgian courts and administrative bodies is not an end in itself. Their application gives Georgia an opportunity to improve its legislation and its judicial and administrative practice so as to ensure an effective protection of human rights in the country.

**THE STATUS OF HUMAN RIGHTS TREATIES
IN DOMESTIC LEGAL SYSTEMS
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The subject considered at this second session of the seminar, i.e. the status of human rights treaties in domestic legal systems, is a natural complement to the discussions that took place during the first session, which was devoted to the status of these treaties in international law. Leading specialists have undertaken an in-depth analysis of the (traditional) themes that warrant attention in this context, which are the status of international conventions in the Kelsenian pyramid of domestic legislation, the ways in which they incorporated into national legal systems and the direct applicability of their provisions, as well as the important issue of the liability borne by states for failing to fulfil their international obligations.

1. The status of international treaties in domestic legal systems is a particularly burning issue for those states that guarantee human rights. It is in this area that domestic courts are most often required to rule on the respective role of the catalogues of basic rights enshrined in international instruments on the one hand and in national constitutions on the other. Whatever their source may be, basic rights are constitutional rights.

The paper presented on this first subject painted a very full picture of the various solutions provided by the practice of individual states, which ranges from the supra-constitutional status that some accord to human rights conventions to a constitutional or infra-constitutional status.

Whatever the theoretical interest of these various solutions, we are entitled to ask ourselves another, even more fundamental question: is it legitimate in the case of human rights treaties to adopt a purely formal approach that consists in according treaties a specific place in the hierarchy of domestic legislation according to the ratification procedure employed? Would it not be better to opt instead for a substantive approach that takes account of the content of the law and, as far as the judge is concerned, consists in applying the rule that provides the most protection or is the most favourable for the individual, irrespective of the legal instrument (international treaty or constitution) that guarantees this right and of the status of that instrument in the hierarchy of legislation in force in a state?

At any rate, it is this approach that the international instruments themselves call on states to adopt when these instruments embody the so-called principle of favourability, such as Article 53 ECHR and Article 5 para. 2 of the International Covenant on Civil and Political Rights. In this respect, too, the international human rights conventions differ from the other international treaties. Their “constitutional” content requires that, in their relationship with states’ domestic law, substantive criteria be given preference over formal considerations.

In addition, this constitutional content of international human rights treaties has exerted much greater influences on states’ domestic law than other international treaties: there are numerous indications that the connection between national and international constitutional justice is tending to become quasi-federal. Whether they like it or not, national supreme and constitutional courts now find themselves in a situation in which they are subordinate to the international bodies, which, more than ever before, appear to be a fourth instance standing above the supreme national courts, which now seem less and less supreme.

At another level, mention should be made of the influence exerted by the review of compliance with treaty provisions over constitutional review. In Switzerland, for example, the former has considerably reduced the effect of the principle that there is no review of the constitutionality of federal laws (Article 191 of the Constitution). Analogous considerations could be put forward for the Netherlands.

2. Each state has its own ways of incorporating international treaties into its domestic law, although all the methods employed can be attributed to either monism and dualism, the two main models. However, here, too, human rights treaties differ from other treaties.

While a treaty cannot as a rule have any legal effect until it has been ratified, there is no need to exclude from the outset the possibility of the “anticipated application” of a treaty when it confers rights on individuals, which is precisely one of the characteristics of international human rights conventions. The practice in Bosnia and Herzegovina illustrates this trend.

3. The direct applicability of treaties must be carefully distinguished from their immediate validity. While the latter is normally governed by the status accorded to treaties by constitutions, the question of direct applicability depends on the target groups and the preciseness of the treaty provisions.

While the direct applicability of civil and political rights is not disputed, there is still disagreement over the enforceability of economic, social and cultural rights. However, the principle of the universality of human rights, proclaimed at the Vienna Conference on Human Rights in 1993, requires that all fundamental rights, whatever their nature, be accorded the same treatment.

At any rate, practice at both the domestic and international levels seems to be moving in this direction. At the national level, several supreme or constitutional courts (in South Africa, India and some Latin American states) have not hesitated to censure measures considered to be in breach of social rights by relying directly on the constitutional provisions that enshrine those rights.

Internationally, the recent entry into force of the Additional Protocol to the European Social Charter, which paves the way for collective complaints, and the already extensive case law of the European Committee of Social Rights based on this instrument indicate that the rights guaranteed by the Charter might well serve as a parameter enabling states to be assessed with respect to their compliance and, where appropriate, a finding to be made against them.

It is to be hoped that, at the global level, the draft Additional Protocol to the International Covenant on Economic, Social and Cultural Rights can soon be drawn up. This will empower the United Nations Committee on Economic, Social and Cultural Rights to consider individual and state party communications.

4. In the last few years, the issue of the international liability borne by states for failing to fulfil their treaty obligations has gained particular prominence in Europe with regard to the implementation of judgments of the European Court of Human Rights. While these judgments have no cassatory effect, states that have ratified the Convention have nonetheless undertaken to comply with them (Article 46 para. 1 ECHR).

States' obligations are, however, not limited to the implementation of the Court's judgment in individual cases but may also extend to the duty to carry out any necessary amendments to legislative or administrative provisions or case-law. The Court has also recently been confronted with a new problem, namely so-called structural obstacles to the execution of its judgments (Broniowski judgment of 22 June 2004).

In each of these cases, all the limits to the just satisfaction provided for by Article 41 ECHR, which is, incidentally, the only provision of the Convention to be devoted to the execution of the Court's judgments, become manifest.

These limits have been extended even further by the Court's (especially the old Court's) interpretation of the scope of Article 41 (formerly Article 50). Until recently (Hentrich and Papamichalopoulos judgments), the approach adopted in all cases seemed to show that sight had been lost of the fact that, according to the philosophy underlying Article 41 ECHR, the compensation paid to the victim is a subsidiary consideration and that states' primary obligation is to ensure *restitutio in integrum*. In this connection, the possibilities of reopening domestic proceedings following the Court's judgments against states parties are of paramount importance.

It is thus to be regretted that, in connection with the major reform instituted by Protocol No. 11, the Protocol's authors did not take the opportunity to alter the scope of Article 41 of the ECHR by drawing on the example of Article 63 para. 1 of the American Convention on Human Rights.

**INTERNATIONAL TREATIES AND AGREEMENTS
MAKING TRADE AND FOREIGN AIDS
CONDITIONAL ON RESPECT FOR HUMAN RIGHTS
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1. The question of whether human rights norms benefit from a special hierarchical status in international law depends on the criteria guiding our research.

Human rights treaties, it has been noticed, differ already from ordinary treaties, since the reservations-regime of the Vienna Convention on the Law of Treaties does not apply with respect to them, and succession into human rights treaties is considered to be automatic. But, according to the same scholar, only *jus cogens* rules as well as obligations *erga omnes* can be considered to be of a constitutional nature, as well as obligations arising out of the UN Charter and general principles¹.

The hierarchical status of human rights norms is here circumscribed to the relationship between human rights treaties and ordinary treaties. But this perspective leaves open the question of the hierarchical status of human rights norms as such, since certain human rights are from *jus cogens* rules, which, given their constitutional nature, should be deemed superior to other human right treaties. Moreover, obligations *erga omnes* affecting non-derogable rights might derive both from customary law and treaty.

Since the status of human rights norms cannot be inferred from the sources of law, we must rely here on a content-based notion of hierarchy. This is confirmed by the fact that no international Court will deny that *jus cogens* obligations exist, and that is rather the uncertainty of its content that forms a barrier for a wider acceptance of the idea of peremptory norms by both states and international courts².

The shift we are witnessing, from a “value-free attitude”, necessary for a horizontal world where no single state can claim supremacy, towards “a more value-oriented attitude”³, is decisively driven by the need for the protection of the human person. Once this said, a content-based notion of hierarchy is needed, and, therefore, a definition of basic, or core, human rights. This appears to be a difficult question, not

¹ S.Kirchner, *Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?*, *German Law Journal*, Vol. 5, January 2004, at 5.

² S.Kirchner, *Relative Normativity*, at 2.

³ T.Koji, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights*, *European Journal of International Law*, 2001, 937.

only because of the deep political divisions and different perceptions of human rights values within the international community, but also because of the uncertainties affecting the le I will argue that the definition of core human rights needs to take account of the different circumstances which it ought to be adapted to. I will then refer to one of those circumstances, that is, the evolution affecting human rights clauses of EU cooperation agreements with third countries, with the aim of enhancing the approach to the issue.

2. During the first decades of the twentieth century, it was never denied that protection of human rights was a matter for each individual state and did not concern the international community, notwithstanding the treatment of Armenians in Turkey and of Jews in Germany⁴. This rule of indifference, as we might call it, not only characterized international law, but corresponded to the acceptance, at the national scale, of a formal notion of constitution, according to which a text may be called a constitution when certain procedural requirements are met, irrespective of its contents, including the nature of the regime, authoritarian or democratic, which it introduces.

After the Second World War and the Nuremberg trial, the Universal Declaration and other Charters on human rights, including the ECHR, were founded on the value of dignity of the human person. This, again, corresponded to the new concept of constitutionalism contextually emerging national States in Western Europe. But all these novelties were not expected to function as a Trojan horse in an international system wholly dominated by states⁵. Prohibition of United Nations intervention in domestic jurisdictions, stated in Article 2, para. 7, of the UN Charter, was deemed sufficient to preserve the traditional sovereignty of states.

During the Cold War, interference in domestic jurisdictions for human rights purposes was barred both by the resistance of communist countries, and by the fact that the United States could express its concern over human rights without having to fear that this might be detrimental to its security interests. In other words, considerations of power politics and moral ethical considerations coincided⁶. It is not surprising, then, that the Final Act of the Helsinki Conference on Security and Cooperation in Europe of 1975 put abstention from intervention in domestic jurisdictions (Principle VI) on an equal footing with respect for human rights and fundamental freedoms (Principle VII).

During those decades, the effectiveness of the Universal Declaration of Human Rights of 1948 was thus paralyzed, even after its translation into the binding rules adopted with the two Covenants of 1966, respectively, on civil and political rights and on economic, social and cultural rights. Besides, that very distinction reflected longstanding quarrels between the two power blocks about the priority of civil and

⁴ H.G.Schermer, *Acceptance of International Supervision of Human Rights*, *Leiden Journal of International Law*, 1999, at 821.

⁵ See A.Bianchi, *Globalization of Human Rights: The Role of Non-state Actors*, in G.Teubner (ed.), *Global Law without a State*, Dartmouth, Aldershot, 1997, 183.

⁶ P.Baehr, *The Role of Human Rights in Foreign Policy*, II ed., London, Macmillan, 1996, at 85.

political over economic, social and cultural rights or *vice versa*⁷, which drove many scholars to consider the Universal Declaration as a set of moral precepts without legal binding force⁸.

However, in the meanwhile, important legal developments occurred in the field of human rights. In the Barcelona Traction case (1970), the International Court of Justice held that obligations *erga omnes* affect “the principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination”⁹. Such “basic rights” were referred to gross violations, roughly corresponding to those protected under the Vienna Convention on the Law of Treaties of 1969 with the proclamation of *jus cogens* (prohibition of aggression, genocide, slavery, racial discrimination, and self-determination of peoples).

To the contrary, the above mentioned “basic rights” do not correspond to the human rights recognized by the UN Covenant on Civil and Political Rights and that on Economic, Social and Cultural Rights of 1966, covering a wider spectrum of rights than those provided in strictly humanitarian terms. Moreover, the human rights listed in the UN Covenants appear differently connected with the welfare of individuals, since they need to be not only protected by State, but also promoted through an active role of the State. Does this mean that they cannot be deemed to be “basic human rights”? The answer is yes to the extent that we relate such rights to gross violations, as in the Barcelona Traction case or according to the Vienna Convention’s list, which presuppose an abstention of the State from interventions violating the dignity of the human person. The answer is no, whenever we refer the basic character of human rights to the minimum welfare of the individual, rather than to strictly humanitarian considerations. While certain rights, e.g. the right to education or freedom of the press, are unlikely to fall within the latter category, they certainly fall within the former.

Our difficulties in achieving a satisfactory response to the question of which human rights are core or basic could thus be significantly reduced, although of course not eliminated, if we left aside the ambition of giving a once-for-all response to that question, and, correspondingly, take account of its different dimensions.

3. I will further concentrate on the minimum individual’s welfare dimension of basic human rights. In this respect, the dissolution of the Soviet block was perceived as a unique opportunity for launching a new vision of human rights, grounded on the mutual relationship among the classes of rights which the two UN Covenants had

⁷ Those quarrels stemmed from a contested decision of the UN General Assembly in 1951 based on the underlying assumption that civil and political rights were absolute, immediate and justiciable, whereas economic, social and cultural rights were programmatic and would be costly to implement: see J.Dine, *Human Rights and Company Law*, in M.K.Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, Kluwer, The Hague, at 211.

⁸ P.Meyer-Bisch, *Le corps des droits de l’homme. L’indivisibilité comme principe d’interprétation et de mise en œuvre des droits de l’homme*, Editions Universitaires Fribourg Suisse, 1992, 65, and N.Bobbio, *L’età dei diritti*, Einaudi, Torino, 1990, 41.

⁹ *Barcelona Traction, Light and Power Company, Limited*, arret, CI.J, Recueil, 1970, at 32.

separately recognized. This vision, as we will see, might improve the understanding of the evolution affecting human rights clauses of the EU agreements with third countries.

By enunciating the principle of the indivisibility of the human rights recognized in the Universal Declaration, and by considering democracy, development and respect for human rights “as interdependent and mutually reinforcing”, the Vienna Declaration and Programme of Action, adopted by consensus by the World Conference on Human Rights on 25 June 1993, appears as a watershed after the deep division which had characterized the international community during the Cold War. Albeit well known to René Cassin¹⁰, the main drafter of the Universal Declaration, the principle of indivisibility contrasted with the propaganda and political behaviour of the two blocks during the Cold War. Hence the importance, on historical grounds, of the explicit reference to that principle in the text of the Vienna Declaration.

But the principle of indivisibility of human rights acquires also a positive meaning, being recognized as a fundamental guideline to achieve the end of both protecting and promoting the “inherent dignity” of human beings enunciated in the Preamble to the Universal Declaration. This implies structural interconnections and mutual reinforcement between such classes, civil and social rights included.

The indivisibility principle corresponds to a conviction that is deeply embedded in the experience of courts and international organizations. The European Court of Human Rights has frequently asserted its competence over controversies concerning social issues, to the extent that they involve civil and political rights, whose protection is at the core of the Court’s tasks¹¹. And the International Labour Organization has described the freedom of association of workers both as a civil liberty and as a requirement for the social covenant, including *inter alia* the right to collective bargaining and equal access to the labour market¹².

The indivisibility principle should also be connected with a new understanding of human rights. According to recent constitutional thinking, the theoretical distinction between social, or economic, and civil rights does not necessarily lead to the conclusion that they are incompatible. The long-standing assumption that only social rights are costly to implement has been convincingly rejected¹³. Moreover, many scholars believe that human rights concerning material goods differ from basic needs, to the extent that entitlement to them does not correspond to a right to receive passive assistance, but gives each individual the opportunity to become author of his or her own freedom¹⁴. And that, in turn, the so-called negative rights cannot be

¹⁰ J.-J. Dupuy, *L’universalité des droits de l’homme*, in *Studi on. Sperduti*, Milano, Giuffrè, 1984, 547.

¹¹ See M. Delmas-Marty, *Trois défis pour un droit mondial*, Seuil, Paris, 1998, 51.

¹² See P. Meyer-Bisch, *Le corps des droits de l’homme*, 191 ff.

¹³ See S. Holmes and C. R. Sunstein, *The Cost of Rights. Why Liberty Depends on Taxes*, New York, W. W. Norton, 1999.

¹⁴ F. Meyer-Bisch, *Le corps des droits de l’homme*, cit., 329.

conceived only as restrictions against intrusions into the individual's realm: by ensuring freedom of choice, those rights enhance also a mutual relationship, whether conflictual or cooperative, between the holders of these rights, and thus a common learning process.

Indivisibility and interdependence between human rights are also clearly needed with regard to market competition. Historical experience has fully demonstrated that markets risk destroying themselves, unless liberty rights, property rights and social human rights are protected and abuses of power are constitutionally restrained. Market failures affecting human rights should thus be corrected, both at the regional and at the international scale, through labour, social and health legislation, and prohibitions of cartels and environmental pollution, without preventing citizens from engaging in mutually beneficial trade¹⁵.

Indivisibility is strictly connected with human dignity, which is put at the edge of the human rights edifice, as an intrinsic value which is incompatible with a purely utilitarian approach to human rights. On the other hand, by presupposing that the protection and promotion of each human right have crucial consequences on the protection and promotion of every other right, the indivisibility of human rights encourages a consequentialist approach to human rights policies.

It should therefore appear clear that the indivisibility of human rights implies the rejection of a hierarchical relationship between the five classes of human rights enshrined in the Universal Declaration. But this does not prevent from searching a category of core human rights. It only prevents from excluding certain human right from that category on the mere ground of its belonging to one class or the other.

It is worth adding that, according to Para. 31 of the Vienna Declaration, States should abstain from unilateral measures putting obstacles to international trade and barring the achievement of adequate standards of living for people with regard to food, health, housing and social services. This presupposes a positive vision of market competition, aimed at ensuring such standards. Since development, democracy and respect for human rights are deemed mutually reinforcing, and since, particularly, fair market competitions are no longer perceived as incompatible with social development, recent declarations and programmes on human rights reject a dogmatic approach to the tensions between universalism and market competition. These tensions may not become intractable, provided that a balanced approach is followed in introducing competition and social rules, and in enhancing true respect for human rights and democracy.

Such an approach also reflects the fact that the original insistence on a complete separation of trade and human rights has been overtaken by the developments of the 1990s. It appears therefore pertinent to consider how the link between trade and

¹⁵ E-U.Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, *European Journal of International Law*, 2002, at 640.

human rights has been established according to the human rights clauses of the EU cooperation agreements with third countries¹⁶, and whether the evolution affecting these clauses is connected with the principle of indivisibility.

4. The European Union has had a pivotal role in promoting human rights and democracy at the international level, and this both in terms of procedures and means aimed at that end¹⁷. This role applies also in terms of financial resources, given that in 1998 the budget for the UN High Commissioner for Human Rights expenses amounted to less than one quarter of that of the “European initiative for democracy and human rights protection”, which was only one of the main EU initiatives¹⁸.

Such special engagement in human rights issues can be connected with a tradition which goes back to the accession by EU member States to the European Convention on Human Rights and Fundamental Freedoms (ECHR) of 1950, testifying the first efforts at the international level to override national borders for the sake of human rights protection. It is worth recalling, in this regard, that Article 6 of the EU Treaty refers to the ECHR as one of the bases of respect for fundamental rights by the EU.

Nevertheless, the EC practice of making development aid, cooperative agreements and bilateral trade conditional on respect for human rights and democracy, has long been affected by legal uncertainty. Leaving aside the question concerning the legal base which under European law are needed for exercising EC and EU competences in the field of human rights, reference will be made to the compatibility of the conditionality practice with Article 60 of the Vienna Convention on the Law of Treaties. Since this provision forbids a State from suspending or terminating an agreement unless an “essential clause” of such agreement has been violated, the right of the Community to suspend or terminate an agreement for reasons connected with the disregard of human rights by the third country concerned is subordinated to the insertion of a “human rights clause” in the text of the agreement as an “essential element” of that agreement.

Prior to 1992 the EC agreements did not provide that clause, thus rendering doubtful their own legal basis. But, after that year, all the agreements have been accompanied by the “essential element” clause, which, according to ECJ rulings, spells out the condition as provided by Article 60, Vienna Convention¹⁹

In the meanwhile, a complementary clause was inserted within the single cooperation agreements, defining the procedures aimed at ascertaining the violation of the human rights clause and the related sanctions. While the so called “Baltic clause”, inserted in the cooperation agreement with Estonia of 1992, provided the

¹⁶ B.Brandter and A.Rosas, *Trade Preferences and Human Rights*, in P.Alston (ed.), *The EU and Human Rights*, Oxford University Press, 1999, at 700.

¹⁷ A.Tizzano, *L'azione dell'Unione europea per la promozione e la protezione dei diritti umani*, *Il Diritto dell'Unione Europea*, 1999, at 163.

¹⁸ For these data see P.Alston, *Diritti umani e globalizzazione. Il ruolo dell'Europa*, EGA, Torino, 1999, at 109.

¹⁹ Case C-268/94, *Portugal v. Council* (1996), ECR I.6177 (para.27). See E.Reidel and M.Will, *Human Rights Clause in External Agreements of the EC*, in P.Alston (ed.), *The EU and Human Rights*, at 729.

immediate suspension of the agreement in case of alleged violation of the human rights clause, the “Bulgarian clause” of 1993 and all the following clauses required a consultation procedure among the parties prior to the suspension of the agreement, conceived rather as a measure of last resort.

In 1995, a human rights clause was inserted in Article 5 of the IV Lomé’s Convention, regulating cooperation agreements of the EC with ACP (the “African, Caribbean and Pacific Group of States”), and procedures inspired to the “Bulgarian clause” model were therein provided with respect to disputes concerning alleged breach as the human rights clause.

In substituting the IV Lomé’s Convention, the 2000 Cotonou’s Convention affords a broader framework of mutual engagements between the EC and the ACP Group, including “joint institutions” (the Council of Ministers, the Committee of Ambassadors and the Joint Parliamentary Assembly) aimed *inter alia* at conducting the political dialogue, adopting the policy guidelines necessary for the implementation of the agreement and resolve any issue liable to impede its functioning (Title I, Part. II).

According to Article 9, para. 2, “Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement”. Article 96, para. 2, states that :

“If, despite the political dialogue conducted regularly between the Parties, a Party considers that the other Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in para. 2 of Article 9, it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. To this end, it shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation ”.

If the consultations, it is added, “do not lead to a solution acceptable to both Parties, if consultation is refused, or in cases of special urgency, appropriate measures may be taken ”. The term “cases of special urgency” refers to exceptional cases of particularly serious and flagrant violation of one of the essential elements referred to in para. 2 of Article 9, that require an immediate reaction”. The term “appropriate measures” refers to “measures taken in accordance with international law, and proportional to the violation. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement. It is understood that suspension would be a measure of last resort ”.

5. From the “Baltic clause” to the Cotonou’s Convention, a significant evolution has affected both the procedures and the sanctions connected with alleged violations of the human rights clause.

By relying only on the immediate and automatic suspension of the agreement, the “Baltic clause” was a rather primitive attempt to regulate the issue. Such suspension was provided irrespective of its collateral damages even on the ground of human rights protection in the country concerned, thus resembling to the UN economic sanctions, such as trade restrictions, investment restrictions and embargoes, which have become the preferred policy instrument of foreign policy-makers after the end of the Cold War. In defining and enforcing sanctions regimes, the Security Council has demonstrated an almost complete disrespect for international law standards, particularly the criteria of proportionality and discrimination, and a scarce consideration of the effectiveness of these measures²⁰.

The further EU-ACP cooperative agreements and Conventions have progressively enlarged the array of measures, as demonstrated in particular by the express reference to the criterion of proportionality in the Cotonou’s Convention. Consultation procedures have also been introduced and progressively enhanced, together with an institutionalisation of the “political dialogue” among the parties.

While devoting due attention to international law standards, these developments presuppose that an alleged violation of the human rights clause needs to be ascertained in light of many elements. As stated before, that clause consists in “respect for human rights, democratic principles and the rule of law”. Moreover, the very insistence on “political dialogue” among the parties of the cooperation agreements presupposes *inter alia* that the human rights concerned require not only protection from undue State’s interference into the realm of the individual, but also active public policies and interventions.

The evolution affecting the measures aimed at the observance of the human rights clause mirrors not only the dimension of human rights as individual welfare, but, more specifically, the indivisibility of human rights as affirmed by the 1993 Vienna Declaration, and a consequentialist approach to human rights policies.

Searching for a satisfactory definition of basic human rights might here seem an intractable burden, not only because human rights do not stem from obligations erga omnes, but also because their own definition could not be established *a priori*. On the other hand, it is worth reminding that conditionality is a fairly recent practice, whose improvements are strictly related to the emergence of minimum standards of human rights protection and promotion. The question of whether this might lead to a progressively refined definition of basic human rights remains of course open. At any rate, an inquiry into the practice of conditionality might appear a fruitful enterprise in this perspective.

²⁰ W.M.Riesman and D.L.Stevick, *The Applicability of International Law Standards to United Economic Sanctions Programmes*, *European Journal of International Law*, 1998, at 126.

**ARE THERE DIFFERENTIATIONS
AMONG HUMAN RIGHTS ?
JUS COGENS, CORE HUMAN RIGHTS,
OBLIGATIONS *ERGA OMNES* AND NON-DEROGABILITY
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Introduction

In 1968, the states attending the first United Nations Conference on Human Rights in Teheran pronounced that all human rights are indivisible.¹ A decade later, General Assembly resolution 32/130 of December 16, 1977, reiterated that all human rights and fundamental freedoms are indivisible and interdependent and that equal attention and urgent consideration should be given to the implementation, promotion and protection of civil and political and economic, social and cultural rights. Despite such proclamation, repeated from Teheran to Vienna, the issue of hierarchy within the field of human rights remains debated.² Debate has included discussion of the importance and impact of doctrines of norms *jus cogens* and obligations *erga omnes* as well as labeling certain human rights or provisions containing them core or non-derogable. In general, there appears to be a gulf between far-reaching claims of scholars about the content and consequences of *jus cogens* and other bases for differentiating rights and the more cautious practice of states and most international and national tribunals. As the same time, within and among human rights treaties, states can and have singled out certain norms for special treatment (e.g. making provisions or rights non-derogable rights or criminalizing their violation).

The relationships among, and the sources of, the different doctrines are complex. It appears logical that all international crimes are obligations *erga omnes* because the international community as a whole identifies and may prosecute and punish the commission of such crimes. The reverse is not the case, however. Not all obligations *erga omnes* have been designated as international crimes. Racial discrimination, for example, has been mentioned by the ICJ as an obligation *erga omnes*, but it is not included among international crimes in the Rome Statute or other agreement. As for sources, international crimes are established by treaty,

¹ See *Final Act of the International Conference on Human Rights, Teheran, 22 April - 13 May 1968* (United Nations publication, Sales No. E.68.XIV.2), chap. II, para. 13.

² The related issue of whether or not human rights law generally has primacy over other international law matters was dealt with in the first session of this seminar.

obligations *erga omnes* primarily by custom. Treaties may change custom,³ custom may render obsolete earlier agreements, treaties may purport to forestall the formation of contrary custom (as the 1982 United Nations Convention on the Law of the Sea does). In this context, *jus cogens* or peremptory norms can be viewed either as a new and non-consensual source of legal obligation or as a consensual identification of certain norms in positive law of a normative status higher than others. In its *Advisory Opinion on the Threat or Use of Nuclear Weapons*, the ICJ did not resolve this question, saying only that “the question whether a norm is part of the *jus cogens* relates to the legal character of the norm”⁴

I. *Jus cogens*

In national legal systems, it is a general principle of law that individual freedom of contract is limited by the general interest.¹⁴ Agreements that have an illegal objective are void and those against public policy will not be enforced.¹⁵ Private agreements, therefore, cannot derogate from the public policy of the community. The international community remains divided over whether the same rules apply to the international legal system as well as over whether or not there are other consequences to violations of peremptory norms, beyond voiding inconsistent agreements. A strictly voluntarist view of international law rejects the notion that a State may be bound to an international legal rule without its consent and thus does not recognize a collective interest that is capable of overriding the will of an individual member of the society. The PCIJ, in one of its first decisions, stated that “the rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law”.¹⁶ As recently as 1986, the ICJ reaffirmed this approach in respect to the acquisition of weaponry by States.¹⁷

The extent to which the international system has moved and may still move toward the imposition of global public policy on non-consenting States remains highly debated, but the need for limits on State freedom of action seems to be increasingly recognized. International legal instruments and doctrine now often refer to the “common interest of humanity”¹⁹ or “common concern of mankind” to identify broad concerns that could form part of international public policy. References also are more frequent to “the international community” as an entity or authority of collective action.²

The assertion of *jus cogens* norms in practice has focused on two main issues: (1) the “trumping” value of such a norm over other norms of international law,

³ As remarked by the International Court of Justice in the *North Sea Continental Shelf Cases*, “Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties ...” 1969 ICJ Rep. 42, para. 72.

⁴ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Rep. 1996, para. 83. The Court went on to say that “the request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter.”

especially customary jurisdictional immunities of States and officials; (2)
imposition of a norm on a persistent objector or in a national system which does

not give supremacy to “ordinary” international law. A third issue, the question of whether *jus cogens* acts to limit the powers of the United Nations Security Council, has recently emerged.

The problem of dissenting States is not as widespread as might be assumed; all states have accepted human rights obligations as members of the United Nations and are parties to at least some of the international instruments. In most cases, therefore, the problem is one of ensuring compliance by States that have freely consented to the obligations in question and not one of imposing obligations on dissenting States. It should also be noted that there is rarely, if ever, any discussion of the evidence that leads an author or tribunal to conclude that a particular norm or right is part of the *jus cogens* canon. Instead, most tribunals and scholars make unsupported and conclusory assertions about particular norms. The remainder of this section reviews the development and application of *jus cogens* doctrine in theory and in practice.

a. Development of *jus cogens* as a concept

The notion of *jus cogens* or peremptory norms as a limitation on international freedom of contract arose in the UN International Law Commission during its work on the law of treaties. An early ILC rapporteur on the subject proposed that the ILC draft convention on the law of treaties include a provision voiding treaties contrary to fundamental principles of international law.⁵ This proposal clearly constituted a challenge to the consensual basis of international law, which viewed States as having the right *inter se* to opt out of any norm of general international law. It also represented “progressive development” of international law and not a codification of existing State practice.⁶ The concept was controversial and divided the Vienna Conference on the Law of Treaties. Strong support came from the Soviet bloc and from newly independent States, who saw it as a means of escaping colonial-era agreements. Western countries were less positive and several expressed opposition to the notion of peremptory norms, voting against the provision and withholding ratification of the treaty because of persisting objections to the concept. To date, the VCLT has garnered 108 ratifications, a little over half the countries of the world.

The drafting of a second treaty on treaties, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations, indicated continued uncertainty over the concept of norms *jus cogens*. The text proposed by the ILC included provisions on *jus cogens* modeled after the 1969 VCLT. The commentary called the prohibition of the illegal use of armed force embodied in the UN Charter “the most reliable known example of a peremptory norm” and also claimed that the notion of peremptory norms, as embodied in VCLT Article 53,

⁵ Sir Humphry Waldock proposed the concept and three categories of *jus cogens*: (1) illegal use of force; (2) international crimes; and (3) acts or omissions whose suppression is required by international law. The categories were dropped by the ILC, because each garnered opposition from at least two-thirds of the Commission. See Kearney and Dalton, 1970, p 535.

⁶ Robledo called it “une innovation profonde et un grand pas franchi”. ROBLED0, AG (1982BIII), “Le Ius Cogens International: Sa Genese, Sa Nature, Ses Fonctions”, 172 *Recueil des Cours* 17.

“had been recognized in public international law before the Convention existed, but that instrument gave it both a precision and a substance which made the notion one of its essential provisions”.⁷ The representative of France disagreed during the plenary drafting session, expressing his government’s opposition to VCLT Article 53 “because it did not agree with the recognition that article gave to *jus cogens*” whilst another government called *jus cogens* “still a highly controversial concept which raised the fundamental question of how to recognize the scope and content of a peremptory norm of general international law,” noting that time had revealed “a divergence of views since 1969 regarding the nature of norms of *jus cogens*, which it had not been possible to define”.⁸ The text of the Convention was adopted by sixty-seven to one, with twenty-three States abstaining; it has yet to enter into force. Several States explained their abstention by referring to the Articles concerning *jus cogens*, including the dispute settlement provisions on the topic.⁹ Even some of those who favored *jus cogens* expressed uncertainty. The representative of Brazil called *jus cogens* “a concept in evolution.”¹⁰

No human rights instrument refers to peremptory norms or *jus cogens*.¹¹ However, to the extent that the theory of peremptory norms derives from custom, natural law, or international public policy, this absence of treaty language is not determinative of the existence or consequences of *jus cogens* norms. The Vienna Convention, Article 53, defines the source of *jus cogens* as state consent (i.e. a peremptory norm is a norm “accepted and recognized by the international community of states as a whole” as one from which no derogation is permitted). While most scholars have focused on deriving such acceptance and recognition from treaty and customary international law, Simma and Alston find the source in general principles of law.¹² Yet another approach would ground notions of *jus*

⁷ According to the Commentary, “it is apparent from the draft articles that peremptory norms of international law apply to international organizations as well as to states, and this is not surprising”. A/Conf.129/16/Add.1 (vol II), pp 39, 44.

⁸ United Nations Conference on the Law of Treaties between States and International Organizations or Between International Organizations, Vienna, 18 February–21 March 1986, A/Conf.129/16 (vol I), 17. See also the concerns expressed by Germany, and similar objections raised to Article 64 which concerns the emergence of a new peremptory norm of general international law (p 18).

⁹ Id, pp 186–194.

¹⁰ Id, p 188.

¹¹ The only references to peremptory norms in international texts are found in the Vienna conventions on the law of treaties. Article 53 of the 1969 Convention (VCLT), concerning treaties between states, provides that a treaty will be void “if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”. Such a norm is defined by the VCLT as one “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm having the same character”. Article 64 adds that the emergence of a new peremptory norm of general international law will render void any existing treaty in conflict with the norm. No clear agreement was reached during the VCLT negotiations nor has one emerged since then about the content of *jus cogens*.

¹² Bruno Simma and Philip Alston, “The Sources of Human Rights Law: Custom, Jus Cogens and General Principles,” 12 *Aust. YBIL* 82, 104 (1988-1989). The cite a report of the American branch of the International Law Association, “The Role of State Practice in the Formation of Customary and Jus Cogens Norms of International Law” (January 19, 1989), 7, 18, which asserts that the customary law-making process may be unable to provide logical and sound devices to identify peremptory norms of abstention because of the requirement of state practice. According to Article 38 of the Statute of the

cogens, like the existence of human rights themselves, in natural law.¹³ In this respect, it may be noted that some human rights instruments specify that human rights do not derive from the will of states, but are “inalienable” or “inherent”¹⁴ The American Convention on Human Rights forthrightly proclaims that “the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality, and . . . they therefore justify international protection. . . .”¹⁵

b. Application of *jus cogens* by international tribunals

At the International Court of Justice the term *jus cogens* or peremptory norms appears only in separate or dissenting opinions;¹⁶ States rarely raise the issue¹⁷ and when they do the Court seems to take pains to avoid any pronouncement on it.¹⁸ The 1986 *Nicaragua* decision, most often cited for the Court’s approval of *jus cogens*, does not in fact take a position on its existence or content.¹⁹ In its subsequent advisory opinion on nuclear weapons, the ICJ utilized descriptive phrases that could be taken to refer to peremptory norms, in calling some rules of international humanitarian law so fundamental to respect for the human person

International Court of Justice, customary international law requires evidence of “a general practice accepted as law” while general principles only need be “recognized by civilized nations.”

¹³ According to Henkin, general principles of law common to legal systems “often reflect natural law principles that underlie international law.” L. Henkin, “International Law: Politics, Values and Functions: General Course in Public International Law,” 216 *Recueil des cours* 61-62 (1989-IV).

¹⁴ PbmI., Universal Declaration of Human Rights, *supra* note 5 at para. 1: pmbI, ICCPR, *supra* note 6, para. 2 (“recognizing that these rights derive from the inherent dignity of the human person”).

¹⁵ American Convention on Human Rights, 22 Nov. 1969, OASTS 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979), reprinted in 9 I.L.M. 673 (1970).

¹⁶ See, eg, *Right of Passage over Indian Territory*, Merits, Judgment, ICJ Reports 1960, p 6 at pp 135, 139B140 (Judge ad hoc Renandés dissenting); *South West Africa*, Second Phase, Judgment, ICJ Reports 1966, p 6 at p 298 (Judge Tanaka dissenting). Simma and Alson, *supra* n. 12, quote references to “general and well-recognized principles,” “principles recognized by civilized nations” and “fundamental general principles” in ICJ judgments and opinions (*Corfu Channel*, *Reservations to Genocide*, *Tehran Hostages* and *Nicaragua*) as evidence that the Court acknowledges fundamental human rights prescriptions “as binding and part of peremptory international law.” The Court certainly has stated that they are binding, but the claim that it has recognized them as peremptory norms appears unsupported.

¹⁷ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p 7, para 112, noting that neither side had contented that new peremptory norms of environmental law had emerged.

¹⁸ See *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p 3, para 72, declining to enter into or pronounce upon any issue concerning *jus cogens*.

¹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, p 14 at para 190, citing the ILC assertion that the norm against aggression is a peremptory norm as evidence that it is an obligation under customary international law.

and “elementary considerations of humanity” that “they constitute intransgressible principles of international customary law.”²⁰ The Court did not elaborate and it is left to the reader to determine whether or not “intransgressible” was intended to indicate that the rules are peremptory.

The ICJ’s *Arrest Warrant* judgment of 14 February 2002 is perhaps the case that most closely implicates norms asserted to be *jus cogens*. Belgium issued an international arrest warrant charging the Congolese foreign minister with grave breaches of the Geneva Conventions of 1949 and with crimes against humanity. Congo claimed that in doing this Belgium violated “the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers.”²¹ Based on the pleadings, the Court proceeded from the assumption that Belgium had jurisdiction under international law to issue and circulate the arrest warrant. The Congo contended that immunity from criminal process is absolute or complete and thus subject to no exception, even for international crimes. Belgium specifically argued that immunities cannot apply to war crimes or crimes against humanity, citing treaties, international and national tribunals, and national legislation. In particular, it contended that an exception to the immunity rule was recognized in the case of serious crimes under international law. The Court held that “certain holders of high-ranking office” enjoy immunity from civil and criminal process and concluded that no customary international law restricts diplomatic immunity when accused are suspected of having committed war crimes or crimes against humanity. The ICJ came to this conclusion without discussing the possible *jus cogens* status of the accusations or the effect of *jus cogens* norms on customary immunities.²²

Human rights tribunals until quite recently also avoided pronouncing on *jus cogens*. In its only human rights judgment to discuss *jus cogens*, decided in 2002, the European Court of Human Rights agreed that torture is a peremptory norm, a fundamental value and an absolute right, but found that it was “unable to discern” any basis for overriding State immunity from civil suit where acts of torture are alleged.²³

In the Inter-American Court of Human Rights, the term has been discussed only once by the court as a whole, in its 2003 advisory opinion on the juridical condition and rights of undocumented migrants.²⁴ Mexico requested the opinion

²⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p 226, para 79.

²¹ The Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations were said to reflect customary international law.

²² Only one of the ten opinions in the *Arrest Warrant* case mentions the concept of *jus cogens* norms despite its obvious relevance to the issues in the case. The dissenting opinion of Judge Al-Khasawneh refers to *jus cogens*, linking immunity and impunity. *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo/Belgium), Preliminary Objections and Merits, Judgment, ICJ Reports 2002*, p 3, Dissenting Opinion of Judge Al-Khasawneh, para 7.

²³ *Al-Adsani v United Kingdom*, Judgment, 21 November 2001, (2002) 34 EHRR 11.

²⁴ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, OC-18/03 Ser A, No 18 (Sept. 17, 2003).

largely to indicate its concern with domestic labor laws and practices in the United States. Perhaps in an effort to anticipate possible U.S. arguments that it has not consented to relevant international norms, Mexico's fourth question to the court asked: "What is the nature today of the principle of non-discrimination and the right to equal and effective protection of the law in the hierarchy of norms established by general international law and, in this context, can they be considered to be the expression of norms *jus cogens*?" Mexico also asked the court to indicate the legal effect of a finding that these norms are *jus cogens*?

Mexico's request generated considerable interest. Five other states, not including the United States, participated in the proceedings, as did the Inter-American Commission on Human Rights; in addition, a dozen individuals and groups filed briefs as *amici curiae*. However, only the interventions of the Commission, and two briefs from university *amici curiae* commented on the issue of *jus cogens*. Costa Rica expressly disavowed any intention to comment on the topic.

Mexico asserted that unnamed publicists have denominated fundamental human rights as norms *jus cogens*. It also referred to the views of individual judges and the International Law Commission on the legal effects of *jus cogens*. The main argument of Mexico, however, was that "international morality", as a source of law, provides a basis for establishing norms *jus cogens*. Mexico claimed, in this respect, that a cautious approach in case law has lagged behind the views of the international community. Indeed, Mexico argued for the "transfer" of the Martens clause from humanitarian law to the field of human rights to imply new norms and obligations, even those characterized as *jus cogens*.

The Commission's position simply claimed that the international community is unanimous in considering the prohibition of racial discrimination as an obligation *erga omnes*, then leaps to the conclusion that the principle of non-discrimination on the basis of race is a norm *jus cogens*, while at the same time noting that the international community has not yet reached consensus on prohibiting discrimination based on motives other than racial discrimination. According to the Commission "this does not lessen its fundamental importance in all international laws."

The Court's opinion, which it expressly stated applies to all OAS member States whether or not they are party to the American Convention on Human Rights, appears clearly to view natural law as a source of obligation. According to the Court: "All persons have attributes inherent to their human dignity that may not be harmed; these attributes make them possessors of fundamental rights that may not be disregarded and which are, consequently, superior to the power of the State, whatever its political structure". The Court nonetheless cited nineteen treaties and fourteen soft law instruments on the principle of non-discrimination, finding that taken together they evidence a universal obligation to respect and guarantee human rights without discrimination. On whether this principle amounts to *jus cogens*, the court moved beyond the Vienna Convention, asserting that "by its definition" and its development, *jus cogens* is not limited to treaty law.²⁵ The court

²⁵ In stating that *jus cogens* has been developed by international case law, the court wrongly cited to the ICJ judgments in the *Application of the Convention of the Prevention and Punishment of*

summarily concluded that non-discrimination is *jus cogens*, being “intrinsicly related to the right to equal protection before the law, which, in turn, derives “directly from the oneness of the human family and is linked to the essential dignity of the individual.” The court added that the principle belongs to *jus cogens* because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. The effect of this declaration, according to the court, is that all states are bound by the norm *erga omnes*.

The court’s opinion considerably shifts law-making from states to international tribunals which may now be asked or may take it upon themselves to assess human dignity and international public order and from these derive human rights norms and determine which of them are *jus cogens*. In this respect, the decision seems to contradict the Vienna Convention on the Law of Treaties which defines *jus cogens* norms as those accepted and recognized as such *by states*. In fact, the Vienna Convention set a high consensual standard for determining peremptory norms: first, there must be a norm of international law (treaty, custom, general principle) to which states have consented and then that norm additionally must be recognized by the community of states as a whole as one from which no derogation is permitted.

In contrast, the Inter-American Commission on Human Rights, like the Inter-American Court, has at times suggested that *jus cogens* derives from an additional, non-consensual source of international legal obligation. The Commission has declared the right to life, for example, to be a norm *jus cogens*: derived from a higher order of norms established in ancient times and which cannot be contravened by the laws of man or nations. The norms of *jus cogens* have been described by public law specialists as those which encompass public international order . . . accepted . . . as necessary to protect the public interest of the society of nations or to maintain levels of public morality recognized by them.²⁶

The International Criminal Tribunal for the Former Yugoslavia (ICTY), the first tribunal to discuss *jus cogens*, declared the prohibition of torture as one such norm: “Because of the importance of the values it protects, “the prohibition against torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through

the Crime of Genocide, Preliminary Objections (Bosnia-Herzegovina v Yugoslavia, ICJ Reports 1996, p. ?? and the Barcelona Traction, Light and Power Company, Second Phase, Judgment, ICJ Reports, p 3, neither of which discusses the subject.”

²⁶ OAS, Inter-American Commission on Human Rights, 81st Sess, Annual Report of the Inter-American Commission on Human Rights, *Victims of the Tugboat “13 de Marzo” v Cuba*, Rep No 47/96, OR OEA/Ser.L/V/II.95/Doc.7, rev (1997) at 146 E147.

international treaties or local or special customs or even general customary rules not endowed with the same normative force. . . . Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community.²⁷

The discussion had no bearing on the guilt or innocence of the person on trial, nor on the binding nature of the law violated. It was not asserted that any treaty or local custom was in conflict with the customary and treaty prohibition of torture. The reference served a rhetorical purpose only. Similarly, an International Labor Organization report on a 1996 complaint against Myanmar for forced labour referred to *jus cogens* although the State had long been a party to ILO Convention (No 29) concerning Forced or Compulsory Labour.²⁸ The Report's statement that the practice of forced labour violates a *jus cogens* norm appears intended to invite the criminal prosecution of individuals using forced labour. It labels the systematic practice of forced labour a "crime against humanity",²⁹ although such a designation is not required for prosecution and punishment to take place.

The Human Rights Committee addressed *jus cogens* in its General Comment No. 29 on States of Emergency, issued 31 August 2001. According to the Committee, the list of non-derogable rights in Article 4(2) of the Covenant on Civil and Political Rights is related to, but not identical with the content of peremptory human rights norms. While some non-derogable rights are included "partly as recognition of the peremptory nature", other rights not included in Article 4(2) figure among peremptory norms. The Committee emphatically insists that "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."³⁰ While this may appear to be adding new conditions to Article 4, in fact para. 1 explicitly provides that any measures taken by states in derogation of Covenant rights must not be "inconsistent with their other obligations under international law". In terms of consequences of this extension, the Committee asserts that one test of the legitimacy of measures in derogation of Covenant rights can be found in the definition of certain violations as crimes against humanity. Thus, the fact that the Covenant would appear on its face to permit such measures cannot be invoked as a defense to individual criminal responsibility.

Finally and most recently, the Court of First Instance of the European Union decided a case raising new issues concerning the impact of Court-identified *jus cogens* norms on the powers of the United Nations Security Council and European

²⁷ *Prosecutor v Furundzija*, Judgment, Case No ITB95B17/1BT, Trial Chamber (10 December 1998), para 153.

²⁸ 28 June 1930, 39 UNTS 55.

²⁹ Report of the Commission of Inquiry on Forced Labour in Myanmar (Burma), ILO Official Bulletin, 1998, Special Supp, vol LXXXI, Ser B, para 538.

³⁰ General Comment No. 29, para. 11.

institutions.³¹ In *Yassin Abdullah Kadi v. Council and Commission*³² the applicant challenged a regulation implementing UN Security Council decisions that impose a freeze on funds and other financial resources of individuals identified by the UN Sanctions Committee as supporters of terrorism. In addition to challenging the EC regulation as ultra vires and for lack of competence, the applicant sought annulment of the regulation on the grounds that it breached his fundamental rights to a fair hearing, to respect for property and to effective judicial review.

The Court found a basis for the regulation in a combination of Article 308 of the EC Treaty, taken in conjunction with Articles 60 and 301. The Court then gave considerable attention to the allegations concerning fundamental rights. According to the applicant, the Security Council resolutions could not confer on the Commission and Council the power to abrogate fundamental rights. He argued that the Council regulation breached such rights because it allowed the Council to freeze his assets without giving him the opportunity to contest the evidence on which the freeze was based. His right to property was violated because his funds were frozen solely on the basis of inclusion of his name on the list drawn up by the Sanctions Committee and the measure was thus disproportionate. Finally, the regulation breached fundamental principles of Community law in failing to provide an opportunity for judicial review of the evidence against him. The Council and Commission defended the measure based on the legal obligation of the Community and its member States to give effect to decisions of the Security Council adopted under Chapter VII of the UN Charter.

As a preliminary matter, the Court considered whether or not its power of judicial review allowed it to decide the matter. The Commission and Council, supported by the UK government, argued that the obligations imposed by the UN Charter on the Community and its member States prevail over every other obligation of international, Community or domestic law and thus there could be no basis for annulling the regulations. This issue necessarily led the Court to consider the matter of hierarchy in international law. The Court accepted that the obligations under the Charter “clearly prevail” over every other obligation of domestic or international treaty law, including the European Convention on Human Rights. This rule of primacy is derived from customary international law and from Article 103 of the UN Charter³³ and extends to decisions of the Security Council taken under Chapter VII.³⁴ The EC member States are therefore bound to take the

³¹ The case also poses the problem of deciding which courts, if any, have the jurisdiction to review Security Council decisions for compatibility with asserted *jus cogens* norms. If national or regional courts like the Court of First Instance may do so, there is a considerable risk of conflicting opinions and fragmentation in application of Security Council mandates.

³² Court of First Instance, Case T-315/01, Judgment of 21.09.05, 2005 E.C.R. xxx.

³³ Article 103 provides that “[i]n 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 provision applies to earlier as well as later treaties. See *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.)*, 1984 ICJ Rep. 392, para. 107.

³⁴ *Order of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.A.)*, 1992 ICJ Rep. 16, para. 42 and 113, para. 39.

measures necessary to ensure that those decisions are put into effect and to leave unapplied any provision of Community law that would raise an impediment to the proper performance of Charter obligations.³⁵ At the same time, the EC is a legal order based on the rule of law which means that neither the member States nor the institutions can avoid judicial review of the conformity of their acts with the basic constitutional charter of the Community. The applicant can thus challenge the lawfulness of a contested regulation that is of direct and individual concern to him. According to the Court, that conclusion required asking further “whether there exist any structural limits, imposed by general international law or by the EC Treaty itself, on the judicial review which it falls to the Court of First Instance to carry out with regard to that regulation.”³⁶

The EC institutions argued that the Court was precluded from judicial review because any review of the lawfulness of the contested regulation would imply that the Court would consider the lawfulness of Security Council resolutions, since the EC measure did not involve any alteration in the content of the resolutions. The EC institutions and the UK government asked the Court to limit itself to determining whether the appropriate procedures were followed and whether the EC measures were appropriate and proportionate in implementing the Security Council decisions. The Court agreed that such a limitation of jurisdiction is a necessary corollary to the primacy of the UN Charter in the international legal order. The Court has no power to review determinations of the Security Council about a threat to peace and the measures required in response, even where issues of fundamental rights are raised. Indeed, “the Court is bound, so far as possible, to interpret and apply Community law in a manner compatible with the obligations of the member States under the Charter of the United Nations.”

While the Court’s pronouncement might seem to end the matter, it did not, because the Court added a surprising exception to its finding of a lack of competence, stating that “nonetheless, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.”³⁷ The Court justified this finding by reference to Article 53 of the Vienna Convention on the Law of Treaties and to the United Charter itself, which the Court held to “presuppose the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person.” Those principles are binding not only on the member States but on the organs of the UN. “International law thus

³⁵ While the Community itself is not a member of the UN and thus not directly bound by the Charter, it is bound by the treaty establishing the Community. Case T-315/01, *supra* n. 32 at paras. 192-203.

³⁶ *Id.* para. 212.

³⁷ *Id.* para. 226.

permits the inference that there exists one limit to the principle that resolutions of the Security Council have a binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*.³⁸ Failure to do so would render the resolutions non-binding.

Having set out a power of judicial review for the compatibility of Security Council resolutions and implementing measures with *jus cogens* norms, the Court then addressed the merits of the applicant's complaint. In doing so, it summarily concluded that arbitrary deprivation of property may be regarded as contrary to *jus cogens*, citing Article 17(1) of the Universal Declaration of Human Rights, but found that the applicant was not a victim of arbitrary deprivation for four reasons: (1) because the asset freeze is part of the campaign against international terrorism, an objective of "fundamental public interest for the international community," (2) the freeze is a temporary precautionary measure affecting the use of the property but not its ownership, (3) there is a measure of periodic review, and (4) those listed may have their case presented to the Sanctions Committee by their state of nationality or residence. The Court also seemed to imply that access to a court is a right guaranteed by *jus cogens*, but one that is not absolute. In its discussion, the Court conflated deprivation of the right of access to a court with jurisdictional immunities applicable to defendants. It also noted that access to justice is a derogable right under the Covenant on Civil and Political Rights during periods of emergency; the Court failed to mention that the right is not derogable under the American Convention on Human Rights nor did it cite the General Comment of the Human Rights Committee questioning whether deprivation of access to justice could be suspended during national emergencies. In sum, the Court seemed to adopt the view that all the rights invoked by the applicant form part of *jus cogens*, supported largely by reference to their appearance in the Universal Declaration of Human Rights, but found them riddled with limitations and exceptions, which permitted the Security Council actions to stand as lawful. The decision may be understandable, but it is not convincing.

c. Application of *jus cogens* by national courts

The concept of norms *jus cogens* has been asserted most strongly in the domestic courts of the United States, initially in an effort to avoid US constitutional doctrine that considers treaties and custom equivalent to federal law, thus allowing later US law inconsistent with international law to prevail over international obligations. *Jus cogens* norms were asserted first in an effort to enforce the 1986 ICJ judgment against the United States in the *Nicaragua* case.³⁹ Lawyers argued that the constitutional precedents do not apply to norms *jus cogens*, which have a higher status that bind even the President and Congress. The Court accepted *arguendo* the theory, but held that compliance with a decision of the ICJ is not a *jus cogens* requirement.

³⁸ Id. para. 230.

³⁹ *Committee of US Citizens Living in Nicaragua v Reagan*, 859 F.2d 929, 940 (DC Cir 1988).

Other domestic court cases involving *jus cogens* fall into one of two categories. First are those cases in which customary immunities have acted to shield defendants from civil lawsuits for damages. The issue has arisen most often in courts of the United States and the United Kingdom.⁴⁰ In both fora lawyers have argued that the foreign sovereign immunity law must be interpreted to include an implied exception to sovereign immunity for violations of *jus cogens* norms. The argument relies on the idea of implied waiver, positing that State agreement to elevate a norm to *jus cogens* status inherently results in an implied waiver of sovereign immunity.⁴¹ In the case of former Chilean leader, Augusto Pinochet Ugarte, the issue of *jus cogens* was pressed in response to a claim of immunity from criminal prosecution. Among the many opinions in the case, Lord Millet stated that “international law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.”⁴² The judgment ultimately did not rely on *jus cogens* to determine the issue, however, because the situation was controlled by the relevant treaty.

While nearly every court thus far has refused to “trump” immunity by *jus cogens* norms, four recent cases from different national courts demonstrate the confusion over the issue. In all of the cases the courts held that the underlying violations constituted breaches of norms *jus cogens* - two cases involved war crimes and two concerned torture - but the courts split evenly on whether a finding of *jus cogens* violations results in overriding traditional immunity. In a case from Greece and one from Italy, the respective supreme courts held that German crimes committed during World War II were not protected by sovereign immunity.⁴³ In contrast, an Ontario, Canada Court of Appeal and an English appellate tribunal held that the *jus cogens* prohibition of torture does not override sovereign immunity.⁴⁴

A second category of domestic law cases in which the nature of norms as *jus cogens* has been asserted are cases filed pursuant to the US Alien Tort Claim Act.⁴⁵ Some of the plaintiffs assert violations of norms *jus cogens*, often wrongly claiming that the landmark decision *Filartiga v Peña-Irala* held torture to be a violation of international *jus cogens*. In fact, the federal appellate court in that case

⁴⁰ *Al-Adsani v Kuwait* was litigated in English courts before it was submitted to the European Court of Human Rights.

⁴¹ See, eg, *Siderman v The Republic of Argentina*, 965 F.2d 699 (9th Cir 1992), cert denied, 113 S Ct 1812 (1993).

⁴² *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* [1999] 2 All ER 97 (HL) at 179.

⁴³ See: Prefecture of Voiotia v. Federal Republic of Germany, Case No 11/2000 (Areios Pagos, Supreme Court of Greece, 4 May 2000) and Ferrini v. Federal Republic of Germany, Corte di Cassazione (Sezioni Unite) judgment no. 5044 of 6 November 2003, registered 11 March 2004, in *Rivista diritto internazionale* 87 (2004), 539. The Italian case is discussed in Pasquale De Sena & Francesca De Vittor, “State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrina Case,” (2005) 16 EJIL 89.

⁴⁴ See *Bonzari v. Iran*, Ontario Court of Appeal, OJ No. 2800 (2004) and *Jones v. Saudi Arabia*, EWCA Civ. 1394 (2004).

⁴⁵ 8 U.S.C. sec. 1350.

held that official torture constitutes a violation of the law of nations and never mentioned the doctrine of *jus cogens* norms.⁴⁶ No ATCA case has turned on the character of the norm as *jus cogens* or “ordinary” custom.

d. The work of the International Law Commission

In addition to its early work on the law of treaties, in which the notion of *jus cogens* was first raised, the ILC has addressed the topic in other recent studies and drafts, especially its completed articles on state responsibility and its efforts to consider the problem of fragmentation in international law.

The ILC Articles on State Responsibility and accompanying Commentary take the position that peremptory norms exist, urging that the concept has been recognized in international practice and in the jurisprudence of international and national courts and tribunals.⁴⁷ The Commentary notes that the issue of hierarchy of norms has been much debated, but finds support for *jus cogens* in the notion of *erga omnes* obligations and the inclusion of the concept of peremptory norms in the Vienna Convention on the Law of Treaties.

The Articles propose a hierarchy of consequences resulting from various breaches of international law. Article 41 sets forth the particular consequences said to result from the commission of a serious breach of a peremptory norm. To a large extent Article 41 seems to reflect developments in the United Nations, such as the actions of the Security Council in response to breaches of the UN Charter in Southern Africa and by Iraq.⁴⁸ The text imposes positive and negative obligations upon all States. In respect to the first, “what is called for in the face of serious breaches is a joint and coordinated effort by all states to counteract the effect of these breaches”.⁴⁹ The Commentary concedes that the proposal “may reflect the progressive development of international law” as it aims to strengthen existing mechanisms of cooperation. The core requirement, to abstain from recognizing consequences of the illegal acts, finds more support in State practice, with precedents including rejection of the unilateral declaration of independence by Rhodesia,⁵⁰ the annexation of Kuwait by Iraq,⁵¹ and the South African presence in

⁴⁶ *Filartiga v Peña-Irala*, 630 F.2d 876 (2nd Cir 1980). The only United States Supreme Court decision to consider issues arising under the ATCA, *Sosa v. Alvarez-Machain*, reprinted in (2004) 43 ILM 1390, also failed to mention *jus cogens*

⁴⁷ Article 40, Commentaries, para 2.

⁴⁸ eg, UN SC Res 662 (1990), saying that the annexation of Kuwait had “no legal validity and is considered null and void” and calling on the international community not to recognize the annexation and to refrain from any action or dealing that might be interpreted as a recognition of it. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, ICJ Reports 1971, p 16, para 126, declaring the illegality of South Africa’s presence in Namibia as having *erga omnes* effects.

⁴⁹ Article 41, Commentaries, para 3.

⁵⁰ UN SC Res 216 (1965).

⁵¹ UN SC Res 662 (1990).

Namibia.⁵² Article 41 extends the duty to combat and not condone, aid, or recognize certain illegal acts beyond breaches of the UN Charter and responsive action by the Security Council. It remains to be seen whether the Article will increase unilateral determinations that serious breaches of peremptory norms have occurred, with consequent unilateral actions.

In 2002, the ILC recommended that a Study Group prepare a series of reports on the topic of fragmentation of international law arising from its diversification and expansion.⁵³ One of these studies, considered by the ILC in 2005, addressed the issue of hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the United Nations Charter.⁵⁴ The report considered that the three categories of obligations should be considered as conflict rules establishing a relationship of priority among different norms of international law, including a mutual relationship among the three “privileged” categories themselves, based on the principle of legality and international public order. Without considering specific norms, the report called for recognition of the principle of harmonization to avoid practical ineffectiveness of international law in view of “competitive tendencies between several norms bearing on a single issue.”

The ILC’s discussion of the report agreed that certain rules are recognized as superior or having a special or privileged status and stated that this is “because of their content, effect, scope of application, or on the basis of consent among parties.” It added: “The rationale of hierarchy in international law found its basis in the principle of the international public order, and its acceptance is reflected in examples of such norms of *jus cogens*, obligations *erga omnes*, as well as treaty-based provisions such as Article 103 of the Charter.” Thus, the ILC seems at the same time to assert a consensual and a non-consensual basis for superior norms. The latter aspect seems reflected in particular in the subsequent comment: “The notion of public order is a recognition of the fact that some norms are more important or less important than others. Certain rules exist to satisfy the interests of the international community as a whole.”⁵⁵ Nonetheless, the ILC agreed that it would not seek to produce a catalogue of such norms as it continues to study this matter.

e. The content and uses of *jus cogens*

The primary purpose of asserting that a norm is *jus cogens* seems to be to establish a hierarchy among competing norms or to override the will of States dissenting from a norm of international law.⁵⁶ The first of these is reflected in the debate

⁵² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, para 126.

⁵³ Report of the International Law Commission (2002), G.A.O.R., 57th Sess., Supp. No. 10, U.N. Doc. A/57/10, 240.

⁵⁴ Zdzislaw Galicki, “Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules,” ILC 57th Sess. (2005).

⁵⁵ Report of the ILC (2005), para. 487

⁵⁶ Theoretically, of course, the concept would be applicable if two or more States actually decided to enter into an agreement to commit genocide or territorial acquisition by aggression and one

over whether some or all of human rights law preempts other international law, e.g. trade or sovereign immunity. It also may be considered when rights are seen to conflict: e.g. the issue of hate speech or that of reconciling and balancing gender equality and freedom of religion. As to the enforcement of norms against dissenting states, if *jus cogens* is “a norm from which no derogation is possible” and its creation by “the international community as a whole” means anything less than unanimity, then the problem arises of imposing the norm on dissenting States. It is not clear that the international community as a whole is willing to accept the enforcement of widely-accepted norms against dissenters, but the problem is likely to arise infrequently in practice because those norms most often identified as *jus cogens* are clearly accepted as customary international law and there are no persistent objectors. Even if States violate the norms in practice, no State claims the right to commit genocide or enslave persons.⁵⁷

The question of dissenters could arise in the future if the number of purported norms *jus cogens* expands in an effort to further the common interests of humanity. The literature is replete with claims that particular international norms constitute norms *jus cogens*. Proponents have argued for inclusion of all human rights, all humanitarian norms, the duty not to cause transboundary environmental harm, the duty to assassinate dictators, the right to life of animals, self-determination, and territorial sovereignty (despite legions of treaties transferring territory from one State to another).⁵⁸ Thus far, international tribunals have been far more restrained. Taking the most progressive reading of the cases and comments described above, the list of norms denominated *jus cogens* consists of the following:

- the right to life,
- the right to a fair trial,
- the right to racial equality,
- the right to be free from torture,
- the right not to be arbitrarily deprived of liberty, and
- the right to the fundamental protections of humanitarian law during armed conflict (presumably the guarantees of common article 3 of the 1949 Geneva Conventions).

of them later changed its mind. According to the VCLT, only a party to an illegal agreement can invoke the illegality to escape its treaty obligations. The ILC Articles on State Responsibility go further and impose obligations on all States to repress breaches of *jus cogens* norms.

⁵⁷ It does seem, however, that the Mexican government may have asserted the *jus cogens* status of non-discrimination out of concern that the US would claim to be a persistent objector to asserted rights for foreign workers.

⁵⁸ See, e.g. Beres, LR, “Prosecuting Iraqi Crimes against Israel During the Gulf War: Jerusalem’s Rights under International Law”, 9 *Ariz J Int’l & Comp L* 337(1992) (*jus cogens* obligation to assassinate in specified circumstances). Raeyham, P, “Genocidal Violence in Burundi: Should International Law Prohibit Domestic Humanitarian Intervention”, 60 *Albany L Rev* 771 (1997) (prohibition of genocide *jus cogens*); Upadhye, S, “The International Watercourse: An Exploitable Resource for the Developing Nation under International Law?”, 8 *Cardozo J Int’l & Comp L* 61 (2000) (right to development *jus cogens*).

The rationale that emerges from the literature and the cases is one of necessity: the international community cannot afford a consensual regime to address many modern international problems. Thus, *jus cogens* is a necessary development in international law, required because the modern independence of States demands an international *ordre public* containing rules that require strict compliance. The ILC Commentary on the Articles on State responsibility favours this position, asserting that peremptory rules exist to “prohibit what has come to be seen as intolerable because of the threat it presents to the survival of states and their peoples and the most basic human values”.⁵⁹ The urgent need to act that is suggested fundamentally challenges the consensual framework of the international system by seeking to impose on dissenting States obligations that the “international community” deems fundamental. State practice has yet to catch up fully with this plea of necessity and it should be recalled that States legally bound by human rights treaties and custom may not plead internal law as a defense to breach of their obligations. Even if a particular human rights treaty permits denunciation, the denouncing state will remain bound by customary international law and by other human rights agreements that permit no denunciation. Member States of the United Nations have human rights obligations even if they do not ratify or accept any of the existing global or regional human rights treaties, because of the duties that flow from membership in the United Nations.

In theory, a state could refrain from joining the United Nations and claim to be a “persistent objector” to the development of human rights law, in an effort to avoid human rights obligations. Even assuming that persistent objection during the formation of a rule is a means to avoid being bound by the rule, in practice no such state exists. There are states, however, that contest particular rights posited as customary international law. Here the doctrine of norms *jus cogens* could be relevant to establishing that the right in question has become binding even in the face of persistent objection. A second practical effect of elevating some human rights norms to the status of *jus cogens* would be to establish clearly that these norms override conflicting or incompatible treaty obligations. While the supremacy of human rights law is being pressed by human rights bodies, international financial and trade institutions have shown no indication of their willingness to accept the proposed hierarchy. As noted above, neither international nor domestic tribunals shown a willingness to override the customary laws of sovereign and diplomatic immunity in order to give priority to asserted *jus cogens* norms.⁶⁰

⁵⁹ Article 40, Commentaries, para 3.

⁶⁰ See *Al-Adsani v. The United Kingdom*, Eur. Ct. Hum. Rts, judgment of 21 Nov. 2001, available at <<http://www.echr.coe.int>>; *Arrest Warrant (Congo v. Belgium)*, 2002 ICJ Rep., available at <<http://www.icj-cij.org>>.

II. Core Human Rights

Core human rights are not necessarily the same as norms *jus cogens*; core rights need not be recognized as peremptory in order to acknowledge that their fulfillment is a prerequisite to the enjoyment of other rights. Identification of such core rights has been attempted by scholars and by international human rights bodies.

a. Core rights in theory

The moral philosophy of human rights “helps us to delineate the structures of human thought in a manner which reveals the implications of thinking and speaking about rights in a particular way, the relationships of rights to one another, the hierarchical ordering of rights and the nature of the conflicts or tension among rights.”⁶¹ One approach sets individual freedom or autonomy and equality as the common themes, joined to a concept of the natural necessity “in the sense of prescribing a minimum definition of what it means to be human in any morally tolerable form of society.”⁶² Rights which preserve the integrity of the person flow logically from the principle of freedom and autonomy, as does the principle of non-discrimination and are thus core in the sense that all other rights flow from them.

Kantian ethics, presupposing a moral foundation for the different desires and ends of all persons, provide a basis for rights flowing from the autonomy of the individual in choosing his or her life plan, consistent with a similar freedom for others. Rawls’s *Theory of Justice* sees justice as the first virtue of social institutions and human rights as both instrumental to and the end of justice, ascertained by rational contractors forming the social contract. The two principles of justice they would choose, according to Rawls are (1) each person is to have an equal right to the most extensive system of equal basic liberties compatible with a similar system of liberty for all and (2) social and economic inequalities are to be arranged so they are both to the greatest benefit of the least advantaged, consistent with a just savings principle and attached to positions and offices open to all under condition of fair equality of opportunity (distributive justice).

Other theorists have constructed a hierarchical system of human rights based upon the protection of human dignity. Dworkin views denial of equality as a core problem to be addressed. He does not elevate individual freedom to this status because of the problem of external preferences (such as prejudice and discrimination) that corrupt a utilitarian decision to afford equal liberties to others. Thus, certain specific liberties like freedom of speech, of religion, association and personal relations, require special protection in the face of such externalities that would corrupt the social duty to provide equal rights to all.

⁶¹ Jerome J. Shestak, *The Philosophical Foundations of Human Rights*, in Janusz Symonides, *Human Rights: Concept and Standards* 31, 32 (UNESCO, 2000).

⁶² *Id.* at 43.

Maurice Cranston proposed in 1967 that human rights must be properly understood to be those matters that are enforceable against duty-holders, genuinely universal, and of paramount importance; everything else must be viewed as aspirational, including, in his view, most economic, social and cultural rights.⁶³ Henry Shue, in contrast, speaks of the “basic” rights to liberty, security, and subsistence, “everyone’s minimum reasonable demands upon the rest of humanity.”⁶⁴ What is crucial to rights being basic is that any attempt to enjoy any other right by sacrificing a basic right would be self-defeating, cutting the ground from beneath itself. Other, non-basic rights may be limited or sacrificed in order to secure the basic right. Shue also argues that there can be no priority according among basic rights because each one is necessary for the exercise of all other rights.

Joseph Raz similarly posits a distinction between core rights and derivative rights⁶⁵ while Diana Meyers argues that four inalienable rights - the right to life, the right to personal liberty, the right to benign treatment, and the right to satisfaction of basic needs - are inherent and inalienable to all human beings, as moral agents who must be able to exercise moral judgments about their life’s plans, and that these cannot be limited or revoked in a just legal system.⁶⁶

b. Core rights in practice

To a large extent, the provisions of positive law reflect the theoretical approaches that posit maximum claims for equality, personal security, and subsistence rights. While there is some variety from one region to another, a minimum core has been identified that supports the idea of fundamental rights and derivative rights.

Equality as a core or foundational human rights finds support in human right texts. As is well-known, the United Nations Charter has no catalogue of human rights, but expressly mentions the entitlement to respect for human rights without discrimination on the basis of race, sex, language or religion and respect for the equal rights and self-determination of peoples. The phrase “without distinction on the basis of race, sex, language or religion” is added to every reference to human rights and fundamental freedoms in the body of the Charter. The Vienna Declaration called non-discrimination “a fundamental rule of international human rights law.” Further reflecting state practice, it is notable that the Convention on the Suppression and Punishment of the Crime of Apartheid⁶⁷ is the only international instrument apart from the Convention on the Prevention and

⁶³ Maurice Cranston, *Human Rights, Real and Supposed*, in D.D. Raphael (ed.), *Political Theory and the Rights of Man*, 43 (1967).

⁶⁴ Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (1980).

⁶⁵ Joseph Raz, *On the Nature of Rights*, 93 MIND 194 (1984).

⁶⁶ Diana T. Meyers, *Inalienable Rights: A Defense* (1985).

⁶⁷ International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, *reprinted in* 13 I.L.M. 50 (1974), art. 1. Earlier, the 1968 Proclamation of Teheran called the policy of apartheid a “crime against humanity.” Proclamation of Teheran, para. 7.

Punishment of the Crime of Genocide⁶⁸ explicitly to designate commission of any act covered by the treaty a “crime under international law.” Genocide and apartheid both involve the targeting of individuals or groups and depriving them of fundamental rights because of their race or ethnicity; the criminalization of these acts can support the notion that freedom from systematic discrimination enjoys a high status in international law, at least as far as race is concerned. As discussed more fully below, derogation clauses that permit the suspension of certain rights during periods of emergency generally prohibit discriminatory measures.

It must be conceded that state practice has not been as favorable to non-discrimination on the basis of sex, language or religion, although in theory and on the basis of the U.N. Charter provisions it should be afforded similar importance. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been accompanied by the most wide-sweeping and frequent reservations of any human rights instrument.⁶⁹ Neither linguistic nor religious discrimination has generated enough concern to produce agreement on the need for the enactment of a binding legal instrument on the global level.⁷⁰ One may also compare the number of ratifications of the Genocide,⁷¹ Apartheid,⁷² and Racial Discrimination Conventions⁷³ with that of CEDAW to observe the lesser agreement with eliminating discrimination based on sex and gender.

In another approach, core human rights could be identified as those whose violation is designated an international crime or for which states are obliged to enact national criminal laws. Prohibiting conduct as criminal usually reflects society’s strongest condemnation and expresses a desire to uphold the fundamental values of the society. As noted above, genocide and apartheid have been expressly called international crimes. In addition, global and regional treaties against torture call upon the states parties to “ensure that all acts of torture are offences under its criminal law.”⁷⁴ War crimes are designated by the Geneva

⁶⁸ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. 1.

⁶⁹ As of January 2000, 67 states parties to CEDAW had entered reservations or declarations. For earlier studies of the problem, see Rebecca Cook, *Reservations to the Convention on the Elimination of All forms of Discrimination against Women*, 30 VA. J. Int’l L. 643 (1990); Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination against Women*, 85 Am. J. Int’l L. 281 (1991).

⁷⁰ The U.N. Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief is one of the few human rights declarations adopted by the United Nations that has not been followed by a treaty. As for language, only within Europe is there a legal instrument, the Framework Convention on Minority Languages.

⁷¹ Genocide Convention, *supra* note 34.

⁷² Apartheid Convention, *supra* note 33.

⁷³ Convention on the Elimination of All forms of Racial Discrimination, 21 Dec. 1965, 660 U.N.T.S. 195, reprinted in 5 I.L.M. 352 (1966).

⁷⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc.A/39/51, at 197; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 Nov. 1987, Doc. No. H(87)4 1987, E.T.S. 126, reprinted in 27 I.L.M. 1152 (1988);

Conventions of 1949⁷⁵ and the Protocols of 1977,⁷⁶ which call upon states parties to suppress and punish “grave breaches” of the Conventions. In the Inter-American system, forced disappearance is considered a crime against humanity.⁷⁷ The establishment of *ad hoc* international tribunals for the former Yugoslavia and for Rwanda, as well as the conclusion of the Rome Statute for a permanent International Criminal Court reinforce the understanding that the international community views the commission of certain acts as particularly egregious and necessitating individual criminal responsibility. The right to be free from these abuses could be viewed as “core” protection.

Global and regional bodies have identified core rights, but also core obligations. This approach has been of particular importance in the area of economic, social and cultural rights, where the obligation of states parties to implement treaties is generally progressive and variable.⁷⁸ The Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), discusses the nature of state parties’ obligations, noting that various obligations in the ICESCR are obligations of immediate effect. Two described as being “of particular importance” are the undertaking to guarantee that rights are exercised “without discrimination” and the other is the obligation “to take steps”. The Committee also is of the view “that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. In a separate General Comment (No. 12) on the right to adequate food, the Committee recognizes the core minimum obligation to ensure freedom from hunger, as distinguished from the more general right to adequate food.”⁷⁹

Inter-American convention to Prevent and Punish Torture, 9 Dec. 1985, OAST S 67, G.A. Doc. OEA/Ser.P, AG/doc.2023/85 rev. 1 (1986), reprinted in 25 I.L.M. 519 (1986).

⁷⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 12 Aug. 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, 74 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 74 U.N.T.S. 287.

⁷⁶ Protocol I Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, U.N. Doc. A/32/144 Annex I, 1125 U.N.T.S. 17512, reprinted in 15 I.L.M. 1391 (1977); Protocol II Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, U.N. Doc. A/32/144 Annex II, 1125 U.N.T.S. 17513, reprinted in 16 I.L.M. 1442 (1977).

⁷⁷ Inter-American Convention on Forced Disappearance of Persons, OEA/Ser.P AG/doc.3114/94 rev. 1, June 8, 1994, art. 3.

⁷⁸ An exception to the approach of “progressive implementation” is the African Charter on Human and Peoples’ Rights. See *Economic and Social Rights Center v. Nigeria*, Afr. Comm’n Hum. Peoples’ Rts, Case 155/96, decision of 27 Oct. 2001.

⁷⁹ The IESCR itself makes this distinction, speaking in art. 11(1) of the right of everyone to adequate food and in art. 11(2) of the “fundamental right of everyone to be free from hunger.”

The Inter-American Commission on Human Rights has adopted a similar “basic needs” approach to economic, social and cultural rights. According to the Commission, the obligation of member States to observe and defend human rights, set forth in the American Declaration and the American Convention, obligates such states, “regardless of the level of economic development, to guarantee a minimum threshold of these rights.”⁸⁰ States must immediately ensure “a minimum level of material well-being which is able to guarantee respect of their rights to personal security, dignity, equality of opportunity and freedom from discrimination.” The European Social Charter and the ILO Declaration of Fundamental Rights of Workers also indicate that certain core rights are deemed of particular significance in the economic and social field.

III. Obligations *erga omnes*

The International Court of Justice was the first to identify the category of obligations *erga omnes* in dicta in the *Barcelona Traction* case.⁸¹ Unlike obligations arising in respect to specific injured states, e.g. in the field of diplomatic protection, obligations *erga omnes* are owed to the international community as a whole. All states thus can be held to have a legal interest in their protection without the need to demonstrate material injury. There is thus a significant broadening of possible avenues to press for compliance. Obligations *erga omnes* are of crucial importance for unilateral obligations, where there are likely to be no states materially affected by a breach. Human rights obligations are the primary example of such unilateral undertakings.⁸²

The importance of this category is thus evident for enforcement, but it is less clear how the category relates to hierarchy of norms. On the one hand, obligations *erga omnes* could be viewed as solely procedural, designed to protect the international community interest where every state or no other state is injured, such as guarantees of human rights. In this respect, the category could be seen as deriving from the principle of effectiveness because violations of the law could not be challenged without the broadening of standing. Yet, the ICJ did not focus on this element in the *Barcelona Traction* decision; instead, it stated that the obligations *erga omnes* exist “in view of the importance of the rights involved.” This

⁸⁰ IACHR, The Realization of Economic, Social and Cultural Rights in the Region, *Annual Report of the Inter-American Commission on Human Rights*, 1993, OEA/Ser.L/V.II.85, doc. 9, rev., February 11, 1994, 519-534.

⁸¹ *Barcelona Traction Light and Power Company, Limited, Second Phase*, 1970 ICJ Rep. 3, 32.

⁸² The *Barcelona Traction* judgment identified as obligations *erga omnes* the rules against aggression, genocide, and Arules concerning the basic rights of the human person, including protection from slavery and racial discrimination. In its Judgment of 11 July 1996 in the Genocide case, the Court held that the rights and obligations contained in the Genocide Convention are *erga omnes* "Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, 1996 ICJ Rep. 616, para. 31.

suggests, perhaps, a higher status for such norms. It may also provide a link with the doctrine of *jus cogens* norms, because if every state has an interest in compliance with *erga omnes* obligations, it is difficult to see how two or a few states could contract out of the obligation.⁸³

A practical effect in favor of human rights does arise from the doctrine of obligations *erga omnes*. It allows any state to raise or contest an alleged violation, in contrast to the law of diplomatic protection which limits standing to bring claims on behalf of an injured person to the state of nationality.⁸⁴ In practice, the issue has not arisen. Inter-state human rights cases generally are based upon treaty provisions allowing any state party to the treaty to complain of violations by another state party.⁸⁵

IV. Non-derogable rights

The final issue of “relative normativity”⁸⁶ in human rights law considers whether international instruments designate certain rights as absolute, in the sense that they apply without limitations clauses and without possibility of reservation, derogation, or denunciation, resulting in treaty-based “fundamental standards of humanity”⁸⁷. Alan Gewirth is one of the few writers⁸⁸ to posit that there are absolute rights. A right is absolute when it cannot be overridden in any circumstances, can never be justifiably infringed and must be fulfilled without any exceptions. The contents of any right include the subject, the objective, the respondent, and the justification or basis of the right. Gewirth assumes a Principle of Generic Consistency that requires every agent act towards all in accordance with generic rights that are necessary conditions of action, freedom and well being, the latter being defined in terms of the various substantive abilities and conditions needed for (successful) action. If two rights are so related to each other that each can be fulfilled only by infringing the other one, then that right takes

⁸³ Article 53 of the Vienna Convention on the Law of Treaties, *supra* note 56, provides that a treaty will be void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” A peremptory norm is defined as one “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Thus a two stage consensual process is involved: first, there must be a rule of international law accepted by the international community and, second, that rule must be accepted as a peremptory norm.

⁸⁴ See *Mavromatis Palestine Concessions (Jurisdiction)* case, P.C.I.J., Ser. A, No. 2 (1924); *Nottebohm Case (Liechtenstein v. Guatemala)*, Preliminary Objections, 1953, IC Rep. 110; Merits, 1955 ICJ Rep. 4.

⁸⁵ Notably, the American Convention on Human Rights makes the inter-state procedure optional, suggesting perhaps that the *erga omnes* character of the obligations is not fully accepted, at least in respect to the supervisory machinery established by the Convention. Art. 45, American Convention on Human Rights.

⁸⁶ See Weil, P (1983), “Towards Relative Normativity in International Law?”, 77 *AJIL* 413.

⁸⁷ See *Minimum humanitarian standards: Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21*, E/CN.4/1998/87 of January 5, 1998.

⁸⁸ Alan Gewirth, *Are There Any Absolute Rights?*, 31 *PHILOSOPHICAL QUARTERLY* 1 (1981)

precedence whose fulfillment is more necessary for action. Rules are absolute if they are specific and not overloaded with exceptions or requiring intricate utilitarian calculations; second, they must be justifiable through a valid moral principle and they must exclude any reference to the possibly disastrous consequences of fulfilling the right. Gewirth uses the example of torture and argues for its absolute nature not only because of the impact on the tortured person, but the impact upon the torturer. Even if the person has knowledge that would save the lives of hundreds or thousands of others, the basic principle of morality that requires respect for the rights of all persons prohibits using any individual merely as a means to the well-being of other persons. Utilitarian arguments are also available: torturing would only lead to further escalation of violence and it cannot be certain that the destruction will not occur anyway. One cannot trade the commission of a present evil for what is only a threatened or possible future evil. In addition, the principle of intervening action makes the bombers/terrorists responsible for any killings that follow, not the person who has knowledge of them or the person who refuses to torture to acquire the knowledge. Gewirth generalizes his example of torture to specify more generally an absolute right not to be made the intended victim of a homicidal project, stemming from the general principle underlying all absolute rights: the prohibition on degrading persons, from treating them as if they had no rights or dignity. Other specific absolute rights may be generated from this principle, such as the right to be free from slavery, but the list is not long.

In practice, it is useful to distinguish among different applications of the term non-derogable. First, it may refer to a hierarchy of norms in national law, in which the constitution grants international customary or treaty law a rank superior to that of a domestic statute, protecting international norms from derogation by a conflicting domestic statute.⁸⁹ Second, the international doctrine of *jus cogens* asserts that treaties may not derogate from peremptory norms. Third, human rights treaties provide that certain provisions are not subject to derogation. Finally, core obligations within the provisions of human rights treaties may be non-derogable.

The International Covenant on Civil and Political Rights (article 4), the American Convention on Human Rights (article 27), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 15), permit states parties to take measures suspending certain rights “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, color, sex, language, religion or social origin”⁹⁰. Supporting the notion that there is a hierarchy implicit in the idea of non-derogable rights, the Inter-American Commission on Human Rights has suggested that states may have a duty to suspend certain derogable rights if this is necessary to protect those rights that are non-derogable.⁹¹

⁸⁹ Art. 25 of the German Basic Law, for example prevents authorities from interpreting and applying any German domestic law in such a way as to violate general rules of international law. See the 1975 decision of the Germany Constitutional Court, 75 BVerfGE 1, 19.

⁹⁰ ICCPR, article 4(1).

⁹¹ See Inter-Am. Comm’n on Hum. Rts., *Report on the Situation of Human Rights in the Republic of Guatemala*, OAS/Ser.L/V/II.53, doc. 21 rev. 2, 13 Oct. 1981, para. 9.

Only four non-derogable rights are common to the three instruments: the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right to be free from slavery, and the right to be free from *ex post facto* criminal laws. Common to the ICCPR and the American Convention as non-derogable rights are recognition as a person before the law, and the right to freedom of thought, conscience and religion. The ICCPR alone declares non-derogable the right to be free from imprisonment for failure to perform a contractual obligation, while the European Convention, with Protocols, considers the freedom from double jeopardy and abolition of the death penalty non-derogable. The American Convention uniquely adds protection of the family, rights of the child, the right to a nationality, the right to participate in government, and fundamental judicial guarantees to the list of non-derogable rights. The instruments also require that measures taken in derogation not be discriminatory.

Among the general human rights conventions, neither the Covenant on Economic, Social and Cultural Rights (CESCR) nor the African Charter on Human and Peoples' Rights contain a provision on derogations. The CESCR perhaps understandably omits discussion of derogations, given that its statement of obligations already contains considerable flexibility for states party to apply the rights "to the maximum of available resources, with a view to achieving [them] progressively . . . by all appropriate means. . . (art. 2). The African Commission has interpreted the Charter's omission of a derogation clause to mean that the Charter as a whole remains in force even during periods of emergency, including armed conflict.⁹²

The common non-derogable rights of life, and freedom from torture and slavery are also protected by the Convention for the Abolition of Slavery,⁹³ the Genocide Convention,⁹⁴ and the Torture Conventions,⁹⁵ none of which contain derogations provisions.⁹⁶ International humanitarian instruments add to the thesis that these rights, together with guarantees against discrimination, form the *noyau dur* of human rights. Common Article 3 to the four 1949 Geneva Conventions,⁹⁷ the essential core of international humanitarian law, demands that all non-combatants be treated humanely and without discrimination by race, color, religion, sex, birth,

⁹² See Comm. 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, in Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights 1995/96, AGH/207 (XXXII), Annex VIII at 12, 16 (The African Charter . . . does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State for violating or permitting violations of rights in the African Charter.)

⁹³ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 Sept. 1956, E.S.C. Res. 608 (XXI), 226 U.N.T.S. 3.

⁹⁴ Genocide Convention, *supra* note 32.

⁹⁵ See Torture Conventions, *supra* note 41.

⁹⁶ The conventions concerning racial discrimination and discrimination against women also omit derogations provisions, supporting the idea that non-discrimination has a hierarchically superior status in international human rights law because it is a form of aggravated deprivation of human rights.

⁹⁷ Geneva Conventions, *supra* note 42, Common Article 3.

wealth or any similar criteria. Specifically protected are life and freedom from torture, humiliating and degrading treatment, hostage-taking, and fundamental due process.

The European Court of Human Rights seems to support this view. It has emphasized the absolute character of the prohibition against torture, reiterating that “Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 sec. 2 even in the event of a public emergency threatening the life of the nation”⁹⁸. As such, it could not be violated in order to give priority to another guaranteed right.

The issue of derogations is linked to that of reservations and denunciations. Many human rights treaties have no provisions on either of the latter topics and both are generally regulated by the provisions of the Vienna Convention on the Law of Treaties.⁹⁹ This means, first, that reservations are permitted if they are not incompatible with the object and purpose of the agreement,¹⁰⁰ while denunciation is permitted only if it is established that the parties intended the treaty to be denounced.¹⁰¹

Concerning reservations, General Comment No. 24¹⁰² issued by the Human Rights Committee questions whether reservations to non-derogable rights in the ICCPR are permissible. It concludes that generally they would be incompatible with the obligations of states, as would be a reservation to the article concerning derogations. The Inter-American Court has gone further, stating that “a reservation which was designed to enable a state to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it.”¹⁰³ In the European Court, reservations incompatible with the object and purpose of the Convention have been rejected. In his separate opinion, Judge de Meyer notes that “the object and purpose of the European Convention on Human Rights is not

⁹⁸ Eur. Ct. Hum. Rts, *Selmouni v. France*, judgment of 28 July 1999, para. 95.

⁹⁹ Vienna Convention on the Law of Treaties, 23 May 1969, U.N. Doc. A/CONF.39/26, reprinted in 8 I.L.M. 679 (1969). As of March 1, 2002, there are ninety states parties.

¹⁰⁰ Vienna Convention, *id.*, arts. 19-23.

¹⁰¹ Vienna Convention, *id.*, art. 54.

¹⁰² Human Rights Committee, General Comment No. 24, CCPR/C/21/Rev.1/Add.6, 2 Nov. 1994, in U.N. Doc. HRI/GEN/1/Rev.3 (15 Aug. 1997), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*; also available at <<http://www.unhchr.ch/tbs/doc/nsf>>.

¹⁰³ “Merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose is, however, permissible. See Inter-American Court of Human Rights, Advisory Opinion OC-3/83 of September 8, 1983, *Restrictions to the Death Penalty, Articles 4(2) and 4(4) American Convention on Human Rights*,” Ser. A, No. 3, para. 61.

to create, but to recognize, rights which must be respected and protected even in the absence of any instrument of positive law. It is difficult to see how reservations can be accepted in respect of provisions recognizing rights of this kind.”¹⁰⁴

Early global human rights treaties permit denunciation or withdrawal, including the Genocide Convention and the Supplementary Anti-Slavery Convention, but later practice omits such provisions and it would appear to be contrary to the object and purpose of such instruments to allow their termination. The Human Rights Committee has interpreted the omission of a withdrawal provision from the ICCPR to mean that denunciation or withdrawal is not permitted, given the nature of the of the Covenant.¹⁰⁵ Regional instruments more commonly contain provisions allowing denunciation upon notice¹⁰⁶.

Taking into account the absence of permissible suspensions, reservations or denunciations in respect to the common non-derogable rights, at least at the global level, they come close to being absolute in nature and thus can be seen as the pinnacle of positive human rights law.

CONCLUSIONS

Taking together the four concepts discussed above, it may be asked whether they recognize common rights, obligations or principles. In reviewing what has been said, there first emerges a clear emphasis on equality and non-discrimination. Apart from the fact that it is the sole right mentioned in the UN Charter, it runs through the *jus cogens* prohibitions of genocide and slavery, which generally target individuals based on their identity as members of ethnic or racial groups. Non-discrimination is also an immediate obligation of states implementing economic, social and cultural rights. It conditions the legality of measures in derogation of rights during periods of national emergency and is part of the

¹⁰⁴ *Belios v. Switzerland*, 132 A Eur. Ct. Hum. Rights, Judgment of 29 April 1988 (separate opinion of Judge de Meyer).

¹⁰⁵ Human Rights Committee, General Comment No. 26, CCPR/C/21/Rev.1/Add.8/Rev.1, reprinted in I.L.M. 839 (1995).

¹⁰⁶ European Convention, *supra* note , art. 58 (requiring six months notice). Greece denounced the Convention in April 1970, after it was found to have committed torture and other human rights violations, and withdrew from the Council of Europe; it rejoined the system in 1974 after the restoration of civilian government. The European Torture Convention, art. 22, similarly allows denunciation, requiring twelve month's notice. The American Convention, *supra* note , art. 78, requires one year's notice. On May 26, 1998, Trinidad and Tobago notified the Secretary General of the OAS of its denunciation of the American Convention. The denunciation became effective one year later. Art. 23 of the Inter-American Convention to Prevent and Punish Torture, 9 Dec. 1985, OASTS No. 67, allows denunciation upon one year notification, as does art. 21 of the American Convention on Forced Disappearance of Persons, 9 June 1994, not yet in force, art. XXIV of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 8 June 1994, and art. XIII of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 7 June 1999, not in force.

requirements of humanitarian law. This emphasis on equality and non-discrimination can be seen to flow from the fundamental notion of the inherent nature and dignity of all persons. A denial of equality is a denial of the very foundation of human rights in the worth of each individual.

Other rights that have been recognized as simultaneously being *jus cogens* norms, core and non-derogable rights, and as obligations *erga omnes* are few in number: the right to life, the right to be free from slavery, and the right to be free from torture, together with fundamental judicial protections necessary to ensure the enjoyment of other rights. Among these, the right to life, as has been recognized by human rights tribunals, imposes both negative and positive obligations on states and encompasses some of the obligations corresponding to core economic, social and cultural rights, i.e. ensuring the right to food, shelter and health care.

The legal consequences of denominating these rights in this fashion have yet to be fully determined and will no doubt evolve over time, as will the list itself. For the present, it seems clear that these rights are ones that impose obligations on all states. They may not be suspended or subordinated to other rights, and they cannot be subject to reservation. In theory they should override conflicting norms of whatever origin, but this is a matter for on-going discussion.

**THE LEGAL STATUS
OF THE EUROPEAN SOCIAL CHARTER:
TAKING INTERDEPENDENCE AND INDIVISIBILITY
OF HUMAN RIGHTS SERIOUSLY
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“It can never be sufficiently reiterated that the European Social Charter...is a legal instrument designed to guarantee and develop human rights, and the human rights are not simply civil and political rights”.

Klaus Fuchs,
*The European Social Charter:
Its role in Present-Day Europe and its Reform*
151-167, at 151 in Drzewicki, Kraus & Rosas (Eds.)
Social Rights as Human Rights: A European Challenge
(Abo Akademi Press, 1994).

1. Introduction.

The purpose of this paper is to review the legal status of the European Social Charter.

If there is a common thread to the papers delivered at this seminar it is that there are some transcendent principles of justice and that there is something special about human rights treaties in so far as they embody these principles of justice. Furthermore, if human rights treaties are qualitatively distinct then it follows that the treaty regime reflected in and advanced by the Vienna Convention on the Law of Treaties (VCLT) should not be mechanically applied without making due allowance for these differences.

I take this intuition of transcendence as a given although it is not without its share of problems. If that is our departure point then where do the principles of ‘distributive justice’ fit? How central are they to our theory of justice and what difference does this make to our understanding of the place of socio-economic rights generally and particularly as embodied in the Charter in the overall scheme of Council of Europe human rights treaties? The underlying thesis of this paper is that economic, social and cultural rights are, especially when combined with non-discrimination, core human rights and that, as such, the Social Charter forms one of the core human rights treaties of the Council of Europe.

The European Social Charter was intended at the outset to complement the European Convention on Human Rights (ECHR). Indeed, the two instruments share some common provisions such as non-discrimination and freedom of association. In a sense the Charter provides for the ‘political economy’ of freedom. It comprises a ‘productive factor’ in our market economies. Just as important, it constitutes a ‘civilising factor’ in our democratic cultures by avoiding severe social dislocation that can stifle the middle ground and afford a breathing space for political extremes. If one were to generalise it would be to say that the Charter is being interpreted to resonate with the underlying purpose of the ECHR – to protect and also to positively provide for a zone of personal freedom within our common democratic culture.

Viewed from a purely formal perspective, the first and most important thing that can be said about the European Social Charter is that it is – despite its title – a legally binding human rights treaty.¹ This may seem like a surprising beginning except for the fact that some might be tempted to question its legal status since – unlike the European Convention on Human Rights – it is styled a ‘Charter’ and not a ‘Convention’. However, such analysis, through rare nowadays, is not motivated by an objective legal appraisal of the status of the Charter. It would seem coloured more by an anachronistic ambivalence toward the very legitimacy of distributive justice – and more especially towards legal instruments that seek to advance its goals.

The relevant supervisory committee (European Committee of Social Rights) clearly conceptualises the treaty as a human rights treaty and approaches it using broad canons of construction applicable to all human rights treaties. Adopting a broad teleological approach appropriate to the interpretation of human rights treaties the Committee has determined that:

the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically but also in fact.²

State practice is increasingly to the effect that the Charter is taken into account in framing legislation (as one might expect) and in litigation before domestic courts (see section 5 below).

What sets the Social Charter treaty apart then is the fact that it deals with economic, social and cultural human rights. Such rights are, by definition, positive in nature and therefore relatively more demanding of States. This distinction should not, however, be overstated since many of thematic human rights of the Council of Europe (e.g., Framework Convention for the Protection of National Minorities) place similarly robust positive obligations on the part of the

¹ There are three recent general works on the Social Charter; Grainne de Burca & Bruno de Witte (Eds.), **Social Rights in Europe**, (Oxford, 2005); David Harris & John Darcy, **The European Social Charter**, (2d Ed., Transnational, USA, 2001); and Lenia Samuel, **Fundamental Social Rights - Case Law of the European Social Charter**, (2d Ed., Council of Europe, 2002). See also, Jaspers & Betten, **European Social Charter**, (Kluwer, 1987).

² ICJ v Portugal, Collective Complaint 1 (2000), para 32.

States Parties. And indeed the European Court of Human Rights has famously interpreted the Convention of Human Rights (ECHR) to give rise to some positive obligations in order ensure that the core rights are fully realised.³ Indeed, the Court seems to require States Parties to proactively intervene on occasion to forestall the occurrence of violations⁴. And several social benefits are protected albeit indirectly) through ECHR caselaw.⁵

Arguments have been heard from time to time and especially in the Parliamentary Assembly that at least some of the rights of the Charter are now so well grounded both at the regional European level and in most of the member States that they should be added to the body of the European Convention on Human Rights.⁶ They would thus be subject to the jurisdiction of the European Court of Human Rights. These arguments are reminiscent of the position taken by Israel during the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to the effect that judicial enforceability should apply to those states that had reached a certain level of socio-economic development and that other States had a duty to aim in that direction.⁷ The creative view of the Israeli delegation did not succeed. But the intent behind the various moves by the Parliamentary Assembly is surely to the effect that Europe had now reached that point with respect to certain rights and that the time was therefore right to tack these rights on to the ECHR. Despite its cogency, these arguments are unlikely to find political traction in the medium term.

It is looking increasingly likely that the European Union will begin at some stage to 'enforce' social rights. It will be recalled that the main part of the EU Charter on Fundamental Rights covers social rights under the heading of 'solidarity'. However, and leaving the EU Charter entirely to one side, the logic of the Article 13 anti-discrimination Directives points decisively towards the progressive enforceability of social rights through EU law. While the Race Directive, for example, is predicated on non-discrimination it can (and predictably will) reach into the core of such social rights as housing.⁸ That is, while the Directive uses the window of non-discrimination to peer onto social rights, it will inevitably enable the European Court of Justice to assess the substantive ingredients of those

³ See generally, Alistair Mowbray, **The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights**, (Hart, 2004).

⁴ See, e.g., *Z and others v UK* (No 2939295 ECHR (2000-V) , 10.05.01

⁵ See, e.g., *Kjartan Asmundsson v Iceland*, No 60669/00, 12.10.04.

⁶ See, e.g., Recommendation 1415 (1999) of the Parliamentary Assembly, '*additional protocol to the European Convention on Human Rights concerning fundamental social rights*'.

⁷ The Israeli delegate argued that rights should not be divided into economic social and cultural on the one hand and civil and political on the other. He argued instead that rights should be divided into those that were immediately effective (which spanned all rights) and those that would require extensive programming. See P Alston & G Quinn, '*The Nature and Scope of States Parties: Obligations under the International Covenant on Economic, Social and Cultural Rights*', 9 Hum. Rts. Q., (1987) at 172-173.

⁷ Harris, *supra* note 1, at 27.

⁸ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of race or ethnic origin.

rights. In its Mangold decision of November 2004, which touches on the issue of age discrimination and the proper interpretation of the EU Framework Directive on Employment the European Court of Justice seems to have laid stress on the fact that the Directive emanates from principles to be located in international human rights instruments.⁹

It is submitted that this overarching ethic of non-discrimination is likely to provide a fruitful bridge between economic, social and cultural rights (European Social Charter), civil and political rights (under existing ECHR jurisprudence) and EU law (especially the Article 13 Directives). Indeed, it could build bridges to other cognate international instruments such as the International Covenant on Civil and Political Rights which, through Article 26, deals with non-discrimination with respect to at least certain social and economic rights as well as with the International Covenant on Economic, Social and Cultural Rights.¹⁰

Such normative partnership is long overdue. Indeed, one eminent academic, Professor Olivier DeSchutter, argues not merely for EU ratification of the ECHR but also for EU ratification of the Social Charter.¹¹ Again this intrinsic tie - or potential normative partnership - between the different normative streams should only intensify accordingly as the European Court of Human Rights comes to terms with Protocol 12 to the ECHR which entered into force in April 2005.

More informally, and at a high political level, the decision taken at the recent Council of Europe Summit in Warsaw to step up its work in the social policy field "on the basis of the European Social Charter" as well as other relevant instruments is greatly welcome. It is obvious that our European social model (or amalgam of social models)¹² is under considerable pressure as a result of globalisation, demographic and technological change, an ageing population. Moreover, these pressures are occurring at a time when there would appear to be a general drift in European political culture away from the ethic of solidarity and towards possessive individualism.¹³ Aware of these challenges the Warsaw Summit agreed to the establishment of a High Level Task Force which will build on the important contribution of the Social Charter and try to find a way of renewing European social solidarity in the circumstances of the 21st Century.

⁹ Mangold, Case-C-144/04, Judgment of the Court, 22 November, 2005. See especially paras 74-96.

¹⁰ See generally, Kevin Kitching (Ed.) **Non-Discrimination in International Law: A Handbook for Practitioners**, (Interights, London, 2005): text available at <http://www.interights.org/page.php?dir=Publication&page=discriminationhandbook.php>

¹¹ DeSchutter, 'L'adhésion de l'Union européenne a la Charte Social européenne révisée', EUI Working Paper LAW no 2004/11.

¹² See, e.g., Andre Sapir, *Globalisation and the Reform of the European Social Models*, (Bruegal Policy Brief, Brussels, September 2005). Sapir argues persuasively that there are four more or less distinct European social models: Anglo-Saxon, Mediterranean, Continental, and Nordic. Text available at http://www.breugel.org/doc_pdf_79

¹³ Declaration and Action Plan: available at http://www.coe.int/t/dcr/summit/20050517_plan_action_en.asp

In this paper, I will first put forward the argument that the much vaunted thesis of the interdependence of both sets of rights (civil and political on the one hand and socio-economic on the other) needs to be restated to make it plain that both sets subservise a common goal – securing liberty through the rule of law in a democratic society. I then explore the amalgam of treaties that collectively comprise the European Social Charter. I do so because some of the legal issues that arise have to do with the complex interaction of these treaties. Then, I look at the issue of the domestic legal status of the Charter which touches on the vexed issue of the ‘enforceability’ of socio-economic rights. Next I look at the territorial application of the Charter and treaty succession. The issue of treaty succession has not arisen frequently under the Charter in part because the newer Revised European Social Charter of 1996 was drafted specifically to attract (and did in fact attract) entirely fresh ratifications from the newer democracies of Eastern Europe in circumstances where the previous political entity was not a State Party. Then I will look at some issues in connection with declarations and reservations as they arise under the Charter. Lastly, I will reflect on the future of this instrument and the bridges that can and should be built between it and the other human rights treaties of the Council of Europe in order to ensure that all human rights are genuinely ‘indivisible and interdependent.’¹⁴

2. Interdependence – A Fresh Argument from Democracy.

It is not enough to simply repeat the mantra of the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993 to the effect that “all human rights are universal, indivisible and interdependent and interrelated.”¹⁵ Repeating it doesn’t make it so – and certainly arouses the suspicions of skeptics. Labels (even ones with which one happens to agree) are no substitute for hard analysis. By this I do not mean to assert that there are no deep connections between both sets of rights – civil and political on the one hand, and economic, social and cultural on the other. Quite the contrary. It was Oliver Wendell Holmes who once said that we must pour cynical acid on ideas to see if there is anything left.¹⁶ Actually when you move beyond the mantra there is much left. But you have to get beyond the mantra.

There are indeed many connexions between both sets of rights that seldom get aired and that go more directly to the fit between social rights and democracy. Indeed, they bring out the extent to which treaties harbouring such rights should be treated as distinct for the purposes of assessing the reach and impact of the VCLT.

¹⁴ An extremely instructive comparison of the treatment of the non-discrimination principle by the European Court of Human Rights and the European Committee of Social Rights has been carried out under the auspices of the EU Social Action Programme against Discrimination; De Schutter, ‘**The Prohibition of Discrimination under European Human Rights Law – Relevance for EU Racial and Employment Equality Directives**’, (European Commission, Brussels, 2005). Text available at: http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisl/agedis_en.pdf

¹⁵ At para 5.

¹⁶ Holmes, ‘*The Path of the Law*’, X Harv. L.Rev. (1887), 457, at 462.

To grasp the full potency of the interdependence argument one must build bridges between social and economic rights in general (as with the Charter in particular) with the maintenance of democracy and the rule of law – the chief distinguishing features of our European public order and the chief inspiration for the work of the Venice Commission. One can immediately discount purely ideological arguments in favour of socio-economic rights. The symbiosis of terror with law in the former Marxist people's democracies rested on a fig leaf promise of equality – a promise never realised.

The concept of democracy provides a rust solvent to gates of enquiry that have remained shut for too long. Consider also the intentions of the framers of the ECHR. It was clear that the framers wished to reflect a sense of transcendent justice into the ECHR – a sense of the inherent dignity and worth of each individual human being. To use a phrase – it was deontological in inspiration. Conceptually, they saw the idea of democracy as providing theoretical support for rights. But it was also equally clear that, in articulating the rights that emanated from this transcendent morality, the framers had another goal in mind. That goal – a more avowedly instrumental goal - was to protect rights in order to preserve a particular vision of an open, diverse, pluralistic model of democracy (in sharp contrast to the 'people's democracies' then emerging behind the iron curtain). Pragmatically, they also saw democracy as a means or an instrument for preserving rights.

Whatever way this is approached – from the perspective of democracy as a support and a source of rights and democracy as a means of preserving rights – this has implications for how we (re)consider the 'fit' between social rights and democracy.

First of all, and at the level of values and ideals, the moral vision of the ECHR is incomplete without some notion of solidarity. Take the moral vision of the ECHR. First there is the value of dignity – the idea that each human being is of inestimable value and that human value is intrinsic and not derived from use value. Second there is the value of autonomy – that each individual is capable of identifying the good life for him/herself and should be afforded enough liberty consistent with a like liberty in others to pursue it. Third there is the value of equality – the idea that all persons are of equal intrinsic worth regardless of social station, wealth, etc. Let me round out these values with another – that of solidarity. Again this phrase suffers because of its mantra-like status. But it has real currency at two levels. First of all, and at an ethical level, we owe more to each other than to merely abstain. Our fates are intertwined. We cannot escape being political animals and living in community. Secondly, if we are serious about freedom we have to be serious about the material underpinnings to freedom. It makes a mockery of our commitment to individual freedom if, for example, we do not extend tangible assistance to those who need it in order to lead independent – and productive – lives. We all gain by helping people help themselves and we all lose when human potential is wasted. As the European Committee for Social Rights stated in its Decision in Collective Complaint 14 (FIDH v France):

The Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention on Human Rights.¹⁷

Secondly, our vision of democracy in practice rests on some notion of active liberty, of citizen participation. Doubtless there may be some who view low rates of political participation as good in democracy. But they are few. Most would agree that a high degree of interest and active participation is of great benefit to the quality and legitimacy of the process. Sometimes people think of social rights as ends in themselves. I think it would be more profitable to think of them as tools that enable people to participate in public life – to belong to their communities.¹⁸ We are not here talking about solidarity for pity or for charity. Rather outemphasis is on active citizenship in democracy and the role of social rights in making that a reality. Certainly that is the demeanour of the European Committee on Social Rights in interpreting the Social Charter. I want to stress one other connector between democracy and social rights.

Thirdly, if we are really concerned with the integrity of the democratic process then we should be concerned with structural deficiencies that undermine its claim to legitimacy and authority. For example, take the social situation of vulnerable and unpopular minorities in our democracies. Hostility towards unpopular minorities can manifest itself in overt violations of civil rights. However, more covertly – but equally if not more effectively – it can manifest itself in the way State largesse is provided, structured or denied. A classic case is the placing of unpopular minorities in housing ghettos which serves to perpetuate their social exclusion and cements in place the very hostility that led to their isolation. In other words, social arrangements can mask deeper political purposes. Or they may have no deep political purposes but result in political alienation. The words of the European Committee of Social Rights in its decision in Collective Complaint 15 (European Roma Rights Centre v Greece) are illuminating:

The Committee emphasises that one of the underlying purposes of the social rights protected by the Charter is to express solidarity and promote social inclusion. It follows that States must respect difference and ensure that social arrangements are not such as would effectively lead to or reinforce social exclusion. This requirement is exemplified in the proscription against discrimination in the Preamble and in its interaction with the substantive rights of the Charter.¹⁹

¹⁷ Decision, Collective Complaint 14 (2004), at para 27.

¹⁸ See e.g., S Breyer, **Active Liberty: Interpreting our Democratic Constitution**, (Knoph, 2005).

¹⁹ Decision, Collective Complaint 15, (2004). Text available at:

http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/List_of_collective_complaints/R_C15_merits.pdf

Indeed, to carry the above analysis a stage further, a State might be tempted to achieve indirectly through social arrangements what it cannot achieve more directly. Carried to an extreme this would allow a state to 'purchase back' civil rights by conditioning the receipt of social rights upon the waiver or surrender of certain rights. A concern for such 'purchase back' led to the useful doctrine of 'unconstitutional conditions' under US Constitutional law. It has been famously described by Dean Kathleen Sullivan as follows:

The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government can withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.²⁰

And finally, European history sadly tells us that economic dislocation and structural injustice contributes to the creation of political vacuums in which the centre cannot hold and extremes take root. A commitment to social justice even – and perhaps especially – during periods of severe political and social stress holds the centre together and allows democracy to do what it is supposed to do – to protect and advance human freedom.

3. The European Social Charter – a Complex Web of Human Rights Treaties.

The European Social Charter is actually an amalgam of five separate treaties stretching back to the original Charter signed in Turin in 1961.²¹ The interaction and overlapping of these treaties is quite complex.

The original Charter contained – for a human rights treaty – an unusual structure.²² The First Part contains 19 Principles that the States Parties accept as the aim of their respective social policies. These 19 Principles are reflected, in turn, in Part II which sets out corresponding rights and obligations in detail. The States Parties were not obliged to accept all 19 Articles. Instead a distinction was made between 'core' economic, social and cultural rights to which all States Parties were obliged and others which they were free to accept. It is quite remarkable to reflect on how most of these 'core' rights have to do with labour market participation and the financial consequences of the loss of income from such

²⁰ Kathleen Sullivan, 'Unconstitutional Conditions', 102 Harvard L.Rev. (1989), at 1415.

²¹ The texts are usefully drawn together in the **European Social Charter Collected Texts** (4th Ed., Council of Europe, 2004).

²² European Social Charter (1961), ETS no 035.

participation²³. Evidently, it was thought that the best form of welfare was (and is) employment. These rights only partially overlap with those specified as core by the ILO Declaration on Fundamental Principles and Rights at Work (1998).

On top of the non-negotiable 'core' of social rights, the States Parties were additionally required to select among the remaining rights a total of not less than ten full Articles or 45 numbered sub-paragraphs (i.e. located within Articles) by which they would agree to be bound.²⁴ Regrettably, this '*a la carte*' approach to human rights and obligations stands in stark contrast to the equivalent global instrument - the International Covenant on Economic, Social and Cultural Rights (ICESCR – adopted only five years later in 1966) - under which no such choice is afforded to States Parties. This element of selectivity also stands in contrast to its sister instrument, the European Convention on Human Rights (ECHR).

Despite the *a la carte* nature of the Charter – which has drawn unfavourable criticism, and rightly so - there is an explicit understanding that States Parties should gradually move towards acceptance of all the Articles in the Social Charter. Indeed, an unusual feature of the Charter is Article 22 whereby States Parties are requested to report on non-accepted provisions and on their readiness (in terms of the evolution of domestic law and policy) to move toward acceptance. These Article 22 Reports are reviewed by the Committee which often visits States Parties for a dialogue on the same.

Unlike the ECHR which applies to 'everyone' in the jurisdiction of a State Party, an Appendix to the 1961 Charter (considered to be an integral part of it) makes it plain (with certain exceptions) that its provisions apply to a Party's own nationals and to foreigners only in as much as they are nationals of other Contracting Parties and are lawfully resident or working regularly within the territory of the Contracting Party concerned.²⁵ This makes the rights in the Charter look more like 'citizen's rights' rather than universal 'human rights'. States Parties can, however, make a declaration upon ratification that widens the personal scope of their treaty obligations. The European Committee on Social Rights has in fact read this Appendix narrowly given the fundamentality of the right in question (right to health care and restrictions on foreign nationals illegally in the country) in a recent Collective Complaint: Collective Complaint 14 (2004), *FIDE v France*.²⁶ The Committee stated:

²³ The core rights are Article 1 (right to work), Article 5 (right to organise), Article 6 (right to bargain collectively), Article 12 (right to social security), Article 13, right to social and medical assistance), Article 16 (right of the family to social, legal and economic protection) and Article 19 (right of migrant workers and their families to protection and assistance).

²⁴ Part of the Charter – Article 20, 'undertakings.'

²⁵ Appendix to the Social Charter: *Scope of the Social Charter in terms of persons protected*.

²⁶ Decision, Collective Complaint 14 (2004). Text available at:

http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/List_of_collective_complaints/R_C14_on_merits.pdf

In the circumstances of the particular case, it treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment.

Human dignity is the fundamental value and indeed the core of positive European Human Rights law – whether under the European Social Charter or under the European Convention on Human Rights and health care is a prerequisite for the preservation of human dignity.²⁷

The supervisory mechanism set up under Part IV of the Charter envisaged periodic reporting by States and their assessment by an Independent Committee of Experts (now styled the European Committee of Social Rights) as the primary means of international oversight. The assessment of these periodic Reports by the Committee leads to ‘Conclusions’ which are published in successive volumes corresponding to the reporting cycle. The normative understandings of the rights that are contained in these Conclusions constitute the ‘caselaw’ of the Committee. These ‘Conclusions’ make their way to the Committee of Ministers *via* an intermediate body called the Governmental Social Committee (now Governmental Committee). The latter body prepares decisions by the Committee of Ministers and in particular draft Resolutions that the Committee of Ministers might adopt. By way of contrast, no similar intermediate body refracts or filters the judgments of the European Court of Human Rights before they reach the Committee of Ministers.

An Additional Protocol of 1988 made provisions for four enhanced or extra rights dealing with the right of workers to equal opportunities without discrimination on the ground of sex (Article 1), the right to be informed and consulted (Article 2) and the right to take part in decisions affecting the improvement of working conditions (Article 3). These rights were all logical (if weak) developments of rights already embedded in the 1961 Charter. Only one wholly new right was added by the 1988 Protocol which went beyond the labour sphere and dealt with the important right of the elderly to social protection (Article 4). Again, and disappointingly, States Parties to this Protocol did not have to accept more than one of the four substantive rights.

In the late 1980s a decision was taken to revitalise the Social Charter and an expert body (the Charte Rel) was set up to begin first with the operation of the supervisory mechanism. An Amending Protocol was adopted in 1991 to make it plain that the Committee of Independent Experts makes its assessment of periodic reports from a ‘legal standpoint’ thus finally ending any doubt as to the standing of its Conclusions in relation to the Governmental Committee (which had been in dispute).²⁸

²⁷ Id at paras 30-31.

²⁸ Protocol Amending the European Social Charter (1991), ETS no 142: Article 2 “...the Committee of Independent Legal Experts shall assess *from a legal standpoint* the compliance of

Most crucially, an Amending Protocol was adopted in 1995 providing for a system of Collective Complaints.²⁹ Essentially, Article 1 of the 1995 Protocol enables certain international organisations of employers and trade unions to lodge such complaints with the European Committee of Social Rights. It further enables other international non-governmental organisations which have consultative status with the Council of Europe under certain conditions to also mount such complaints. States Parties have an option to widen the net of NGOs entitled to lodge complaints to include purely domestic NGOs (Article 2(1)).³⁰ Finland, for example, allows for this possibility. The current list of organisations so entitled now numbers 63 and ranges from groups such as Amnesty International, Eurolink Age and the European Roma Rights Centre.³¹ To date eleven States have ratified the Amending Protocol and others accepted it when migrating from the 1960 Charter to the 1996 Charter.

The complaint must be genuinely collective in character. As the Explanatory Report to the Protocol makes plain:

because of the their ‘collective’ nature, complaints may only raise questions concerning non-compliance of a state’s law or practice with one of the provisions of the Charter. Individual situations may not be submitted.³²

Thus the mechanism is collective rather than individual so as to enable representative cases to come forward highlighting structural deficiencies that affect a large number or a unique category of people. Among other things, this means that the system is designed to respond to structural deficiencies and therefore less prone to the phenomenon whereby individual test cases end up distorting social policy (or so one argument goes).

Article 5 nominates the Secretary General of the Council of Europe as the initial recipient of collective complaints who shall ‘immediately transmit it to the Committee. The Explanatory Report asserts that “[T]he adverb ‘immediately’ underlines that one of the advantages of the new procedure is its rapidity.”³³ This concern to enable rapid decisions to be reached may explain why – unlike the ECHR –there is no explicit requirement that domestic remedies should be exhausted. The absence of such a requirement is also presumably due to the fact that there does not tend to be any domestic remedies available to ventilate grievances relating to social rights.

national law and practice with the obligations arising from the Charter for the Contracting Parties concerned [italics added].”

²⁹ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, (1995), ETS no 158.

³⁰ Article 2(1).

³¹ The full list of NGOs so entitled is available at:

http://www.coe.int/TE/Human_Rights/Esc/4_Collective_complaints/Organisations_entitled/default.asp#TopOfPage

³² Explanatory Report, para 31.

³³ Id. at para 33.

The caselaw under this complaints procedure is developing particularly in substantive fields going beyond the traditional concern of 'hard core' social rights dealing with labour law and labour relations. Some 32 complaints have been – or are being – dealt with by the Committee.³⁴ Indeed, the collective complaint system is inspiring many at the United Nations Ad Hoc Committee drafting a new thematic treaty on the human rights of persons with disabilities to look to it as a workable model for the new treaty.³⁵

Updating the European social model appears to be a periodic concern. It was felt by the *Charte Rel* that extra social rights had to be added to the original 1961 Charter (and old rights developed) in order to ensure its continued relevance in a changing Europe. Rather than amend the 1961 Charter a decision was taken to draft and adopt a wholly new Revised Social Charter. It was finally adopted in 1996 containing all the 'old' rights as amended as well as wholly new ones.³⁶

Strikingly, many of the 'new' rights continue to relate to employment in a broad sense. However, whole new social rights were added including Article 30 (right to protection against poverty and social exclusions) and Article 31 (right to housing). Nevertheless, the Revised European Social Charter continued with the same *a la carte* approach that discredits the original 1961 Charter with the effect that States parties are not obligated to accept the new Articles 30 and 31.

Extremely important additions were made to certain of the 'old' (i.e., 1961 Charter) Articles including, for example, Article 15 on disability. The amendments gave Article 15 a more modern spin in terms of integration and inclusion and away from welfare and rehabilitation. Indeed, the caselaw of the Social Charter on disability is probably now the most advanced in the world at the moment of any human rights treaty body.³⁷ Perhaps the most profound change was the removal of the (seemingly passing) reference to non-discrimination in the preamble to the 1961 Charter to the body of the 1996 Revised Charter. Because it is not listed in the enumerated substantive rights (Articles 1-31) it is not subject to selective acceptance (i.e. it is mandatory).

A State that was Party to the 1961 Charter and which ratifies the 1995 Protocol on Collective Complaints and which later proceeds to ratify the 1996 Revised Social Charter is considered bound by the 1995 Protocol with respect to the obligations it undertakes under the 1996 Revised Charter (Article D (1) of same). A Party that

³⁴ See:

http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/List_of_collective_complaints01_List_%20of_complaints.asp#TopOfPage

³⁵ This is the approach of the combined National Human Rights Institutions which presented a draft text on monitoring (encompassing collective complaints) at the 6th Session of the Ad Hoc Committee of States (UN, August 2005).

³⁶ European Social Charter (Revised) (1996), ETS no 163.

³⁷ See, e.g., G Quinn 'The European Social Charter and EU Anti-Discrimination Law in the Field of Disability: Two Gravitational Fields with one Common Purpose', in *Social Rights in Europe*, supra note 1, 279-304.

had not previously ratified the 1995 Collective Complaint Protocol may make a declaration upon the ratification of the 1996 Revised Social Charter that it will be also bound by the 1995 Protocol with respect to the Revised Charter (Article D (2)).

An elegant solution would have been to declare the 1961 Charter dead and to place sole focus on the expanded Revised Social Charter of 1996. All States could have collectively denounced the 1961 Charter but this was unlikely. But as Oliver Wendell Holmes said, “the life of the law is not logic but experience”. A single consolidated instrument was not possible since States Parties to the 1961 Charter might not want to ratify a more modern version or felt they needed time to move to that point. The end result is the continued legal co-existence of two Social Charters and the monitoring of two separate – but related instruments by the Committee. This is confusing. It is hoped that most if not all States will migrate toward the Revised Social Charter soon. Indeed, the figures look promising. To date, there are 17 States Parties to the 1961 Social Charter and 21 States Parties to the 1996 Revised Social Charter. The trend is therefore in the right direction.

4. A Mix of Obligations of Conduct and Obligations of Result.

Interestingly, and by way of contrast with the ICESCR the Charter contains no overall limiting principle on State obligations. It will be recalled that Article 2(2) of the ICESCR only commits States Parties:

to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.³⁸

In other words, the principle of ‘progressive achievement’ is not evident on the face of the Charter. The obligations are cast – and generally understood – as providing ‘obligations of result’ rather than ‘obligations of conduct’. Lack of financial resources is therefore not, in principle, a good defence.

This impacted most directly on the Federal Republic of Germany upon reunification. Given that Germany was now answerable for the former GDR (see next section below) the issue that faced the Committee was whether to make any express allowance for the relatively low level of social attainment in the old East Germany. In the result, the Committee

expected Germany to meet the standards of the Charter *vis a vis* the whole of its territory straight away and regardless of cost.³⁹

³⁸ See generally P Alston and GQuinn, ‘*The Nature and Scope of States Parties Obligations under the International Covenant on Economic, Social and Cultural Rights*’, 9 Hum. Rts. Q., (1987) 256.

³⁹ Harris, loc. cit. at 27.

Sometimes, however, the Committee will characterise an obligation as ‘dynamic’ in the sense that it contains perhaps a mix of ‘obligations of conduct’ with those of result. It will therefore genuflect before the exigencies of the States Parties with respect to the relevant obligations provided tangible progress can be reported.

Dynamic obligations also oblige the States Parties to steadily ratchet upwards the level of enjoyment of a right. Additionally, in Collective Complaint 13 the Committee acknowledged the inherently progressive nature of some of the obligations. It stated:

When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allow it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for other persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.⁴⁰

Realpolitik also suggests that in times of financial retrenchment cutbacks will be necessary. The United Nations Committee on Economic Social and Cultural Rights has developed limiting principles that allow for such cutbacks but which also constrain how they may be implemented (General Comment 3, ICESCR, 1994). The UN Committee there stated that it:

underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.⁴¹

Similar principles have been adopted by the Committee at least with respect to Article 21 (3) (obligation to raise progressively the system of social security).

In sum, the Charter is evolving into a living instrument and not an inert statute. The main advantage of this development is that it allows for a principled debate about the modernisation of the European Social model/s. That is to say, the evolving dynamic character of the Charter creates space for social adjustment and therefore genuflects of necessity to economic circumstances. But it does so while insisting on the maintenance of broad and limiting principles.

⁴⁰ Collective Complaint 13, November, 2003, para 53.

⁴¹ ICESCR General Comment 3, The Nature of States Parties Obligations, at para 12.

5. The Domestic Status of the Charter.

As a matter of fact, and unlike the European Convention on Human Rights, the rights set forth under the Charter were not (and are still not) generally given any explicit status in the constitutional orders of the States Parties.⁴² Nothing in the Charter requires such a status to be granted. This is significant since it is more normal for international law to reflect and crystallise norms that already have some toehold in the domestic legal order. To be sure, our common European social model was (is?) to the effect that these rights were accepted as forming part of the goal of the modern democratic State. And to be equally sure, they were underpinned by a web of legislation. Yet it is true to say that such rights were not robustly reflected in domestic constitutional orders and that hard judicial remedies were few and far between.

As a matter of formal treaty law, the Appendix to the 1961 Charter emphasises that the Charter contains obligations that “are of an international character, the application of which is submitted *solely* to the supervision provided for in Part IV” [italics added].⁴³ In other words, the Charter is not to be deemed self-executing in the domestic law of the States Parties and one cannot directly infer any legal obligation to give effect to it in domestic law. There is no equivalent limitation contained in the ECHR which leaves the matter with respect to that convention open for resolution by the domestic courts. Indeed, the recent Warsaw Summit called for the provision of more domestic remedies for violations of the ECHR which assumes that the ECHR is given a domestic legal status.⁴⁴

Nor indeed, is there any equivalent in the Charter to General Comment 9 of the ICESCR which deals with the “the domestic application of the covenant”⁴⁵. General Comment 9 presumes the provision of domestic judicial remedies with respect to the rights protected under the ICESCR while leaving space for administrative enforcement provided the remedies are ‘accessible, affordable, timely and effective’.

Notwithstanding the Appendix, the Dutch and Belgian courts have in fact invoked the Charter in their decisions. Indeed, the Dutch Supreme Court has acknowledged the direct applicability of Article 6(4) on the right to strike.⁴⁶ In 1996 the Belgian *Conseil d’Etat* also used Article 6 of the Charter to fortify its

⁴² See generally, Gisella Gori, ‘Domestic Enforcement of the European Social Charter’ in *Social Rights in Europe*, supra note 1, at 69. There is a growing body of literature tracking the judicial enforceability of socio-economic rights: see, e.g., Nordic Council of Ministers, *The Welfare State and Constitutionalism in the Nordic Countries*, (2001), COHRE, *Litigating Economic, Social and Cultural Rights – achievements, challenges and strategies*, (2003).

⁴³ Appendix to the European Social Charter (1961), Part III.

⁴⁴ The Summit Action Plan called for “effective domestic remedies exist for anyone with an arguable complaint of a Convention [i.e., ECHR] violation”. Text available at: http://www.coe.int/t/dcr/summit/20050517_plan_action_en.asp

⁴⁵ Indeed, the Committee has never adopted the practice of issuing General Comments which do serve a useful function in crystallising normative understandings.

⁴⁶ Supreme Court (*Hoge Raad*), 30 May 1986, NJ 1986/668.

reasoning in annulling an internal administrative act – thereby acknowledging it as a source of law.⁴⁷ At least four ‘monist’ states have incorporated the Charter at some level.⁴⁸

The Italian Constitutional Court has referred to the Charter as an aid in interpreting domestic legislation.⁴⁹ Indeed, the Romanian Constitutional Court has referred to the Charter when reviewing the constitutionality of domestic legislation.⁵⁰ And in a 1994 decision the German Federal Labour Court affirmed that national courts were bound by the obligations contained in the Charter whenever they had to interpret the lacunae in the law on industrial disputes.⁵¹

In point of fact, the Committee reaches its ‘Conclusions’ on the basis of a review of both law and practice. This implicitly means that some such law must exist.⁵² And the Committee has itself interpreted several rights as giving rise to an obligation for domestic remedies without dictating the ultimate shape of these remedies. This is especially so in the context of the interaction of Article E (non-discrimination) with the various substantive rights. A prohibition on non-discrimination would appear to be immediately realisable and forms an obligation of result rather than conduct. Domestic remedies before independent bodies are required by the Committee under specific Articles: right to equal pay (Article 4 (3)), right to social and medical assistance (Article 13) and the right of a migrant worker not to be deported (Article 19 (8)) and, more recently, Article 1 (1) (protection against discrimination in employment) and Article 15 (1) & (2) (protection against non-discrimination in education and employment for persons with disabilities).

Article 32 of the 1961 Charter is to the effect that its terms would not prejudice the application of higher standards if such standards flow from treaties or conventions already in force. In fact, some states have given constitutional expression to socio-economic rights.⁵³

So although the Charter does not explicitly require that its terms should be transposed into domestic law nor invoked before domestic courts there is a trend in that direction.

⁴⁷ Conseil d’Etat, (Vi ch.), 22 March, 1995, *Henry*.

⁴⁸ Hungary, Germany, Finland and Italy.

⁴⁹ Judgment no 86/1994.

⁵⁰ Decisions Nos 24/2003, 25/2003, 108/2003, 351/2003.

⁵¹ BAGE 46, 350.

⁵² For example, in its decision on the merits in Collective Complaint 1, *International Commission of Jurists v Portugal* (1998), the Committee stated “the satisfactory application of Article 7 cannot be secured solely by the operation of legislation if this is not effectively applied and rigorously supervised”, para 32.

⁵³ For a global perspective on the domestic status of economic and social rights see H Lewis & J Woods (Eds.), *Human Rights and the Global Marketplace – Economic, Social and Cultural Dimensions*, (Transnational, 2004).

6. Territorial Application and State Succession under the Social Charter.

Article 34 of the 1961 Charter contains detailed rules on territorial application. Its default setting is the automatic application of the Charter to the whole of the metropolitan territory of States Parties.⁵⁴

Normally the composition of the metropolitan territory is not open to debate. However, upon signature or ratification the States Parties may lodge a declaration stating or clarifying which territory it considers to be metropolitan.

States Parties may also indicate by declaration made under Article 34 (3) to which non-metropolitan territories (“for whose international relations it is responsible or for which it assumes international responsibility”) its Charter obligations will apply.⁵⁵ That is, a State Party has the option of extending the application beyond its metropolitan territory if it so wishes.

Germany considered that it had ‘added’ to its metropolitan territory by reunification in October 1990. No declaration was made under Article 34 (2) to the effect that it considered the former GDR to now form part of its metropolitan territory. The Committee apparently expected Germany to report on the situation in the former GDR *as if* it were part of its metropolitan territory and without the need for a declaration⁵⁶ - which in fact it did. Commenting on this, Professor David Harris wrote:

Should a contracting party add to its metropolitan territory, the new territory will be automatically be subject to the Charter by succession.”⁵⁷

What then of territories that were once part of the metropolitan territory of a State Party and which secedes? Harris considers that any declaration made in respect of such territory should be considered automatically terminated. If the territory comprises a wholly new State does it succeed to the Charter responsibilities of its parent State? Bearing in mind that not even member States of the Council of Europe are obliged to ratify the Social Charter, Harris argues that it does not.

If the break-away territory joins an existing member State then the new host State will be responsible assuming it has ratified the Charter. In this instance, the new host State will be only responsible for the Article and paragraphs it has accepted for itself – and not the Articles or paragraphs accepted by the territory’s former host State. The Czech and Slovak Federal Republic signed the European Social Charter in 1992. The two new States created (Czech Republic and Slovak Republic) then proceeded to make declarations to the effect that they would continue to respect the obligations of the Charter with respect to their territories.

⁵⁴ Article 34 (1).

⁵⁵ Article 34 (2).

⁵⁶ Conclusions XII Vol 2, 11; Conclusions XIII Vol 2, 23.

⁵⁷ Harris at 390.

7. Declarations and Reservations.

Some declarations are compulsory in the sense that States Parties must indicate upon ratification which of the non 'hard core' rights they accept. States Parties can make additional declarations later if they wish to add to the number of Articles or paragraphs they are willing to accept.

Ireland made an interesting declaration whereby it accepted the obligations contained in Article 27 (right of workers with family responsibilities to equal opportunities). This Article contains three paragraphs. The first numbered paragraph is further subdivided into three parts ((a), (b) & (c)). By its declaration Ireland disavowed any obligations under Article 27 (1)(c). The Committee has never made an explicit ruling on the capacity of States Parties to select within numbered sub-paragraphs which parts they would accept.

Optional declarations may be made with respect to territorial application, the extension of the personal scope (extending potentially to all persons within their jurisdictions), allowing purely domestic NGOs to lodge Collective Complaints, to agree to be bound by the terms of the 1995 Optional Protocol on Collective Complaints when ratifying the Revised Social Charter.

The Charter does not make any express allowance for reservations. The Vienna Convention on the Law of Treaties permits reservations unless (1) expressly prohibited by the treaty in question (not the case with the Charter), or (2) allowed but only on specified issues (similarly not so under the Charter) and (3) so long as the reservation in question is not incompatible with the object and purpose of the treaty.

It is possible to take the view that since the States Parties already enjoy a high degree of selectivity as to which Articles or paragraphs they will accept that there is no room for reservations. Indeed, this was the initial view of the Committee. The Committee took the view that

The Charter's very structure compelling as it does every Contracting Party ratifying the Charter to accept the obligations laid down in a certain number of paragraphs, necessarily implies that acceptance of a particular paragraph extends to all the obligations embodied therein so that none of them may be evaded by means of a reservation or otherwise.⁵⁸

The current practice appears to be to accept reservations and to urge States Parties to remove them as circumstances permit. Harris concludes:

The better view would appear to be that reservations to Part II [of the Charter] are permitted provided that the minimum number of provisions are fully accepted and provided that the object and purpose of the Charter is otherwise not infringed.⁵⁹

⁵⁸ Conclusions IV 49 (Federal Republic of Germany).

⁵⁹ Harris, *supra* note 1, at 392-393.

An interesting issue arose *before* the 1961 Charter was adopted – and in anticipation of its adoption⁶⁰. The Federal Republic of Germany wished to make plain its understanding that Article 6 (4) (right to strike) did not apply to the established German civil service (*beamte*). It sent a letter containing a ‘declaration’ to that effect to the Secretary General. The letter was subsequently circulated to the other States Parties – none commented on it. Subsequently, Germany was assessed not to be in compliance with Article 6 (4) precisely because of this restriction. The Committee was of the view that it was not a reservation since it was not made contemporaneous with the ratification of the Charter. Instead it was analogised to an instrument under Article 31 (2) (b) of the Vienna Convention which allows for such provided they are accepted by the other States Parties. Failure to comment on the ‘declaration’ was taken as acquiescence which means that the ‘declaration’ goes to the background context for the interpretation of Article 6 (4).

8. Conclusions

I believe the above analysis warrants the following observations.

On the one hand, and on first impression, the status of the Social Charter from the perspective of international (universal) human rights law does not look good. States are not obliged to ratify it (or even to promise to ratify it) upon becoming members of the Council of Europe. Ratification is only open to member States of the Council of Europe.⁶¹ Even when States ratify they do not need to sign up to all its provisions. Such selectivity flies in the face of the “universal” principles of human rights. Furthermore, an intermediate ‘political’ body filters its Conclusions on State reports and Decisions on Collective Complaints before they reach the Committee of Ministers. It could be argued that this unduly contaminates the oversight mechanism. And domestic NGOs are given no automatic standing to maintain a Collective Complaint.

On the other hand, the European Social Charter is in fact one of the most widely ratified of Council of Europe human rights instruments. Twenty seven States have ratified the original 1961 Social Charter twenty one States have ratified the 1996 Revised Social Charter. The Charter was once described as a ‘sleeping beauty’. It has become a living instrument especially in the last few years and largely (though not exclusively) as a result of the case law emerging from the Collective Complaints procedure. This complaints procedure is still unique in the world and will mark 10 years of operation in 2006.

More improvements can be made. Thematic reporting could possibly help sustain a coherent focus on connected sets of rights – e.g., affecting vulnerable groups

⁶⁰ See generally, Harris, *supra* note 1, at 393-4.

⁶¹ Article 35, European Social Charter.

such as the elderly, the disabled or affecting labour rights.⁶² Consideration should be given to the drafting of General Comments which would enhance the accessibility of the jurisprudence for civil society. Ways might be explored of enhancing the role of civil society through – for example – the submission of shadow reports. More use might be made of technology. If, for example, the US Supreme Court allows its hearings to be audio taped and placed on the web (as it does) then there would appear to be little reason why the public hearings of the Committee on Collective Complaints cannot be similarly made available.

If one were to generalise it would be to say that the Charter is being interpreted to resonate with the underlying purpose of the ECHR – to protect and also to positively provide for a zone of personal freedom within our common democratic culture.

At a time when negotiations in the United Nations to produce a new Optional Protocol to the ICESCR dealing with complaints seem stalled the Collective Complaints mechanism of the Social Charter remains a unique regional instrument for vindicating economic, social and cultural rights.⁶³ A strong case can therefore be made as to the fundamentality of social rights in general and the Charter in particular because of its close connectedness with the preservation and enhancement of human liberty in democracy.

⁶² For a cogent critique of the existing reporting system see Philip Alston, *Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System*, in *Social Rights in Europe*, supra note 37 at 45.

⁶³ Documentation on the draft Protocol is available on the web site of the International Covenant on Economic, Social and Cultural Rights:

<http://www.ohchr.org/english/bodies/cescr/index.htm>

**HUMAN RIGHTS PROVISIONS
IN CONVENTIONAL SOURCES
OF INTERNATIONAL CRIMINAL LAW
AND THEIR EFFECTS
ON INTERNATIONAL CRIMINAL JUSTICE
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1. Introduction

The primary purpose of international criminal law is to address the most serious violations of fundamental human rights. It is therefore of great importance that this evolving branch of international law respects the very principles it is meant to serve. Criminal justice and human rights are closely related: the modern notion of human rights can find its origins in the first institutes protecting the rights of the accused in criminal proceedings, such as *habeas corpus*, due process, and the prohibition of torture. As criminal justice by definition implies the use of the coercive powers of the State and restrictions of individual freedoms, most constitutions and international human rights instruments contain a detailed rendition of rights guaranteed in the course of criminal proceedings. For instance, Articles 5-7 of the European Convention on Human Rights (ECHR) and Articles 9, 10, 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), guarantee the rights to liberty and security, fair trial, humane treatment and the principle of *nullum crimen, nulla poena sine lege*. These provisions have always purported to shelter the individual from the overwhelming might of the State.

Criminal justice at the international level presents challenges to the classical concept of the rights of the accused in a liberal democracy; these challenges are due to some intrinsic features of international criminal law. Namely, international courts and tribunals do not possess a repressive apparatus of their own: they are entirely dependent on cooperation by states and occasionally on the limited coercive powers of the international community. This has had consequences on the conduct of investigations, collection of evidence and the apprehension of suspects. The immensely complex factual and legal issues raised at international trials cause the latter to last considerably longer, and restrict the use of some traditional institutes of criminal law in some countries, such as trial by jury. Finally, international courts deal only with the most serious crimes.

Persons arraigned before international criminal courts come most frequently from the higher echelons of the political and military hierarchy, and, as a consequence, influential agents within municipal legal systems are often unable or unwilling to prosecute them. As a rule, the accused have wielded, or still wield, great power and influence. They can usually rely on an organization supporting them, either in the commission of crimes and in their attempts to escape responsibility, and are able to cover up their trails, obstruct investigations and intimidate witnesses. This has justified the use of some unorthodox mechanisms of substantive criminal law, such as command responsibility and joint criminal enterprise¹, as well as procedural instruments similar to those used in national trials for organized crime, including special rules on the collection and admissibility of evidence, witness protection etc.² Furthermore, international criminal trials have tended to take place in post-conflict situations and to have significant impacts on international peace and security. All this extends the purpose of these trials much beyond mere deterrence and allows them to become a major means to re-establish the fundamental principles of justice and further the process of reconciliation.³

The specific features of international criminal proceedings make it impossible to simply transpose human rights standards developed in the context of municipal criminal justice. This, however, does not mean that the human rights of suspects in such proceedings can be flaunted under the pretext of pursuing some greater aim.

Concern for human rights has been reflected in the rules governing the work of two active *ad hoc* international tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as of the International Criminal Court (ICC), a permanent institution. To be sure, the statutes of the two tribunals are formally not treaties but were enacted by the UN Security Council. However, they ultimately derive their authority from the UN Charter and have been regarded in practice as treaties.⁴ It is also believed that the general rules of interpretation of international treaties apply to these documents, while the ICC statute is undoubtedly an international treaty.

In view of the ambivalent nature of the Security Council and other important considerations, it has to be constantly borne in mind that persons administering international justice in international criminal courts must of need be influenced by other sources of international law. In this respect, apart from rules of customary international law the “general principles of law recognized by civilized nations”,

¹ For a general overview, see Antonio Cassese, *International Criminal Law*, OUP 2003, pp. 179-200, 207-211.

² See e.g. Patricia M. Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal', 5 *Yale H.R. & Dev. L.J.* 217.

³ See Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' 95 *A.J.I.L.* 7.

⁴ See Patrick L. Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia', *EJIL* 2000 11, p. 569.

quoted in Art. 38, 1, d of the Statute of the International Court of Justice. The latter source has gained additional importance in this particular context since some procedural institutes have been tested for a long time leading to the development of similar criteria in most States.⁵

This paper will attempt to analyze the human rights provisions and safeguards in what can be regarded as contemporary conventional international criminal law, i.e. the statutes and the rules of procedure and evidence of the ICTY, the ICTR and the ICC. Particular emphasis will be put on any divergence between these standards and the standards of international human rights law which apply to national criminal proceedings.

2. International Criminal Procedure

2.1. *Normative framework.* - The normative framework of international criminal trials differs significantly from that of their municipal counterparts. Criminal procedure and the rights of the participants in the proceedings are laid down in the statutes of the respective courts. They are supplemented by the more detailed rules of procedure and evidence (RPE), which are in the ICTY and the ICTR adopted by the judges themselves sitting in a plenary session, and in the case of the ICC by the Assembly of State Parties.

There are also significant normative differences between the ICTY and the ICTR on the one hand, and the ICC on the other, which are mostly the result of the *ad hoc* nature of the former. The Rome Statute is much more comprehensive than the Statutes of the ICTY and the ICTR, and more closely resembles the codified criminal procedure found in civil law countries.

2.2. *Choice of a Procedural Model - Its Impact on Human Rights.* - The drafters of the statutes of international criminal courts have always been faced with the choice between the adversarial and the inquisitorial model of criminal procedure. Generally, the adversarial model was chosen. Of course, neither model now exists in its pure form; in a sense, most models of criminal procedure are now 'mixed'.⁶

This also applies to international criminal justice. Although a fundamentally adversarial model was adopted at the international level, it has been significantly modified and has acquired some features of the inquisitorial system.⁷

⁵ See e.g. the Judgement of 13 September 1928 of the Permanent Court of International Justice in the *Case Concerning the Factory at Chorzów*, *PCIJ*, Ser. A, No. 17 (1928), p. 47.

⁶ For more detailed comparisons of these two systems, especially as seen through the prism of international criminal law, see Cassese, *op. cit.*, pp. 365-387.

⁷ For a general appraisal of international criminal procedure, see the now standard reference work on the subject, by Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers, 2002).

The first thing to go was the jury. It would be impossible to select a jury at the international level - the nationality and language abilities of the would-be jurors are reason enough. A jury in an international court could never provide the element of democratic legitimacy as in municipal trials. The extremely complex factual and legal issues which come before international courts, as well as the length of proceedings, would overwhelm any imaginable jury, and would actually render such trials unfair. Yet, trial by jury is regarded as a 'fundamental right' in many legal systems; the lack of such a system at the ICC was even raised as one of the principal legal reasons why the United States should not (or even *could* not) ratify the Rome Statute.⁸ Nevertheless, even though trial by jury may be regarded as a fundamental *civil* right in some jurisdictions and undoubtedly does contribute to the legitimacy of the judicial process, it has never attained the status of a *human* right guaranteed by international law. Even those states which use juries do not object to their citizens being tried in jurisdictions where there are no juries; they do not even regard this as an obstacle to extradition.

The lack of a jury in international proceedings, and the ensuing amalgamation of the trier of fact and the trier of law have also led to the relaxing of formal rules of evidence found in adversarial systems. However, one of the hallmarks of the adversarial system has remained relatively intact, namely the limited scope of appeals. The appeals chambers of international courts do not conduct retrials, but reverse factual findings made by trial chambers of first instance in specific cases only if "no reasonable trial chamber" could have established a given fact beyond reasonable doubt, which is the same appellate standard of review as the one used in adversarial systems.

3. Rights of the Accused

3.1. *Presumption of Innocence.*- The presumption of innocence is a fundamental principle of criminal law, protected by international human rights treaties (see e.g. Article 14 (2) ICCPR, Article 6 (2) ECHR), as well as by the Statutes of the ICTY (Article 21 (3)), ICTR (Article 20 (3)) and the ICC (Article 66).

The right to be presumed innocent is comprised of two elements. The first one is absolute and is essentially procedural. As stated by Article 66 (2) of the Rome Statute, "[t]he onus is on the Prosecutor to prove the guilt of the accused." The burden of proof must always be borne by the prosecuting party. It is this aspect of the presumption of innocence, focusing on the judicial proceedings themselves, that is identical both at the international and the municipal level.

The second aspect of the presumption of innocence is much more elusive, and requires that the accused must be treated as innocent both within and *outside* criminal proceedings, i.e. that all public actors should refrain from asserting the guilt of an accused person as long as he/she is not convicted by a final decision of the competent court. However, the presumption of innocence is a purely legal

⁸ See e.g. at <http://www.cato.org/pubs/pas/pa-311.html>.

construct - in free and democratic societies prosecutors generally do not institute criminal proceedings against innocent people. The precondition for the initiation of criminal proceedings in most countries is the existence of reasonable grounds (sufficient evidence) to believe that a person has committed a crime. The very nature of international crimes, the manifest depravity of the wrongdoers, and the fact that they often directly or indirectly affect millions of people, make it impossible to enforce a strict interpretation of this public aspect of the presumption of innocence. It cannot be expected of the multitude of victims or witnesses to keep their silence or for the media and political factors to maintain the standards developed for “ordinary” crimes. However, this level of decorum can still be expected from court officials, such as the judges or the registrar, who must fully observe their own impartiality.

3.2. *Nullum crimen, nulla poena sine lege.* - The principle of non-retroactivity of criminal law has long been an essential part of municipal legal systems.

However, ever since the Nuremberg trials it has been accepted that the principle of non-retroactivity cannot be used to shield individuals from responsibility under international criminal law. This understanding of *nullum crimen* is contained in international human rights instruments (e.g. Article 15 ICCPR, Article 7 ECHR). It is also a reflection of the principle that states cannot invoke their own internal law to justify their non-compliance with obligations under international law⁹ and conveys the message that international law in these cases directly addresses individuals: it establishes the criminal responsibility of the perpetrator and protects the rights of the victim.¹⁰ It should not be ignored that the original source of international criminal law is in the provisions of international *customary* law, as subsequently codified by treaty. The provisions of the ICTY and the ICTR Statutes, as well as the Rome Statute of the ICC, are principally not of *substantive* nature, such as those found in the criminal codes of many states, but are essentially *jurisdictional*, establishing the crimes over which a particular international court has jurisdiction. This necessitates the use of other sources of international law and makes the role of the courts in defining and interpreting the criminal offences themselves much greater than in most states with a civil law tradition.¹¹ The Statutes of the two *ad hoc* tribunals do not contain an explicit statement of the non-retroactivity principle, while the Rome Statute contains provisions to that effect (Articles 22 and 23), also prohibiting the expansion of criminal law by analogy.

It has not been claimed so far that the lack of an explicit statement of the *nullum crimen* principle in the statutes of the two *ad hoc* tribunals and the application of this principle in the jurisprudence of these tribunals has led to any miscarriage of

⁹ See e.g. Article 32 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its fifty-third session (2001).

¹⁰ For an interesting discussion of the principle of non-retroactivity in international human rights law, albeit in a somewhat different context, see the case of *Streletz, Kessler and Krenz v. Germany* before the European Court of Human Rights (App. no. 34044/96 ECHR 227, 22 March 2001).

¹¹ See in this regard Cassese, *op. cit.*, pp. 145-147.

justice. The purpose of this principle has at all times been to shield the individual from the might of the state and to prevent punishment for acts which could not have been perceived as prohibited or criminal *by the perpetrator*. It cannot be seriously maintained that perpetrators of international crimes could not have foreseen that the commission of the latter can lead to their criminal responsibility, even if these acts were not explicitly prohibited *as such* under their own internal criminal law, or if their own law in some way justified their criminal acts. For instance, the fact that the category of crimes against humanity did not exist in the criminal codes of the countries of the former Yugoslavia has not meant that individuals could not be held accountable for such crimes, especially so because the “ordinary” crimes, of which the elements of crimes against humanity consist, such as murder, rape, assault and pillage, were punishable.

The application of the *nulla poena sine lege* principle poses more serious questions, as international law does not define precise penalties for international crimes. The original idea (based on the concepts of “old” international criminal law) was for states to incorporate rules of international criminal law into their own criminal law and thus adapt the former to their own penal systems and penal policy. Article 24 (1) of the ICTY Statute prescribes that “[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia”. A similar provision can be found in Article 23 (1) of the ICTR Statute, and in the RPE of both tribunals (Rule 101 (b)). The practical effect of these provisions - other than excluding the imposition of the death penalty - has not helped increase legal certainty with regard to sentencing. There had been virtually no judicial practice regarding crimes against international law, either in the former Yugoslavia or in Rwanda, so recourse could only be made to the national courts dealing with “ordinary” crimes. The punishments in the criminal codes of the former Yugoslavia were much more lenient than those meted out by the ICTY - for instance, the maximum term of imprisonment was only 15 years.¹² The ICTY, on the other hand, has resorted to the penalty of life imprisonment;¹³ it has also sentenced several defendants to more than 40 years.¹⁴

The Statutes of the two *ad hoc* tribunals do not prescribe strict ranges of punishments. The Rome Statute of the ICC (Article 77) introduces some changes with respect to penalties - so, for instance, the sentence of imprisonment is limited to a maximum of 30 years, or, if the crime is particularly serious and if the individual circumstances of the convicted person so warrant, the sentence of life

¹² Death penalty could also be imposed, although it was routinely substituted by a special sentence of 20 years imprisonment.

¹³ Milomir Stakic was convicted of crimes against humanity and sentenced to life imprisonment (IT-97-24-T, Judgment of 31 July 2003). The case is currently under appeal.

¹⁴ In the *Delalic* (IT-96-21-T, Judgment of 16 November 1998, paras. 1193 and 1194) and the *Aleksovski* (IT-95-14/1-T, Judgment of 25 June 1999, para. 242) cases, the ICTY concluded that the requirements of Art. 24 of the Statute are merely indicative, and not mandatory for the court.

imprisonment can be imposed. The Statute also allows the imposition of fines, according to the criteria provided for in the RPE, as well as for the confiscation of the proceeds of the crime itself.¹⁵

3.3. *Ne bis in idem*. - The principle of *ne bis in idem* prohibits the same person from being twice for the same crime. It is fundamental in most legal systems and is protected by international human rights law (see Article 14 (7) ICCPR). A common exception to the rule is re-trial in favour of the defendant, i.e. if he/she was found to be guilty in the first trial.

This principle is also protected by international criminal law (Article 10 ICTY Statute, Article 9 ICTR Statute, Article 20 ICC Statute), though in a somewhat modified variant, necessitated by the very purpose of international criminal justice. Namely, one of the main reasons for trying the perpetrators of crimes against international law before international courts is that states have often been unable or unwilling to prosecute. The international community cannot tolerate agents of a state commit atrocities against their own citizens with impunity while remaining in the shelter of state sovereignty. This was also the motivation behind declaring the primacy of the existing international criminal tribunals over national courts. The ICC, on the other hand, is envisaged as complementary to municipal jurisdictions, but its task is also to check whether national courts conduct proceedings in an internationally acceptable manner.¹⁶

Article 10 of the ICTY Statute (and, in the same words, its counterpart in the ICTR Statute), accordingly states that “[n]o person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal” and that “[a] person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.” Article 20 (3) of the ICC Statute similarly prescribes that “[n]o person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in

¹⁵ For a detailed analysis see Susan Lamb, '*Nullum crimen, nulla poena sine lege* in International Criminal Law', in A. Cassese, P. Gaeta, J. R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary* (OUP, 2002)., pp. 733-766.

¹⁶ Despite the fact that the Rome Statute is a treaty and that the ICC's jurisdiction is primarily based on the consensus of the parties to the treaty, Article 13 of the Rome Statute empowers the Security Council, acting under Chapter VII of the UN Charter, to refer to the Court a 'situation', even if there is no other basis for the Court's jurisdiction, i.e. according to the territoriality and personality principles. This was apparently done in order to avoid setting up new *ad hoc* tribunals. See Luigi Condorelli and Santiago Villalpando, 'Can the Security Council Extend the ICC's Jurisdiction?' and 'Referral and Deferral by the Security Council', in A. Cassese, P. Gaeta, J. Jones, *op. cit.*, pp. 571-582, 627-656.

accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”

From the standpoint of human rights, the principal shortcoming of Article 20 of the Rome Statute is that it does not address a major issue of contemporary international law linked to individual responsibility for mass atrocities, namely, the conflict between the victims' right to justice and effective remedy and the sovereign right of states to proclaim amnesties and confer pardon. The issue of amnesties (i.e. general regulations excluding criminal responsibility for an entire class of people who have committed a specific criminal offence) and pardons (i.e. individual regulations either excluding criminal responsibility or punishment for a particular person) is even more complicated by the fact that they can serve a very useful purpose in furthering reconciliation in a conflict-torn society. It must be reiterated that the purpose of international criminal justice is not simply to punish, but also to aid processes of reconciliation. Also, amnesties (or an explicit lack of prosecution) may be instrumental in conducting peace negotiations. For instance, in October 2005 the ICC Prosecutor had unsealed five arrest warrants issued in July against five leaders of the Lord's Resistance Army in Uganda, while an international mediator was trying to facilitate a peace negotiation between the same leaders and the government of Uganda. So, paradoxically, the ICC prosecution might be perceived as leading to more suffering in Uganda: even though the Ugandan government is now in favour of negotiations and wishes to grant amnesty to the rebels¹⁷ it had itself referred the situation to the ICC while the conflict was still raging.

Although, in exceptional cases, amnesties and pardons may further the processes of peace and reconciliation, they must never be allowed to favour impunity and injustice. Amnesties which have the sole purpose of protecting the perpetrators of crimes against humanity from responsibility are contrary both to customary and conventional international human rights law, as witnessed by the decision of the Inter-American Court of Human Rights in *Barrios Altos* case;¹⁸ they also violate fundamental constitutional principles, as shown by the recent striking down of amnesty laws by the Argentine Supreme Court.¹⁹ Though the ICC will undoubtedly follow the same reasoning, an explicit statement to that effect should have been made in the Rome Statute.²⁰ In any case, the last word on whether a particular amnesty or pardon had a legitimate purpose must be with the ICC, but its assessment must not be mechanical, and should take into account all of the circumstances and consequences a particular decision might have.

¹⁷ See more at <http://www.globalsecurity.org/military/library/news/2005/10/mil-051010-irin02.htm>.

¹⁸ *Barrios Altos Case* [2001] IACHR 5 (14 March 2001) www.worldlii.org/int/cases/IACHR/2001/5.html.

¹⁹ See at hrw.org/english/docs/2005/06/14/argent11119.htm.

²⁰ For more, see C. Van den Wyngaert and T. Ongena, 'Ne bis in idem Principle, Including the Issue of Amnesty', in A. Cassese, P. Gaeta, J. Jones, *supra* note 2, pp. 705–729.

4. Due Process

Statutes of the international criminal courts and tribunals guarantee almost all due process rights found in most adversarial, as well as inquisitorial systems, such as the right of the accused to be informed of the charges against him/her, the right of the accused to remain silent, or the duty of the prosecution to disclose exculpatory evidence, as well as the essential structural principles, such as the impartiality and independence of judges.²¹ Only rights with specific manifestations on the international level will be considered here.

4.1. *Detention on Remand.* - Detention is an essential ingredient of criminal procedure: it is meant to secure the presence of the accused at the trial and preserve the integrity of evidence. According to the jurisprudence of human rights bodies, as well as the general practice in most countries with a civil law tradition, the presumption of innocence requires that detention be used sparingly, only when sufficient and substantiated cause can be shown. The European Court of Human Rights has opined that in no case, however serious, should detention be regarded as mandatory. However, at the international level detention is rule rather than exception, either in law and in actual practice. Thus, for instance, while very little criticism has been levied against the ICTY regarding the living conditions in the ICTY's Detention Unit, conditions for ordering detention and the duration thereof have raised serious questions pertaining to the protection of the detainees' human rights. In contrast to the prevailing European human rights standards, the ICTY RPE state that upon arrival in the seat of the ICTY, the accused *shall be detained* in a facility provided by the host country (Rule 64), and that the accused may temporarily be released until the beginning of the trial if the accused and the states to which they ask to be released *provide sufficient guarantees* that the accused shall appear before the Tribunal for trial (Rule 65). A pre-trial judge's detention order is strictly formal: the judge does not assess whether there are grounds for ordering detention, but is bound by Rule 64 to pronounce such a decision automatically, irrespective of the circumstances of the case. The rules prescribe no limits on the duration of detention: even those accused who were temporarily released pending trial must eventually be detained for the duration of the trials.

The process of state cooperation with international courts regarding the apprehension of their nationals charged with crimes against international law is always complicated and fraught with political difficulties, even intentional obstruction. An international criminal court cannot therefore be expected to release a defendant charged with the most grievous crime, who has sometimes avoided arrest for considerable time, without firm guarantees from both the defendant and the state to whose custody he/she is to be released.

Nevertheless, the excessive length of detention remains one of the most conspicuous problems regarding the human rights of detainees. For example, Momčilo Krajišnik was arrested and placed in ICTY detention on 3 April 2000, and his trial began on 4 February 2004, meaning that the total time of his pre-trial

²¹ See e.g. Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge', *44 Harv. Int'l L.J.*, p. 271.

detention amounted to 3 years and 10 months. However, as stated by some commentators, the length of detention depends on the circumstances of each case.²²

Another major problem is the absence of a remedy to compensate persons who were unjustly detained or convicted. Many legal systems afford wrongfully convicted or detained persons the right to rehabilitation and compensation from the state. Article 5 (5) and Article 9 (5) ECHR provide for a right to compensation for unlawful detention, while Article 3 of Protocol No. 7 to the ECHR and Article 14 (6) of the ICCPR provide for such remedy in respect of wrongful convictions. The statutes of ICTY and ICTR have not established such mechanisms, but this shortcoming was removed in the Rome Statute of the ICC (Article 85):

“1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. 2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her. 3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.”

4.2. Right to Trial within Reasonable Time. - The right to a trial within a reasonable time and without undue delay is laid down in international human rights treaties, as well as in the statutes of international courts and tribunals. This has probably been the right most often claimed before the European Court of Human Rights, under Article 6 (1) of the ECHR. As noted, the fact that the accused before international courts remains in detention for the whole duration of their trials makes it all the more important that the proceedings be conducted expeditiously. This is not always possible due to the complex legal and factual issues involved and the limited resources at the disposal of the international courts. Furthermore, international courts have to rely on state cooperation to obtain key evidence, documents and witnesses, as well as to apprehend the accused, therefore delays in criminal proceedings are not always imputable to the court itself.

Language issues also plague international courts, and the costs of interpretation and translation consume a major part of their budgets. The desire of several accused to act as their own counsel may also prolong a trial (see 4.3). It can be

²² See Robinson, *op. cit.*, p. 583.

argued that all these factors warrant a more lenient standard of reasonableness as to the duration of the proceedings.²³

4.3. Appointment of Counsel and the Right to Self-Representation. - National legal systems and international human rights law guarantee the right of defendants in criminal trials to represent themselves, without the assistance of counsel. However, there are important differences between adversarial and inquisitorial systems regarding the scope of the right to self-representation, and these differences have resurfaced at the international level.²⁴

To date, three persons accused before the ICTY have, with variable success, invoked their right to represent themselves: Slobodan Milošević, Vojislav Šešelj and, most recently, Momcilo Krajišnik.

The Chamber presided by the late judge Richard May allowed Milošević to defend himself with the help of three “legal assistants” of his own choosing, although it also appointed three experts in various fields of law as *amici curiae*, whose task was to monitor, as officers of the Tribunal, the impartiality and fairness of the trial and to defend, where appropriate, the interests of the accused.

In contrast, Judge Wolfgang Schomburg’s Chamber appointed stand-by counsel for Vojislav Šešelj, also against his explicit objections.²⁵

Due to Milošević’s health problems, the Trial Chamber later found it necessary to appoint two defence counsel while retaining only one *amicus curiae*. However, the appointed advocates themselves appealed the decision on the assignment of counsel to the Appeals Chamber, when they were faced the defence witnesses’ refusal to cooperate: they declined to appear before the Tribunal because Milošević had been deprived of his right to self-representation. The counsel requested the Tribunal to allow them to withdraw due to the total absence of cooperation and communication with their client and the ensuing ethical problems. The Appeals Chamber²⁶ *did not* reverse the Trial Chamber decision as to the assignment of counsel as such – at the time of the writing Milošević is still represented by counsel assigned to him, contrary to his wishes. The Appeals Chamber found that the Trial Chamber had discretion with regard to the management of the proceedings, that it had not abused its powers, and that it had been guided by its duty to complete the trial within reasonable time. The Appeals Chamber altered the modalities of the duties of the appointed counsel so that Milošević now conducts the examination-in-chief of witnesses and controls the presentation of evidence of the defence, while counsel play a subsidiary role.

²³ See Cassese, *op. cit.*, pp. 398-400.

²⁴ For more, see Nina Jorgensen, ‘The Right of the Accused to Self-Representation before International Criminal Tribunals’, 98 *A.J.I.L.* 711, pp. 718-722.

²⁵ See *Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj in His Defence*, 9 May 2003. The case of Šešelj is currently in the pre-trial stage.

²⁶ *Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of a defence Counsel*, 1 November 2004.

The question of assignment of a defence counsel against the express wishes of the accused in any given case can be approached by three alleys. The first issue is one of principle - whether the right of the accused to self-representation is absolute or subject to specific restrictions. Many European legal systems, such as the French, German, Belgian, and the one in Serbia and other countries of the former Yugoslavia, recognize the institute of mandatory defence for certain serious crimes, presuming that the accused in such cases may not be able to defend himself successfully. However, there are fundamental differences between inquisitorial and adversarial systems as to the appointment of counsel, and, more importantly, as to the role the advocate plays in the proceedings. In inquisitorial systems, the accused, by appointing counsel, is not prevented from actively participating in the proceedings. On the other hand, in adversarial systems this right is almost absolute, but as soon as a defendant appoints counsel he can no longer participate in the proceedings in an active manner.

Article 21 (4.d) of the ICTY Statute, which relies heavily on Article 14 (3(4)) of the ICCPR, prescribes that an accused shall have the right to act as his own defender but will be assigned legal assistance in *any case where the interests of justice so require*, and without payment by the accused if he/she cannot afford it. An identical provision can be found in the ICTR Statute (Article 20 (4.d)) and the Rome Statute of the ICC (Article 67 (1.d)). In other words, appointment of counsel is not limited only to situations where an accused has no means to hire an attorney. This is also the position of the European Court of Human Rights, stated in its judgment in *Croissant v. Germany*.²⁷ Another relevant precedent is that of the Human Rights Committee, which in its views on *Michael and Brian Hill v. Spain*²⁸, stated that the complainant, who had been accused before a Spanish criminal court, should have been allowed to represent himself in the circumstances of that particular case, but still did not say that the right to self-representation was absolute.

The second question is whether the interests of justice in a particular case require the imposition of a defence counsel. In the Milošević case, it appears that, in any inquisitorial system, the inefficiency and irrelevance of Milošević's defence would constitute sufficient grounds to impose counsel. The ICTY judges have, however, adopted a different approach.

The final question is not one of law, but of judicial policy - although the Chamber had *the right* to assign defence counsel to Milošević, the question arises as to whether it *should have done so*. In this case, the Chamber should have been guided by the principle that the public impression of a fair trial is as important as the trial itself.²⁹

²⁷ Judgment of 25 September 1992. Series A No 237-B. The Court found that the provision of the German Code on Criminal Procedure on mandatory assignment of counsel in specific circumstances was compatible with the ECHR.

²⁸ Communication No. 526/1993.

²⁹ See Vojin Dimitrijević, 'Justice Must Be Done and Be Seen to Be Done: The Milosevic Trial', *East European Constitutional Review*, 1-2/2002, pp. 59-62.

To conclude, the right to self-representation is not absolute, in national legal systems, in international human rights law and in international criminal law. It must not be used to make a mockery of the proceedings or as an excuse to avoid the principal purpose of a criminal trial - the determination of a defendant's guilt or innocence. However, utmost caution must be exercised and both fairness and the *appearance* of fairness must always be maintained. *Inter alia*, this means that alternative modalities, which are foreign to traditional adversarial systems, have to be taken into consideration in order to assure the active involvement of the accused in his trial, if the accused so desires.³⁰

5. Rights of Victims

The accused is in the central focus of criminal proceedings – it is his rights and liberty that are in jeopardy. On the other hand, the purpose of international criminal law is to redress the most serious and massive human rights violations, which endanger the very fabric of the international community and of civilized society. It is therefore very important for the victims of such atrocities to appear in court, to confront those who have harmed them and to obtain some measure of satisfaction. Their voices must be heard, their pain and anguish known, and their names must not be forgotten.

The position of victims before the ICTY and the ICTR has been similar to that in adversarial systems, although both the judges and the prosecution have tried to accommodate their requests. The Rome Statute grants some special rights to victims, expanding their role in the criminal proceedings and thereby again deviating from the traditional adversarial model. It establishes an effective remedy enabling victims to obtain at least some compensation for the violation of their human rights. In cases of massive atrocities, victims usually cannot get any reparations from the perpetrator(s), as most of them do not possess enough assets, or are not under the jurisdiction of a specific state. Their best chance to secure compensation, and at that a very flimsy one, has been to sue the state itself, given that the perpetrators of massive human rights violations have usually been agents of a state, which entails its responsibility. However, this route is almost invariably fraught with practical and legal difficulties, such as sovereign immunity or expiry of the statute of limitations regarding compensation. The Rome Statute (Article 75) gives the Court the authority to determine the scope and amount of any damages suffered by the victim, and to make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. The Rome Statute goes even further in its Article 79 providing for the establishment of a trust fund for victims, to which states parties to the Statute will contribute, and from which the victims will be compensated, if compensation cannot be obtained from the perpetrator himself. The success of this mechanism will entirely depend on the willingness of states to contribute to this fund.³¹ Article 68 of the Rome Statute, entitled “Protection of the

³⁰ See also Jorgensen, *op. cit.*, pp. 725-726.

³¹ As of June 2005, states have pledged 400.000 euros. See http://www.icc-pi.int/library/about/newsletter/4/pdf/ICC-CPI_NL4_En.pdf.

victims and witnesses and their participation in the proceedings”, provides for measures to safeguard the dignity and physical and mental integrity of the victims if they appear before the court as witnesses, such as conduct of proceedings in camera or the presentation of evidence by electronic means.

6. Conclusions

The statutes and the rules of international criminal courts and tribunals are in general conformity with the body of international human rights law, though with certain qualifications. It is sometimes not possible to apply these standards in the same manner in municipal and international criminal proceedings. Yet, this does not mean that international criminal courts can disregard long-established rules of judicial propriety and due process. The respect of the human rights of all participants in criminal proceedings is a value in and of itself.

There are, however, at least two more reasons why international courts must exercise extreme caution and restraint.

The first is that, unlike most national courts, international criminal courts are not under a regime of external judicial control and review of their respect for the human rights of participants in proceedings before them. No defendant whose human rights have been violated before an international court can file a complaint to the European Court of Human Rights, to a UN treaty body, or even to the national courts of the Netherlands, Tanzania or, for that matter, any other state. It is this lack of external control - which would have been complicated and highly impractical even if it were jurisdictionally possible - which necessitates that international courts and tribunals maintain an equivalent level of protection of fundamental rights.

Secondly, as the main purpose of international criminal justice is to redress the the most grievous violations of human rights, these same human rights must be respected in the course of international criminal proceedings. If international courts are to aid in any way the process of reconciliation and transitional justice, they must follow the highest ethical and legal standards, for the people on all sides of wars and conflicts have to acquire trust in these judicial institutions and believe in the veracity and fairness of their decisions. It does not suffice that justice is done before international courts, but it must also be seen to be done.

THE STATUS OF INTERNATIONAL TREATIES ON HUMAN RIGHTS
THE HIERARCHY OF RULES OF INTERNATIONAL LAW
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In general, the hierarchy of legal rules is determined on the basis of three main criteria: (a) the contents and scope of the respective rules; (b) their age; and (c) their sources.

The criterion of contents and scope is reflected in the adagium *lex specialis derogat lege generali*. If a certain legal position or situation is governed by a general rule but also by a more specific rule, the latter applies to the extent that it is more specific. An expression of this criterion is to be found, for instance, in Article 5 of the Vienna Convention on the Law of Treaties, which reads as follows: “The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization”.

The criterion of age is reflected in the adagium *lex posterior derogat lege priori*. A rule governing a certain subject is set aside by a later rule that is binding on the same parties. This criterion is expressed, for instance, in Article 30, para. 3, of the Vienna Convention on the Law of Treaties, which reads as follows: “When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty”. The latter proviso, of course, implies that, if the parties to the latter treaty have agreed that the earlier treaty shall prevail, in that respect the earlier treaty is not incompatible with the later one.

In national legal systems, the most important criterion, and the one which may set aside the two other ones, is **the criterion of source**: legal rules of a constitutional status prevail over other legal rules, while statutory rules prevail over rules of delegated legislation.

In international law, the hierarchy of rules is less clear because of the mainly horizontally structured inter-State relationships. Treaties establishing international organizations may claim to have a constitutional character (one may think of the

so-called “European Constitution”,¹ while treaties such as the European Convention on Human Rights and its supervisory system also tend to establish a constitutional order for the European juridical space,²) but that does not automatically give them a special status among treaties. Article 103 of the Charter of the United Nations, which stipulates that “[i]n 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” must be assumed to have that prevailing effect in virtue of the will of the Contracting States.³ Therefore, the criterion of source doesn’t lend itself very well for application at the international level. Indeed, Article 38 of the Statute of the International Court of Justice, which is considered to be an authoritative statement of the sources of international law, is generally considered not to indicate any hierarchy.⁴

Nevertheless, there would seem to be *communis opinio* that there are rules of international law which have precedence over any other rules, irrespective of their respective sources. As Akehurst has put it: “In the event of a conflict between a rule of *jus cogens* and a rule of *jus dispositivum*, the rule of *jus cogens* must prevail, regardless of the sources of the conflicting rules, regardless of whether the rule of *jus dispositivum* came into existence before or after the rule of *jus cogens*, and regardless of whether the rule of *jus dispositivum* is more specific or less specific than the rule of *jus cogens*.⁵ In fact, therefore, the body of recognized *jus cogens*, which may gradually develop, constitutes a rudimentary unwritten constitution of the international legal order.⁶ Rules of *jus cogens* by definition contain obligations *erga omnes*. Whether, on the other hand, all obligations *erga omnes* have the rank of *jus cogens* is less clear. So what seems to be sure, however is, that both categories of rules may be said to have a higher rank than other rules of international law, which gives them, as Professor Pinelli puts it in his paper, a constitutional status, or, as Professor Shalton puts it, makes them elements of an international *ordre public*. These observations may serve to explain why, in an international legal context, the criterion of source is by many authors replaced by the criterion of substantive contents. This is also the approach taken by Professor Pinelli in his paper.

¹ See N. Walkwer, “The EU and the WTO: Constitutionalism in a New Key”, in G. de Búrca and J. Scott (ed.), *The EU and the WTO – Legal and Constitutional Issues*, 2001, pp. 31-57.

² See L. Wildhaber, “A Constitutional Future for the European Court of Human Rights?”, *Human Rights Law Journal* 2002, pp. 161-165.

³ See, however, Article 2, para. 6, of the Charter. For a recent recognition of the priority rank of the UN Charter, see two judgments of the Court of First Instance of the European Communities of 21 September 2005 in the cases T-306/01 and 315/01. On the legal character of the UN Charter, see also R.St.J. MacDonald, “The United Nations Charter: Constitution or Contract”, in *Contemporary Problems of International Law*, 1988, p. 889.

⁴ See G.J.H. van Hoof, *Rethinking the Sources of International Law*, 1983, p. 152, note 627.

⁵ M. Akehurst, “The Hierarchy of the Sources of International Law”, XLVII *British Yearbook of International Law* 1974-75, pp. 281-282.

⁶ See I.D. Selderman, *Hierarchy in International Law*, 2001, pp. 284-289.

Especially in the field of human rights, a **fourth criterion** would seem to be of great relevance, *viz.* whether, and if so to what extent a right or obligation laid down in a legal rule may be derogated from, or may be restricted, and whether it may be made the object of a reservation. For human rights treaties in particular this may constitute a strong indication of the hierarchy among the different human-rights provisions in that particular treaty. It may, therefore, be concluded that, although the human rights treaties do not contain specific provisions about the hierarchy among the rights included, let alone any characterizations such as *jus cogens* or peremptory norm, they contain elements that indicate that a certain right or obligation is intended to have an absolute character while others have not. Professor Shelton points to General Comment No. 29 of the Human Rights Committee, where the relation between the non-derogable character of certain rights and their status as peremptory law is elaborated upon. It may also be concluded, as is also pointed out by Professor Pinelli, that the issue under discussion is not so much what is the special status of human rights treaties but what is the special status of certain human rights as “core rights”.

Professor Pinelli takes the view that for the determination of a hierarchy of international rules and, consequently, of “core rights” there are no absolute criteria. Such a determination depends on several circumstances of time and place. Consequently, he takes the position that the question of which rights are to be considered “core rights” cannot be answered once and for all, since different dimensions have to be taken into account. This may be illustrated by the rising status of social rights in general and some of them in particular, are dealt with by Professor Quinn in his paper. For a long time these rights have been considered to be by definition subordinated to civil and political rights and to be of a programmatic, non-self-executing nature only. At present, in broad circles they are recognized as indivisible *vis-à-vis* civil rights, and as also containing positive obligations that may be self-executing and in some respect constitute core rights themselves.

Professor Shelton raises the question of the legal foundation of the binding character of *jus cogens* outside the framework of treaties, in view of the voluntarist character of international law. She refers to such notions as “common interest of humanity” and “common concern of mankind”, and, in view of Article 53 of the Vienna Convention on the Law of Treaties, “the will of the international community”. If such a source of rights and obligation is recognized, it means that a State is bound by *jus cogens*, even if it has not ratified the treaty concerned, and even if it has been a “persistent objector” during the formation of the rule as customary law.

Connected with the issue of the legal foundation is that of whether States are obliged to prosecute violations of *jus cogens*, even in cases where the violated norm is not part of their criminal law or was not committed under their jurisdiction (think of the act of female circumcision), and even in derogation of rules concerning immunity (torture by foreign public officials). Case-law of the International Court of Justice and the European Court of Human Rights on the matter is still very restrictive and, as is respectfully submitted, rather

disappointing, while that of the Inter-American Court of Human Rights would seem to go beyond the present *opinio juris*.⁷ Guidance from national case-law is also still far from clear and convincing.⁸

As is rightly observed by Professor Shelton, the notion of “core rights” and that of *jus cogens* do not necessarily coincide. The specific feature of core rights is not primarily their absolute character but the fact that their ensurance is a *conditio sine qua non* of the enjoyment of other rights. They encompass, on the one hand, instrumental rights such as the principle of equality and the core of the right to a fair trial, and on the other hand existence rights such as the right to life and to physical and psychological integrity. It is evident that the rights mentioned are not absolute but contain an absolute core. In the case of the principle of equality, only the prohibition of racial discrimination may, at present, be said to have an absolute character. And the minimum standard of fair trial allows for certain restrictions in specific circumstances but not from the core elements such as impartiality and presumption of innocence. The standard of fair trial may even be lower, or let us say somewhat qualified, in international criminal procedures because of their special features and circumstances. This was emphasized by Mr. Dimitrijevic and Mr. Milanovic in their paper, especially in relation to the *nullum crimen/ nulla poena* principle and the *ne bis in idem* principle.

The same is evident for the core rights of the European Social Charter which all States Parties have to accept, referred to by Professor Quinn; they have a special treaty status but are not absolute.

Core rights may also be effectively protected outside the framework of the separate treaty regimes, if their violation constitutes an international crime that may give rise to international jurisdiction. That connection is made in the paper by Mr. Dimitrijevic and Mr. Milanovic on international criminal law. In addition, these core rights may give rise to universal domestic jurisdiction, irrespective of whether the act constitutes a crime in the legal system of the state where the act was committed. Within the treaty regimes – and legal practice based thereupon – they may imply very specific positive obligations, which in turn may develop into core obligations, especially *vis-à-vis* basic needs, and even into obligations *erga omnes*. This might also imply that these obligations may not be the subject of reservations nor of withdrawal.

The principle of equality as a core principle has the instrumental effect, pointed out by Professor Quinn, that it may give rise to positive obligations implied in provisions drafted as abstention obligations, may make social and economic rights self-executing and enforceable, may turn an obligation of conduct into an obligation of result, and in general reinforces the interrelation between civil and social rights.

⁷ See the international case-law referred to by Professor Shelton.

⁸ See the domestic case-law referred to by Professor Shelton.

From the papers for the third session of the seminar, the presentations by the rapporteurs, and our discussion it may be concluded that there is agreement that core human rights exist and that certain rights, or their hard core, fall into that category. For other rights, or elements thereof, especially in the area of social rights, there appears to be less consensus. For the exact definition of and criteria for this category of human rights, as well as for the legal implications of the recognition that a certain right belongs to that category, more research and discussion will be needed.

The seminar has provided us with a great number of very comprehensive and topical views, and a lot of very useful information for that purpose

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This volume compiles the papers and comments delivered and the conclusions reached at the seminar on "The Status of international treaties on Human Rights", which was organised In Coimbra, Portugal, on 7 and 8 October 2005 by the Venice Commission in co-operation with the Ius Gentium Coimbrigae Centre and the Faculty of Law of the University of Coimbra and The International Association of Constitutional Law - IACL.

The reports analyse the specific features of international human rights treaties; the impact of state succession on these treaties; the territorial scope of human rights obligations; the position of human rights treaties in the national legal systems; the impact on the national systems of the obligation to comply with the judgments of the European Court of Human Rights; the criteria for establishing the hierarchy of legal rules in national and international law; the difference between *jus cogens* and *core rights*; the protection of core rights through international jurisdiction or universal domestic jurisdiction.