Annex ZA

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Monitoring in the Western Pacific region shows evidence of seagrass decline in line with global trends

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ABSTRACT

Seagrass systems of the Western Pacific region are biodiverse habitats, providing vital services to ecosystems and humans over a vast geographic range. SeagrassNet is a worldwide monitoring program that collects data on seagrass habitats, including the ten locations across the Western Pacific reported here where change at various scales was rapidly detected. Three sites remote from human influence were stable. Seagrasses declined largely due to increased nutrient loading (4 sites) and increased sedimentation (3 sites), the two most common stressors of seagrass worldwide. Two sites experienced near-total loss from of excess sedimentation, followed by partial recovery once sedimentation was reduced. Species shifts were observed at every site with recovering sites colonized by pioneer species. Regulation of watersheds is essential if marine protected areas are to preserve seagrass meadows. Seagrasses in the Western Pacific experience stress due to human impacts despite the vastness of the ocean area and low development pressures.

1. Introduction

Seagrass meadows form the foundation of important shallow-water coastal systems and associated biodiversity globally (den Hartog, 1970; Green and Short, 2003, Duarte et al., 2008, Short et al. 2011). They provide an assortment of ecosystem services to resident species including the endangered dugong and green turtle, interconnected habitats (mangroves and coral reefs) and populations through direct (nursery and foraging areas) and indirect (carbon and nutrient sequestration and export) means as well as supporting the needs of human populations (fisheries, biological filtering, hydro-dynamic buffering). Nowhere is the importance of seagrass systems more evident than in the tropical Western Pacific region, which represents the highest biodiversity of seagrass species, the broadest area of seagrass meadow cover, and the largest gap in information on global seagrass distribution and status (Spaulding et al., 2003; Short et al., 2007; Waycott et al., 2009; Short et al., 2011).

Differences in the life history strategies of tropical seagrasses result in varying species assemblages. *Enhalus acoroides* is a slow turnover, persistent species with low resistance to perturbation (Bridges et al., 1981; Walker et al., 1999). In contrast, *Cymodocea serrulata, Halodule uninervis* and *Halophila ovalis* are more ephemeral (Birch and Birch, 1984). *H. uninervis* and *H. ovalis* are considered pioneer species, growing rapidly and surviving well in unstable or depositional environments (Bridges et al., 1981; Birch and Birch, 1984). *C. serrulata* is found associated with deep sediment layers, and has been linked to increased sediment accretion (Birch and Birch, 1984).

As with shallow coastal systems globally, seagrass habitats of the Western Pacific face a number of threats including the damage caused by rapidly growing human populations, declines in water quality, loss of biodiversity, and erosion of habitat structure (Short

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and Wyllie-Echeverria, 1996; Orth et al., 2006). Deforestation of watersheds, destruction of mangroves, agriculture and aquaculture practices – all exacerbate sedimentation and habitat loss (Grech et al., 2012). The aim of SeagrassNet is to establish seagrass monitoring worldwide: preserving seagrass habitat, increasing awareness, and tracking the status of seagrasses as an indicator of trends in environmental health, using a standardized protocol (Short et al., 2006a). Teams have been established to monitor seagrass habitat simultaneously four times a year, using the same protocol, in 33 countries at 122 sites worldwide. In each case, it is the quarterly, repeated sampling of a series of specific locations across a seagrass meadow that provides evidence of change in the seagrass environment, including distribution, species composition, and abundance. The protocol (Short et al., 2006a) is based on a statistically valid and peer-reviewed sampling scheme (Burdick and Kendrick, 2001); results are comparable over time at a given site, and the repeated measures monitoring allows trend detection over relatively short time periods (1–2 years) even within diverse (3–7 species) communities. The protocol captures increments of change at seagrass sites representative of the area; widespread use of the protocol allows comparisons across countries, regions, and the world (Short et al., 2006b; Freeman et al., 2008).

The present study examines the spatial and temporal dynamics of monitoring sites in multi-species seagrass populations at various locations across the Western Pacific including insular Southeast Asia and northeast Australia (Fig. 1). These locations represent the variety of geographic and environmental conditions in which seagrasses occur and we use them to report on trends in seagrass condition in the Western Pacific.

2. Methods

Standard SeagrassNet methods were used (Short et al., 2006a, www.SeagrassNet.org). To summarize the monitoring protocol, a site consists of three, fixed, parallel 50 m transects, their midpoints located on a line laid out seaward, perpendicular to shore. The transects are at the nearshore, mid-depth, and deep parts of the seagrass bed. Monitoring was conducted at the 10 sites across the Western Pacific, over periods ranging from 3 to 8 years per site (Table 1, Fig. 1). Some sites experienced breaks in data collection from 1 to 2.5 years. All site monitoring commenced between 2001 and 2004 and was conducted at set times, four times per year. The sites themselves were chosen based on a set of parameters (Short et al., 2006a) designed to locate a typical or representative seagrass bed given the range of conditions of the area under consideration, either a site distant from anthropogenic stressors or one considered by the monitoring team to be affected by an ongoing stressor or having a potential stressor. The quarterly sampling is done at twelve 0.25 m^2 quadrats placed at pre-determined, random locations along each of the transects. Seagrass percent cover by species is visually estimated per quadrat using a photo guide representing various cover conditions. Percent cover data provide a good representation of overall ecosystem status in Western Pacific seagrass; seagrass decline is defined as the loss of percent cover over time (Freeman et al., 2008; Mellors et al., 2008; Coles et al., 2005; McKenzie et al., 2012).

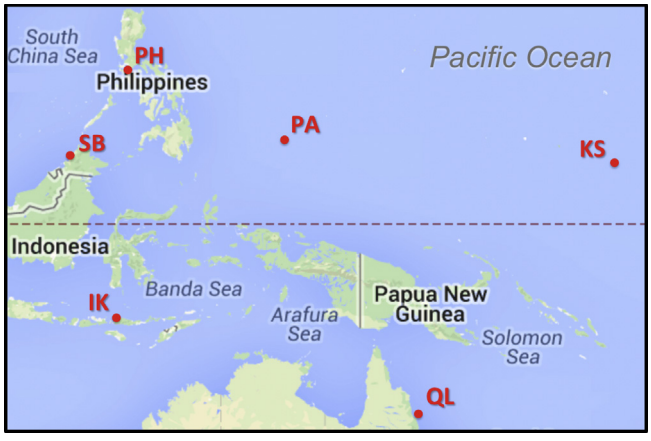

Fig. 1. Map of the Western Pacific with the position of the SeagrassNet sites in Kosrae (FSM; KS), Palau (PA), Mindoro (Philippines; PH), and Sabah (Malaysia; SB), Komodo (Indonesia; IK), Queensland (Australia; QL). Dashed line is the Equator.

Countries and locations were selected to represent wide geographic coverage of the Western Pacific region. In each location representative meadows were selected using knowledge from previous visits by seagrass scientists and local advice. To avoid potential bias, at least two sites were monitored at each location when possible, at least one of which was remote from population centers. Representative meadows included the dominant seagrass community type and average abundance. Intertidal sampling ensured local scientists and community members could carry out the quarterly monitoring long-term.

Change in distribution of seagrasses over time is captured by measurement of the position of the meadow relative to the permanent transects. Species composition is measured along the transects, and seagrass abundance is determined via measurements of plant percent cover, canopy height, density, and biomass. Voucher specimens are collected and prepared as herbarium sheets of each seagrass species (with flowering parts if present), archived at the International Seagrass Herbarium at the Smithsonian, Washington, DC, USA. Each quadrat is photographed quarterly to create a permanent record. Water temperature is monitored continuously with two Hobo Pendent data loggers at each site (Short et al., 2006a).

Correlation analysis with least square regression was used on data from the Western Pacific sites to examine trends over time with repeated-measures ANOVA for differences between transects and sites using JMP (SAS Institute Inc. Version 8.0). Significance was determined at $p < 0.05$ except for two instances of $p < 0.06$, as indicated.

3. Results

All ten sites were located within 17° of the Equator, with all but two sites in the Northern Hemisphere (Table 1). Three to seven seagrass species were found in each of the ten Western Pacific SeagrassNet sites analyzed here. Komodo, Indonesia had the most, with seven seagrass species while Kosrae, Federated States of Micronesia and one site in Palau had the lowest, at three species each. *Thalassia hemprichii* and *Cymodocea rotundata* were found at nine of the sites, with *T. hemprichii* absent only from a site in Malaysia and *C. rotundata* absent only from a site in Palau. *H. ovalis* was found at eight sites, *H. uninervis* at seven sites, *E. acoroides* at six and *C. serrulata* at four. *Syringodium isoetifolium* was found only in Komodo. The two Kosrae sites had all the seagrass species known to exist there (Green and Short, 2003), while other sites did not fully represent their country's seagrass species diversity. Seagrass percent cover at the site level (mean of total cover of the 3 transects at each site with replicate quadrats, $n = 12$) ranged from 2.4% (Sabah, SB5.2) to 90.1% (Kosrae, KS1.2).

Seagrass percent cover was stable at three of the ten sites (Fig. 2): Kosrae (KS1.1), the Philippines (PH4.1) and Australia (QL8.1). All three sites showed species shifts (Table 2) even though the overall site cover did not change. At the other seven sites, declines in seagrass percent cover occurred: PA3.1 (18%/y), SB5.1 (56%/y), SB5.2 (78%/y), IK16.1 (5.4%/y); PA3.2 (1.9%/y), PH4.2

Table 1
Western Pacific sites, locations, monitoring dates, and seagrass species. Seagrass species codes: Cr – *Cymodocea rotundata*, Cs – *Cymodocea serrulata*, Ea – *Enhalus acoroides*, Hn – *Halophila spinulosa*, Ho – *Halophila ovalis*, Hu – *Halodule uninervis*, Si – *Syringodium isoetifolium*, Th – *Thalassia hemprichii*.

Site	Country	Location	Latitude	Longitude	Monitoring dates	Species present
KS1.1	Federated States of Micronesia	Kosrae/Lacs, Okat Harbor	N 05° 20.29″	E 162° 57.01″	07/2001–01/2009	Cr, Ea, Th
KS1.2	Federated States of Micronesia	Kosrae/Lelu	N 05° 20.10″	E 163° 1.54″	04/2004–01/2009	Cr, Ea, Th
PA3.1	Republic of Palau	Koror/Ngermiid	N 07° 21.19″	E 134° 30.50″	07/2001–01/2009	Ea, Th, Ho
PA3.2	Republic of Palau	Babelthraup/Ngchesar	N 07° 25.83″	E 134° 36.35″	04/2004–01/2009	Th, Cr, Hu, Ea, Ho
PH4.1	Philippines	Mindoro/Paniquian	N 13° 31.10″	E 120° 57.07″	07/2001–01/2009	Th, Cr, Hu, Ea, Ho
PH4.2	Philippines	Mindoro/Sabang	N 13° 31.29″	E 120° 58.65″	07/2001–01/2009	Th, Cr, Hu, Ho
SB5.1	Malaysia	Sabah/Kuari Bay, Pulau Gaya	N 06° 00.50″	E 116° 02.05″	07/2001–01/2009	Hu, Cs, Cr, Ho
SB5.2	Malaysia	Sabah/Police Beach, Pulau Gaya	N 06° 02.14″	E 116° 00.90″	07/2001–01/2009	Hu, Th, Cr, Cs, Ho, Hn
QL8.1	Australia	Queensland/Green Island, Cairns	S 16° 45.5″	E 145° 58.4″	10/2001–01/2009	Th, Cr, Hu, Cs, Ho
IK16.1	Indonesia	Komodo/Seraya Kecil	S 8° 24.70″	E 119° 52.05″	07/2002–01/2009	Th, Cr, Cs, Ho, Ea, Hu, Si

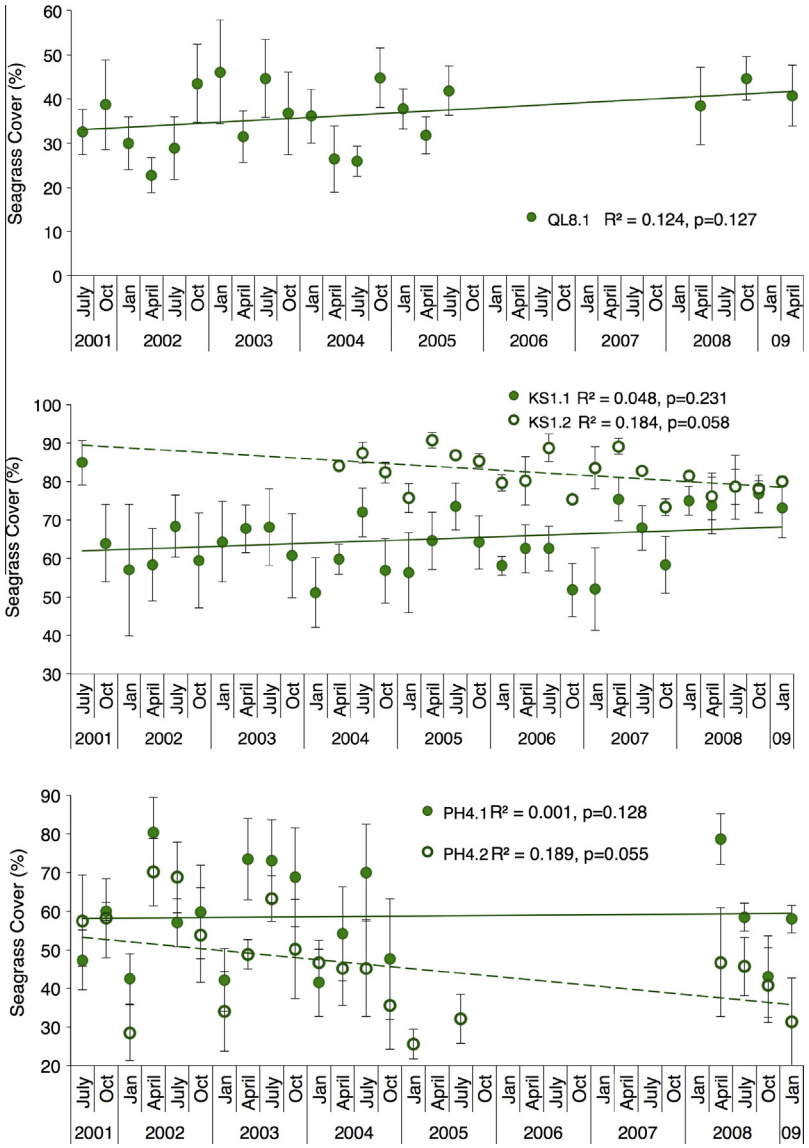

Fig. 2. Western Pacific sites with stable or lowest declines in seagrass populations between 2001–09 for KS1.1 and KS1.2, Kosrae (FSM); QL8.1, Queensland (Australia); PH4.1 and PH4.2, Mindoro (Philippines), with correlation coefficients and *p*-values.

(1.1%/y), and KS1.2 (0.4%/y) (Figs. 2–4). The Koror, Palau (PA3.1) site experienced wastewater discharge impacts as a result of sewer installation. Both sites in Sabah, Malaysia (SB5.1 and SB5.2) were affected by watershed deforestation and the resulting massive sediment loading that degraded the waters off much of western Sabah (Freeman et al., 2008). In Komodo, Indonesia, the site IK16.1 was affected by nutrient loading from beachside tourist cabins. Two sites, Kosrae (KS1.2) and Philippines (PH 4.2), showed lesser declines (Fig. 2a and c) and had nearby shoreline villages, presumably with some nutrient impact. Babelthraup, Palau (PA3.2) showed low level seagrass decline due to increased sediment loading from road construction (see Table 3).

Table 2
Summary of trends in seagrass species percent cover at transects (A, B, and C) of the ten Western Pacific sites, showing significant decreasing and increasing species cover as well as stable species cover (with *p*-values). Seagrass species codes in Table 1.

Transect	A			B			C		
Site	Species decrease	Species increase	Transect trend	Species decrease	Species increase	Transect trend	Species decrease	Species increase	Transect trend
KS1.1	Ea $p < 0.0001$	Cr $p = 0.0003$	Species shift			Stable		Th $p = 0.0096$	Increase $p = 0.0099$
KS1.2	Cr $p = 0.0179$	Th $p = 0.0514$	Species shift	Cr $p = 0.015$		Decline $p = 0.033$	Th $p = 0.040$		Stable
PA3.1	Ea $p < 0.0001$		Decline $p < 0.0001$	Ea $p < 0.0001$		Decline $p < 0.0001$	Ea $p < 0.0001$		Decline $p < 0.0001$
PA3.2	Ea $p = 0.0006$ Th $p = 0.039$ Cr $p = 0.016$	Cs $p = 0.004$	Stable	Ea $p = 0.0003$		Decline $p = 0.0162$	Ea $p < 0.0001$ Th $p = 0.019$ Cr $p = 0.029$	Cs $p = 0.0003$	Decline $p = 0.0032$
PH4.1			Stable			Stable		Cr $p = 0.016$	Stable
PH4.2	Cr $p = 0.047$ Hu $p = 0.044$		Decline $p = 0.038$	Cr $p = 0.001$ Hu $p = 0.038$	Th $p = 0.032$	Stable			Stable
SB5.1 2001-6	Cr $p = 0.0002$ Hu $p = 0.0002$		Decline $p = 0.0001$	Cs $p < 0.0001$ Hu $p = 0.0001$		Decline $p = 0.0001$	Hu $p = 0.0001$		Decline $p = 0.0001$
SB5.1 2006-9	Cr $p = 0.036$		Stable		Hu $p = 0.0076$	Recovery $p = 0.012$		Hu $p = 0.0007$ Cs $p = 0.0054$	Recovery $p = 0.0006$
SB5.2 2001-5	Hu $p = 0.0001$ Th $p = 0.0001$ Ho $p = 0.0001$ Cs $p = 0.0001$ Cr $p = 0.0001$		Decline $p = 0.0001$	Hu $p = 0.0001$ Th $p = 0.0001$ Ho $p = 0.0001$ Cs $p = 0.0001$ Cr $p = 0.0001$		Decline $p = 0.0001$	Th $p = 0.0001$ Ho $p = 0.0445$		Decline $p = 0.0001$
SB5.2 2007-9		Hu $p = 0.0122$	Recovery $p < 0.0001$		Hu $p = 0.0005$	Recovery $p < 0.001$			
QL8.1		Cr $p = 0.0196$	Stable			Stable		Cr $p = 0.0022$	Increase $p = 0.0237$
IK16.1	Ea $p = 0.047$		Stable	Ea $p = 0.015$		Decline $p = 0.007$	Th $p = 0.015$ Si $p = 0.019$		Decline $p = 0.025$

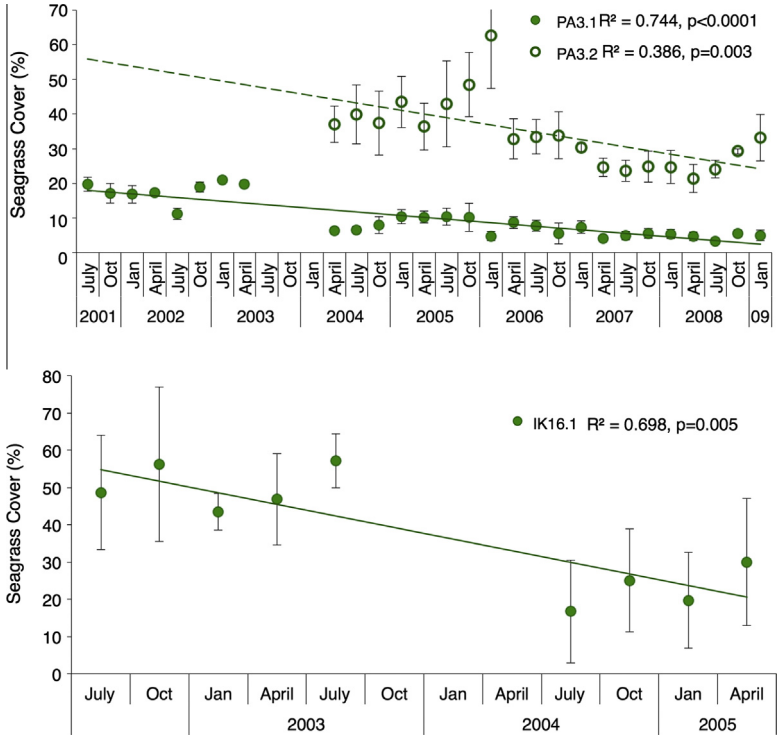

Fig. 3. Western Pacific sites with declining seagrass populations between 2001–09 for PA3.1 and PA3.2, Palau and between 2002–05 for IK16.1, Komodo (Indonesia), with correlation coefficient and *p*-value.

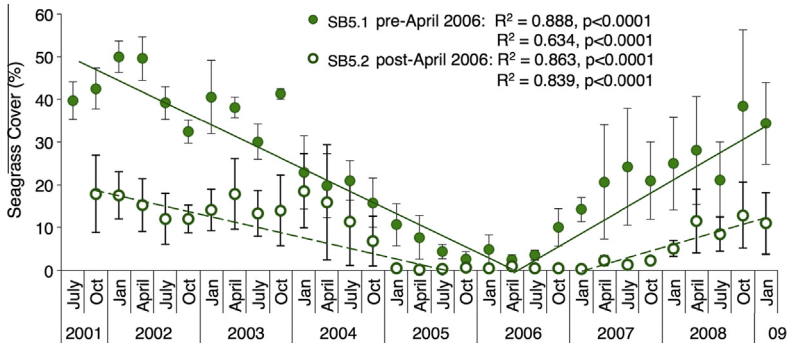

Fig. 4. Western Pacific sites experiencing decline and recovery between 2001–09, from seagrass populations in SB5.1 and SB5.2, Sabah (Malaysia), with correlation coefficients and p-values.

In Malaysia, after the 2004-6 decline, the two sites showed partial recovery: SB5.1 regained 71% of its seagrass cover and SB5.2 regained 68% of its previous cover (Fig. 4). The decline included all six seagrass species, but the recovery at both sites was dominated by a single species, *H. uninervis*. Both these sites rebounded as a result of reduced sediment loading after the watershed stabilized in 2006.

All of the Western Pacific sites showed species shifts over time, measured by percent cover of individual seagrass species. Species shifts were observed at the transect level even when total seagrass cover did not change, as seen at the Kosrae sites (Table 2). At the nearshore transect of KS1.1 (Fig. 5a), *E. acoroides* decreased and *C. rotundata* increased, creating a clear shift in species dominance. At this site's mid-bed transect (Fig. 5b), no species shifts were seen. Over the same time period, the deep transect (Fig. 5c) showed an increase in *T. hemprichii* and no change in the other species.

Significant species dynamics were observed at many sites (Table 2). At five sites, total seagrass percent cover declined with seagrass species shifts in each case. At PA3.1, *E. acoroides* declined at all three transects with no change in *T. hemprichii* or *H. ovalis* (Fig. 6). At PA3.2, *E. acoroides* and *T. hemprichii* declined while *C. serrulata* increased and *C. rotundata*, *S. isoetifolium*, *H. uninervis* and *H. ovalis* were stable. At PH4.2, decreases were seen in *C. rotundata* and *H. uninervis* while *T. hemprichii* and *H. ovalis* did not change. The site IK16.1 showed declines in *E. acoroides* and *S. isoetifolium*, with *C. rotundata, H. ovalis,* and *T. hemprichii* stable. Change in species cover was marked at many sites showing decline, as seen in the loss of *E. acoroides* and other stress intolerant species, while the more pioneering species remained stable or increased.

Both the Sabah, Malaysia sites showed declines of all species between 2001 and 2006 with a recovery between 2006 and 2009. At SB5.1, the whole seagrass community (*C. rotundata*, *C. serrulata*, *H. uninervis*) declined (up to April 2006); the three transects (A, B and C) were all dominated by different species (Fig. 7A–C) until 2006. At all three transects, only *H. uninervis* showed recovery. The decline at SB5.2 showed similar losses of all seagrass species, with *H. uninervis* the dominant species in recovery, followed by *H. ovalis*. Again the pioneering species showed the recovery after stress.

4. Discussion

Seagrass percent cover was used as an easy-to-measure parameter that represented the status of seagrasses at the site, as well as at the species, level (Short et al., 2006b; Mellors et al., 2008). Seagrass percent cover has been shown to be a suitable parameter for assessing change in tropical seagrass meadows (Freeman et al., 2008). In tropical environments, seagrass meadows rarely reach 100% cover; the measure of percent cover is directly proportional to aboveground biomass; percent cover changes rapidly in response to many stresses (Short unpublished). Thus, percent cover in these tropical meadows represents a good stand-in for other, more complex, measures of seagrass health and status. Percent cover estimates showed substantial change from one monitoring period to another; leaf material can be lost rapidly through herbivory, storm damage, high temperature stress, or exposure, and can rebound quickly as long as the meristem, roots and rhizomes remain intact (Rivers and Short, 2007; Short et al., 2006b; Orth et al., 2010; Kavieng, PNG data at www.SeagrassNet.org, respectively).

These Western Pacific sites represent a variety of biophysical conditions, geographic locations (including islands, reefs, and channels), and perturbations (including nutrient loading, sedimentation, temperature stress, and exposure on reef flats). The sites were chosen to include a wide range of conditions, with a site in each country that was undeveloped and well-flushed. In some countries, a second site with substantial human impact or the potential for such impact was also monitored. The dominant trend of the data was seagrass decline with 7 of 10 sites showing losses (at $p < 0.06$); none of the 10 sites showed overall increases in seagrass cover. Four sites declined from nutrient (KS1.2, PA3.1, PH4.2 &

Table 3
Western Pacific sites, years monitored, number of species (see Table 1), type of development impacting seagrasses, trend in seagrass cover and probable cause of seagrass change.

Site	Monitoring years	Number species present	Type of proximate development	Seagrass trends	Probable cause of change
KS1.1	8	3	MPA – Air strip – 2 km away	Stable with species shift	Unknown
KS1.2	5	3	Rural homes	Decreasing	Nutrients
PA3.1	8	3	City with sewage outfall	Decreasing	Nutrients
PA3.2	8	5	MPA – New road construction	Decreasing	Sediment
PH4.1	8	5	Distant city	Stable	
PH4.2	8	4	New city sewer outfall	Decreasing	Nutrients
SB5.1	8	4	MPA – Within an island park	Decline/partial recovery	Sediment
SB5.2	8	6	Village of stilt houses	Decline/partial recovery	Sediment
QL8.1	8	5	MPA – Resort	Stable	
IK16.1	7	7	MPA – Hotel cabins on beach	Decreasing	Nutrients

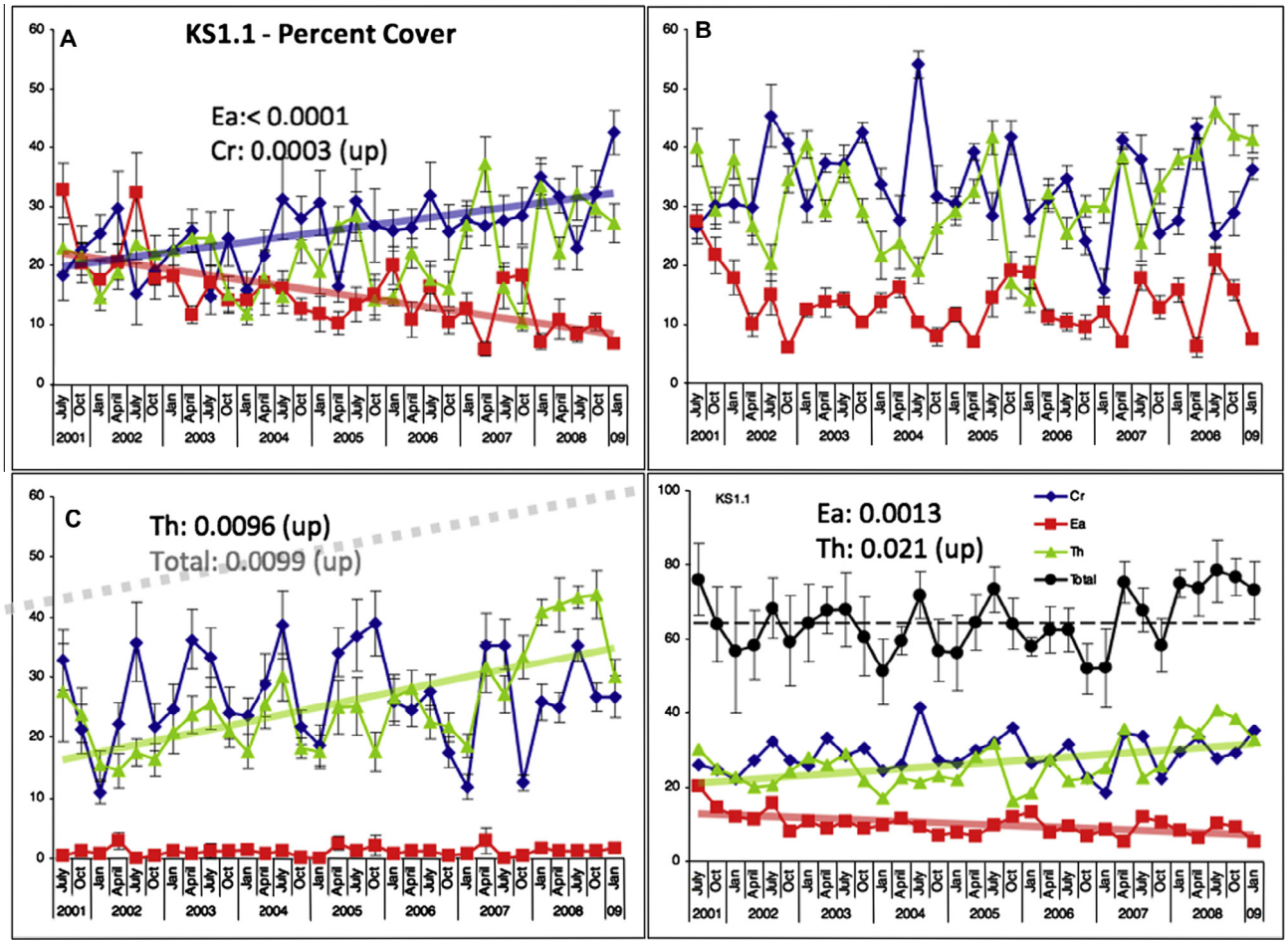

Fig. 5. Site in Kosrae (FSM) with stable seagrass populations between 2001–09. Panel A is the shallow transect, B the mid-bed transect, C the offshore transect, and KS1.1 is the sum of the data from A, B, and C. Symbols represent different species (see Table 1); species codes with *p*-values indicate significant linear trends; "up" indicates a positive trend.

IK16.1) and three from sediment (PA3.2, SB5.1 & SB5.2) impacts. Two sites that declined (SB5.1 & SB5.2) later showed partial recovery after severe sedimentation stress abated (Fig. 1). The three most stable sites (KS1.1, PH4.1 & QL8.1) were all in remote locations of low human impact (Table 3).

Stable sites (KS1.1, PH4.1 & QL8.1) were seen in Kosrae (FSM), Mindoro (Philippines), and Queensland (Australia) where the nearshore areas were well flushed and relatively unimpacted by human activities (Fig. 2). The seven sites with decreasing seagrass cover fell into two groups: three sites had a gradual loss in seagrass percent cover over several years, while four sites showed rapid decline in less than 2 years (Figs. 2 and 3). Two of the three sites with gradual declines were located near to small shoreline villages with steadily increasing nutrient pollution: Kosrae (KS1.2) and Mindoro (PH4.2). The third gradual decline occurred at Babelthraup, Palau (PA3.2), after stress of sediment loading from road construction and resulting watershed runoff. The rapidly declining sites all responded to diminishing water quality conditions from identified events: in Sabah (SB5.1 & SB5.2), the sediment from rapid land clearing for palm oil plantations (Freeman et al., 2008); in Koror, Palau, the installation of a sewage pumping station discharging upstream from the site (PA3.1) and in Komodo (IK16.1), the development of resort cabins on the beach.

The two sites in Sabah where monitoring documented total seagrass loss from excess sedimentation (Freeman et al., 2008) and subsequent, though partial, recovery after the alleviation of sediment loading, are examples of both the resilience of seagrass meadows (Fig. 4) and successional dynamics. The dramatic increase in sediment loading that engulfed most of the west coast of Sabah virtually eliminated seagrass habitat for over a year at SB5.1 in the Sabah Marine National Park and for more than 2 years at SB5.2 outside the park. Not only did the recovery occur sooner inside the park, but the rate of recovery was nearly twice as rapid within the marine protected area (MPA), where human stressors were somewhat less.

Three of the ten sites were located in MPAs, and two were adjacent to MPAs. Lacs, Kosrae (in a MPA set up to exclude snail, *Trocus,* harvesting) and Green Island, Queensland (the Great Barrier Reef Marine Park) had stable seagrass status (Table 3). The Sabah site in the Sabah Marine National Park lacked upland regulation and declined due to excessive sedimentation. The site in Babelthraup, Palau was adjacent to a Marine Park but similarly lacked upland regulation to prevent sediment runoff from watershed development. The site in Komodo, Indonesia is at a secluded offshore island on the border of Komodo National Park, and was impacted by a small development of tourist cabins that discharge sewage. Clearly, to ensure healthy seagrass meadows, more local controls as well as government protection of both waters and watersheds is needed, as well as actual protection and monitoring of MPAs.

Rapid seagrass losses were detectable in 1–2 years, given a suitable baseline. The monitoring protocol detects change in percent cover and species composition at the transect level as well as the site level. Within sites, the analysis of species and percent cover change at the shallow, mid and deep transects provides insight into

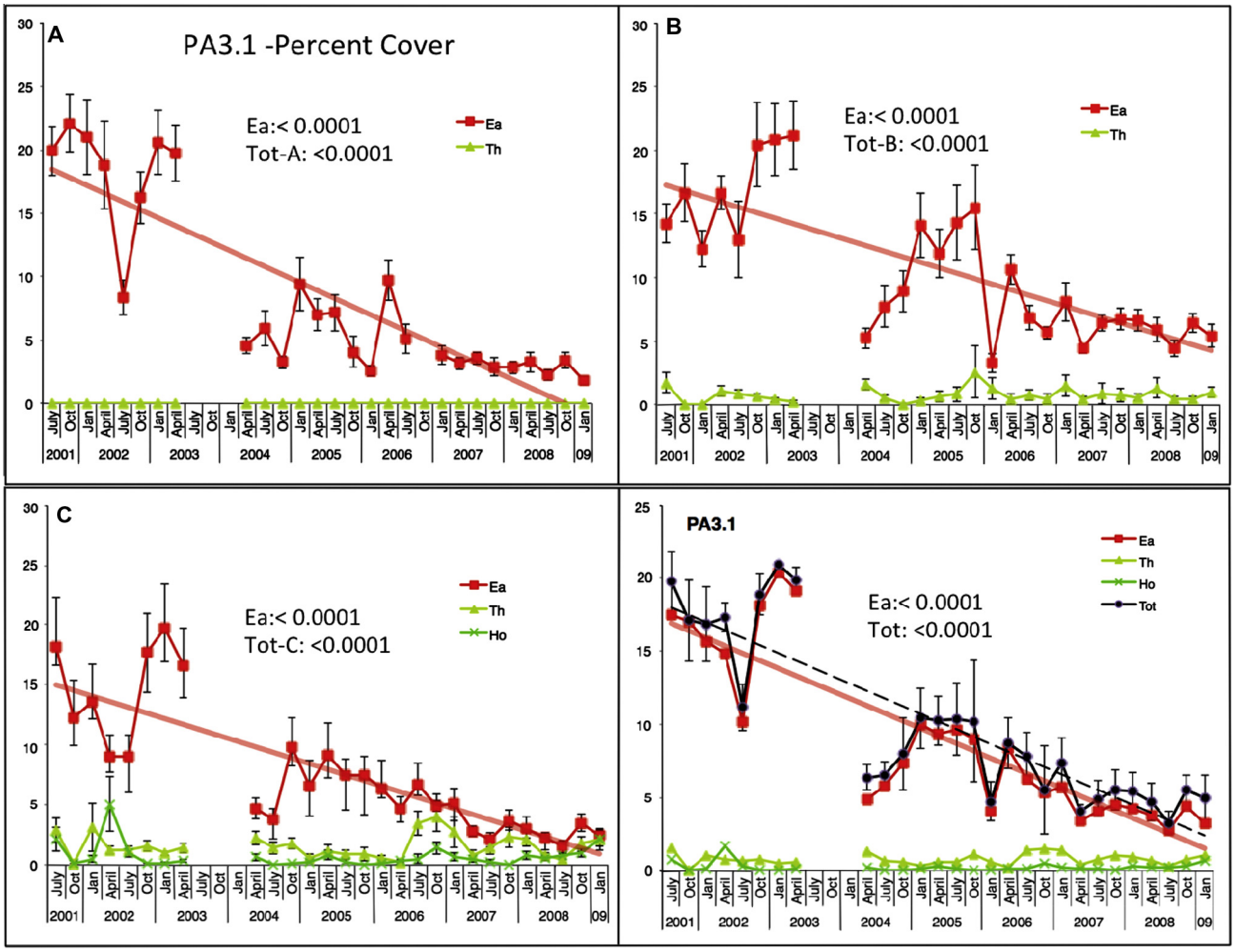

Fig. 6. Pristine Site in Palau with declining seagrass populations between 2001–09. Panel A is the shallow transect, B the mid-bed transect, C the offshore transect, and PA3.1 is the sum of the data from A, B, and C. Symbols represent different species (see Table 1); species codes with *p*-values indicate significant linear trends.

seagrass dynamics at different locations across the seagrass meadow. At the three sites that were stable, showing no significant overall trend in percent cover, many complex changes in species dynamics were documented. For example, in Kosrae at KS1.1 (Fig. 5), seagrasses showed species shift along the shallow transect (A) with a decline in *E. acoroides* over the 8 years of monitoring accompanied by a steady increase in *C. rotundata*. At transect C (deep) in contrast, a change in species dominance was seen: the larger species *T. hemprichii* increased over *C. rotundata*, and the transect showed an overall increase in seagrass percent cover which was balanced by insignificant changes in the other transects. The protocol reveals overall trends but also captures small-scale dynamics that, even in sites with stable percent seagrass cover, show interesting species shifts.

In Palau, where *E. acoroides* was dominant at PA3.1 (Fig. 6), the decline in *E. acoroides* was evident within a year at all transects, with no detectable change in the two understory species of seagrass. In Sabah at SB5.1 (Fig. 7) no single dominant species was present before the decline. The site had several abundant species, with a different species dominating each transect. The decline of *C. rotundata*, the dominant species at transect A, occurred within 1 year; *C. serrulata*, transect B's dominant species, virtually disappeared in less than 3 years and *H. uninervis*, the dominant seagrass at transect C, was nearly gone in 2 years. After the sedimentation stress was reduced at SB5.1, only *H. uninervis*, a pioneering species (den Hartog, 1970; Sidik et al., 2006), returned to colonize all three transects, with the entire site nearly a single-species stand of *H. uninervis* and very little regrowth of the climax species evident (Rollon et al., 1998).

The very large seagrass species in the Western Pacific, *E. acoroides*, grew at six of the ten monitoring sites and was found to be declining in four. Even in the remote environment of Kosrae KS1.1 where no overall site decline was observed and in the absence of any detectable stressor, *E. acoroides* declined and was replaced by *C. rotundata* and *T. hemprichii*. *E. acoroides* declined in several other sites, including Komodo (IK16.1). Such declines suggest that *E. acoroides* has very low tolerance to environmental stress. *E. acoroides* appears to be self-shading, even at moderate shoot densities (Bridges et al., 1981; Walker et al., 1999, Rattanachot et al., in preparation); its vulnerability to decreased light from suspended sediments or from competition with algal species may make it more susceptible to pollution than other seagrasses. The two sites where *E. acoroides* did not show a significant decline both had low levels of stress: Kosrae KS1.2 and the Philippines PH4.1. Our long-term monitoring suggests that *E. acoroides* is not a climax species in stressed environments. Alternatively, as seen in Kosrae KS1.1, a remote MPA, some region-wide stressor may be contributing to loss of *E. acoroides* and as a species it may be more susceptible to the impacts of global climate change and increasing temperatures (Unsworth et al., 2012).

Analysis of long-term results demonstrates losses of seagrass at sites across the Western Pacific region with the exception of

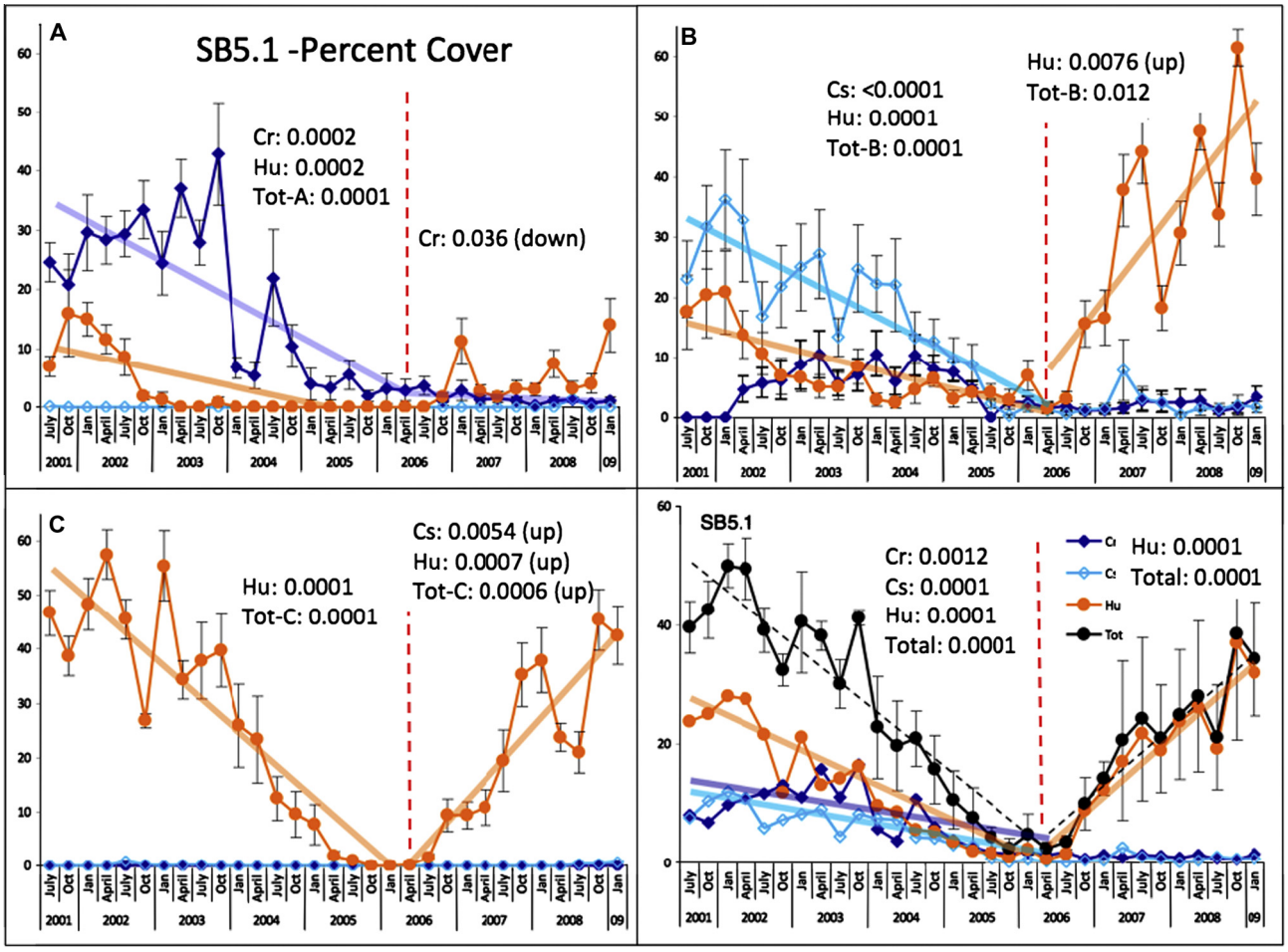

Fig. 7. Site in Sabah, Mayalsia with declining and recovering seagrass populations between 2001–09. Panel A is the shallow transect, B the mid-bed transect, C the offshore transect, and SB5.1 is the sum of the data from A, B, and C. Symbols represent different species (see Table 1); species codes with *p*-values indicate significant linear trends; "up" indicates a positive trend.

remote areas of low human population. The understanding and clarification of such dynamics and their underlying environmental conditions will allow scientists, resource managers, policy makers, and local communities to make sound and proactive decisions to protect seagrass systems and the many critical services they provide (Bjork et al., 2008), including the sequestration of organic (or blue) carbon (Fourqurean et al., 2012).

5. Conclusions

The assessment of ten sites in the Western Pacific showed seven sites in decline and three stable, a conclusion that does not bode well for these shallow marine ecosystems that provide vital resources to human populations in the Western Pacific region (de la Torres-Castro and Ronnback, 2004; Unsworth and Cullen, 2010). Analogous to the trend assessment for the more developed parts of the world (Waycott et al., 2009), the incidence of decline in seagrass habitats greatly outweighs stable systems.

The SeagrassNet methodology detected change rapidly, documenting losses in less than a year in Palau, Komodo, and Sabah. The monitoring protocol captured changes across the broad range of sites used in this study regardless of the specific geographic location, environmental conditions or types of perturbation at individual sites. Our wide ranging observations, the standardized protocol and the detailed, repeated measures of seagrass transects contribute to the robustness of the methodology and its ability to scientifically document seagrass ecological status and trends and the mechanisms driving change.

Overall, seagrasses in the Western Pacific are showing signs of stress and decline due to human impacts despite the vastness of the ocean area and relatively low development pressure. It may not be surprising that these Western Pacific seagrass beds are being impacted by a similar suite of anthropogenic perturbations as in other regions of the world. What is alarming is that many of the sites are located in fairly remote areas where the brunt of urban human population growth and associated development is absent. However, even in such wilderness/rural areas, small impacts create significant declines of multi-species seagrass ecosystems that have developed over time in the absence of humans. No part of our planet is immune from the impacts of human development. The management and conservation of seagrass habitats across the globe, and especially in the area of the richest biological diversity on our planet, must be a priority.

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to the SeagrassNet teams across the Western Pacific for many years of effort in monitoring seagrass meadows and for educating governments and the public about the seagrass ecosystem.

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Annex ZB

nature geoscience

ARTICLES

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Projections of tropical heat stress constrained by atmospheric dynamics

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Extreme heat under global warming is a concerning issue for the growing tropical population. However, model projections of extreme temperatures, a widely used metric for extreme heat, are uncertain on regional scales. In addition, humidity needs to be taken into account to estimate the health impact of extreme heat. Here we show that an integrated temperature–humidity metric for the health impact of heat, namely, the extreme wet-bulb temperature (TW), is controlled by established atmospheric dynamics and thus can be robustly projected on regional scales. For each 1 °C of tropical mean warming, global climate models project extreme TW (the annual maximum of daily mean or 3-hourly values) to increase roughly uniformly between 20° S and 20° N latitude by about 1 °C. This projection is consistent with theoretical expectation based on tropical atmospheric dynamics, and observations over the past 40 years, which gives confidence to the model projection. For a 1.5 °C warmer world, the probable (66% confidence interval) increase of regional extreme TW is projected to be 1.33–1.49 °C, whereas the uncertainty of projected extreme temperatures is 3.7 times as large. These results suggest that limiting global warming to 1.5 °C will prevent most of the tropics from reaching a TW of 35 °C, the limit of human adaptation.

The impact of global warming on local extreme heat is projected to be detectable earliest in the tropics[1–3], where baseline temperatures are already high. In addition, countries located between 20° S and 20° N latitude will soon become major contributors to the global population growth[4], and there is thus a pressing need for accurate projections of extreme heat in the tropics down to regional scales.

The most widely used metric for extreme heat has been the extreme temperature. However, projections of extreme temperatures have large regional uncertainty arising from insufficient model representation of important land processes[5]. Moreover, to facilitate the estimation of heat-induced health impact (or heat stress), the effect of humidity should also be included[6,7]. This is because the major way for humans to lose metabolic heat in hot weather is evaporative cooling (sweating)[8,9], the efficiency of which anti-correlates with humidity. In particular, the inclusion of humidity is necessary for assessing heat stress in the tropics, the warmest and the most humid places on Earth.

The importance of humid heat has been increasingly recognized[10,11]. Studies have shown that increased humidity with temperature following the Clausius–Clapeyron relationship can worsen summer heat stress in the tropics[12,13], while other work has noticed a reduction in either relative humidity[14] or specific humidity[15] on the hottest days (not limited to the tropics). Given the possibility that humidity can interact with temperature in extreme heat, it is necessary to better quantify and improve our mechanistic understanding for the control of humid heat.

Here, we use the extreme wet-bulb temperature (TW), an integrated temperature–humidity metric for heat stress (Methods). TW by definition is the lowest temperature that human skin can be cooled to through evaporation of sweat. Therefore, the closer TW is to the upper limit of human skin temperature (around 35 °C), the more intolerable the heat is, with a survival limit of TW = 35 °C (ref. [16]) (high TW values below this survival limit also have adverse health impact). Furthermore, TW is a major component in the wet-bulb globe temperature (WBGT; Methods)[17], which is the standard metric for workplace heat stress. In this article, we argue that the regional extreme TW in the tropics is controlled mainly by robust atmospheric dynamics that have been established previously[18–21], rather than by local processes that are more uncertain. Therefore, tropical extreme TW can be robustly projected on regional scales under global warming.

Global climate model projections

Figure 1a shows the projections of extreme TW (TW_{max}) and extreme temperatures (T_{max}) by 22 global climate models (Supplementary Table 1) from the Coupled Model Intercomparison Project phase 5 (CMIP5)[22] under the representative concentration pathway 8.5 (RCP 8.5) emission scenario (TW_{max} and T_{max} refer mostly to the annual maximum of daily mean values in this paper and refer to the annual maximum of 3-hourly values when specifically stated). The multi-model mean of T_{max} averaged over tropical land within 20° S–20° N warms faster than the tropical mean temperature. However, TW_{max} closely follows the tropical mean warming, similar to an earlier finding using an atmospheric model coupled to a slab ocean[16]. These results also hold when analysing 3-hourly data that resolve the diurnal cycle from two models (GFDL-CM3 and IPSL-CM5A-LR) (Fig. 1b,c).

Figure 1d,e shows T_{max} and TW_{max} trends for all locations normalized by the tropical mean warming under RCP 8.5. T_{max} warming is spatially inhomogeneous over land ranging from 1.0 °C to 2.3 °C for each 1 °C of tropical mean warming (Fig. 1d), consistent with previous findings. By contrast, we find that increases of TW_{max} have no notable land–ocean contrast ranging from 0.8 °C to 1.3 °C for each 1 °C of tropical mean warming (Fig. 1e). Using the annual-maximum 3-hourly TW for TW_{max} does not change this result (Supplementary Fig. 1).

The spatially uniform TW_{max} trend (Fig. 1e) is not a cancellation of errors among different models. Instead, all models show good agreement on TW_{max} trend, even down to regional scales. Fig. 2 shows the model spread (2.5–97.5th percentiles) of T_{max} and TW_{max} projections for four selected regions that have caught substantial

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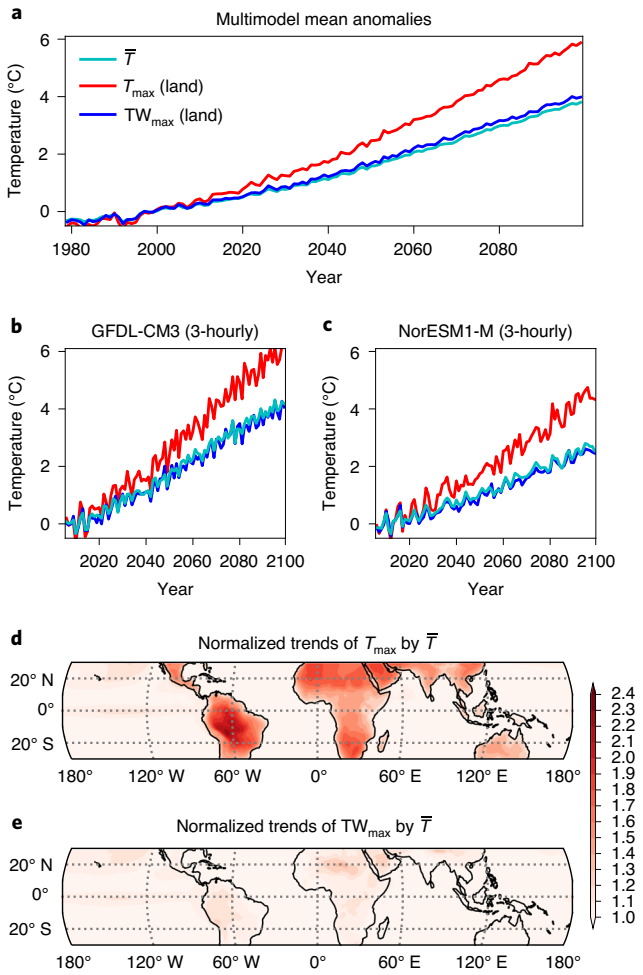

Fig. 1 | TW_{max} and T_{max} trends in climate models under RCP 8.5. a, Multimodel-mean time series of the tropical mean (20° S–20° N) temperature ($\overline{T}$; cyan), land-mean T_{max} (red) and land-mean TW_{max} (blue). **b**,**c**, The same as **a** but using the annual-maximum 3-hourly values for T_{max} and TW_{max} for two individual models. **d**,**e**, Multimodel-mean location-specific T_{max} and TW_{max} trends normalized by $\overline{T}$ trends.

attention in the literature: the Amazon rain forest, the Maritime Continent, the Indian peninsula and the Sahel. The projected T_{max} warming has large spread among models, which is especially prominent in the Amazon rain forest, consistent with earlier analysis[5]. However, for regional TW_{max}, all 22 climate models project a close to 1/1 ratio with the tropical mean warming. Using the annual maximum of 3-hourly TW does not change this result (Supplementary Fig. 2). Intriguingly, the model spread of T_{max} tends to grow with the amplitude of the projected warming (pronounced for the Amazon rain forest and the Maritime Continent), whereas the model spread of TW_{max} does not show evident growth within the range of simulated warming (roughly 4 °C). That the intermodel spread is much less for TW_{max} projections than for T_{max} is also true for other tropical land regions (Supplementary Fig. 3).

To summarize, global climate models predict that TW_{max} will increase roughly uniformly in the tropics by about 1 °C for each 1 °C of tropical mean warming. Models show wide spread on regional T_{max} projections but agree very well upon regional TW_{max}.

Theoretical support

For a theoretical projection of TW_{max}, we argue that tropical atmospheric dynamics exert a strong, tropics-wide control on local TW_{max}. This control is through the functional relationship between TW and moist static energy (MSE; Supplementary Fig. 4), which is a variable regulated by atmospheric dynamics. In the tropics, the free-tropospheric temperature is roughly uniform in the horizontal as a result of the weak effect of the Earth's rotation. This horizontally uniform temperature, which is determined by the near-surface MSE in regions of deep convection, sets the upper bound for MSE at all locations. Indeed, the maximum near-surface MSE is roughly uniform within 20° S–20° N (even more uniform than the time-mean MSE; Supplementary Fig. 5a,b), and the spatial pattern of TW_{max} closely follows the uniformity of the maximum MSE (Supplementary Fig. 5c). As this upper bound for near-surface MSE and, equivalently, for TW is a common one over land or over ocean[21], we expect that changes in TW_{max} should also be roughly equal over land and over ocean under global warming:

$$\Delta TW_{max,Land} \approx \Delta TW_{max,Ocean} \quad (1)$$

Equation (1) thus provides a handle on TW_{max} over land which is challenging to predict due to various land types and land processes, as a theoretical projection for TW_{max} over ocean can be made relatively easily. Near the ocean surface, air is close to saturation and TW changes are approximately equal to temperature changes (exactly equal when air is saturated); $\Delta TW_{max,Ocean}$ is thus approximately equal to the change in the warmest sea surface temperatures (SSTs). Therefore, 1 °C of $\Delta TW_{max,Land}$ is accompanied by 1 °C of warming of the warmest SSTs according to Eq. (1). Furthermore, the area dominance of the ocean and the relatively constant shape of SST histogram under global warming (Supplementary Fig. 6) together result in a 1/1 correspondence between warming of the warmest SSTs and the tropical mean temperature. (While there is potential for differences between changes in these relatively warm SSTs and the tropical mean SST[23–25], we find these differences to be small enough that they do not undermine the theoretical considerations here.) We thus expect $\Delta TW_{max,Land}$ roughly equals the tropical mean warming.

Global climate models shown in Figs. 1 and 2 are consistent with the preceding theoretical considerations. For each 1 °C of tropical mean warming, models on average give 1.05 °C of $\Delta TW_{max,Land}$, 0.93 °C of $\Delta TW_{max,Ocean}$ and 0.91 °C of the warmest-quartile-mean SST increase, all close to 1 °C.

The non-local control of TW_{max} by the warmest SSTs seems to be at odds with the perception that these extreme events are driven by rare local meteorology, and this controversy deserves some clarification. While TW_{max} events are driven by local processes, the potential magnitude of TW_{max} is largely set by the uniform free-tropospheric temperature. The effectiveness of this non-local control is evident in the uniformity of TW_{max} increases in Fig. 1e and the good agreement across models in Fig. 2, neither of which can be explained by the heterogeneity of local processes. Moreover, the existence of such a non-local control within the tropics also explains why the tropics are consistently warm and humid, but the highest TW and WBGT are observed in the subtropics[13,26,27]. These considerations thus support the picture that the magnitude of ΔTW_{max} across tropical land regions is set by the warmest SSTs and not by local processes or the spatial pattern of SST.

Observational evidence

From 1979 to 2018, the tropical (20° S–20° N) land-mean T_{max} trend has a 95% confidence interval of 0.24–0.31 °C per decade, which is almost three times the tropical mean warming of 0.08–0.12 °C per decade on the basis of the European Centre for Medium-Range Weather Forecasts Reanalysis Interim (ERA-Interim)[28] (Fig. 3a). TW_{max} has a trend of 0.05–0.10 °C per decade, very similar to the tropical mean warming, and the interannual variabilities of the two are highly correlated, with a correlation coefficient of 0.85 (Fig. 3a). Using the annual-maximum 3-hourly TW from ERA-Interim yields

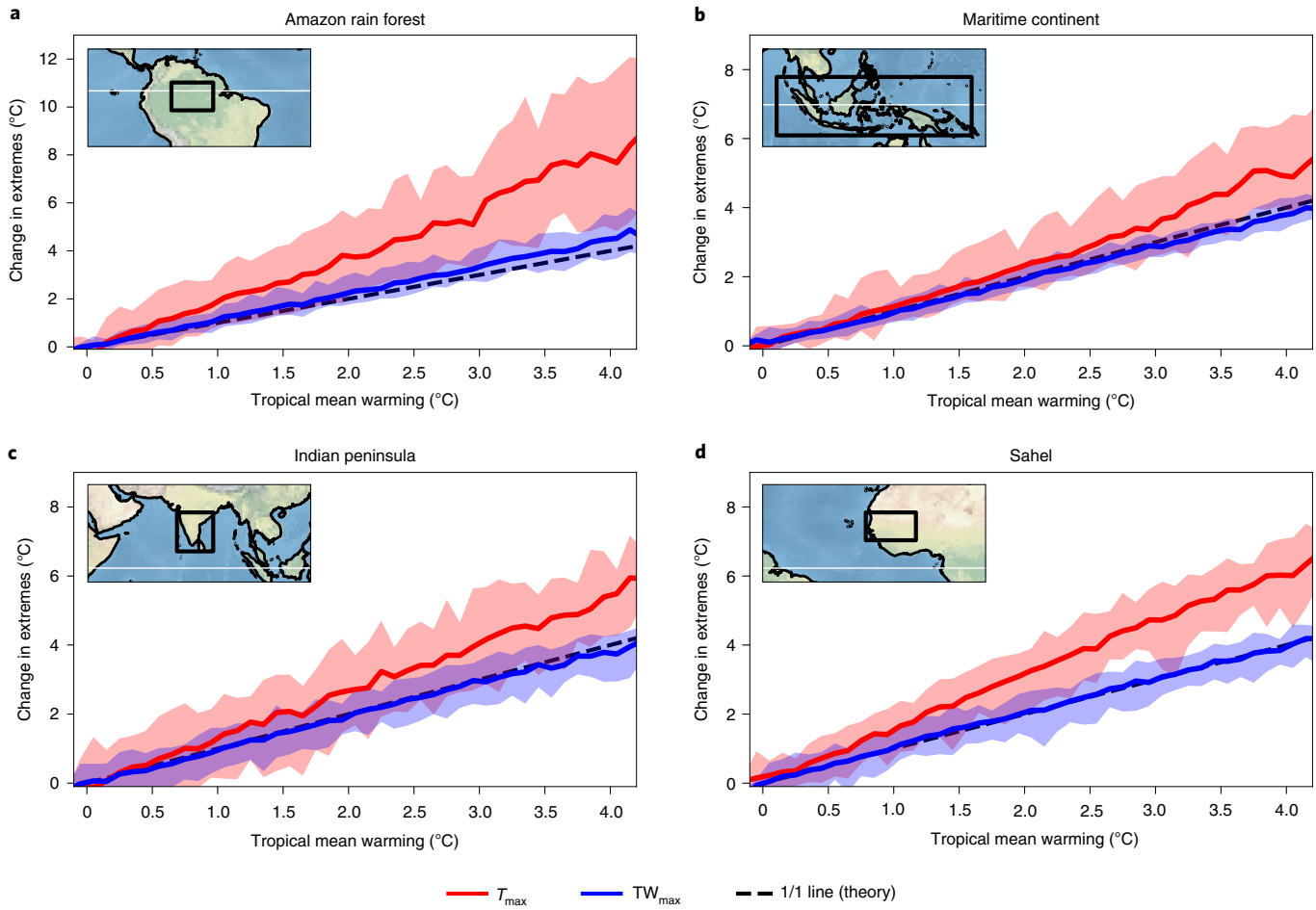

Fig. 2 | Model agreement on regional TW_{max} projections. a–d, Multimodel means (lines) and spreads (2.5–97.5th percentiles; shading) for regional T_{max} (red) and TW_{max} (blue) as a function of the tropical mean warming are shown for four regions: Amazon rain forest (**a**), Maritime Continent (**b**), Indian peninsula (**c**) and Sahel (**d**). Only land data within the black frames on the maps are sampled. The dashed black lines indicate the 1/1 ratio.

very similar anomalies, although the long-term trend is smaller (Supplementary Fig. 7). Furthermore, station measurements of TW provided by HadISD[29] (Methods and Supplementary Fig. 8) show that TW_{max} averaged over tropical stations is highly correlated with that from ERA-Interim and has a similar trend of 0.05–0.10 °C per decade (Fig. 3a). The consistency of reanalysis data with station observations and the theory lends support to the quality of the reanalysis data over tropical land.

The warmest-quartile-mean SST (the average of the top 25% of monthly SST at all grid points within each year) from HadISST[30] is highly correlated with land-mean TW_{max} and has a similar trend of 0.08–0.12 °C per decade (Fig. 3a). Satellite SST observations and station TW observations are largely independent, and the very good consistency in their extreme values lends strong support to the aforementioned argument that TW_{max} over land is coupled to the warmest SSTs. Strong El Niño events have the potential of warming the warmest SSTs and, as a result, affect TW_{max} over land (for example, 1998 in Fig. 3a).

Location-specific evaluation of long-term TW_{max} trends for the observations suffers from the smallness of the warming signal, but interannual variability of SST provides room for testing the 1/1 relationship with TW_{max}. Regression slopes of TW_{max} (ERA-Interim) onto the tropical mean temperature (linear trends removed) is relatively uniform over most of the land regions within 20° S–20° N (Fig. 3b) with a mode value very close to 1 (Fig. 3c). This relationship loosens in the subtropics (indicated by the hatching in Fig. 3b), consistent with the latitudinal range where the theory works[21]. That the Andes and the southern edge of the Sahara have much higher TW_{max} sensitivity does not violate the proposed theory, as climatological TW_{max} in those regions is too low to trigger convection and thus not constrained by the aforementioned mechanism. The standard deviation of these slopes in the reanalysis is larger than that for the global warming simulations shown in Fig. 1e (Fig. 3c). A likely explanation is that the spatial pattern of TW_{max} can change in the interannual variability, and such a spatial rearrangement can cause a spread in the regression slopes but does not affect the tropical averages shown in Fig. 3a. Indeed, global climate models also show a similar spread of TW_{max} trends under historical radiative forcing, and the removal of long-term trends in the global warming simulations for the same set of models also results in a similar spread (Fig. 3c). Therefore, regional TW_{max} trends diagnosed from reanalysis data over the past 40 years are consistent with global climate models. For similar reasons, we do not expect every station to give the same TW_{max} trend.

While we do not attempt to formulate an attribution statement for the TW_{max} trend over land seen in Fig. 3a, we note that the tight relationship in the overall trend as well as higher frequency variability strongly suggests that any attribution statements for the tropical mean temperature or SST can also be applied to TW_{max}.

Implications for the future climate

Consistency of model results with the theory and observations lends strong support to the capability of global climate models in properly simulating regional TW_{max} increases. In a 1.5 °C warmer

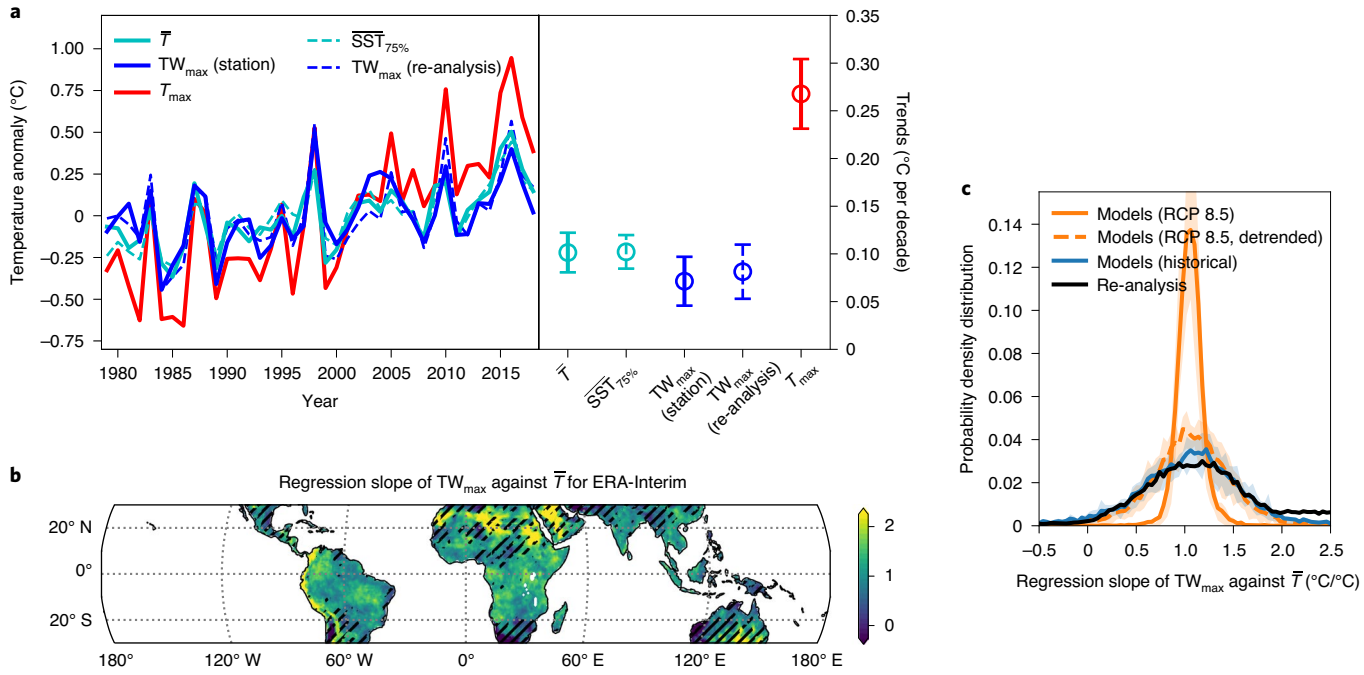

Fig. 3 | TW$_{max}$ in observations and reanalysis data. a, Time series and corresponding linear trends of tropical mean temperature ($\overline{T}$; solid cyan), land-mean T_{max} (red), land-mean TW$_{max}$ from stations (solid blue) and ERA-Interim (dashed blue), and the warmest-quartile-mean SST from HadISST (dashed cyan) for 1979–2018 (20° S–20° N). The confidence intervals for the linear trends represent 95% significance assuming that the detrended annual data points are independent. **b**, Linear regression slopes of local TW$_{max}$ onto $\overline{T}$ in the interannual variabilities (linear trends removed) from ERA-Interim for 1979–2018. Regions where TW$_{max}$ and $\overline{T}$ are not correlated on a 95% significance level are hatched. **c**, Histograms of regression slopes of local TW$_{max}$ onto $\overline{T}$ (linear trends removed) for 1979–2005 in ERA-Interim (black solid) and models (blue solid) and for the global warming simulations in models (orange dashed). The same histogram for non-detrended global warming simulations (Fig. 1e) is also shown (orange solid). Shading indicates the 25–75th percentiles of models.

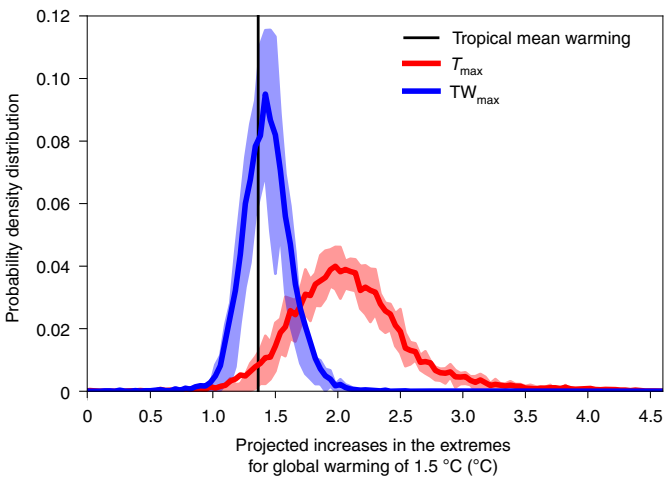

Fig. 4 | Uncertainty of T_{max} and TW$_{max}$ projection in a 1.5 °C warmer world (land between 20° S and 20° N). Distributions of model-projected TW$_{max}$ increases (blue) and T_{max} increases (red) under RCP 8.5 at 1.5 °C of global mean warming are shown. The distributions are constructed by linearly regressing local T_{max} and TW$_{max}$ increases onto global mean warming and taking the regression values at 1.5 °C of global mean warming. Solid lines show the average distribution of all models, and the shading indicates the 25–75th percentiles across models.

world, the projected 66% confidence interval (equivalent to the Intergovernmental Panel on Climate Change's 'likely range') for TW$_{max}$ increases across all tropical land regions (20° S–20° N) is 1.33–1.49 °C, consistent with the simulated tropical mean warming of ~1.4 °C in a 1.5 °C warmer climate (Fig. 4). However, projected T_{max} increases have a wider distribution, the absolute (relative) standard deviation of which is 3.7 (1.8) times that of TW$_{max}$ increases. The reduction in uncertainty is more pronounced for regions where T_{max} projections are most uncertain. For example, in the Amazon rain forest and the Maritime Continent (Fig. 2), the absolute (relative) uncertainty of T_{max} increases is around 4 (2.5) times that of TW$_{max}$ increases.

Our results imply that curtailing global mean warming will have a proportional effect on regional TW$_{max}$ in the tropics. The maximum 3-hourly TW (ERA-Interim) ever experienced in the past 40 years by 99.98% of the land area within 20° S–20° N is below 33 °C. Therefore, a 1.5 °C or 2 °C warmer world will likely exempt the majority of the tropical area from reaching the survival limit of 35 °C. However, there exists little knowledge on safety thresholds for TW besides the survival limit[11], and 1 °C of TW increase could have adverse health impact equivalent to that of several degrees of temperature increase. TW will thus have to be better calibrated to health impact before wider societal implementation. Nonetheless, the confidence in TW$_{max}$ projection provided in this work still raises the confidence in the projections of other calibrated heat stress metrics that account for TW, such as the WBGT.

Online content

Any methods, additional references, Nature Research reporting summaries, source data, extended data, supplementary information, acknowledgements, peer review information; details of author contributions and competing interests; and statements of data and code availability are available at https://doi.org/10.1038/s41561-021-00695-3.

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Methods

Wet-bulb temperature. TW is thermodynamically defined as the temperature that an air parcel would have if cooled adiabatically to saturation at constant pressure by evaporation of water into it, all latent heat being supplied by the parcel. This process is enthalpy conserving; therefore, $c_pT+Lq=c_p\mathrm{TW}+Lq_{sat}(\mathrm{TW})$, where T and q are the temperature and the specific humidity of an environmental air parcel[31]. TW is empirically defined as the temperature read from the wet-bulb thermometer, which is a balance between diffusion of sensible heat from the environment to the saturated surface and the latent heat the other way around. Here we adopt the second definition because it is more relevant for the process of evaporative cooling of sweat. The two definitions give the same result due to the coincidence that the diffusivities of sensible and latent heat are the same. TW is calculated by solving the following equation using Newton's iteration: $c_pT+Lq=c_p\mathrm{TW}+\epsilon Le_{sat}(\mathrm{TW})/p_s$, where T, q and p_s are temperature, specific humidity and pressure of the surface air, ϵ is the molecular mass ratio of water vapour and air, e_{sat} is the saturation vapour pressure and L is the latent heat of condensation.

Wet-bulb globe temperature. WBGT evaluates the heat stress to which a person is exposed. It is used by workers, athletes and military. It is defined as $\mathrm{WBGT}=0.7\mathrm{TW}+0.3T_d$ (or $\mathrm{WBGT}=0.7\mathrm{TW}+0.2T_g+0.1T_d$ to take solar insolation into account), where TW is the wet-bulb temperature, T_g is the globe thermometer temperature and T_d is the dry-bulb temperature (or actual air temperature).

Station data. Station data from HadISD are selected on the basis of the following procedure. For each station, we first scan though TW measurements for each day and take only the daily averages of those days containing at least four measurements. Then, for the years containing more than 300 daily mean TWs, the annual-maximum TW is taken. In the end, stations with at least 20 valid annual-maximum TW values are included in this paper, which ends up to be 293 stations (Supplementary Fig. 8). For those stations, the average TW is subtracted within each station, then the anomalies are averaged among all stations as shown in Fig. 3.

Daily mean and 3-hourly TW from CMIP5 models. CMIP5 models provide surface air temperature and specific humidity on daily and 3-hourly frequency but not surface pressure. Therefore, we interpolate monthly surface pressure in a piece-wise manner to daily frequency for daily TW calculation and ignore the diurnal cycle in surface pressure for 3-hourly TW calculation. The error thus induced in TW is estimated to be less than 0.3 °C.

Data availability

CMIP5 model data provided by the World Climate Research Programme's Working Group on Coupled Modelling, and climate modelling groups can be accessed at https://esgf-node.llnl.gov/projects/cmip5. ERA-Interim data provided by European Centre for Medium-Range Weather Forecast (ECMWF) can be accessed at http://go.nature.com/3piVLPO. HadISD global sub-daily station dataset (v3.0.1.201909p) provided by Met Office Hadley Centre can be accessed at https://www.metoffice.gov.uk/hadobs/hadisd. HadISST data provided by the Met Office Hadley Centre can be accessed at https://www.metoffice.gov.uk/hadobs/hadisst.

Code availability

The computer code used in this paper is available from the corresponding author.

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Author contributions

Y.Z. conceived the theory, performed the data analysis and wrote the manuscript. I.H. suggested the examination of observations/reanalysis. S.F. interpreted the widening of TW_{max} trend distribution in reanalysis (Fig. 3c). All authors discussed the results and edited the manuscript.

Competing interests

The authors declare no competing interests.

Additional information

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Annex ZC

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Article

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Using a human rights lens to understand and address loss and damage

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Check for updates

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The Vanuatu government is seeking an advisory opinion from the International Court of Justice on the legal responsibility of countries to act on climate change. This will provide clarity on loss and damage finance and could catalyse powerful legal tools that hold polluters accountable. Human rights can be a valuable framing for calling attention to and addressing loss and damage, but there remains limited scholarship so far. Here we explore how climate change is impinging on the rights of Ni-Vanuatu and what can be done in response. Our findings show that loss and damage to fundamental rights is already occurring and will worsen, undermining the right to a life of dignity. The future loss and damage fund, and other initiatives, should integrate a human rights restoration package that includes recording and safeguarding Indigenous knowledge, promoting cultural continuity, restoring the socio-ecological system, building back better and investing in education.

Climate change has been labelled 'the human rights challenge of the twenty-first century'[1]. Since the 2005 Inuit petition put before the Inter-American Commission on Human Rights, the links between climate change and human rights have increasingly received attention, highlighting the importance of the Universal Declaration of Human Rights, among others, in responding to the climate crisis. All countries have ratified at least one of the nine core international human rights treaties, and most have ratified several, implying an international obligation to prevent the foreseeable adverse effects of climate change and ensure that those affected by it have access to appropriate remedies and means of adaptation[2]. Bringing a human rights lens to climate change is new in that it seeks to shift the focus and attention onto the individual experiences of those suffering its impacts[3]. Such a lens provides 'a compelling reason why each of us should bear our fair share of the costs of mitigation and adaptation—namely, if we don't, we will be contributing to the violation of someone's human rights'[3].

A human rights lens is particularly valuable in framing, calling attention to, and addressing loss and damage, despite limited scholarship in this field so far (see an exception in ref. 1) and limited application thus far in addressing loss and damage[4]. Although not a silver bullet, international law, especially human rights law, can provide a strong normative framework to guide policymakers and implementers in loss and damage actions, refocus the political narrative on the fundamental rights of individuals that must be protected through climate action, and amplify the voices and interests of those who are often sidelined[1,5–7]. Bridging the loss and damage regime with international law helps emphasize how climate change and loss and damage policy do not exist in isolation from the obligations that countries already have under existing international and regional human rights treaties[8]. It can also provide judicial recourse, and its basic principles and guidelines can provide the relevant normative foundations for liability and compensation mechanisms under the climate regime[1,9], shifting the burden of addressing loss and damage, which was historically placed disproportionately on developing countries that have contributed little to climate change[4]. At the national level, human rights impact assessments can inform national and sectoral

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policy planning and budgeting, ensuring that climate policies align with affected peoples' needs and rights, and that effective redress is established with transparency and accountability[1].

This dialogue is particularly relevant now after the historic decision at the 2022 United Nations Climate Change Conference (COP27) to establish and operationalize a global loss and damage fund. A dedicated funding structure and fund will be established, with a transitional committee set up in March 2023 to develop institutional arrangements and governance, define the funding arrangements and sources of funding, and ensure coordination with existing funding arrangements[10]. This follows multiple proposals since 1991 by Vanuatu as founding chair of the Alliance of Small Island States for similar types of funding arrangements, which have been repeatedly rejected[11]. Human rights law can provide a normative framework to assist the transitional committee in its work and for countries to design funding arrangements and long-term plans to avert, minimize, and address loss and damage in ways that protect the rights of individuals.

The COP27 decision on establishing the fund complements and offers support to the case raised by Vanuatu for consideration by the International Court of Justice (ICJ), the principal legal organ of the United Nations (UN). Over the last 4 years, the government of Vanuatu (a nation with good claim to be one of the most at-risk nations globally to environmental hazards[12–14]) has built a global coalition of more than 132 countries seeking an advisory opinion from the ICJ on how climate change affects the rights of individuals from present and future generations, and what the legal responsibilities of countries are to protect against harm, loss and damage[15]. In late March 2023, the UN adopted the landmark resolution by the Vanuatu government for the ICJ advisory opinion and the court process is underway to deliver an opinion on climate change and the legal consequences countries face. This 'could set a legal precedent that may be used in any court—a potentially powerful tool for the growing number of plaintiffs using legal levers to try and hold big polluters (and big countries) to account'[16]. It is critical that, in this process, frontline communities, such as those in the Pacific Islands region, are not portrayed as 'victims' or 'proof' of climate change but 'as real people with dignity and dreams for the future'[6]. In this way, we acknowledge the rich, varied and extensive practices and knowledge of Pacific Islanders that have been used to face variability for centuries, which is critical for ongoing adaptive capacity and resilience[17–19].

In support of the Vanuatu government's ICJ strategic litigation process and to support the work of the transitional committee in the design of the loss and damage fund, we present the findings of research undertaken from June to October 2022 with 118 participants across Vanuatu (Methods). The study aimed to explore how climate change is affecting people's fundamental human rights and identify tangible ways to address the loss and damage to these rights.

Climate change is impinging on people's human rights

Participants shared their personal experiences with a changing climate, which ranged from slow-onset changes, such as sea level rise, saltwater intrusion, longer dry periods and increasing temperatures, to extreme weather events, such as more intense cyclones, heavy downpours and flooding. The extent to which climate change impacts have affected everyday lives over the last year yielded a mean of 3.94 (using a scale of 1 (meaning not at all) to 5 (meaning very high)). The majority of participants selected 'high' (39.8%) or 'very high' (30.6%), with 23.5% selecting 'medium', only 5.1% selecting 'little' and 1% selecting 'not at all'.

Loss and damage to human rights from these changes in slow-onset processes and extreme events have had, and will continue to have, interrelated and diverse effects on people's everyday lives. Impacts are affecting the availability of food and water, health, individual property and communal infrastructure (for example, roads in particular), income sources and, in some cases as an option of last resort, the ability to remain on homelands. One participant explained how 'the future is just unpredictable… I think the future will be like this, just unexpected' (participant number 11). Direct and indirect impacts related to these changes and events are impinging on people's right to lives of dignity.

To gain a deeper understanding of how climate change impinges on and causes loss and damage to people's human rights, key human rights declarations and covenants were analysed and articles with relevance for climate change were identified and grouped. From this, nine thematic groupings were created, and participants considered 'how much' (using a scale of 1 (for not at all) to 5 (for very high)) and 'how' each of these groupings have been affected by the impacts of climate change (Fig. 1).

The most severe impacts are on Ni-Vanuatu's rights to a healthy environment and ability to own, use, develop and control lands, followed closely by high impacts on rights to property and communal assets, standard of living, and family and social cohesion. As participants expressed: 'Our low-lying areas are always flooded during heavy rains—our land is not fertile any more due to topsoil wash down by heavy rain' (participant number 60), and 'I am more concerned about sea level rise which is washing away our land, which our forefathers have inherited over many generations and with it being washed away, it means our family's access to equitable land for gardening is limited' (participant number 48). Pacific Islanders have deep connections to land, which is the foundation of culture, livelihoods and identity[20], and it is this foundation that is considered to be the most severely affected human right due to the impacts of climate change.

The impingements of climate change on people's human rights are having cascading implications on numerous other interconnected human rights and can transcend across generations. Examples of such implications include climate-induced losses of traditional medicines that impact on ways of being, health, human life and well-being. Flooding of low-lying areas not only impacts infrastructure and precious cultural heritage such as gravesites but also causes salinization of freshwater tables that then impinge on potable water—another critical human need or right. Furthermore, increases in ocean temperatures and ocean acidification induces reef degradation, increased coral bleaching and outbreaks of crown-of-thorns starfish (all interconnected); these effects cascade into fishing resources being diminished and marine wildlife losses. This then presents challenges to ways of being, traditional and cultural food sources, and people's diet, negatively impacting human health.

One poignant example, worth exploring at length here, is of cascading impacts caused by the destruction of the yam, a traditional root crop and staple food widely used in Vanuatu and elsewhere in the Pacific Islands region. One participant from Ambrym explained how yam is the 'main commodity of value for exchange' and that the 'rituals, rites, and customs of the yam… are the main social fabric that holds our kinship, tribe and communities, and society, together' (participant number 61). The deterioration and physical loss of the yam due to increased climate variability and extreme weather has impinged on human rights on multiple fronts, violating Vanuatu's social fabric, culture and traditions, agency, identities and food security:

> The yams are significant in our culture. Its harvest is marked by special cultural rituals and ceremonies, but the climate had affected the harvest sessions which resulted in a big delay in harvest and that makes people lose their normal cultural rhythm and ritual… The cultural ways of planting are not adaptive to these fast changes caused by the climate which is now leading to a loss of cultural practices and knowledge. This is a cultural right that can never be recovered and re-built if we lose it due to climate change. No financial means can recover those non-economic losses, which are our heritage and dignity. And climate change is taking these rights away from us. (participant number 59)

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Fig. 1 | An infographic summarising how climate change impinges on human rights. The relevant Articles of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[29], Universal Declaration of Human Rights (UDHR)[30], International Covenant on Civil and Political Rights (ICCPR)[31] and International Covenant on Economic, Social and Cultural Rights (ICESCR)[32] are listed for each thematic grouping. Design credit: Sarah K. Jones.

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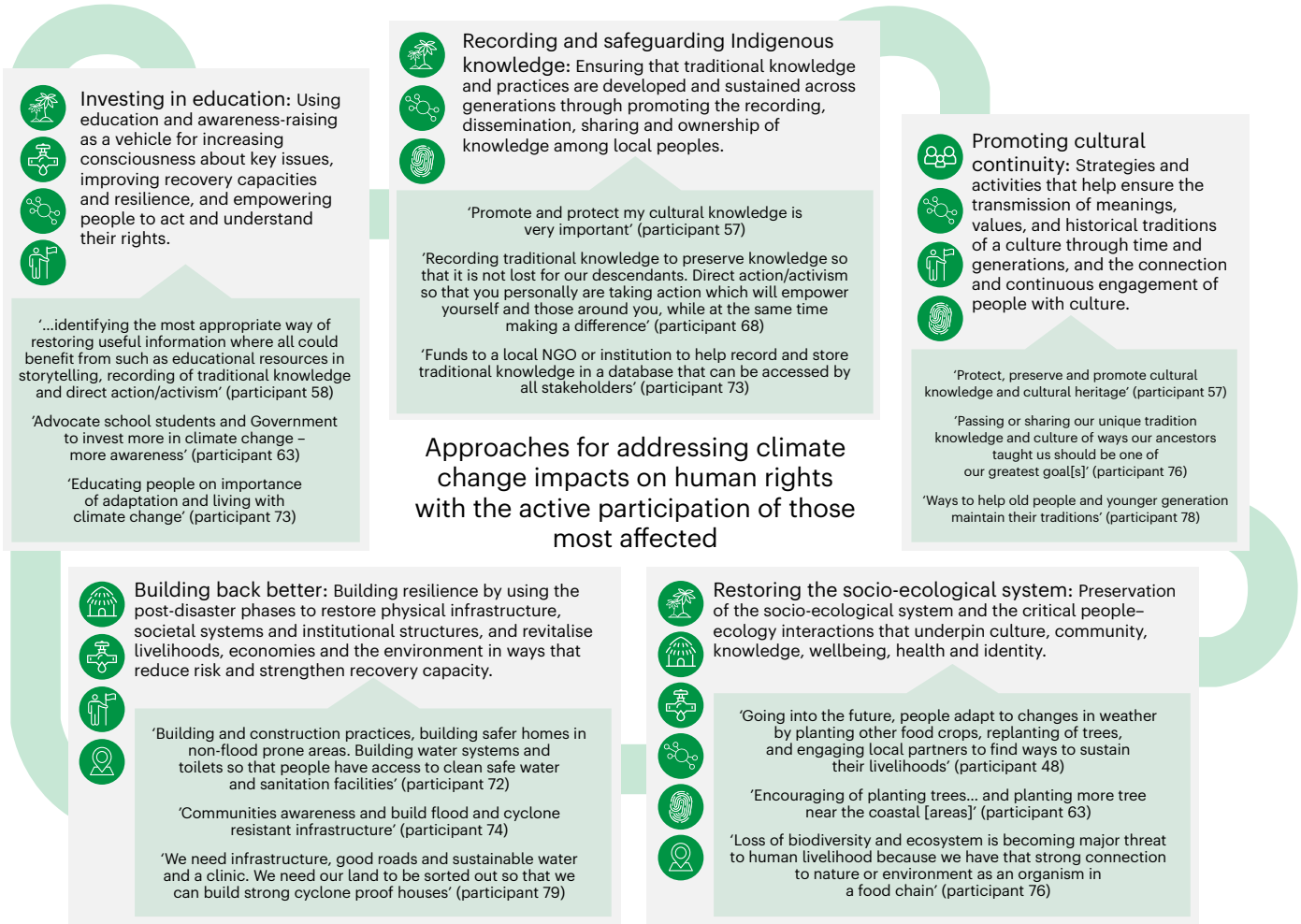

Fig. 2 | Five key approaches for addressing the impacts of climate change on people's human rights. These five key approaches address the impacts of climate change on people's human rights. NGO, non-governmental organization.

The centrality of yam to identity, social cohesion, culture, tradition and food security illustrates the impacts of climate change on Vanuatu's 'biocultural heritage' and the complex, cascading human rights impingements from the loss of one singularly important crop species[21]. The loss of identity is associated with a substantial rupture of one's sense of self and the agency to control how one can identify themselves with respect to the world around them[22].

Responding to the loss and damage of people's human rights

Loss and damage to fundamental human rights is already occurring and will only increase over time, necessitating effective and appropriate ways of responding. Here we show a series of locally developed solutions that participants described as the most appropriate and useful ways of mitigating and restoring human rights that have been affected by the impacts of climate change. These solutions have been categorized into five key approaches that complement each other and should be funded and implemented as part of a human rights restoration package (Fig. 2).

A key approach for restoring the climate-induced loss and damage on people's human rights involves promoting mechanisms to safeguard Indigenous knowledge and cultural practices and restore the socio-ecological system, which is foundational for Pacific ways of living. To protect lives and livelihoods, support from the Global North to build back better after extreme weather events (induced by climate change) in the Pacific Islands was also strongly suggested as a means of restoring human rights loss and damage. Participants also emphasized the responsibility of national and provincial governments in efficiently providing loss and damage finance, including the provision of emergency funding for families 'to re-establish themselves' (participant number 82) after disaster events. Participants noted that investments in these approaches should be considered holistically and in the context of, and in support for, ongoing investment in mitigation and adaptation. By bringing the focus to those most affected at an individual scale, it can be seen how the human rights lens helps address a central deficiency of the ongoing climate debate—the abstract, state-centric terms in which loss and damage has been framed[7]. Underpinning any human rights restoration packages should be the effective and active participation of those most directly affected by loss and damage through institutionalized cooperation[23].

Beyond investment in specific approaches, participants made it clear that compensation is also an appropriate and justice-based financial response to climate-induced human rights violations and must be considered as part of the funding arrangements to be proposed by the transitional committee. In the context of human rights, the compensation for some loss and damage is more difficult than others. As one participant explained: 'Compensation will be challenging as we cannot compensate for the loss of a culture... But for economic compensation, climate finance must be given, and a justice process must be given to countries that cause more of these losses due to their GHG emissions' (participant number 59).

At the centre of Ni-Vanuatu participant concerns and experiences with loss and damage is the importance of land and rights to an

adequate environment, including biodiversity and ecosystem services. The right to an adequate environment protects interests of paramount importance, such as life, health and welfare[24]. Extreme weather events and gradual processes place substantial pressures on local environmental resources that have cascading effects on livelihoods, health, food and water security, culture, way of life, knowledge systems, community and kinship[25–27]. Therefore, climate change impacts affect an interconnected and complex system that is centred on the critical relationships between Pacific Islanders and their environments. Greater attention must be given to the interdependencies between losses, including the nature of some losses as risk multipliers (for example, loss of important crops, such as yam)[28]. This reinforces the importance of restoring the socio-ecological system as a critical resilience-building response to climate change that can mitigate impingements on human rights, especially through nature-based solutions and biodiversity and ecosystem conservation. Preserving critical people–ecology interactions and the socio-ecological system that underpins culture, community, knowledge, well-being, health and identity are paramount.

Key takeaway messages

When considering these findings, a few conclusions can be made. The first is that the Ni-Vanuatu people are already experiencing loss and damage to their fundamental human rights, and this will worsen over time. The second is that the most severe loss and damage now undermining Ni-Vanuatu's rights are related to the right to a healthy environment and ability to own, use, develop and control lands, and to the high impacts on rights to property and communal assets, standard of living and family and social cohesion. The third point is that loss and damage to Ni-Vanuatu's human rights are having cascading impingements on many other interconnected human rights and can transcend across generations (for example, interconnected human rights to custom, Indigenous knowledge, family, agency and identity). Loss and damage to one human right is rarely in isolation, and cascading impacts and risks are unfortunate but inevitable[28], the acknowledgement of which should motivate the transitional committee of the loss and damage fund to recommend long-term, nationally determined and programmatic funding approaches to address these compounding, cascading and intensifying climate impacts. Finally, the loss and damage fund must finance locally developed and led initiatives to address human rights loss and damage, including investing in recording and safeguarding of Indigenous knowledge, promoting cultural continuity, restoring the socio-ecological system, building back better and investing in education. Compensation is also an appropriate and justice-based financial response to climate-induced human rights violations and must be included as part of the funding arrangements to be proposed by the transitional committee.

This study demonstrates how a human rights lens to loss and damage can provide a useful normative framework and basis for holistically assessing and understanding climate change impacts, loss and damage. It helps to refocus the narrative on the fundamental rights of individuals that must be protected through, and when taking, climate action, and illustrates how climate policy generally, and the UN Framework Convention on Climate Change and its Paris Agreement, cannot operate in a vacuum, disconnected from other obligations in relevant treaties and customary international law. The detailed findings on experiences of and the nature of loss and damage should inform climate policy, guiding international and national activities on what should be funded and targeted for effective redress and adaptation. Although a human rights lens cannot tell us all we need to know about the morality of climate change, it emphasizes the moral seriousness of the problem and can be a driving force for meaningful international action[3].

Online content

Any methods, additional references, Nature Portfolio reporting summaries, source data, extended data, supplementary information, acknowledgements, peer review information; details of author contributions and competing interests; and statements of data and code availability are available at https://doi.org/10.1038/s41558-023-01831-0.

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Methods

This study set out to explore how Ni-Vanuatu people experience human rights loss and damage due to the impacts of climate change. These experiences and perspectives were ascertained through an online survey that was carried out between 18 June and 6 October 2022 (see Supplementary Information for the survey template used). We chose to use a survey for its speed, ease, cost-effectiveness, ability to reach geographically dispersed populations in Vanuatu and ability to gather qualitative data[33]. Although effective in ascertaining the views of a geographically dispersed population, we also note the limitations of surveys. These limitations include being weak on 'why' questions and the inherent assumptions that attitudes and beliefs can be numerically measured, but we have resolved some of these issues by making most questions open ended. These open-ended questions allowed participants to recount their experiences and perspectives in their own way and own words[34].

To design the survey, we first reviewed key human rights declarations and covenants including the Universal Declaration of Human Rights[30], International Covenant on Civil and Political Rights[31], International Covenant on Economic, Social and Cultural Rights[32] and the UN Declaration on the Rights of Indigenous Peoples[29]. Each of the four declarations and covenants were carefully analysed, and articles with relevance for climate change were identified. We had a shortlist of 22 human rights as a result of this process. Two of the authors then collaborated to thematically group the human rights together and arrive at a final list of nine generally representative human rights 'groupings'. These nine overarching thematic areas included cultural life, traditions, customs and traditional knowledge; family and social cohesion; freedom, peace and security; identity; local environment; property and communal assets; sense of place and home; standard of living; and self-determination and agency.

Guided by the identified groupings, 24 questions were developed for the survey, with the majority of questions being open ended (yielding substantive qualitative data) and the remaining being closed answers. The survey started with questions related to participants' backgrounds, including age, birthplace, formal education, local or Indigenous knowledge and sources of income. In-depth questioning about the impacts of climate change on everyday lives followed, and participants were prompted to include personal examples and stories, where possible, to elucidate these experiences over the last year. We acknowledge, however, that it is probable that participants recollected experiences from the last 5–10 years.

For each of the nine thematic areas, a five-point Likert scale was used to understand how much these human rights groupings have been affected by the impacts of climate change. This was followed by a series of in-depth questions around what has been affected, how and why. Questions were also asked about the experiences of vulnerable groups, along with the most appropriate and useful ways of responding to the impacts of climate change on people's human rights and restoring losses and damages (for example, fair, just and equal compensation).

The survey was reviewed by staff in the Climate Diplomacy Taskforce of the Vanuatu Government and members of the Vanuatu Climate Action Network to check that questions were clear, appropriate and easy to complete. The survey was then administered online through the programs Checkbox and Kobo, and participants could complete the survey in Bislama, English or French.

The online survey was circulated on the email lists of the Climate Diplomacy Taskforce and Vanuatu Climate Action Network. Members of the Vanuatu Climate Action Network living in outer islands collaborated with their local community members to complete the survey using Kobo, which does not require an internet connection. Although this ensured that some views and experiences of people living in the outer islands was included, the majority of respondents were living in the most populous province (Shefa), where the nation's capital (Port Vila) is located. An additional sample bias was the high number of 'professional' participants with a bachelor's degree.

Potential participants were assured of the confidentiality and anonymity of their responses and, before undertaking the survey, were asked to consent to participating. This followed ethical protocols as part of the approval from the University of Queensland (approval number 2020000640). Quantitative data were analysed using the Statistical Package for the Social Sciences (SPSS v.27) and qualitative data were analysed manually through content analysis to help capture core themes and storylines.

Overall there were 118 participants in the study. Participants included 65 women, 49 men and 4 participants who preferred to self-identify. The age range for participants was 18–76 years old (mean age of 36.4 years old). Participants were predominately born in the Shefa province (39.6%), followed by Tafea (21.6%), Sanma (13.5%), Penama (12.6%), Malampa (9%) and Torba (3.6%). These proportions differ from where participants currently live, which was concentrated in the Shefa province (72.8%, which includes Port Vila, the country's capital), followed by Sanma (12.3%), Tafea (9.6%), Malampa (3.5%), Penama (0.9%) and Torba (0.9%). A bachelor's degree was the highest level of formal education for most participants (38.8%), followed by a master's degree (20.7%), high school certificate (18.1%), technical training (18.1%), elementary school certification (2.6%) or a PhD (1.7%). Most participants also indicated that they are holders of substantial Indigenous knowledge, particularly in relation to crops (75% of participants), plants and animals (50%), weather (49.1%), forests (41.7%), medicine (42.6%), fishing (35.2%), weaving (28.7%) and marine life (27.8%).

Reporting summary

Further information on research design is available in the Nature Portfolio Reporting Summary linked to this article.

Data availability

The data that support the findings of this study are not publicly available due to them containing information that would compromise research participant confidentiality and anonymity.

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Author contributions

K.E.M., R.C., R.W. and C.Y.B. conceived and designed the research. K.E.M., R.C., R.W., S.S., G.K. and W.M. collected data. K.E.M., R.C. and R.W. analysed data. K.E.M., R.C., R.W. and C.Y.B. wrote the article.

Competing interests

The authors declare no competing interests.

Additional information

Supplementary information The online version contains supplementary material available at https://doi.org/10.1038/s41558-023-01831-0.

Correspondence and requests for materials should be addressed to Karen E. McNamara.

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☒	☐	The exact sample size (*n*) for each experimental group/condition, given as a discrete number and unit of measurement
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Our web collection on statistics for biologists contains articles on many of the points above.

Software and code

Policy information about availability of computer code

Data collection	Primary, qualitative and quantitative data was collected as part of a survey distributed across Vanuatu.
Data analysis	SPSS version 27 was used to code and analyze the quantitative data and qualitative data was coded preliminarily in Excel to create themes and analyzed manually.

For manuscripts utilizing custom algorithms or software that are central to the research but not yet described in published literature, software must be made available to editors and reviewers. We strongly encourage code deposition in a community repository (e.g. GitHub). See the Nature Portfolio guidelines for submitting code & software for further information.

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The raw data is confidential and not publicly available.

Human research participants

Policy information about studies involving human research participants and Sex and Gender in Research.

Reporting on sex and gender	Participants included 65 females, 49 males and four who preferred to self-identify.
Population characteristics	See below ("Research sample").
Recruitment	See below ("Sampling strategy").
Ethics oversight	As a study involving human participants, ethical approval was provided by the University of Queensland (approval number: 2020000640). All participants gave informed consent to participate in this voluntary study.

Note that full information on the approval of the study protocol must also be provided in the manuscript.

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Behavioural & social sciences study design

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Study description	The aim of this study was to explore how locals in Vanuatu experience the impacts of climate change and how these impacts can impinge on their human rights.
Research sample	Participants included 65 females, 49 males and four who preferred to self-identify. The age range for participants was from 18 to 76 years old, with a mean age of 36.4 years old. Participants were predominately born in Shefa province (39.6%), followed by Tafea (21.6%), Sanma (13.5%), Penama (12.6%), Malampa (9%), and Torba (3.6%). This was slightly different to where participants currently live, which was largely Shefa province (72.8%), followed by Sanma (12.3%), Tafea (9.6%), Malampa (3.5%), Penama (0.9%), and Torba (0.9%). As for highest level of formal education or training, most participants indicated that they hold a bachelor's degree (38.8%), followed by a master's degree (20.7%), high school certificate (18.1%), technical training (18.1%), elementary school certification (2.6%), or a PhD (1.7%). Participants, who could select more than one option, are holders of vast local and Indigenous knowledge related to crops (75% of participants), plants and animals (50%), weather (49.1%), forests (41.7%), medicine (42.6%), fishing (35.2%), weaving (28.7%), marine life (27.8%), rivers (16.7%), pest and disease on crops and animals (14.8%), 'other' (14.8%), and carving (8.3%). Examples of 'other' included: custom ceremonies, architecture, cultural stories, local cooking, governance and leadership, and teaching. Participants predominately earned an income through government work (31.9% of respondents), 'other' activities such as volunteering or working for NGOs (25.9%), being a private business employee (15.5%), through farming (12.9%), being a private business owner (7.8%), having money sent from others (2.6%), through handicrafts or fishing (both 0.9%) or had no income (1.7%).
Sampling strategy	The local partner organization, the Vanuatu Climate Action Network (VCAN), undertook extensive promotion of the project and survey through its network (via its email list and social media sites). Participants were encouraged to share the survey link with other local Vanuatu community members to complete. As mentioned below, local VCAN members also undertook the survey with local community members in very remote parts of the country. In this way, our sampling strategy was largely based on expediency and access. A limitation of this study was the lack of targeting towards groups of different ability, ethnicity and religion, among other factors, and we acknowledge that viewpoints from these groups may remain underrepresented.
Data collection	Data collection involved an online survey with both qualitative and quantitative questions. Using a survey method is useful in terms of its ease, cost-effectiveness, and ability to reach geographically dispersed populations in Vanuatu. We used Checkbox and Kobo to administer the survey. Checkbox was available through an online link that was circulated to, and through, several networks and relevant organisations across the country. Kobo was used by local members of VCAN, the local partner organization, to complete in-field surveys in remote parts of Vanuatu not requiring an Internet connection, that could later be uploaded. The survey had a logical structure: introductions and participant consent (landing page), followed by questions about participant's backgrounds, experiences of climate change impacts, links between human rights and climate change, and appropriate and useful responses. The survey was provided in English, Bislama, and French.
Timing	The overall study was conducted between June and October 2022.
Data exclusions	No data were excluded from the analysis.
Non-participation	No participants dropped out or declined participation.

Randomization	Participants were not allocated into experimental groups.

Reporting for specific materials, systems and methods

We require information from authors about some types of materials, experimental systems and methods used in many studies. Here, indicate whether each material, system or method listed is relevant to your study. If you are not sure if a list item applies to your research, read the appropriate section before selecting a response.

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☒	☐ Eukaryotic cell lines
☒	☐ Palaeontology and archaeology
☒	☐ Animals and other organisms
☒	☐ Clinical data
☒	☐ Dual use research of concern

Methods

n/a	Involved in the study
☒	☐ ChIP-seq
☒	☐ Flow cytometry
☒	☐ MRI-based neuroimaging

Annex ZD

The Aaland Islands Question.

I.

LETTER ADDRESSED TO THE FINNISH MINISTER IN PARIS BY THE SECRETARY-GENERAL OF THE LEAGUE.

[*Translation.*]

GENEVA, February 17th, 1921.

Your Excellency

In accordance with the desire expressed in your letter of February 10th, I have the honour to inform you that I have ordered the publication, in No. 9 of the League of Nations *Official Journal*, of the second part of your letter of January 7th, with regard to some errors in translation which you observed in certain documents issued by the Secretariat.

Your criticism on this point appears to me to be fully justified.

I have the honour to be, etc.,

(Signed) ERIC DRUMMOND,
Secretary-General.

His Excellency
The Minister for Finland,
22, Rue de la Paix,
PARIS.

II.

EXTRACT FROM A LETTER FROM THE FINNISH MINISTER IN PARIS CONCERNING THE PUBLICITY OF SOME OF HIS STATEMENTS

[*Translation.*]

FINNISH LEGATION
22, Rue de la Paix.
No. 24.

PARIS, January 7th, 1921.

...I would beg you to be so good as to insert in the Official Organ of the League of Nations the correction of the following mistakes, which might convey to the reader a wrong impression of the events in question.

1) *Journal officiel.* Supplément spécial n° 1, aout 1920, p. 13. — La note du représentant du Gouvernement Finlandais du 9 juillet porte que « le dissentiment... n'a pas le caractère d'un différend d'ordre international, mais celui d'une crise d'ordre interne », tandis que la teneur de la traduction anglaise affaiblit le sens de cette déclaration « the difference of opinion... is *not so much* a crisis of an international, as of a domestic nature ». Cette même traduction se retrouve dans la publication officielle du Gouvernement Anglais, *Reference to the League of Nations of the question of the Aaland Islands, Miscellaneous* n° 12 (1920), document 4.

2) *Procès-verbal de la septième session du Conseil de la Société des Nations tenue à Londres du 9 au 12 juillet* 1920, Annexe 68 *h*, p. 59. — Le rapporteur du Conseil, dans la question des îles d'Aland, M. Balfour, a ainsi formule, dans sa déclaration faite en anglais, la principale revendication présentée par le représentant de la Suède

« That the Aaland Islands population shall be allowed to determine immediately by plebiscite whether the Archipelago shall remain *under Finnish sovereignty* or be incorporated with the Kingdom of Sweden », ce qui est la traduction exacte de la formule française employée d'abord dans la lettre du Gouvernement Suédois au Conseil en date du 2 juillet 1920, et répétée dans la lettre du 9 juillet, du représentant de la Suède à M. le Secrétaire Général *(Procès-verbal,* annexe 68 *e*, pp. 50 et 51)

« Il sera permis à la population alandaise de décider immédiatement par plébiscite si l'Archipel alandais doit rester *sous la souveraineté finlandaise,* etc. »

Cette formule se retrouve aussi dans le mémorandum présenté au Conseil par M. le Secrétaire Géneral (ibid. Annexe 68 *f*, p. 52).

Mais la traduction française que le Secrétariat a exécutée du texte original de la déclaration précitée de M. Balfour, porte

« Si l'archipel resterait sous la *domination* finnoise ou serait incorporé au Royaume de Suède », traduction qui constitue une grave altération d'un fait de toute première importance.

3) Le rapport sur les travaux du Conseil de la Société des Nations présenté à la première session de l'Assemblée est, en anglais, ainsi conçu

« The Council at the same time noted the special interest taken by Russia in the destiny of the Aaland Islands, and stated that it [c'est-à-dire le Conseil] would naturally desire to hear the views of Russia on the subject, when she had emerged from the exceptional position in which she found herself. »

Or, le texte français est ainsi conçu

« Le Conseil, en même temps, a reconnu l'intérêt particulier que la Russie attache au sort des Iles d'Aland et il fait observer qu'elle (c'est-à-dire la Russie) desirera évidemment faire entendre à ce sujet sa voix, lorsqu'elle sera sortie de l'état exceptionnel où elle se trouve aujourd'hui. »

De ces deux textes, le second seul est exact, puisqu'il est la traduction correcte du rapport de M. Fisher, ainsi conçu *(Procès-Verbal de la neuvième session du Conseil,* etc., p. 75)

« No one can deny the interest felt by Russia in the fate of these Islands, nor can it be doubted that when Russia, sooner or later, emerges from her present abnormal conditions, she will certainly wish to make her voice heard with regard to them. »

(Il y a là encore une inexactitude qu'il conviendrait de faire disparaître.)

Veuillez agréer, Monsieur le Secrétaire Général, les assurances de ma haute considération.

(Signé) ENCKELL.

(1) *Official Journal.*—Special Supplement No. 1. August, 1920, page 13. The Note from the Finnish Government, dated July 9th states that "le dissentiment... n'a pas le caractère d'un différend d'ordre international, mais celui d'une crise d'ordre interne," while the text of the English translation weakens the sense of this declaration "the difference of opinion... is *not so much* a crisis of an international as of a domestic nature." This same translation occurs again in the official publication of the British Government *Reference to the League of Nations of the question of the Aaland Islands, Miscellaneous* No. 12 (1920). Document No. 4.

(2) *Minutes of the Seventh Meeting of the Council of the League of Nations, held in London from July 9th to 12th, 1920.* Annex 68 *h*, page 59. The Council's Rapporteur for the Aaland Islands question, Mr. Balfour, in his statement, made in English, formulated the principal claim presented by the Swedish Representative as follows -

"That the Aaland Islands population shall be allowed to determine immediately by plebiscite whether the Archipelago shall remain *under Finnish sovereignty* or be incorporated with the Kingdom of Sweden," which is the exact translation of the French formula, used first in the letter, dated July 2nd, 1920, from the Swedish Government to the Council, and repeated in the letter, dated July 9th, from the Swedish Representative to the Secretary-General (*Minutes*, Annex 68*e*, pages 50 and 51)

"Il sera permis a la population alandaise de décider immédiatement par plébiscite si l'Archipel alandais doit rester *sous la souveraneté finlandaise, etc.*"

This formula also occurs in the Memorandum submitted to the Council by the Secretary-General (in the same place Annex 68 *f*, page 52).

But the French translation which was made from the original text of the above-mentioned statement of Mr. Balfour reads

"Si l'Archipel resterait sous la *domination* finnoise ou serait incorporé au Royaume de Suède," a translation which constitutes a serious misstatement of a fact of capital importance.

(3) The Report on the work of the Council of the League of Nations which was submitted to the Assembly at its first meeting reads in English as follows

"The Council at the same time noted the special interest taken by Russia in the destiny of the Aaland Islands, and stated that it [that is to say, the Council] would naturally desire to hear the views of Russia on the subject, when she had emerged from the exceptional position in which she found herself."

The French text, however, reads as follows

"Le Conseil, en même temps, a reconnu l'interêt particulier que la Russie attache au sort des Iles d'Aland et il fait observer qu'elle [that is to say Russia] désirera évidemment faire entendre a ce sujet sa voix, lorsqu'elle sera sortie de l'état exceptionnel où elle se trouve aujourd'hui."

Of these two texts the second only is accurate, since it is the correct translation from Mr. Fisher's Report, which reads as follows (*Minutes of the Ninth Meeting of the Council, etc.*, page 75)

"No one can deny the interest felt by Russia in the fate of these Islands, nor can it be doubted that when Russia, sooner or later, emerges from her present abnormal conditions, she will certainly wish to make her voice heard with regard to them."

(There is an inaccuracy here also which should be removed.)

I have the honour to be, etc.,

(Signed) ENCKELL.

III

OBSERVATIONS PRÉLIMINAIRES DU MINISTRE DE FINLANDE SUR LE RAPPORT DE LA COMMISSION DES JURISTES[1]

16 septembre 1920.

I

La Commission constate de la manière la plus nette et la plus ferme que le Droit international positif ne reconnaît pas à des fractions de peuples, comme telles, le droit de se séparer par un simple acte de volonté de l'Etat dont elles font partie, pas plus qu'il ne reconnaît à d'autres Etats le droit de réclamer une telle séparation. D'une manière générale, il appartient exclusivement à la souveraineté de tout Etat, définitivement constitué, d'accorder ou de refuser à une fraction de sa population le droit de déterminer son propre sort politique par la voie d'un plébiscite ou autrement. Ceci posé, la Commission cherche à démontrer que la Finlande n'est pas un Etat définitivement constitué et que, dès lors, la règle de droit positif qui laisse l'Etat souverain seul maître de décider du sort des populations incluses dans son territoire ne trouve pas ici d'application.

Sans examiner si les jurisconsultes expriment le Droit international positif, en distinguant entre l'Etat constitué définitivement et celui qui ne serait pas encore définitivement constitué, nous croyons devoir faire observer qu'un certain nombre d'erreurs matérielles s'introduisent ici dans l'application à la Finlande de la règle juridique par eux posée.

Leur première erreur tient à la position même de la question.

La question serait aussitôt résolue que posée, d'après le principe ci-dessus rappelé, si les jurisconsultes lui avaient laissé ses véritables termes. Prié par le Président du Conseil de la Société des Nations de donner par écrit au Conseil les conclusions, qu'au nom du Gouvernement Suédois, il avait à formuler, quant à la question alandaise, maintenant devant le Conseil, M. Branting s'exprimait ainsi

« Me conformant à ce désir, j'ai l'honneur de vous soumettre les conclusions suivantes

« Il sera permis à la population alandaise de décider immédiatement par plébiscite si l'Archipel alandais doit rester sous la *souveraineté* finlandaise ou être réintégré au Royaume de Suède. »

Ainsi, d'après le Gouvernement Suédois, l'archipel d'Aland se trouvait, à la date du 9 juillet 1920, sous la *souveraineté* finlandaise. La seule question était de déterminer si, étant sous cette *souveraineté*, il devait y rester.

Une pareille position de la question conduisait, d'après le principe formulé par les juristes, à cette conséquence nécessaire l'archipel d'Aland étant sous la souveraineté de la Finlande, le Droit positif international ne permettait pas à la Suède d'enlever à celle-ci le droit de disposer librement d'une partie de son territoire et de sa population.

Les jurisconsultes n'ont pu raisonner comme ils l'ont fait qu'à la suite d'une modification de la question posée le 9 juillet 1920 par M. Branting. Dans cette question, le mot « souveraineté », qui ne permettait pas de doute, a été remplacé par le mot « domination ». A la page 5 du texte français du mémoire des juristes, on lit ceci

« De son côté, la Suède peut-elle réclamer qu'un plébiscite ait lieu pour permettre à la population des Iles de se prononcer sur leur rattachement à la Suède, ou le maintien de la « domination » finlandaise ?

Il ne nous appartient pas de rechercher à quel moment s'est produite une altération aussi fondamentale dans la position de la question mais nous tenons à déclarer de la manière la plus

[1] Cf. *Journal Officiel*, Supplément Spécial N° 3, octobre 1920.

III.

PRELIMINARY OBSERVATIONS BY THE FINNISH MINISTER ON THE REPORT OF THE COMMITTEE OF JURISTS[1]

[*Translation.*]

September 16th, 1920.

I.

The Committee points out as clearly and categorically that positive International Law does not recognise the right of fractions of peoples, as such, to separate themselves, by a simple act of will, from the State of which they form part, any more that it recognises the right of other States to demand such a separation. Generally speaking, it pertains exclusively to the sovereignty of any definitely constituted State to grant to, or withhold from, a fraction of its population the right of deciding its own political destiny by means of a plebiscite, or in any other way. This principle being admitted, the Committee endeavours to show that Finland is not a definitely constituted State, and that hence the rule of positive law, which recognises that a sovereign State is alone entitled to decide the future status of the populations comprised within its territory cannot here be applied.

Without discussing whether the Jurists, in referring to positive International Law, distinguish between a State which is definitely constituted and one which is not yet so constituted, we feel bound to point out that the application to Finland of the legal ruling laid down by them gives rise to a certain number of material errors.

Their first error is connected with the very form in which the question is part.

According to the principle mentioned above, the question would be no sooner put than answered, if the Jurists had not altered its original terms. M. Branting, when asked by the President of the Council of the League of Nations to submit in writing to the Council such observations as he had to put forward on behalf of the Swedish Government with regard to the Aaland question, which is at present being dealt with by the Council, expressed himself as follows

"In accordance with your wishes, I have the honour to submit to you the following observations..

"'The Aaland population will be allowed to decide immediately by means of a Plebiscite whether the Aaland Archipelago is to remain under Finnish *sovereignty* or to be restored to the Kingdom of Sweden."

Hence, according to the Swedish Government, the Aaland Archipelago was on July 9th, 1920, under Finnish *sovereignty*. The only question was to decide whether, being under this *sovereignty*, it should remain there.

According to the principle laid down by the Jurists, the fact that the problem was stated in this way led to the inevitable conclusion that, since the Aaland Archipelago was under the Sovereignty of Finland, positive International Law did not allow Sweden to deprive Finland of the right to dispose freely of a part of its territory and of its population.

It was only owing to an alteration in the wording of the statement made by M. Branting on July 9th, 1920, that the Jurists were able to argue in this way. In this statement the word "sovereignty," which allowed of no misunderstanding, has been replaced by the word "domination." On page 5 of the French text of the Jurist's memorandum the following passage occurs —

"Can Sweden for her part, demand that a Plebiscite should be held in order to allow the population of the Islands to state whether they prefer to be restored to Sweden or to remain under Finnish *domination* ?"

It is not for us to try to discover when so fundamental a change in the wording of the question was introduced but we would state most emphatically that the Council promised us that it would

[1] See *Official Journal*: Special Supplement No. 3, October 1920.

nette que le Conseil n'a souscrit devant nous qu'à la position du problème, dans les termes mêmes où il a été présenté par M. Branting que c'est dans ces termes mêmes qu'il devait être soumis aux juristes et qu'enfin, dans la manière dont la question était officiellement posée par le Président du Conseil de Suède, se trouvait à tout le moins, avant que la controverse juridique se fût exercée sur ce point, la véritable pensée spontanée et sincère de la Suède sur la nature du lien qui présentement lie l'archipel d'Aland à la Finlande c'est le lien de la souveraineté. Ce n'est pas seulement nous qui l'affirmons, c'est la Suède qui l'a solennellement reconnu le 9 juillet. Et les jurisconsultes n'ont pu décider que la question n'était pas de celles que le Droit international laisse à la compétence exclusive de la Finlande, que parce que dans la position du problème le mot précis, juridique, de souveraineté a été ultérieurement remplacé par le mot, sans valeur juridique, mais tout de fait, de domination.

Cette simple constatation nous permettrait de ne pas insister davantage. Il nous suffit de faire remarquer que la question posée par M. Branting était celle-ci *l'Archipel doit-il rester sous la souveraineté finlandaise* ? qu'à cette question a été substituée, par une altération à peine croyable de texte, celle-ci *l'Archipel alandais doit-il rester sous la domination finlandaise* ? pour que toute autorité soit manifestement déniée à l'avis du Comité consultatif.

Du principe posé par les juristes, à savoir que la souveraineté d'un Etat ne permet pas à tout autre qu'à lui de décider du sort des peuples situés sur son territoire, il résulte, si l'archipel alandais est sous la souveraineté finlandaise en juillet 1920, que la question de savoir s'il doit être réuni à un autre Etat, n'est pas une question qui dépend d'une autre décision même de la Finlande, c'est-à-dire une question qui relève exclusivement de sa juridiction.

II

Bien que nous puissions arrêter à ce point nos observations, supposons cependant que la question posée n'est pas expressément ni même implicitement supposée, et que l'Archipel alandais est, actuellement, sous la souveraineté de la Finlande.

Suivons dès lors les juristes dans un raisonnement où, sans l'altération du texte qui constitue le vice fondamental de leurs discussions, ils n'auraient même pas eu la simple possibilité d'entrer.

Quel est ce raisonnement ?

S'il appartient, disent-ils (page 7), exclusivement à la souveraineté de tout Etat définitivement constitué, d'accorder ou de refuser à une fraction de la population des droits de déterminer son propre sort politique, par la voie d'un plébiscite ou autrement, il n'en est pas de même, lorsqu'il s'agit d'un Etat qui n'est pas définitivement constitué

« Au point de vue aussi bien du droit interne que du droit international (page 8), la formation, la transformation et le démembrement d'Etats par suite de révolutions et de guerres, créent des situations de fait qui échappent en grande partie aux règles normales du droit positif. » Cela revient à dire que, lorsque le fondement essentiel de ces règles, à savoir la souveraineté territoriale, fait défaut, soit parce que l'Etat n'a pas encore pris complètement naissance, soit qu'il se trouve dans une période de transformation ou de dissolution, il existe, quant au droit, une situation douteuse, incertaine, qui ne prend fin que du moment où le développement s'est achevé et qu'une nouvelle situation, définitivement normale quant à la souveraineté territoriale s'est établie.

A moins qu'un droit international nouveau ne doive naître de la décision même des jurisconsultes, il est impossible de donner à ces idées générales un autre sens que celui-ci lorsqu'un Etat nouveau se crée, par cession ou séparation d'un autre Etat, il existe, entre sa proclamation d'indépendance et sa reconnaissance, tant par l'Etat dont il s'est séparé, que par les autres, une période d'incertitude, où l'on ne sait encore, si triomphant des obstacles nés de sa formation, le nouvel organisme politique parviendra à se constituer. A ce moment l'on peut dire que la souveraineté territoriale de l'Etat n'est pas établie d'une manière définitive. Aussi les droits de l'Etat ne sont-ils reconnus à l'organisme nouveau que dans la mesure nécessaire pour arriver, par la guerre, à ses fins, c'est-à-dire à la manifestation de son indépendance. De là, la théorie de la reconnaissance comme belligérants, née dans le droit politique du commencement du XIX^me^ siècle, est aussi, par

only accept the statement of this problem in the same terms as it was put by M. Branting; that it was in these same terms that it was to be submitted to the Jurists; and that finally the form in which the question was officially put by the Swedish Prime Minister contained, before the legal controversy began to rage upon this point, the true, spontaneous and genuine feeling of Sweden as to the nature of the ties which at the present time bind the Aaland Archipelago to Finland, *i. e.*, the ties of sovereignty. It is not only we who make this affirmation, it was formally admitted by Sweden herself on July 9th. And the Jurists have only been able to decide that the question was not one of those which International Law leaves to the exclusive competence of Finland because in the posing of the question the legal, and at the same time precise, word "sovereignty" was subsequently replaced by the word "domination," which has no legal, but a merely practical, significance.

This simple observation would make it unnecessary for us to insist further. If we point out that the question as put by Mr. Branting was as follows *Must the Archipelago remain under the sovereignty of Finland* ? and that this question, by an almost incredible alteration in the text, was subsequently altered to the following *Must the Aaland Archipelago remain under the domination of Finland* ? it will be enough to show that the opinion of the Advisory Committee is manifestly lacking in all authority.

According to the principle laid down by the Jurists, namely that the sovereignty of a State does not allow any other State to decide the future of populations dwelling on its territory it follows that, if the Aaland Archipelago was under the sovereignty of Finland in July, 1920, the question as to whether it is to be joined to another State is one which only depends on the decision of Finland itself—that is to say it is a question which comes exclusively under the jurisdiction of Finland.

II.

Although we might conclude our remarks at this point, let us nevertheless suppose that the question raised is neither explicitly nor implicitly raised, and that the Aaland Archipelago is now under the sovereignty of Finland.

Let us now follow the Jurists in a line of argument which, without the change in the text wherein lies the fundamental unsoundness of their reasoning, it would be absolutely impossible for them to pursue.

What is this line of argument ?

If it is the exclusive privilege of the sovereignty of every definitely constituted State, they argue (see page 7), to grant to or withhold from a fraction of the population the right to decide its own political future by means of a plebiscite or by any other means, this does not hold good in the case of a State which is not definitely constituted.

"From the point of view of both domestic and international law (page 8) the formation, transformation, and dismemberment of States as a result of revolutions or wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law." This is equivalent to saying that when the essential basis of these rules—namely, territorial sovereignty—is lacking either because the State is not yet completely constituted or because it is undergoing a period of transformation or dissolution, a doubtful and uncertain situation is created from the legal point of view which only ceases to exist when the State development is completed and a new situation which is normal as far as territorial sovereignty is concerned has been established."

Unless a new international law is to be called into existence merely owing to this decision of the Jurists, it is impossible to discern any other meaning in these general ideas that the following When a new State is created, either through being ceded by or separated from another State, there occurs between the time of its proclamation of independence and its recognition both by the State from which it is separated and by other States — a period of instability, during which it is impossible to know whether the new political organisation, triumphing over the obstacles accompanying its formation, will succeed in establishing itself. At that moment it may be said that the territorial sovereignty of the State is not definitely constituted. Moreover the new organisation is only recognised as possessing State rights if it has been able to attain its ends through war — that is to say, if it has been able to assert or prove its independence. Hence the theory

un développement recent, dans la guerre de 1914-18, la théorie de la reconnaissance comme nation. Mais, dès qu'un Etat est reconnu, soit par celui dont il se sépare, soit, sans même attendre cette reconnaissance, souvent très longue à venir (reconnaissance de la Belgique, 1831 par les Puissances, 1839 par la Hollande) par les autres Etats, la situation de l'Etat nouveau est une situation définitive. *Sa souveraineté territoriale est fixee.* Sans doute, ses frontières peuvent ne pas être encore, sur tous les points, notamment déterminées: des constitutions de frontières se sont poursuivies et quelques-unes se poursuivent encore entre les Etats de l'Amerique latine entre le XIX^{e} siècle et le commencement du XX^{e}, sans qu'on puisse dire que la situation de ces Etats n'est pas une situation définitive et normale. La période de formation d'un Etat, telle qu'elle est reconnue, comme douteuse, incertaine, suivant les termes des Juristes, se limite à la periode anterieure aux reconnaissances et, cette période, la Finlande l'a franchie.

Dès l'instant que les reconnaissances sont intervenues, la souveraineté de l'Etat est formee, le peuple est définitivement constitué. Jusqu'à présent, le droit international n'a jamais admis qu'il pût en être autrement, et l'on comprend, à lire l'avis des Jurisconsultes, qu'aucune citation n'a été faite par eux, ni des précédents historiques, ni des auteurs, ni de la jurisprudence internationale ce silence s'explique parce qu'il serait difficile de trouver dans le droit antérieur une règle semblable à celle qu'ils ont cru pouvoir poser.

Mais, supposons que la règle de droit international, formulee par eux, pour la première fois, et qui ne sera certainement pas sans rencontrer, dans le monde juridique, d'immediates contradictions, soit acceptee, comme une règle incontestable, incontestée, et qu'il n'y ait plus qu'à en faire l'application à la Finlande. D'après l'affirmation des Jurisconsultes (page 16) « la formation d'un Etat finlandais indépendant en 1917 et 1918, quel qu'ait éte précédemment le statut juridique de la Finlande dans l'Empire de Russie, doit être envisagée, au moins sous plusieurs rapports, comme un evénement politique nouveau, et non comme la continuation pure et simple d'une existence politique antérieure ».

On comprend le but d'une telle affirmation. S'il était demontre que la Finlande, anterieurement à sa reconnaissance, a eu, dans l'Empire russe, de 1809 a 1917, un statut politique détermine, en vertu duquel l'archipel d'Aland n'eût été qu'une partie dans l'unité politique finlandaise, il s'ensuivrait que la reconnaissance s'applique à cette Finlande, telle qu'elle était déjà déterminée, dans ses frontières particulières, par rapport a la Russie, à laquelle elle s'unissait dans l'Empire, sans cependant se confondre avec elle. Si la Finlande avait un statut territorial nettement fixé dans l'Empire Russe, c'est a ce statut territorial que naturellement devaient s'appliquer les reconnaissances des Puissances. Pour prétendre qu'en 1917, la Finlande se forme sans un essai territorial déterminé, les Jurisconsultes étaient donc conduits à dénier à la Finlande, antérieurement à 1917, ce même essai. Cette négation forme l'une des parties capitales de leur avis. Elle est catégorique « La Finlande a été traitée, en fait, par le Gouvernement Russe, depuis 1899, comme une simple province. »

Il n'est pas un juriste qui ne s'étonne, en presence de ces termes, de voir des Jurisconsultes, dans l'examen d'une question de droit, passer du droit qui, d'après eux, — ils ne le contestent pas — faisait de la Finlande, a l'interieur, un Etat, au fait, qui depuis 1899, l'aurait ramenée, sous l'influence d'une politique de russification, au régime de simple province. Parmi les Jurisconsultes qui, dans tous les pays de l'Europe, et notamment dans celui de deux des Membres au moins de la Commission des Juristes (la France et la Hollande) ont énergiquement soutenu et clairement démontré, d'une manière qui reste acquise à la science politique, que la Finlande, en vertu du Pacte de Borgo, « nation libre à l'intérieur », suivant la parole même de l'Empereur Alexandre I^{er}, avait sa constitution propre, il n'en est pas un qui, à l'heure actuelle, ne soit certainement prêt à protester contre cette si singulière manière de faire état dans une discussion juridique de la violation par la Russie de ce qu'ils ont considere comme l'inviolable droit de la Finlande, en vertu des principes du droit public universel. Mais il y a plus. Le Gouvernement Russe, alors même qu'il agissait contrairement à la constitution finlandaise, n'a jamais prétendu traiter la Finlande comme une simple province. Or, la nationalite finlandaise a toujours été distincte de la nationalité russe. L'une des questions les plus discutees à la fin de l'ancien régime était precisément de savoir quels seraient les droits des Russes en Finlande, ce qui montre bien que la nationalité finlandaise était une nationalité séparée. Sans doute, le Gouverneur Général de Finlande, Président du Sénat de Finlande, c'est-à-dire du Conseil des Ministres de Finlande, pouvait avoir la nationalité russe, en raison du fait que la Finlande, bien que nation à l'intérieur, était, à l'extérieur, dans les relations internationales, representée par l'Empire russe,

of the recognition of a State or a belligerent, which grew up in international law at the beginning of the 19th century, has also, by a recent development during the war of 1914-18, come to be the theory of its recognition as a nation. But as soon as a State has been recognised either by the State from which it has been separated or, even without waiting for this recognition — which is often withheld for a long time (*cf.* the recognition of Belgium in 1831 by the Powers and in 1839 by Holland) by other States — the status of a new State is a definite status. *Its territorial sovereignty is determined.* No doubt its frontiers are perhaps not yet fixed at every point between the 19th and the beginning of the 20th centuries the frontiers of some South American States were still being fixed (and in some cases this process is still going on), but this does not prevent the constitution of these States from being normal and well established. The period during which the formation of a State is, in the words of the Jurists, recognised as being doubtful or uncertain, is limited to the period preceding the recognition of the State, and in the case of Finland this period has been passed.

As soon as a State has been recognised, its sovereignty is established and the nation is definitely constituted. Hitherto international law has never admitted any other point of view, and on reading the opinion of the Jurists we can understand why they have made no allusion to historical precedence and no quotations from authors or from the text-books of international jurisprudence, their silence is explained by the fact that it would be difficult to find in the annals of Law any principle such as that which they have seen fit to bring forward.

But let us suppose that the principle of International Law formulated by them for the first time, and which is certain to meet with immediate contradiction on the part of legal authorities, is accepted as an incontestable and uncontested principle, and that nothing remains but to apply it to the case of Finland. According to the declaration of the Jurists (page 16) "The formation of an independent State of Finland in 1917 and 1918, whatever may have been the legal status of Finland formerly under the Russian Empire, must be considered, at any rate in several aspects, as a new political phenomenon and not as a mere continuation of a previously existing political entity"

The object of this affirmation can be understood. If it were shown that Finland before her recognition as a State possessed, within the Russian Empire of 1809 to 1917, a definite political status, by virtue of which the Aaland Archipelago would have been only one part of the Finnish political unity, it would follow that the recognition applies to Finland within her own frontiers, fixed as they already were in relation to Russia, she being united to the Russian Empire without, however, being absorbed in it. If Finland had a definite territorial status within the Russian Empire the enquiry of the Powers should naturally have had relation to this territorial status. In order to maintain that, in 1917, Finland was formed without a definite territorial outline (?) the Jurists were forced to deny to Finland the possession of this same outline prior to 1917. This denial is one of the integral parts of their conclusions. It is a categorical denial "Finland has in fact been treated by the Russian Government since 1899 as a simple province."

No Jurist can help feeling astonishment in regard to these terms when he sees Jurists, in considering a question of law, turn from the *de jure* position, which, as they admit, constituted Finland in domestic affairs as a State, to the mere *de facto* position which, since 1899, under the influence of a Russianising policy, would have reduced it to the status of a simple province. Amongst the Jurists who, in all the countries of Europe and in particular in those of at least two members of the Committee of Jurists (France and Holland), have firmly maintained and clearly shown, in a manner which is now an accepted principle in political science, that Finland, which was by virtue of the Treaty of Borgo "a free nation in domestic matters," according to the actual words of the Emperor Alexander I, and possessed its own Constitution, there is not one who at the present moment would not certainly be ready to protest against this unusual method of relying for support in a political argument on the violation by Russia of what they consider as the inviolable right of Finland, by virtue of the principles of universal justice. But that is not all. The Russian Government, at the very time when it was acting contrary to the Finnish Constitution, never pretended to treat Finland as a simple province. Finnish nationality has always been distinct from Russian nationality. One of the questions most discussed at the end of the old regime was precisely what should be the rights of Russians in Finland this clearly shows that Finnish nationality was a separate nationality No doubt, the Governor-General of Finland, who was President of the Finnish Senate— that is to say the Finnish Prime Minister—might be of Russian

dont elle formait une partie intégrante, mais les autres membres du Sénat de Finlande devaient tous avoir la nationalité finlandaise et même au pire moment de la russification, la plupart d'entre eux était encore de nationalité finlandaise. Jamais on n'a vu de simples provinces avoir ainsi une nationalité propre. Jamais, par conséquent, le Gouvernement Russe n'a traité la Finlande comme une simple province. L erreur des Jurisconsultes est, sur ce point, une erreur matérielle.

Il est vraiment regrettable que la documentation qui a été mise à leur disposition ne leur ait pas permis de pénétrer dans toutes les phases d'une évolution, assurément compliquée, mais d'où les principes surgissent cependant assez facilement reconnaissables, de la question finlandaise de 1899 à 1917 C'est avec peine qu'on constate à la page 12 que les Jurisconsultes croient que depuis 1899 les atteintes a la liberté finlandaise ont toujours été maintenues par le Gouvernement Russe, alors qu'en 1905, ces atteintes ont été suspendues et, pendant un certain temps, la constitution respectée.

D'autre part, les Jurisconsultes ne semblent pas avoir aperçu qu'en 1917 après la grande révolution, le Gouvernement du Prince Lvow a remis en vigueur la constitution, et celui de Kerensky a même, dans une notable mesure au delà des termes de la constitution, augmenté les libertés de la nation finlandaise.

Dire que le Gouvernement Russe a toujours traite la Finlande de la même manière depuis 1899 jusqu'en 1917 c'est une erreur, une erreur de fait.

Autre erreur les Jurisconsultes considèrent la nomination des Gouverneurs généraux de Finlande comme la preuve que le Gouvernement Russe comptait même après la grande révolution, la Finlande comme une province, puisqu'il continuait d'y nommer des Gouverneurs généraux. Mais la nomination des Gouverneurs généraux représentant l'Empire russe en Finlande, n'était pas un fait nouveau. L'institution existait sans interruption depuis 1809 et ceci même prouve qu'elle n'était pas contraire à la notion de l'indépendance intérieure de la nation finlandaise.

Ainsi les erreurs s'accumulent. Ce n'est pas sur une construction juridique composée sur des matériaux aussi insuffisants que peut se baser, avec l'autorité qu'elle mérite, devant le monde, une décision du Conseil de la Société des Nations.

Vainement les juristes essaient-ils de nier que la Finlande soit dans l'Empire Russe une unite politique distincte. La vérité est que la Finlande est entrée dans l'Empire Russe en 1809 comme un Grand-Duché particulier et avec ses limites spéciales, que dans ces limites se trouvaient les Iles d'Aland, et qu'au moment où l'indépendance finlandaise a été reconnue, tant par la Russie que par les Puissances, elle l'a été non pas avec un statut territorial incertain, mais avec une base territoriale, déterminee par les limites constantes de 1809 à 1917 (En y ajoutant les territoires qui, déjà cédés à la Russie antérieurement à 1809 par les Traites de 1721 et de 1743 ont été réincorporés à la Finlande par ukase du Tzar du 23 décembre 1811).

III

Par un raisonnement des plus hardis, pour ne pas dire plus, les juristes se sont efforcés de demontrer que l'Archipel d'Aland, quelle qu'eût éte sa situation juridique, sous la souveraineté suedoise où ils faisaient partie du district finlandais d'Abo, puis dans l'Etat de Finlande pendant que celui-ci faisait partie de l'Empire de Russie, n'en avait pas moins, tant en 1809, au moment de la separation de la Finlande d'avec la Suède, qu'en 1917 au moment de la séparation de la Suède d'avec la Russie, disjoint son sort de celui de la Finlande. en 1809, en restant incorporé à la Suède plus longtemps que la Finlande, en 1917 en procedant, par rapport à la Russie, à une séparation antérieure a celle de la Finlande elle-même.

Ce sont là, pour la décision des juristes, des constatations de faits d'une importance capitale. L'une et l'autre sont manifestement inexactes.

En ce qui concerne la première information, ou les Jurisconsultes sont formels (page 17) « La réunion des îles ne se fit pas de la même manière, disent-ils, que celle de la Finlande continentale », les faits protestent manifestement contre leur assertion. « La population des Iles d'Aland, disent les Jurisconsultes, refusa de se détacher de la Suède elle fit de grands efforts pour chasser les troupes russes des îles elle réussit même à les tenir éloignees assez longtemps et elle ne se résigna au changement de patrie et de souverain qu'après la cession de son territoire par son Roi dans le Traite du 17 septembre... La Finlande faisait déjà partie de l'Empire Russe avant que les îles d'Aland y fussent rattachees. »

nationality owing to the fact that Finland, although in domestic affairs a nation, was in foreign affairs represented abroad by the Russian Empire, of which it formed an integral part. But the other members of the Finnish Senate were all supposed to be of Finnish nationality, and even at the worst moment of the Russianisation the majority of them were still of Finnish nationality. Mere provinces have never therefore treated Finland as a mere province. The mistake of the Jurists in this matter is an important one.

It is much to be regretted that the evidence placed at their disposal does not permit them to enter into all the phases of the evolution of the Finnish question from 1899 to 1917. This is admittedly a complicated matter, but out of it rise principles which may be fairly clearly recognised. It is with regret that we note on page 12 that the Jurists believe that the attacks upon Finnish liberty have been constantly maintained by the Russian Government since 1899, whereas in 1905 these attacks were suspended, and for some time the Constitution was respected.

On the other hand, the Jurists do not seem to have noticed that in 1917, after the Great Revolution, the Government of Prince Lvow re-established the Constitution, and Kerensky's Government even extended the freedom of the Finnish nation in a remarkable provision which went beyond the terms of the Constitution.

To state that the Russian Government always treated Finland in the same manner from 1899 to 1917 is an error, and an error of fact.

Another error the Jurists are of opinion that the nomination of Governors-General of Finland is a proof that the Russian Government, even after the Great Revolution, regarded Finland as a province since it continued to appoint Governors-General. But the appointment of Governors-General, representing the Russian Empire in Finland, was not a new thing. Such a practice had continued without interruption since 1809, this also proves that it was not contrary to the idea of the domestic independence of the Finnish nation.

Errors are thus piled upon errors. It is not possible for a decision of the Council of the League of Nations, with all the authority which it should possess in the eyes of the world, to be based on a legal interpretation made up of such insufficient material.

In vain do the Jurists endeavour to deny that Finland is a distinct political unit within the Russian Empire. The truth is that Finland entered the Russian Empire in 1809 as an independent Grand-Duchy with its own frontiers, that within these frontiers were included the Aaland Islands, and that as soon as Finnish independence was recognised both by Russia and by the Powers, it was recognised not with any uncertain territorial status, but with frontiers fixed by the boundaries which remained unchanged from 1809 to 1917. (Adding thereto the territory which had already been ceded to Russia prior to 1809, by the Treaties of 1721 and 1743, and was restored to Finland by Ukase of the Czar on December 23rd, 1811).

III.

By an argument which is, to say the least of it, extremely bold, the Jurists have attempted to prove that the Aaland Archipelago — whatever its legal status may have been under Swedish sovereignty when it formed part of the Finnish district of Abo and later in the State of Finland, when the latter formed part of the Russian Empire — had, none the less, separated itself from Finland both in 1809, at the moment of the separation of Finland and Sweden, and in 1917 at the moment of the separation of Finland and Russia, in 1809, by remaining incorporated with Sweden longer than Finland did in 1917 by proceeding, in its relations with Russia, to a separation which took place before that of Finland itself.

These statements of facts are of the first importance so far as the legal position is concerned. Both of them are manifestly inaccurate.

With regard to the first statement, where the Jurists are explicit (page 17) "The Union of the Aaland Islands was not carried out in the same way as that of Continental Finland." The facts are clearly at variance with their assertion. "The population of the Aaland Islands" say the Jurists "refused to be separated from Sweden, they made great efforts to drive the Russian troops from the Islands they even succeeded in keeping them at a distance for a considerable time, and they only resigned themselves to the change of sovereign and nationality after the territory had been ceded by their King in the Treaty of the September 17th. Finland was already part of the Russian Empire before the Aaland Islands were annexed to it."

Ces constatations sont matériellement inexactes. L acceptation par la Finlande de l'Empereur Alexandre 1er comme Grand Duc à la Diète de Borgo, à la suite du détrônement du Roi de Suède à Stockholm, le 13 mars, et de l'armistice suédo-russe du 21 mars, est du 29 mars 1809. A cette date l'archipel, où des insurrections de paysans avaient en effet éclate contre les troupes russes en mai 1808, avait été définitivement repris, du 10 au 13 mars 1809 par l'armée russe qui y était entree sans résistance. Quand la Finlande, à la Diète de Borgo, reconnut avant tout traite de paix, le Tsar comme Grand-Duc, l'autorité russe était aussi fortement assise sur Aland qu'elle pouvait l'être sur n'importe quelle autre partie du territoire finlandais. Ce n'est pas, comme les juristes le disent, après la Diète de Borgo que la population des Iles Aland s'efforça de chasser les troupes russes des Îles et reussit même à les tenir éloignées c'était un an auparavant. Les Jurisconsultes continuent en affirmant que la population ne se resigna à ce changement de patrie et de souverain « qu'après la cession de son territoire par son Roi dans le Traite du 17 septembre ». Il n'y eut pas de cession du territoire d'Aland distincte de la cession du territoire finlandais. L'archipel d'Aland avait, avant le traité du 17 septembre, accepté le sort de la Finlande, en élisant un député, dont les pleins pouvoirs sont datés du 3 mai 1809 et arrivèrent à la Diète de Borgo le 17 mai suivant (la clôture de la Diète n'eut lieu que le 19 juillet suivant). Si, d'ailleurs, ces pouvoirs sont datés du 3 mai et sont arrivés le 17 c'est que du mois de mars au mois de mai, les communications entre les Îles et la Finlande deviennent extrêmement difficiles pour cette raison qu'on ne peut pas, comme pendant l'hiver, passer sur la glace et qu'on ne peut pas encore, comme pendant l'été, naviguer.

L absence de brise-glaces ne permettait pas alors la navigation comme ils le permettent aujourd'hui. Ainsi cette différence de date, d'ailleurs très légère, s'explique par des circonstances materielles, nullement par la volonté de la population d'Aland exprimée d'une manière distincte du reste de la Finlande. Il est bien vrai que la Suède renonçait plus difficilement à la perte des Iles d'Aland qu'à celle du reste de la Finlande. C'est la raison pour laquelle, bien que les Jurisconsultes n'en parlent pas (mais nous ne voulons pas laisser ce fait sous silence) un prêtre alandais, Hambraeus, fut, par une decision spéciale du Régent, appele à prendre part aux travaux du Riksdag suédois. Mais ce prêtre alandais dont le départ des îles tenait précisément à ce que son attitude était desavouée par la population, ne devait sa désignation qu'à l'autorisation spéciale du Régent Le procès-verbal de l'Assemblée du Clergé du Riksdag suédois du 4 mai 1809, paragraphe 10, annonçant la nomination (et non l'élection) de M. Hambraeus déclare que la population de l'archipel était dans l'impossibilité de se faire représenter au Riksdag. Nous ne pouvons comprendre, en présence de ces faits qui appartiennent à l'Histoire, comment on peut écrire que « la Finlande faisait déjà partie de l'Empire russe avant que les îles d'Aland y fussent rattachées » (page 18).

Pas davantage il ne saurait être question d'admettre, comme les juristes l'ont cependant soutenu, que la population des Iles d'Aland ait fait entendre son désir d'être séparée de la Russie d'une manière indépendante de la Finlande et avant même la separation de la Finlande d'avec la Russie.

Le 20 aout 1917, disent les juristes (page 21), des délégués des Communes des Îles se réunirent à Finström et résolurent de porter à la connaissance du Gouvernement et du parlement Suédois que, pour des raisons spéciales, la population alandaise désirait vivement la réincorporation des Îles au Royaume de Suède. Mais, en transcrivant ici, purement et simplement, l'annexe 4 du mémoire suédois du 2 juillet 1920 dans la question d'Aland, les juristes ont négligé, comme d'ailleurs le memoire suédois, le paragraphe premier de ce texte qui meritait d'être rappelé. Si l'on reconstitue ce document dans son integrité, on s'aperçoit que les communes dont il est ainsi question ne représentaient que 8 paroisses sur 16. Si, d'autre part, on étend le champ des investigations, on s'aperçoit que la question de la réunion des Iles à la Suède ne figure même pas à l'ordre du jour, et que la decision resta sans publicité, même dans l'archipel d'Aland, jusqu'au jour où, brusquement, à la fin de novembre 1917, la presse suedoise en fit, avant même la presse alandaise, la révélation « Il est assez bizarre, constate le Bulletin confidentiel français du Ministère de la Guerre et des Affaires Etrangères, à la date du 17 janvier 1918, dans son dépouillement de la presse scandinave, que les journaux suédois aient attendu trois mois pour en saisir l'opinion de leur pays. »

Ce défaut de publicité contraste avec l'attitude nette, ouverte, qui toujours est celle des populations, qui, mécontentes de leur sort, désirent un changement de souveraineté. D'ailleurs, en exprimant ce désir d'un rattachement à la Suède, les Alandais prennent position contre la Finlande

These statements are essentially inaccurate. The Emperor Alexander I was accepted as Grand Duke by Finland at the Diet of Borgo, on March 29th, 1809, as a result of the dethronement of the King of Sweden at Stockholm on March 13th and of the Swedish-Russian Armistice on March 21st. At this date, the Archipelago, in which peasant risings had broken out against the Russian troops in May 1808, had been finally recaptured between March 10th and 13th, 1809, by the Russian Army which had entered it without resistance. When Finland, at the Diet of Borgo, recognised the Tzar as Grand Duke, before any Peace Treaty, Russian authority was as strongly established in the Aaland Islands as it could be in any other part of Finnish territory. It was not, as the Jurists say after the Diet of Borgo that the population of the Aaland Islands endeavoured to drive out the Russian troops from the Islands and even managed to keep them at a distance it was a year previously The Jurists go on to assert that the population only resigned itself to this change of country and of Sovereign "after the cession of its territory by its King in the Treaty of September 17th." There was no cession of Aaland territory as distinct from the cession of Finnish territory The Aaland Archipelago, before the Treaty of September 17th, had accepted the fate of Finland, by electing a Deputy, whose credentials are dated May 3rd, 1809, and were presented at the Diet of Borgo on May 17th following (the Diet was only dissolved on July 19th following). It is true that these credentials are dated May 3rd and were presented on the 17th the reason is that from the month of March to the month of May communications between the Islands and Finland become extremely difficult, because one cannot, as in winter, travel across the ice, and it is impossible to go by water, as in summer.

The absence of ice-breakers did not then permit of navigation, which has now become possible. Thus this difference in date, which is very slight, is due to material circumstances, and not at all to the expression of any desire on the part of the population of the Aaland Islands, as distinct from the rest of Finland. It is quite true that Sweden gave up possession of the Aaland Islands with greater reluctance than the rest of Finland. For this reason, though the Jurists do not mention it — and we cannot allow this fact to be passed over in silence — an Aaland pastor named Hambraeus was, by special decision of the Regent, summoned to take part in the deliberations of the Swedish Riksdag. This pastor, however, whose departure from the Islands was prompted by the fact that his attitude was disavowed by the population, owed his appointment only to a special authority from the Regent. The Minutes of the Assembly of Clergy of the Swedish Riksdag for May 4th, 1809, paragraph 10, in which the appointment (not election) of the Rev Hambraeus was announced, state that it was impossible for the population of the Archipelago to be represented in the Riksdag. We fail to understand how, in face of these facts, which belong to history, it has been found possible to write that "Finland already formed part of the Russian Empire before the Aaland Isles were joined to it." (Page 18.)

Nor can it be admitted, though the Jurists have maintained it, that the population of the Aaland Islands had expressed their desire to be separated from Russia, independently of Finland, and even before the actual separation of Finland from Russia.

On August 20th, 1917, according to the Jurists (page 21), delegates from the Communes of the Islands met at Finström and resolved to inform the Government and Parliament of Sweden that, for special reasons, the population of the Aaland Islands earnestly desired to be once more joined to the Kingdom of Sweden. The Jurists, however, in simply copying the text of Annex No. 4 of the Swedish Note of July 2nd, 1920, concerning the Aaland question, have neglected — as also does the Swedish Note — the first paragraph of this text, which ought to have been referred to. If this document be completely reproduced, it will be seen that the Communes in question only represented 8 out of 16 parishes. If, on the other hand, the scope of the investigation be extended, it will be seen that the question of the reunion of the Islands to Sweden was not even included on the agenda, and that the decision was not made public even in the Aaland Archipelago until the Swedish Press, before the Aaland Island Press, revealed it quite suddenly, at the end of November, 1917. The Confidential French Bulletin of the Ministry of War and Foreign Affairs, in its summary of the Scandinavian Press, on January 17th, 1918, remarks "It is somewhat strange that the Swedish papers have waited three months before making an announcement to the general public of their country."

This lack of publicity is in sharp contrast to the frank and open attitude always adopted by populations which are discontented with their lot and anxious for a change of sovereignty Further, the Aaland Islanders, by this expression of a desire to be united to Sweden, adopt a line

non contre la Russie, et lorsque la Suède, prenant leur cause en main, entend les soutenir, ce n'est pas à la Russie, c'est à la Finlande qu'elle s'adresse pour faire statuer sur le régime des Iles d'Aland. En tout cas, on chercherait vainement, le 27 décembre, la pièce à laquelle les juristes font allusion quand ils disent que la résolution prise le 20 aout par les délégués des Assemblées communales des Iles aurait éte, à cette date, transmise au Gouvernement Suédois. Les juristes continuent. « Au moment où la Finlande se déclarait indépendante, les Alandais préparaient un plébiscite en faveur de leur rattachement à la Suède. Ce plébiscite eut lieu le 31 décembre, plus de 7.000 Alandais exprimèrent le desir de voir les Iles d'Aland réunies au royaume de Suède. » Mais ce plébiscite s'est fait, et les jurisconsultes omettent de s expliquer sur ce point, dans des conditions de fait sans précedent dans l'histoire des plébiscites. Des signatures furent recueillies à domicile, l'annexe 3 du mémoire suédois du 2 juillet 1920 le constate toute personne majeure devait être mise en demeure d'apposer sa signature sur un registre « *la cueillette des signatures* s'est étendue aux Iles principales d'Aland ». On eut aimé connaître le sentiment des jurisconsultes sur la valeur, comme expression du droit des suffrages, *d'une cueillette des signatures à domicile.* Que dirait-on d'élections intérieures, au parlement par exemple, qui se poursuivraient dans ces circonstances, et comment pourrait-on, d'apres un tel critérium, dégager l'expression de la volonté populaire, dans la circonstance plus importante encore du choix d'une patrie ?

Nous ne saurions trop énergiquement protester contre l'affirmation des jurisconsultes, d'après lesquels la population des Iles d'Aland aurait manifesté, dès le début de la révolution russe, la volonté de se rattacher à la Suede, suivant ce qu'on peut regarder « comme un vœu *unanime, sincère et constant* ».

Il n'y a pas de vœu unanime d'une consultation de huit paroisses sur seize. Il n'y a pas de vœu sincère d'une cueillette de signatures. Enfin, il n'y a pas de vœu constant si l'on observe que les Iles d'Aland n'ont pas hésité à prendre part aux élections qui ont eu lieu en 1917, en vue de constituer la Diète qui devait proclamer l'indépendance de la Finlande, ainsi que la Diète suivante (mars 1919). Le nombre des Alandais qui participèrent aux premières élections législatives des 1er et 2 octobre 1917 était de 67,7 % du nombre total des inscrits.

Le nombre des participants aux élections finlandaises des 1er et 2 mars 1919 était de 48 % pour l'archipel mais, vu le grand nombre d'électeurs absents des îles, ainsi qu'en témoigne le mémoire suédois du 2 juillet 1920 (page 11), la participation correspondait environ aux deux tiers de la population.

Un nom doit être ici prononce, celui de M. Sundblom. M. Sundblom avait été charge, le 20 aout 1917, par l'Assemblee de Finström, de porter à la Suède le désir de l'archipel d'Aland de lui être réunie, vu la position de l'archipel entre la Finlande et la Suède et son importance stratégique. Or, M. Sundblom a participe, en 1917 et en 1918, aux travaux de la Diète. Vainement a-t-il tente de soutenir qu'il n'y penétrait qu'avec la pensée de faire reconnaître par la Finlande la liberté des îles et leur droit, en vertu des principes du Président Wilson, de se rattacher à la Suède. Même a supposer que telle fût sa veritable pensée, il en résulterait que, pour lui, ce n'était pas de la Russie, mais de la Finlande, contrairement à l'affirmation des juristes, que se détachaient les Iles d'Aland.

Le mouvement des Iles d'Aland n'est pas, quoi qu'en prétendent les jurisconsultes, un mouvement d'autonomie qui se manifeste au regard de la Russie parallèlement à l'émancipation de la Finlande de cette même Russie, mais un sous-mouvement d'indépendance qui, à l'intérieur de la Finlande, vient se manifester, après que la Finlande, dans son ensemble (Aland compris), s'est séparée de la Russie.

Cette simple constatation du sentiment alandais suffirait à renier ici toute la thèse des jurisconsultes. Mais, indépendamment de cette constatation, nous tenons à en faire une autre qui montrera que le sentiment de la population alandaise était, de 1917 à 1918, un sentiment très net de patriotisme finlandais. Pour ne prendre qu'un exemple, le 25 mai 1918, M. Sundblom, à la Diète, s'exprimait ainsi « Pour moi, qui peux me considérer au nombre minime des navigateurs et des armateurs finlandais, j'estime qu'il est de mon droit et de mon devoir de donner mon avis dans la question du drapeau commercial de la Finlande. Présentant un télégramme des armateurs d'Abo, ainsi qu'un télégramme de l'Association des armateurs alandais, relativement aux couleurs du nouveau pavillon, il s'écriait « Il s'agit de choisir pour toujours les couleurs du drapeau de la libre Finlande... Il faut se souvenir que nos couleurs historiques étaient le rouge et le

of action directed against Finland and not against Russia, and when Sweden, taking up their cause, undertakes to support them, it is to Finland, and not to Russia, that she would apply for the purpose of obtaining a decision with regard to the Aaland Islands question. In any case, it will be useless to search under date December 27th for the document referred to by the Jurists when they state that the Resolution adopted on August 20th by the delegates of the Communal Assemblies of the Islands, had been transmitted to the Swedish Government of this date. The Jurists go on to say that, when Finland declared her independence, the Aaland Islanders were preparing a plebiscite in favour of reunion with Sweden. This plebiscite took place on December 31st; more than 7,000 Islanders expressed the wish that the Islands should be reunited to the Kingdom of Sweden. This plebiscite, however, took place under conditions quite without precedent in the history of plebiscites, and the Jurists omit to refer to this point. Signatures were collected by house-to-house visits; Annex 3 of the Swedish Note of July 2nd, 1920, admits this "every adult was to be given the opportunity of placing his signature upon a register, *the system of collection of signatures* was used in the principal Islands." One would be glad to know the opinion of the Jurists with regard to the value of a *house-to-house collection of signatures* as an expression of the right to vote. What would be thought of elections — parliamentary elections for instance — held on these lines, how can a text of this kind elicit an expression of popular opinion on the still more important question of the choice of the country to which one wishes to belong?

We cannot protest too strongly against the statement of the Jurists that the population of the Aaland Islands had from the commencement of the Russian revolution shown a desire to be united to Sweden—"a desire that may be regarded as *unanimous, sincere and constant.*"

A consultation of 8 parishes out of 16 cannot be considered as constituting a unanimous opinion. A collection of signatures does not express a sincere desire. Lastly, the constancy of the desire is refuted by the fact that the Aaland Islands did not hesitate to take part in the elections which took place in 1917 for the purpose of forming the Diet which was to proclaim Finnish independence, and also the following Diet (March, 1919). The number of Islanders who took part in the first legislative elections of October 1st and 2nd, 1917, amounted to 67.7 % of the total number on the register.

The number who took part in the Finnish elections of March 1st and 2nd, 1919, amounted to 48 % for the Archipelago but, considering the large number of electors who were absent from the islands — as is borne out by the Swedish Note of July 2nd, 1920 (page 11) — this percentage corresponded to about two-thirds of the population.

And here we must mention the name of M. Sundblom. M. Sundblom was, on August 20th, 1917 entrusted by the Finström Assembly with the task of informing Sweden of the wish of the Aaland Archipelago to be reunited to her on account of the position of the Archipelago between Sweden and Finland, and also of its strategic importance. M. Sundblom also took part in the deliberations of the Diet in 1917 and 1918. He has vainly tried to prove that he only attended the Diet with the intention of making Finland recognise the freedom of the Islands, and their right, in accordance with President Wilson's principles, to be united to Sweden. Even supposing that such was his real intention, it would follow that, in his opinion, it was not Russia, but Finland — in contrast to the Jurists' statement — from which the Aaland Islands were to be separated.

The movement in the Aaland Islands is not — whatever the Jurists may hold — a movement towards autonomy the attitude of which towards Russia is similar to that of Finland in her emancipation from Russia but a part only of the movement towards independence which appeared within Finland, after Finland as a whole (including the Aaland Islands) had been separated from Russia.

This simple indication as to the true feelings of the Aaland Islanders would suffice to refute the entire thesis of the Jurists. But, in addition, we would place on record another fact which will show that the population of the Aaland Islands was, from 1917 to 1918, strongly pro-Finnish in sentiment. To take only one example, on May 25th, 1918, M. Sundblom expressed himself in the Diet as follows "In my capacity as one of the few Finnish shipowners, I consider it my duty and my right to state my views on the question of Finland's commercial flag." Producing a telegram from the shipowners of Abo, and another from the Association of Aaland shipowners with regard to the colours of the new flag, he cried "We have to choose for all time colours for the flag of a free Finland... We must remember that our historic colours were red and yellow, because these colours figure on our arms, and are associated with traditions far more ancient than those attaching to the blue and white." Author of several draft laws relating to education and economic questions,

jaune, car ces couleurs se trouvent dans les armes de la Finlande et ont des traditions beaucoup plus anciennes que le bleu et le blanc ». Auteur de plusieurs projets de lois concernant l'instruction publique, les questions économiques, l'élu de l'archipel d'Aland ne faisait donc nullement — les paroles précitées le prouvent — figure de protestataire a la Diète finlandaise. Après avoir rendu visite le 9 novembre 1918 au Président du Conseil (et non pas, comme il l'affirme dans le document présenté le 10 aout 1920 à la Commission des juristes, au mois de décembre), il demeura à la Diète jusqu'au 17 septembre 1918, encore que, d'après lui, cette visite au Président lui eût montré qu'il n'y a pas à attendre de la Finlande l'émancipation spontanée des Iles d'Aland. Mais, quand il quitta la Diète le 17 décembre 1918, il ne le fit pas en évoquant publiquement le désir des Iles d'Aland de se séparer de la Finlande ce fut sans aucune espèce de protestation, en demandant simplement l'autorisation de s'absenter, et en produisant à l'appui un certificat médical du 28 décembre 1918, constatant qu'il était, pour six semaines, inapte à tout travail intellectuel, certificat que nous tenons à la disposition du Conseil.

Est-ce ainsi que se manifestent dans l'histoire des desirs de separation, lorsqu'ils sont, comme l'affirment les jurisconsultes, en sortant ici du cadre de la question posée, l'expression « d'un vœu unanime, sincère et constant » ? Et, puisque certains rapprochements ont été faits, puisqu'on a, du côté suédois, parlé d'une Alsace-Lorraine alandaise, peut-on comparer l'attitude de M. Sundblom, chef de l'activité suédoise d'Aland à la Diète finlandaise, à l'attitude si nette, si catégorique, si franchement déclarée des députés protestataires de l'Alsace et de la Lorraine au Reichstag allemand ?

En droit comme en fait, c'est à tort, et manifestement a tort, que les jurisconsultes ont cru pouvoir affirmer

1° Qu'en 1809, l'Archipel d'Aland s'est détaché de la Finlande plus tard que le reste de la Finlande

2° Qu'en 1917 le désir d'indépendance de l'Archipel d'Aland se manifestait d'une manière séparée, exclusive, avant même que ne se manifestât le sentiment de l'indépendance de la Finlande vis-à-vis de la Russie.

Enfin, c'est à tort, manifestement a tort, que les juristes, en recherchant la volonté des Alandais, ont déclaré que leur vœu de se réunir à la Suède était unanimement sincère et constant, de 1917 à 1918, alors qu'ils élisaient à la Diète finlandaise un député qui, bien qu'agitateur suédois dans les Iles, se présentait à la Diète comme un partisan déclaré de la patrie finlandaise, un défenseur du drapeau finlandais, et, pour prendre sa qualité de patriote finlandais, s'appuyait sur un télégramme de l'Assemblée des armateurs alandais.

IV

Après ces constatations, il semble bien inutile de suivre l'avis consultatif en ce qui concerne les événements militaires. On se demande comment des jurisconsultes ont pu considérer que, par le fait des interventions militaires diverses, russe, suédoise, allemande, qui se sont succédées sur le territoire de l'Archipel apres l'indépendance de la Finlande, de véritables *carences de souveraineté* (page 26) aient pu se produire sur ces îles. L'occupation militaire, à quelque titre qu'elle ait eu lieu, n'a jamais entraîné de déplacement de souveraineté.

Tant que le pouvoir civil garde son autorité sur le territoire, il n'y a même pas, en fait, carence de pouvoirs. A plus forte raison puisque la souveraineté est une notion de droit, et que l'occupation même ne suffit pas à suspendre, il n'y avait pas de carence de souveraineté.

Les jurisconsultes n'ont jamais contesté que le pouvoir civil de la Finlande se soit continuellement et normalement exercé. Même pendant qu'il y avait encore des troupes suédoises dans l'Ile, le Préfet, nommé spécialement pour Aland (jusqu'alors réuni à la circonscription territoriale d'Abo), procéda à l'expulsion d'un journaliste suédois ce qui est la marque la plus manifeste d'un maintien de souveraineté.

V

En ce qui concerne les rapports de la Finlande et de la Russie, les jurisconsultes conviennent que le Gouvernement des Soviets n'a mis aucune condition à la reconnaissance de la Finlande.

the elected representative of the Aaland Archipelago did not, however, appear in the Finnish Diet as a protesting deputy, as is proved by the words just quoted. After having paid a visit to the Prime Minister on November 9th, 1918 (and not, as he asserted in the document submitted, on August 10th, 1920, to the Committee of Jurists in December) he remained in the Diet until September 17th, 1918, although, on his own admission, his visit to the Prime Minister had shown him that it was useless to hope that Finland would of her own accord grant independence to the Aaland Islands. Moreover, when, on December 17th, 1918, he left the Diet, he did not couple this action with a public reference to the desire of the Aaland Islands to be separated from Finland, but went without uttering any protest, and only asked for permission to absent himself, producing a medical certificate, dated December 28th, 1918, stating that he would be unfit for any intellectual work for six weeks. This certificate we hold at the disposal of the Council.

Desires for separation, when, in the word of the Jurists (who here go beyond the scope of their enquiry), they are the expression of "an unanimous, sincere and constant prayer," were not shown in this way in the past nor, in view of certain reproaches which have been made, and since on the Swedish side reference has been made to an Aaland Alsace-Lorraine, can the attitude of M. Sundblom, the leader in the Diet of the Swedish faction in Aaland, be compared to the clear, categorical, and openly-expressed attitude of the protesting deputies of Alsace-Lorraine in the Reichstag.

Legally, as well as actually, the Jurists are clearly wrong when they attempt to show

(1) That in 1809 the Aaland Archipelago was separated from Finland later than the rest of Finland.

(2) That in 1917 the desire for independence on the part of the Aaland Archipelago was shown in a special and exclusive way even before Finland showed signs of her desire to claim her independence from Russia.

Finally the Jurists are clearly wrong again when, in endeavouring to discover the wishes of the Aalanders, they declare that their desire to be united with Sweden was, from 1917 to 1918, unanimous, sincere and constant, in spite of the fact that they elected to the Finnish Diet a Deputy who, although a Swedish agitator in the islands, appeared in the Diet as an avowed partisan of the mother-country, Finland, and a defender of the Finnish flag, and who in, order to prove himself a Finnish patriot, appealed to a telegram sent by an Assembly of Finnish shipowners.

IV

It is thus useless to follow the Jurists' opinion with regard to military events. It seems incredible that Jurists should have thought that the fact that various military interventions — Russian, Swedish, German — have successively taken place on the territory of the Archipelago since the declaration of Finnish independence should have given rise to actual *abeyance of sovereignty* (page 26) over these islands. Military occupation, carried out under no matter what pretext, has never entailed a displacement of sovereignty.

So long as the civil power retains its authority over the territory, there is, in actual fact, not even an abeyance of authority. Still more then — since sovereignty is a legal conception, and since it cannot be suspended even through the occupation of the country by another Power — there was no abeyance of sovereignty.

The jurists have never disputed the fact that the civil power in Finland has been carried on continuously and normally. Even while there were still Swedish troops in the island, the Prefect who had been specially appointed for Aaland (which had hitherto been joined to the territorial district of Abo) proceeded to expel a Swedish journalist, this is a signal proof of the maintenance of sovereignty.

V

With regard to the relations of Finland and Russia, the Jurists agree that the Soviet Government imposed no conditions with regard to the recognition of Finland.

Dans ces conditions, c'est la Finlande tout entière, telle qu'elle se comportait dans l'Empire russe de 1899 à 1917 qui se trouvait, par rapport au Gouvernement des Soviets, former l'Etat nouveau de Finlande.

Les deux radios du 3 octobre 1919 et du 1er juillet 1920, motivés par les prétentions de la Suède, sur les Iles d'Aland, ne signifient nullement (il suffit de les lire) qu'après avoir reconnu dans son intégrité territoriale ancienne l'Etat nouveau de la Finlande, le Gouvernement soviétique ne le reconnaît plus qu'abstraction faite de l'Archipel d'Aland ils signifient simplement que si la Finlande n est pas en état de retenir, en dehors de la souveraineté suédoise, l'Archipel d'Aland, la Russie réserve tous droits sur elle. Les jurisconsultes (page 29) l'ont expressément déclaré « Le Gouvernement des Soviets, en reconnaissant la Finlande, a abdiqué tous les droits de la Russie sur cette partie de l'ancien Empire. »

Dans ces conditions, on ne peut, d'une déclaration soviétique, rien deduire en contradiction des droits de souveraineté actuels de la Finlande sur l'Archipel d'Aland. L'exposé de la délégation suédoise devant le Conseil Suprême, le 4 avril 1919 (annexe 17 du mémoire suédois du 2 juillet 1920) dit, en toutes lettres

> « Le Gouvernement de l'Amiral Koltchak qui, de fait, a reconnu l'independance de la Finlande, peut difficilement revendiquer la souveraineté sur les Iles d'Aland, lesquelles, une fois la Finlande indépendante, n'ont aucun rapport direct avec l'Empire russe. »

VI

Les déclarations de M. Clemenceau à la Chambre française, lors de la discussion du Traité de Paix, dont les jurisconsultes ont cru devoir faire état (page 14) n'ont, dans la question à eux posée par le Conseil, aucune valeur. Car, si M. Clemenceau déclare que la France « est prête à rendre service a la Suède, » sans d'ailleurs s'expliquer sur la manière dont ce service pourrait être rendu, il ne nie nullement (ce qui est la seule question à résoudre par les jurisconsultes) que la Finlande avait, au moment même où il parlait, la souveraineté des Iles d'Aland. Quant à prétendre interpréter la reconnaissance française, du 4 janvier 1918, comme s'appliquant à la Finlande, sans y comprendre les Iles d'Aland, ainsi que le soutiennent les jurisconsultes, c'est une interprétation manifestement inexacte de la pensee française.

Contre cette allegation des jurisconsultes, le représentant de la Finlande élève le plus formel démenti. Emu de l'interprétation grossissante que la presse suédoise avait, au lendemain de la declaration de M. Clemenceau, donnée aux paroles du Président du Conseil français, le Ministre de Finlande à Paris, qui est aujourd'hui le représentant de la Finlande dans l'affaire des Iles d'Aland, s'est rendu, d'ordre de son Gouvernemnet, au Quai d'Orsay pour demander si les paroles de M. Clemenceau devaient être considérées, ainsi que la presse suédoise le prétendait, comme une volonté d'attribution des Iles d'Aland à la Suède.

Tant au Secrétariat Général de la Conférence qu'auprès de la Direction politique, unanimes a déclarer que la presse suedoise avait mal interprété la pensée de M. Clemenceau, il fut répondu au Ministre de Finlande que les paroles de M. Clemenceau ne pouvaient exprimer, en leurs termes d'ailleurs vagues, qu'une opinion personnelle qui n'était capable, à aucun degre, d'engager la Conférence à un règlement à venir. A plus forte raison ne pouvait-elle restreindre, quant à la souveraineté actuelle de la Finlande, les termes de la reconnaissance intervenue, sans condition ni réserve, le 4 janvier 1918.

Les jurisconsultes, tout en faisant allusion à cette déclaration, n'en reproduisent pas les termes ils se bornent a dire que le Président du Conseil a publiquement déclaré le 29 septembre (lisez 25 septembre 1918) qu'il considérait la question des Iles d'Aland comme rentrant dans la sphère d'activite de la Conférence de la Paix. Quoi qu'on puisse penser de son bien-fondé, lorsqu'il s'agit d'étendre a des neutres une compétence qui normalement ne s'applique qu'à des belligérants, et toute réserve expressement faite sur une telle extension, cette déclaration serait, en tout cas, sans valeur pour la solution de la question qui nous occupe les travaux de la Conférence démontrent qu'une question, qui soulève à propos du passage d'un territoire d'une souveraineté nettement établie à une autre souveraineté, rentre dans la sphère d'activité de la Conférence de

In these circumstances it was the whole of Finland, as it existed in the Russian Empire from 1899 to 1917 which, by agreement with the Soviet Government, formed the new State of Finland.

The two radiograms of October 3rd, 1919, and July 1st, 1920, which originated by reason of Sweden's claim to the Aaland Islands, in no way imply (it is only necessary to read them for this to become evident) that, after having recognised the new State of Finland in its territorial integrity, the Soviet Government now only recognises it *minus* the Aaland Archipelago, they simply mean that, should Finland not be in a position to keep the Aaland Archipelago free from Swedish sovereignty Russia will reserve all her rights over the Archipelago. The Jurists expressly stated (page 29) "The Soviet Government, by recognising Finland, renounced all Russian claims to this part of the former Empire."

In these circumstances nothing can be inferred from any declaration on the part of the Soviets denying the existing Finnish rights of sovereignty over the Aaland Archipelago. The statement which the Swedish Delegation made to the Supreme Council on April 4th, 1919 (Annex 17 of the Swedish Memorandum of July 2nd, 1920), says

> "The Government of Admiral Koltchak, which recognised the *de facto* independence of Finland, can hardly claim sovereignty over the Aaland Islands, which, once Finland has become independent, cease to be directly connected with the Russian Empire."

VI.

The declarations which M. Clemenceau made in the French Chamber at the time of the discussion of the Treaty of Peace, and which the Jurists have seen fit to cite (page 14), are of no value in connection with the question put to them by the Council. For, if M. Clemenceau declares that France "is prepared to offer her services to Sweden," but without explaining in what way he in no way denies (and this is the only question which the Jurists have to settle) that Finland, at the moment when he was speaking, possessed sovereignty over the Aaland Islands. As for attempting to interpret the French recognition of January 4th, 1918, as applying to Finland exclusive of the Aaland Islands — which is what the Jurists maintain — that is an obviously inaccurate interpretation of the French intention.

This allegation on the part of the Jurists has been explicitly denied by the representative of Finland. Aroused by the exaggerated interpretation, which, after M. Clemenceau's statement, had been placed by the Swedish Press on the words of the President of the French Council, the Finnish Minister in Paris, who is now the Finnish representative in the Aaland Islands question, visited the Quai d'Orsay at the instance of his Government, to ask whether, as was claimed by the Swedish Press, M. Clemenceau's words were to be understood as expressing a desire to allocate the Aaland Islands to Sweden.

The Secretariat-General of the Conference and the Political Section were unanimous in declaring that the Swedish Press had wrongly interpreted M. Clemenceau's intention, and the reply given to the Swedish Minister was that M. Clemenceau's words, which in any case were vague, were merely the expression of a personal opinion and could in no may commit the Conference as regards any future settlement. They were even less able to limit the terms of the recognition of the present sovereignty of Finland, which was entered into unconditionally and unreservedly on January 4th, 1918.

The Jurists, while referring to this declaration, do not quote its terms; they confine themselves to saying that the French Premier publicly declared on September 29th (read September 25th, 1918) that he considered the question of the Aaland Islands as coming within the scope of the Peace Conference. Whatever view may be held as to the validity of this statement, when it is a question of extending to neutrals powers which are normally only allowed to belligerents, and due reservation being made as to such an extension, a declaration of this kind would in any case be valueless from the point of view of the solution of the question with which we are dealing, the work of the Conference has shown that a question which arises with regard to the transference of territory from one clearly-established sovereignty to another sovereignty comes within the scope of the Peace Conference it has often happened that it has detached territories from a sovereignty to which in

la Paix il lui est arrivé à maintes reprises de détacher des territoires à laquelle en droit positif ils appartiennent inévitablement. On ne saurait en induire que, pour le Gouvernement français, l'Archipel d'Aland n'était pas compris dans l'Etat finlandais, reconnu par la France.

VII

L avis consultatif présente d'une manière manifestement inexacte l'attitude de la Grande-Bretagne dans la question de la reconnaissance de la Finlande (pages 14 et 15).

« Le Gouvernement de la Grande-Bretagne, lui, n'a reconnu l'Etat finlandais que beaucoup plus tard, le 6 mai 1919. Il accompagnait, le lendemain, cette reconnaissance d'une note exprimant l'espoir que la Finlande ne refuserait en aucun cas d'accepter les décisions de la Conférence de la Paix, relatives a ces frontières. Et c'est seulement le 21 janvier 1920 qu'il a déclaré que sa reconnaissance était faite sans aucune réserve. »

Ce passage appelle les observations suivantes

1° La déclaration du 21 janvier 1920 ne constitue pas une reconnaissance nouvelle, plus complète que la première, mais une interprétation authentique du sens exact de la première reconnaissance donnée par le Foreign Office au Ministre de Finlande à Londres, M. Donner, sur la demande expresse qu'il lui en avait adressée, afin de couper court à des rumeurs tendancieuses.

2° Si, le 7 mai 1919, la Grande-Bretagne exprimait « l'espoir que la Finlande ne refuserait en aucun cas d'accepter les décisions de la Conférence de la Paix, relatives à ses frontières », ce n'était pas la limitation de la reconnaissance du 6 mai 1919, mais simplement une suggestion accompagnée d'un vœu.

3° Mais il y a plus, et c'est ici que l'erreur de l'avis consultatif est particulièrement lourde, en exprimant l'espoir que la Finlande ne refuserait pas d'accepter les décisions de la Conférence relatives à ses frontières. La Grande-Bretagne ne pensait pas à d'autres frontières que celles que la Finlande pouvait, un jour, se proposer de demander, par extension de ses anciennes frontières historiques, en revendiquant sur la Russie les territoires de Petchenga et de la Carélie orientale, mais la Grande-Bretagne n'entend nullement demander à la Finlande de vouloir se soumettre à quelques décisions que ce fussent, en ce qui concerne une restriction de son territoire historique, par une modification, non pas au regard de la Russie, mais au regard de la Suède. Cette disposition ne pouvait, dans ces conditions, trouver d'application à l'Archipel d'Aland. Pour éviter à cet égard toute équivoque et faire éclater sur ce point une indiscutable clarté, le Ministre de Finlande à Londres posa expressément au Foreign Office la question de savoir quel était le sens exact qu'il devait attribuer à cette formule. La réponse du Foreign Office, donnée sur cette démarche, par Lord Hardinge, fut qu'il ne s'agissait pas ici d'une restriction des frontières historiques de la Finlande et que, dès lors, rien dans cette espérance de voir la Finlande accepter la décision des Puissances ne s'applique à l'archipel d'Aland.

VIII

D'ailleurs, à quoi bon insister ? Ce ne sont pas seulement les Alandais qui, coopérant à la vie publique finlandaise, ont d'eux-mêmes reconnu que la Finlande exerçait la souveraineté dans leur territoire c'est le Gouvernement suédois lui-même qui en a fait l'aveu en demandant le 9 juillet 1920 au Conseil qu'il soit permis à la population alandaise de décider immédiatement, par plébiscite, si l'archipel d'Aland doit rester sous la souveraineté finlandaise ou être réintégré au Royaume de Suède, M. Branting a reconnu que l'archipel alandais est présentement sous la souveraineté finlandaise. Des lors, et d'après les principes mêmes que les juristes ont posés au début de leur avis consultatif, la question de savoir s'il doit rester sous cette souveraineté dépend de la juridiction exclusive de la Finlande.

Les réflexions faites sont celles d'un premier examen hâtif et incomplet et suggèrent au représentant de la Finlande le devoir de rappeler au Conseil les conditions générales dans lesquelles les juristes ont statue.

positive law they obviously belong. It could not be inferred from this that, in the view of the French Government, the Aaland Archipelago is not included in the Finnish State, which has been recognised by France.

VII.

The advisory opinion gives an inaccurate description of the attitude of Great Britain on the question of the recognition of Finland (pages 14 and 15).

"The Government of Great Britain only recognised Finland as a State much later — May 6th, 1919. On the following day it added to this recognition a Note expressing the hope that Finland would not refuse under any circumstances, to accept the decisions of the Peace Conference with reference to her frontiers. It was only on January 21st, 1920, that the British Government stated that its recognition was given without any representations whatever."

This passage calls for the following remarks —

(1) The Declaration of January 21st, 1920, does not constitute a new recognition, more complete than the first, but is an authentic interpretation of the exact meaning of the first recognition granted by the Foreign Office to the Finnish Minister in London, M. Donner, at the request expressly made by him in order to put an end to dangerous rumours.

(2) The fact that on May 7th, 1919, Great Britain expressed the hope "that Finland would, under no circumstances, refuse to accept the decisions of the Peace Conference, with regard to its frontiers," did not imply a limitation of the recognition of May 6th, 1919, but was simply a suggestion accompanied by a recommendation.

(3) Furthermore — and this is where the error in the Jurists' Report is particularly serious — when expressing a hope that Finland would not refuse to accept the decisions of the Conference with regard to its frontiers, Great Britain only had in mind those frontiers which Finland might, at some future date, decide to demand, as an extension of her old historic frontier, by claiming from Russia the territories of Petchenga and Eastern Karelia. Great Britain, however, had no intention of requiring that Finland should submit to any decisions whatsoever with regard to a restriction of her historic territory involving any change, not with regard to Russia, but with regard to Sweden. This provision could not, under these circumstances, be applied to the Aaland Archipelago. In order to avoid any confusion in this matter, and to clear up this point beyond dispute, the Finnish Minister in London expressly asked the Foreign Office to inform him what was the exact meaning that he should attribute to this text. The reply of the Foreign Office as made by Lord Hardinge was that there was no question here of a restriction of the historic frontiers of Finland, and that therefore the hope expressed that Finland would accept the decisions of the Powers did not apply to the Aaland Archipelago.

VIII.

But, indeed, why elaborate this matter further? Not only have the Aaland Islanders, by co-operating in Finnish public life, themselves recognised that Finland exercised the sovereignty in their territory; the Swedish Government itself has admitted it when M. Branting asked the Council on July 9th, 1920, that the Aaland population should be permitted to decide immediately by plebiscite, whether the Aaland Archipelago should remain under Finnish sovereignty or be reunited with the Kingdom of Sweden, he acknowledged that the Aaland Archipelago is at this moment under Finnish sovereignty. It follows, therefore, from the above, and from the principles that the Jurists laid down at the beginning of their advisory Report, that the question as to whether it should remain under this sovereignty comes within the domestic jurisdiction of Finland.

The above observations were made after a preliminary, hasty, and incomplete examination and suggest to the Finnish Representative that it is necessary to remind the Council of the general conditions under which the Jurists gave their opinion.

Les jurisconsultes n'ont pas procédé comme des arbitres devant lesquels les parties présentent contradictoirement leur demande et leur défense ils n ont pas communiqué notamment au représentant de la Finlande les declarations orales ni même les mémoires écrits, de son contradicteur suédois même il a constate que c'est seulement le 6 septembre, au moment où la decision des jurisconsultes arrivait à Londres que le Secrétaire du Comite des Juristes a remis au représentant de la Finlande, à Paris, deux memoires que le représentant de la Suède avait, le 10 et le 11 août, fait parvenir a la Commission des Juristes Communication véritablement tardive puisqu'elle s'opère au moment même ou, la décision rendue, il était impossible à la Finlande de présenter des observations qui eussent pu redresser l'avis à intervenir. Enfin, ce qui est plus grave, par la lecture de ces mémoires, le représentant de la Finlande a pu se convaincre qu'un document (la lettre du 22 juillet presentée a la Société des Nations par les Alandais, qui se trouvait — le mémoire du 11 août en fait foi — entre les mains du représentant de la Suède) n'avait jamais éte communiqué a celui de la Finlande.

Le représentant de la Suède dit, dans cette lettre du 11 aout, à la Commission des Juristes

« Vous trouverez des renseignements plus amples, a ce sujet, dans la lettre du 22 juillet dernier, adressee par les délegues alandais à Sir Eric Drummond, et dont vous n'avez certainement pas manque de prendre connaissance.

« Si, contrairement a ce que je suppose, cette lettre ne vous a pas été transmise, je vous prie de m'en avertir et je vous en procurerai immediatement une copie. Cette lettre, me semble-t-il, offre beaucoup d'interêt pour la solution de la question ».

Ces observations devraient être présentees parce qu'elles seraient de nature, à elles seules, à infirmer la valeur de l'avis consultatif et qu'elles expliquent comment des erreurs aussi nombreuses et aussi graves que celles qui ont éte relevées dans ce développement ont pu s'y glisser.

IV

DÉCLARATIONS SUPPLÉMENTAIRES FAITES AU CONSEIL DE LA SOCIÉTÉ PAR LE MINISTRE DE FINLANDE, LE 18 SEPTEMBRE 1920.

La formule officiellement donnée par M. Branting le 9 juillet 1920 à la demande du Président du Conseil de la Société des Nations pour préciser la question pendante devant le Conseil, était la suivante

« Il sera permis à la population alandaise de décider immédiatement par plébiscite si l'Archipel alandais doit rester sous la souveraineté finlandaise ou être réintégré au Royaume de Suède. »

Pour échapper à l'argumentation produite par le Représentant de la Finlande dans ses observations orales du 16 septembre, M. Branting répond que le mot de souveraineté ne doit pas être pris dans le sens d'un pouvoir de droit, mais d'un simple pouvoir de fait.

Une telle explication n'est pas recevable.

Le mot « souveraineté » a toujours eu, dans toutes les langues, un sens rigoureusement défini c'est un pouvoir qui n'est pas seulement un pouvoir de fait, mais un pouvoir de droit.

Il en est ainsi dans le droit interne. Quand la Déclaration Des droits de l'Homme du 26 août 1789, art. 3, déclare « Le principe de toute *souveraineté* réside essentiellement dans la nation », quand la Constitution, du 3 septembre 1791, déclare « La souveraineté est une, indivisible, inaliénable, imprescriptible », le mot de souveraineté indique manifestement, non pas un pouvoir de fait, mais un pouvoir de droit. Il en est de même dans la constitution du 4 novembre 1848 « La souveraineté reside dans l'universalite des citoyens français ». Qu'on essaie de remplacer, dans chacune de ces formules, l'expression souveraineté par l'expression domination, on verra au changement de ton, d'accent, d'expression, que les deux mots ne sont pas synonymes.

The Jurists did not act as arbitrators before whom the Parties respectively presented, as in cross-examination, their plea and their defence in particular they did not communicate to the Finnish Representative the verbal Declarations, nor even the written memorandum of his Swedish adversary he has even pointed out that it was only on September 6th, when the decision of the Jurists arrived in London that the Secretary of the Committee of Jurists transmitted to the Finnish Representative in Paris two memoranda which the Representative of Sweden had communicated to the Committee of Jurists on August 10th and 11th. This communication was made far too late, since it only occurred at the moment when the decision had been made, and it was impossible for Finland to bring forward observations which might have affected the conclusions to be arrived at. Finally and more serious still, by reading these memoranda, the Finnish representative has convinced himself that one document (the letter of July 22nd, addressed to the League of Nations by the Aaland Islanders, which was — the Memo. of August 11th proves this— in the possession of the Swedish Representative) was never communicated to the Finnish Representative.

The Swedish Representative says, in this letter of August 11th, to the Committee of Jurists

"You will find fuller information on this subject in the letter of July 22nd last, addressed by the Aaland Delegates to Sir Eric Drummond, and with which you are sure to be acquainted.

"If, contrary to what I suppose, this letter has not been transmitted to you, I beg you to let me know and I will procure you a copy immediately This letter, it appears to me, contains much that will be useful in the solution of the question."

It was felt that these observations should be submitted, because they are, by themselves, calculated to detract seriously from the value of the advisory Report, and explain why such a large number of serious errors as those mentioned in this memorandum have crept into the advisory Report.

IV

SUPPLEMENTARY STATEMENTS MADE TO THE COUNCIL OF THE LEAGUE BY THE FINNISH MINISTER, SEPTEMBER 18th, 1920.

The formula officially given by M. Branting on July 9th, 1920, on the request of the President of the Council of the League of Nations that the question pending before the Council should be exactly defined, was the following —

"The inhabitants of the Aaland Islands shall be permitted to decide immediately by plebiscite whether the Aaland Archipelago shall remain under Finnish sovereignty or be reunited with the Swedish Kingdom."

To refute the argument submitted by the Representative of Finland in his verbal remarks of September 16th, M. Branting replies that the word "sovereignty" should not be taken to mean *de jure*, but merely *de facto* power.

Such an interpretation is inadmissible.

The word "sovereignty" has always, and in every language, had a strictly defined meaning — it is not only a *de facto*, but also a *de jure* power.

This is so in national law. When the Declaration of the Rights of Man of August 26th, 1789, Article 3, declares, "The principle of all *sovereignty* is essentially vested in the nation", when the Constitution of September 3rd, 1791, declares, "Sovereignty is one, indivisible, inalienable, unreciprocal," the word "sovereignty" obviously means not a *de facto*, but a *de jure* power. The same is true of the Constitution of November 4th, 1848— "Sovereignty is vested in the whole body of French citizens." If in each of these formulas the term "sovereignty" is replaced by the term "domination," it will at once be seen by the change of tone, of accent and of expression, that the two words do not mean the same thing.

Dans le droit international, comme dans le droit public interne, tous les auteurs sont unanimes à prendre la souveraineté comme une *qualité juridique* de l'Etat. Pour ne citer ici qu'une seule opinion, celle d'une autorité française du droit public interne et du droit international « La plupart des theses sur la souveraineté ont pour but d'arriver à démontrer l'une ou l'autre des idées suivantes. que la souveraineté consiste dans le *pouvoir juridique* pour le souverain d'agir sans contrôle, que la souveraineté ainsi conçue comme le *droit de commander* appartient légitimement à un titulaire déterminé, roi, assemblee, ou peuple entier » (Le Fur· *La Souveraineté et le Droit, Revue de Droit Public*, 1908, page 389). Ou pour citer un auteur italien (Gaetano, Arangio-Ruiz. *Istituzioni di Diritto Costituzionale Italiano*, Turin, 1913, page 17) « In sostanza, la sovranità (o potestà d'impero, come con diversità di parole oggi vuol dirsi) è la originaria esplicazione della personalità dello Stato nella sua capacità di comandare autocraticamente entro un dato territorio ».

Le mot de souveraineté a commencé par désigner le caractère suprême d'une Puissance pleinement indépendante puis l'assemblée des pouvoirs compris dans la puissance d'Etat, enfin la position qu'occupe dans l'Etat le titulaire suprême de la puissance étatique. Mais, quelle que soit l'acception dans laquelle soit prise le mot souveraineté, toujours il désigne un pouvoir de fait élevé à une telle hauteur qu'il s'impose comme pouvoir de droit. On ne peut pas concevoir une souveraineté qui ne consisterait qu'en un titre nu sans pouvoir de fait, pas davantage on ne peut concevoir une souveraineté qui consisterait en un pouvoir de fait, sans titre de droit « L'existence de l'Etat souverain est un fait, indépendant du droit. L'Etat peut s'être formé injustement par trahison, par violence. Sa formation n'en est pas moins un fait accompli et ce fait accompli prevaudra et restera définitivement si l'Etat nouveau réussit à se maintenir... Le fait accompli a, dans la vie des nations et en droit des gens, une importance capitale, prépondérante il est générateur du droit ». Ainsi s'exprime une haute autorité du droit des gens, une autorité reconnue, Rivier (Suisse), dans ses *Principes du Droit des Gens*, Paris 1896, Tome 1er page 55. Les deux notions de droit et de fait sont tellement étroitement unies dans celle de souveraineté que l'on ne peut pas plus comprendre l'expression de souveraineté de droit que l'expression de souveraineté de fait, car dans la souveraineté, qui est la plus haute puissance, le fait et le droit coincident. D'autre part, cette haute puissance suppose un certain degré de stabilité là où il y a souveraineté, il y a un Etat definitivement constitué, et non pas un Etat en voie de formation d'un mouvement séparatiste, on ne peut pas dire qu'il ait la souveraineté, mais lorsque la reconnaissance est intervenue, la souveraineté se trouve être par cela même admise dans les limites où le titulaire du pouvoir de fait a réussi à la stabiliser.

Pour éviter à cet égard tout doute, et sans entrer dans une de ces controverses où risquent toujours de s'obscurcir les idées les plus claires et les plus simples, nous nous bornerons à constater qu'en cas d'occupation militaire, par exemple, au cours d'une guerre, bien que l'occupant ait exercé pendant un temps souvent très long l'autorité de fait et qu'il y ait une véritable domination, cependant il n'y a pas de deplacement de souveraineté parce que le pouvoir de fait qui se substitue à l'ancien ne prétend pas et ne peut pas, d'après les règles du droit des gens, se prétendre un pouvoir de droit, un pouvoir définitif et stable. C'est la raison pour laquelle, dans la Convention de La Haye de 1899, confirmée et revisee en 1907 sur les lois et coutumes de la guerre sur terre, il n'est jamais parlé d'une souveraineté de fait de l'occupant sur le territoire occupé, mais quels que soient ses droits, d'une *autorité* « *L autorité d'un pouvoir legal*, dit l'article 43 du Règlement de La Haye sur les lois et coutumes de la guerre sur terre, « ayant passé de fait entre les mains de l'occupant, celui-ci prendra toujours les mesures qui dependent de lui en vue de rétablir et d'assurer autant qu'il est possible, l'ordre et la vie publique en respectant, sauf empêchement absolu, les lois en vigueur dans le pays ». *L'autorité du pouvoir legal*, ainsi parle l'article 43 il ne dit pas « la souveraineté ayant passé de fait entre les mains de l'occupant ». C'est que la Convention de La Haye sait bien que s'il existe un pouvoir de fait, une autorité de fait, une domination de fait, il ne peut pas exister une souveraineté qui ne soit que de fait.

Il y a plus. Etant donne le libellé de la formule arrêtée par M. Branting, « Si l'archipel alandais doit *rester* sous la souveraineté finlandaise », il sera à l'avenir sous une souveraineté finlandaise qui ne sera pas seulement de fait, mais de droit. Si le mot souveraineté a, dans la formule, ce sens en se référant à l'avenir, comment en aurait-il un autre en se référant au passé ? Il est impossible de lire ce texte « doit rester sous la souveraineté finlandaise » dans ce sens « doit passer de la souveraineté de fait de la Finlande sous la souveraineté de fait et de droit de cette même Finlande ». Ce serait une fois de plus changer les textes qu'on n'a, dans la circonstance, jusqu'ici que trop altéres.

In international law as in domestic public law, all authors are unanimous in taking sovereignty to be a legal attribute of the State. To quote only one opinion, that of a French authority on national and international law — "The object of the majority of theses on sovereignty is to succeed in proving one or other of the following ideas — that sovereignty consists in the *legal power* of the sovereign to act without check that sovereignty, thus conceived as the right to command, legally belongs to a definite possessor, king, assembly or whole people." (Le Fur: *La Souveraineté et le Droit*, Revue de Droit Public, 1908, page 389). Or to quote an Italian author (Gaetano, Arangio-Ruiz, *Istituzioni di Diritto Costituzionale Italiano*, Turin, 1913, page 17) "In substance, sovereignty (or the power to rule, as it is styled to-day) is the original definition of the legal personality of the State in its capacity to rule autocratically over given territory."

Sovereignty originally meant the supreme characteristic of a fully independent Power then it meant the assemblage of powers included in the authority of the State, and eventually the position occupied in the State by the supreme possessor of the power of the State. But whatever be the acceptation in which the word "sovereignty" is interpreted, it always means a *de facto* power rising to such a position as to be able to impose itself as a legal power. It is impossible to conceive of a sovereignty merely consisting of a title without actual power, neither can a sovereignty be imagined consisting of a *de facto* power without legal title. "The existence of the sovereign State is a fact, independent of law The State may have been formed unjustly, by treason or violence. Its formation is none the less a *fait accompli*, and this *fait accompli* will prevail and remain permanently if the new State succeeds in maintaining its existence. The *fait accompli* is a supreme and predominant influence in the lives of peoples and in international law. It originates law." These are the the words of a high authority on international law — a recognised authority (Rivier [Swiss], in his *Principles of International Law*, Paris, 1896, Vol. 1, page 55). The two ideas of right and of fact are so closely bound up with that of sovereignty that one can no more understand the expression *de jure* sovereignty than the expression *de facto* sovereignty for in sovereignty which is the supreme power, *de facto* and *de jure* coincide. On the other hand, supreme power presupposes a certain degree of stability. Where there is sovereignty there is a definitely establishment State, and not a State in process of formation. One cannot say that a separatist movement possesses sovereignty, but, when recognition has been obtained, sovereignty is admitted by that very fact, in so far as the holder of *de facto* power has succeeded in establishing it.

To avoid any confusion on this point, and without entering into one of those controversies where even the clearest and simplest issues incur the risk of being obscure, we will confine ourselves to noting that in the case of military occupation, as for example during the war, although the occupying force has for a considerable time exercised a *de facto* authority and though there has been a real domination, nevertheless there has been no change of sovereignty, since the *de facto* power, which takes the place of the former one, does not claim to be a *de jure* power of a fixed and stable nature, and indeed cannot claim to be so according to the rules of International Law. This is the reason why the Hague Convention of 1899, with regard to the Laws and Customs of War by Land, confirmed and revised in 1907, never speaks of the *de facto* sovereignty, but of the "authority" of an occupier of occupied territory, whatever his rights may be. "*The authority of a legal power*" says Article 43 of the Hague Convention on the Laws and Customs of War by Land, "having passed *de facto* into the hands of the occupier, the latter shall invariably take such measures as may be necessary for him to re-establish and ensure, so far as possible, the ordered life of the community, while respecting, unless absolutely impossible, the laws in force in the country" *The authority of the legal power* — such are the words of Article 43, it does not say "sovereignty having passed *de facto* into the hands of the occupier." The reason of this is that the Hague Convention fully realises that, although there may exist a *de facto* power, a *de facto* authority a *de facto* domination, there cannot exist a sovereignty which is only *de facto*.

Furthermore, in view of the wording of the statement drawn up by M. Branting, "If the Aaland Archipelago is to *remain* under Finnish sovereignty," this must mean that it will be in future under a Finnish sovereignty which shall not only be *de facto*, but *de jure*. If the word "sovereignty" has, in this sentence, this meaning when it refers to the future, how can it have another meaning when referring to the past? It is impossible to make the words "is to remain under Finnish sovereignty" to mean "shall be transferred from the *de facto* sovereignty of Finland to the *de facto* and *de jure* sovereignty of that same Finland." This would be yet another change in texts which, under the circumstances, have been up to the present far too much altered already

Puisque la question se trouve portee sur ce terrain, ajoutons que l'on ne peut pas concevoir en droit international qu'il y ait une portion de territoire ayant appartenu un jour à un Etat civilisé qui puisse cesser d'être sous la souveraineté d'un Etat. Il n'est pas possible qu'une population se trouve à un moment donné sans souveraineté qui s'exerce sur elle pas plus qu'un individu ne doit rester sans patrie, une population ne peut rester sans Gouvernement dont elle depende et qui en soit internationalement responsable. Or, si la Finlande n est pas à l'heure actuelle souveraine de l'Archipel d'Aland, comme d'autre part l'Archipel d'Aland lui-même ne se prétend pas souverain et qu'incontestablement la Suède, avant tout plébiscite, ne saurait en aucun cas réclamer la souveraineté de ce même archipel, et d'ailleurs ne la reclame pas, il en resulte qu'aucune contradiction à la souveraineté de la Finlande ne s'étant élevée sur l'archipel d'Aland, c'est elle seule qui s'applique à cet archipel tant que par un acte exprès de sa volonté elle n'y a pas renonce. Sinon, il y aurait sur un point déterminé carence de souveraineté, ce qui est absolument contraire à tous les principes du droit public moderne, carence d'autant plus inexplicable que M. Branting ne conteste pas qu'en fait la souveraineté de la Finlande s exerce. Comment, si elle s'exerce en fait, ne s'exercerait-elle pas en droit, puisqu'elle n'est présentement contredite par aucune autre en ce qui concerne le passe, mais seulement en ce qui concerne l'avenir.

De la Convention du 30 decembre 1918, entre la Suède, l'Allemagne et la Finlande, il résulte que la Finlande est souveraine des Iles Aland au regard de la Suède au même titre qu'au regard de l'Allemagne. Car

1° — Tandis que l'élément militaire ouvrier suédois et allemand ne peut dépasser le chiffre de 150 hommes pour la Suède et l'Allemagne, il n est pas limité pour la Finlande or, c'est le propre du souverain de fixer librement le chiffre de ses troupes, et, par suite, de ses ouvriers militaires, sur son territoire

2° — C'est avec l'autorité finlandaise que la Suède et l'Allemagne doivent s'entendre pour les conditions d'achat des vivres nécessaires aux mains-d'œuvre suédoise et allemande, or, si la Finlande n'avait pas plus de droit que les deux autres, il n'y aurait plus qu'à recourir à une Commission mixte, et, si la Finlande a plus de droit que les autres, n'est-ce pas une reconnaissance de sa souveraineté ?

3° — Le droit de convocation à Mariehamn par la Commission de Contrôle Militaire appartient à la Finlande c est la preuve même de sa souveraineté.

Dans cet ordre d'idées, deux autres marques de la souveraineté de la Finlande sont à relever

1° — La Finlande a retire l'exequatur à un vice-consul suédois or le retrait d'exequatur est un acte de souveraineté.

2° — La Finlande a procédé à l'expulsion des Iles d'Aland d'un journaliste suédois or l'expulsion est un acte de souveraineté.

Dans ces deux cas, la Suède n'a pas proteste, ainsi elle n'a pas dénié à la Finlande, à ce moment la souveraineté de l'Archipel d'Aland. Elle se réservait de lui contester le droit de la garder à l'avenir, malgré le vœu de la population, en vertu du droit naturel international elle ne la lui dénait pas jusqu'au plébiscite, en vertu du droit positif.

Lorsqu'une souveraineté s'affirme, et la Finlande affirme la sienne sur Aland, il faut pour la faire tomber, qu'elle soit au moins contredite or, à l'affirmation de souveraineté de la Finlande sur l'Archipel, ne s'élevait de la part d'aucun autre Etat, même la Suede, aucune espece de contradiction.

Telles sont les observations verbales que l'on peut, dès maintenant, présenter sous réserve de toute autre qu'il y aurait lieu d'ajouter.

Since this aspect of the question has arisen it may be added that it is impossible in international law to conceive of a piece of territory which, having once belonged to a civilised state, can then cease to be under the sovereignty of a State. It is impossible that a population should, at any given moment, be under no sovereignty. Just as an individual cannot remain without a country so a population cannot remain without a Government to which it is subject, and which is internationally responsible for it. Now, if Finland does not at this moment possess sovereignty over the Aaland Islands, and as, moreover, the Aaland Islands do not claim sovereignty for themselves, while Sweden, before any plebiscite has been held, could not possibly in any case claim, and indeed does not claim, sovereignty over these islands, it follows that, as no counter-claim against the sovereignty of Finland over the Aaland Islands has been preferred, it is Finland's sovereignty alone which is supreme over these islands, until she shall have renounced such sovereignty by a direct expression of her will. Were this not so, there would be an absence of sovereignty in a certain contingency which is absolutely contrary to all the principles of modern public law an absence which is all the more inexplicable in that M. Branting does not dispute the fact that Finnish sovereignty is at present operative *de facto*. Now if it exists *de facto*, should it not exist *de jure*, since at the present moment it is not disputed by any other Power so far as the past is concerned, but only with regard to the future?

Under the terms of the Convention of December 30th, 1918, between Sweden, Germany, and Finland, Finland has sovereignty over the Aaland Islands as far as both Sweden and Germany are concerned

(1) While the number of Swedish and German military workers is not allowed to exceed 150 men for Sweden and Germany it is not limited in the case of Finland. Now it is the attribute of the sovereign to be free to fix the number of his troops, and in consequence that of the military workers on his territory

(2) Sweden and Germany have to come to an agreement with the Finnish authorities with regard to the conditions governing the purchase of food supplies for Swedish and German workmen now if Finland had no more rights than the other two Powers, it would be necessary to set up a mixed Commission and is not the fact that Finland has more rights than the others a recognition of her sovereignty?

(3) The right of summons to Mariehamn by the Commission of Military Control belongs to Finland. This is in itself a proof of her sovereignty.

In the same connection two other marks of Finnish sovereignty should be noted —

(1) Finland has withdrawn the exequatur granted to a Swedish Vice-Consul, and the withdrawal of an exequatur is an act of sovereignty.

(2) Finland has expelled a Swedish journalist from the Aaland Islands, and expulsion is an act of sovereignty.

In these two cases Sweden did not protest, hence she did not deny at that moment Finland's sovereignty over the Aaland Archipelago. She reserved the right, by virtue of "natural" international law, to contest Finland's title to keep it in the future in spite of the wishes of the population but Sweden did not contest it till the time of the plebiscite, by virtue of positive law.

When sovereignty is claimed — and Finland claims her sovereignty over Aaland — it must be contested before it can be abolished, now Finland's claim to sovereignty over the Archipelago was not disputed by any other State, even by Sweden.

Such are the verbal remarks which I am able to make at the moment, reservation being made as to anything else that it may be necessary to add.

V

COMMUNICATION DU GOUVERNEMENT FINLANDAIS

En date du 29 septembre. 1920

Apres avoir examiné les documents relatifs a la décision du Conseil de la Société des Nations dans l'Affaire d'Aland, le Gouvernement finlandais, animé des sentiments de justice et de paix qui sont à la base du Pacte de la Société des Nations, et également pénétré du sentiment du devoir que lui cree l'importance politique de l'archipel d'Aland dans la constitution independante de l'Etat souverain de Finlande, confirme les réserves, faites par M. Enckell, à Paris, le 20 septembre 1920, du droit de souveraineté de la Finlande sur les îles d'Aland. En consequence, le Gouvernement finlandais affirme ne pouvoir examiner, à quelque moment que ce soit, une recommandation du Conseil de la Société des Nations dont la consequence, directe ou indirecte, serait de priver la Finlande de son droit de souveraineté sur les îles d'Aland. Il proteste egalement comme le fit M. Enckell, contre les graves erreurs qui sont à la base de l'avis des jurisconsultes, au vu duquel le Conseil s'est declaré compétent. Le Gouvernement finlandais, tout pénétré de l'esprit de publicité du Pacte de la Société des Nations, n'a pas de plus vif désir que de voir, à la suite de la publication des documents de cette affaire, le bien-fonde de ses graves et catégoriques objections à l'avis des jurisconsultes déféré à la libre critique des historiens et des juristes. Le respect du droit est la première des garanties de la paix. Et le Gouvernement finlandais ne peut croire que la Société des Nations puisse asseoir ses decisions sur un déni de justice.

V

COMMUNICATION FROM THE FINNISH GOVERNEMENT

September 29th, 1920:

After considering the documents relating to the decision of the Council of the League of Nations in the question of Aaland, the Finnish Government, actuated by the sentiments of justice and peace on which the Covenant of the League of Nations is based, and by a sense of duty arising from the political importance of the Aaland archipelago in the independent constitution of the sovereign State of Finland, confirms the reservations of the right of sovereignty possessed by Finland over the Aaland Islands, which were voiced by M. Enckell at Paris, on September 20th, 1920. The Finnish Government declares, therefore, that it is unable to consider at any time whatsoever a recommendation of the Council of the League of Nations, the direct or indirect result of which would be to deprive Finland of its right of sovereignty over the Aaland Islands.

It also protests, as did M. Enckell, against the serious errors on which the opinion of the jurists is founded, in view of which opinion the Council declared itself competent. The Finnish Government, animated by that spirit of publicity which the Covenant of the League of Nations enjoins, has no keener desire than to see the justice of its serious and categorical objections to the opinion of the jurists submitted to the free criticism of historians and jurists after the documents of this case have been published. Respect for right is the first guarantee of peace. The Finnish Government cannot believe that the League of Nations will allow its decisions to rest on a denial of justice.

La Question Arménienne

I

TÉLÉGRAMME DU SECRÉTAIRE D'ÉTAT DES ETATS-UNIS A M. HYMANS

[*Traduction*]

16 décembre 1920.

A Son Excellence M. Paul HYMANS,
Président du Conseil de la Société des Nations, Genève.

Le Président m'a chargé de vous faire savoir qu'il a désigne comme envoyé personnel, M. Henry Morgenthau, qui est prêt à se mettre en route, dès que possible, pour donner suite à son offre de bons offices et de mediation personnelle dans la question arménienne. Cependant, le Président attend encore les indications du Conseil de la Société des Nations, pour savoir par quelle voie son offre devra être transmise et quelles sont les parties avec qui son représentant devra entrer en relations. Il attend également l'assurance de l'appui diplomatique et moral des Principales Puissances représentées au Conseil de la Société des Nations.

(Signé) NORMAN DAVIS,
faisant fonctions de Secrétaire d'Etat.

II

TÉLÉGRAMME, EN DATE DU 18 DÉCEMBRE, ADRESSÉ AU PRÉSIDENT DU CONSEIL PAR LE PREMIER MINISTRE DE GRANDE-BRETAGNE

[*Traduction*]

A Monsieur HYMANS, Conseil de la Société des Nations, Genève, de Monsieur LLOYD GEORGE.
No. 39.

Comme suite à votre télégramme du 2 decembre, et après avoir consulté les représentants britanniques à Constantinople et à Tiflis, il semble que la meilleure marche à suivre serait que le Président Wilson télégraphiât directement ses instructions au Haut Commissaire américain à Constantinople, qui se concerterait avec ses collègues à ce sujet. La nouvelle est maintenant parvenue qu'un traite de paix a été conclu entre le Gouvernement armenien et les nationalistes. Le Conseil sait, sans doute, que l'Arménie est signalée comme étant, pour l'instant, soumise à l'autorité de la Russie des Soviets et du parti avancé Dachnac.

CURZON.

Annex ZE

INTERNATIONAL HUMAN RIGHTS LAW

Fourth Edition

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QUESTIONS FOR REFLECTION

1. What steps might be necessary to ensure that temporary special measures, aimed at accelerating women's equal enjoyment of a particular human right, promote women's empowerment rather than reinforce their secondary status?
2. How should 'the family' be understood in international human rights law?
3. Is women's sexual freedom protected by international human rights law?
4. How has gender mainstreaming been taken up domestically, in your jurisdiction?
5. Do you think that CEDAW could or should be interpreted to cover all forms of gender (identity) discrimination rather than only discrimination against women?

17

CHILDREN'S RIGHTS

Aoife Nolan

SUMMARY

The last 30 years have seen the emergence of children as a discrete–and increasing–focus of international human rights law attention. Centring on the Convention on the Rights of the Child (CRC) and the work of its treaty-monitoring body, the UN Committee on the Rights of the Child, this chapter addresses the key sources, developments, standards, and debates regarding international children's rights law. In tackling questions related to CRC rights, obligations, duty-bearers, jurisdiction, and limitations, the chapter makes clear the strengths and weaknesses of both the CRC and the enforcement mechanisms associated with that treaty. The chapter provides an in-depth discussion of the past record and future prospects of the CRC in terms of responding meaningfully to the diverse challenges faced by children.

1 INTRODUCTION

The last 30 years have seen the emergence of children as a discrete—and increasing—focus of international human rights law attention. Much of this is attributable to the growing influence of the UN Convention on the Rights of the Child 1989, the most widely ratified of all human rights treaties.[1] However, it is also consistent with a broader trend within international human rights law to focus on the rights of particular groups of persons, both in terms of the development of group-specific treaties[2] as well as in the work of 'general' treaty bodies.

The CRC was adopted on 20 November 1989 and came into force the following September. It emerged from a ten-year drafting process,[3] initiated as part of the

[1] At the time of writing, only the US had not ratified the CRC, having signed it in 1995.

[2] At the international level, see eg the UN Convention on the Rights of Persons with Disabilities (2006). At the regional level, see eg the Protocols to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) and of Older Persons in Africa (2016).

[3] See Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'* (Martinus Nijhoff, 1992); OHCHR, *Legislative History of the Convention on the Rights of the Child* (2007).

5 THE ROLE OF THE CRC COMMITTEE

The CRC is monitored by the 18-member expert CRC Committee, which is mandated to examine the progress made by states parties in achieving the realization of obligations undertaken in the CRC. This is primarily achieved through the state reporting process.[33]

In 2014, the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (CRC-OP3) came into force, which adds to the tools available to the Committee. It sets out a complaints system that allows communications to be submitted by or on behalf of a child or group of children, within the jurisdiction of a state party, claiming to be victims of a violation by that state party of any of the rights set forth in the CRC or one of its substantive Optional Protocols.[34] The CRC-OP3 also provides for inter-state communications[35] and an inquiry procedure for systematic violations.[36] The Committee's work under the CRC-OP3 is still nascent: as of November 2021, only 22 sets of views have been adopted, with many of these addressing the rights of migrant and asylum-seeking children. Twenty-eight complaints have been declared inadmissible on a range of grounds. One inquiry—focused on residential care in Chile—has been carried out at the time of writing.[37]

Despite being a child-specific instrument, the CRC-OP3 is very strongly based on the 'general' complaints mechanisms pertaining to other UN treaty bodies. It is particularly similar to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR-OP), the adoption of which was a crucial step towards a complaints mechanism under the CRC, given that the ICESCR-OP made clear that economic, social, and cultural rights could be rendered justiciable under international law.[38] Despite the commitment of the CRC to child participation, there was no child involvement in the drafting process of the CRC-OP3.

The CRC-OP3 does have some features that are child-specific. For example, it provides that the rules of procedure for using the complaints mechanism must be child-sensitive and include safeguards to prevent manipulation of children and that the Committee may decline to examine communications that are not in the child's best interests.[39] However, there is no scope for collective complaints, which would arguably be particularly important given the challenges (including capacity, knowledge, and resources) faced by children in terms of engaging themselves with international legal processes.

It is in the Committee's working methods and rules of procedure that the child-specific nature of the monitoring and enforcement mechanisms has been honed. For instance, the Committee has adopted working methods for child participation in both its reporting process and its days of general discussion in 2014 and 2018, respectively. In setting out a range of measures to be taken to ensure that CRC-OP3 processes are both child-friendly and child rights-consistent, the Committee made clear that:

> [i]n fulfilling all functions conferred on it by the [CRC-OP3], the Committee shall be guided by the principle of the best interests of the child(ren). It shall also have regard for the rights and views of the child(ren), the views of the child(ren) being given due weight in accordance with her/his/their age and maturity.[40]

[33] See Chapter 19.

[34] CRC-OP3, Art 5(1).

[35] CRC-OP3, Art 12.

[36] CRC-OP3, Arts 13–14.

[37] Espejo Yaksic, 'Report of the investigation in Chile under article 13 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure', CRC/C/CHL/INQ/1, Leiden Children's Rights Observatory, <https://www.childrensrightsobservatory.nl/case-notes/casenote2018-2>.

[38] See Egan, 'The New Complaints Mechanism for the Convention on the Rights of the Child: A Mini Step Forward for Children' (2014) 22 *Int J of Children's Rights* 205.

[39] CRC-OP3, Art 3.

[40] Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, CRC/C/62/3 (8 April 2013) Rule 1.

Therefore, although the international enforcement and monitoring systems associated with the CRC were missing a strong child-centric perspective, the Committee has taken crucial steps to address this important oversight.

6 RIGHTS AND PRINCIPLES UNDER THE CRC

The CRC was the first multilateral UN treaty to include both civil and political rights, as well as economic, social, and cultural rights. Its Part I sets out the rights of children, as well as delineating specific state obligations.

6.1 BRINGING ECONOMIC, CIVIL, SOCIAL, POLITICAL, AND CULTURAL RIGHTS TOGETHER

Historically, there has been a tendency on the part of different commentators to divide rights up into different categories. A particularly pervasive typology in children's rights has been that of protection, provision, and participation rights (sometimes reconfigured as protection, participation, provision, and prevention). Such typologies are useful in terms of identifying themes within the CRC as well as providing for 'an easy understanding of the Convention'.[41] However, there are strong arguments against the use of the '3 Ps' to frame analysis of CRC rights—not least the fact that any suggestion that all of the rights fit neatly into one or the other discrete category is incorrect. This typology will not therefore be used in this chapter.

Perhaps the key division for the purposes of the CRC is that between civil and political rights and economic, social, and cultural rights. While the CRC does not specify which rights are which, its Article 4—the umbrella obligations provision under the Convention—makes a distinction for the purposes of states duties:

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. *With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.*[42]

If Article 4 CRC is to be applied properly, it is necessary to identify which rights qualify as civil and political and which as economic, social, and cultural. Any such categorization will, of course, be imperfect and there are some rights which could fall under either heading: for instance, the right to non-discrimination (Article 2), the right to protection from all forms of exploitation prejudicial to the child's welfare (Article 36), the right to education (Article 28), and the right to physical and psychological recovery and social reintegration of child victims (Article 39).

The categorization of rights for the purposes of this chapter is based, first, on the inclusion of corresponding rights protections in the ICESCR and the International Covenant on Civil and Political Rights (ICCPR). Where equivalent provisions do not appear in those instruments, the chapter considers whether the relevant CRC rights are preponderantly civil and political or economic, social, and cultural in nature, in the light of how they have been interpreted and applied by the CRC Committee.

[41] Hammarberg, 'The UN Convention on the Rights of the Child—and How to Make It Work' (1990) 12 *HRQ* 97, 99.

[42] Emphasis added.

Article 2 covers multiple and intersectional discrimination.[48] By referring to the status of parents and legal guardians, the CRC recognizes that children may be the subject of discrimination due to their association with, or membership of, a particular social group.[49] Notably, there is no explicit prohibition on age discrimination: that is, discrimination against children on the basis of their age vis-à-vis other children or adults. However, a growing number of commentators argue that Article 2 should be read as covering this, drawing on understandings of the particular political, social, and economic position of children within societies as well as growing research around the phenomenon of childism (frequently understood as prejudice and negative attitudes towards or stereotyping of children).[50]

Drawing on the work of the Human Rights Committee and other treaty bodies, the CRC Committee has been clear that Article 2 CRC is not focused on identical treatment: there may be a call for special measures to diminish or eliminate conditions that cause discrimination with regard to particular groups of children.[51] Differential treatment must 'be lawful and proportionate, in pursuit of a legitimate aim and in line with the child's best interests and international human rights norms and standards' to be in conformity with Article 2.[52]

6.2.2 Best interests of the child (Article 3(1))

While the CRC Committee sometimes cites Article 3 CRC as a whole as a general principle, its practice makes clear that it is the first paragraph of that provision that is of primary importance when it comes to its operationalization. Article 3(1) provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In contrast to more demanding domestic provisions,[53] the child's best interests are described as a *primary* rather than a *paramount* consideration. As such, the child's best interests are neither always determinative nor do they always trump other considerations. The term 'all actions concerning children' has been interpreted very broadly by the Committee to cover a wide range of actions and inactions that directly or indirectly affect children (including decisions, acts, conduct, proposals, services, procedures and other measures, inaction, and omissions).[54]

The Committee has described the child's best interests as a 'threefold concept'. First, it is a 'substantive right' of the child 'to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general'.[55]

[48] General Comment 22, para 23.

[49] See further CRC, Art 2(2) which requires states to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

[50] For more on childism, see Young-Bruehl, *Childism: Confronting Prejudice Against Children* (Yale UP, 2012).

[51] CRC Committee, General Comment 5, CRC/GC/2003/5 (27 November 2003) para 12.

[52] General Comment 22, para 22.

[53] eg Section 28(2) of the Constitution of the Republic of South Africa 1996. See also CRC, Art 21, which refers to best interests as a 'paramount consideration' in the context of adoption.

[54] CRC Committee, General Comment 14, CRC/C/GC/14 (29 May 2013) paras 17, 18.

[55] General Comment 14, para 6.

The CRC sets out a series of civil and political rights of children, including the rights to life (Article 6(1)), to birth registration (Article 7), to respect for the views of the child (Article 12), to freedom of expression (Article 13), to freedom of thought, conscience, and religion (Article 14), to association and peaceful assembly (Article 15), to protection from interference with privacy, family, home, or correspondence (Article 16), to information (Article 17), to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, and maltreatment or exploitation (Article 19), and to a fair trial (Article 40).

Children's economic, social, and cultural rights include the rights to the highest attainable standard of health (Article 24), to benefit from social security (Article 26), to a standard of living adequate for their development (Article 27), and to rest, leisure, and play (Article 31).

Finally, the CRC contains provisions focused on specific groups of children, which include both civil and political and economic, social, and cultural elements. Such groups include refugee children (Article 22), disabled children (Article 23), and minority or indigenous children (Article 30).

6.2 GENERAL PRINCIPLES

In its work, the CRC Committee has identified four so-called 'general principles' (sometimes referred to by it as 'overarching principles'),[43] which it has treated as being of central importance to state efforts to implement the CRC as a whole. These are usefully thought of as lens(es) through which states should conceptualize their efforts to implement children's rights in all contexts, and which the Committee will use when interpreting and applying the CRC. The provisions identified by the Committee as general principles are Articles 2 (non-discrimination), 3(1) (best interests of the child), 6 (right to life, survival, and development), and 12 (right to respect for the views of the child).

The CRC Committee's singling out of Articles 2, 3, 6, and 12 CRC has not been without controversy. Some authors have argued, for instance, that Article 5 is more suited as a general principle than Article 6, given the former's cross-cutting nature and its formulation in direct relation to other rights in the Convention. The inconsistent and sometimes unsatisfactory way in which the Committee makes use of the general principles has also been rightly criticized.[44] That said, the Committee's emphasis on these provisions has meant that a good understanding of them is of particular importance.

6.2.1 Non-discrimination (Article 2)

Article 2(1) CRC prohibits discrimination 'of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'. The use of 'or other status' makes clear that this list of grounds is not exhaustive. According to the CRC Committee, 'other status' includes grounds such as migration status,[45] health status,[46] and sexual orientation or gender identity.[47] The Committee has been explicit that

[43] eg CRC Committee, General Comment 22, CRC/C/GC/22 (16 November 2017) para 19.

[44] Hanson and Lundy, 'Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child' (2017) 25 *Int J of Children's Rights* 285–306, 300–1.

[45] General Comment 22, para 9.

[46] CRC Committee, General Comment 3, CRC/GC/2003/3 (17 March 2003) paras 7–9.

[47] See Peleg, 'International Rights of the Child: General Principles' in Kilkelly and Liefaard (eds), *International Human Rights of Children* (Springer, 2019) 135–57.

Article 2 covers multiple and intersectional discrimination.[48] By referring to the status of parents and legal guardians, the CRC recognizes that children may be the subject of discrimination due to their association with, or membership of, a particular social group.[49] Notably, there is no explicit prohibition on age discrimination: that is, discrimination against children on the basis of their age vis-à-vis other children or adults. However, a growing number of commentators argue that Article 2 should be read as covering this, drawing on understandings of the particular political, social, and economic position of children within societies as well as growing research around the phenomenon of childism (frequently understood as prejudice and negative attitudes towards or stereotyping of children).[50]

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[48] General Comment 22, para 23.

[49] See further CRC, Art 2(2) which requires states to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

[50] For more on childism, see Young-Bruehl, *Childism: Confronting Prejudice Against Children* (Yale UP, 2012).

[51] CRC Committee, General Comment 5, CRC/GC/2003/5 (27 November 2003) para 12.

[52] General Comment 22, para 22.

[53] eg Section 28(2) of the Constitution of the Republic of South Africa 1996. See also CRC, Art 21, which refers to best interests as a 'paramount consideration' in the context of adoption.

[54] CRC Committee, General Comment 14, CRC/C/GC/14 (29 May 2013) paras 17, 18.

[55] General Comment 14, para 6.

Annex ZF

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ANNIVERSARY ISSUE ARTICLE

'Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement

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Abstract
The Paris Agreement has struck a careful balance between the need for ambitious and effective climate action and for fair effort sharing among parties based on differentiation. This article provides an overview of the negotiation history of differentiation and analyzes the 'dynamic differentiation' as built into the architecture of the Agreement. While being set against the normative background of the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement adopts a more diversified way of differential treatment among parties, approaching it in three complementary ways: firstly, on a principled basis, reflecting common but differentiated responsibilities and respective capabilities (CBDR-RC), in the light of different national circumstances; secondly, in the content of its articles, in particular on mitigation, finance and transparency; and thirdly, on the basis of the principles of progression and highest possible ambition, which represent new and dynamic aspects of differentiation. The authors argue that 'highest possible ambition' is reflective of a duty of care that states now need to exercise. It implies a due diligence standard, which requires each government to act in proportion to the risk at stake and to take all appropriate and adequate climate measures according to its responsibility and its best capabilities. By expecting parties to apply this standard at each successive preparation of nationally determined contributions (NDCs), and to progress beyond previous ones, the Paris Agreement has set up reiterative processes, an 'international normative pull' and a collective learning environment. This, in turn, creates a reflexive approach to parties' determination of effort, promoting the evolution of voluntary cooperative behaviour.

Keywords: Highest possible ambition, Progression, Differentiation, Equity, Effort sharing, Common but differentiated responsibilities and respective capabilities (CBDR-RC)

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This article draws upon and expands on C. Voigt & F. Ferreira, 'Differentiation in the Paris Agreement' (2016) 6(1–2) *Climate Law*, pp. 58–74. *Climate Law* has kindly agreed to the inclusion of Figure 1 in this article.

1. INTRODUCTION

Traditionally, international law is defined by the sovereign equality of states, which aims to guarantee that all states have equal rights and obligations.[1] Yet, states differ significantly. Based on the concepts of cooperation, effectiveness and solidarity,[2] those differences must be taken into account in order to create a fair international legal order.[3] Differential treatment – or differentiation between states – has therefore become an important feature of international law.[4] The idea is to bring about practical, rather than formal, equality among *de facto* unequal states and to increase participation in and the effectiveness of international agreements.[5]

In international environmental law, differentiation has assumed pivotal, almost defining characteristics, placing heavier burdens on developed countries while providing for differential (and preferential) treatment of developing countries. This has been expressed – for example, in Principle 7 of the 1992 Rio Declaration – as 'common but differentiated responsibilities', which establishes an obligation on all states to cooperate towards environmental integrity, while acknowledging that developed countries have a greater responsibility as a result of the pressure their societies have placed on the global environment and of their assumed greater economic and technological capabilities.[6] In this sense, differentiation is expected to bridge the gap between the formal equality of states under international law and the deep inequalities in wealth, power and responsibility that divide them.[7]

These factors have led to procedurally more demanding and substantively stronger obligations on developed countries, with developing countries having more flexible or

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1 M. Koskenniemi, *The Politics of International Law* (Bloomsbury, 2011); J. Crawford, 'Sovereignty as a Legal Value', in J. Crawford & M. Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), pp. 117–33, at 117.

2 L. Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press, 2006).

3 A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004); D. Held & A. Kaya, *Global Inequality: Patterns and Explanations* (Oxford University Press, 2007); D. Held, *Cosmopolitanism: Ideals and Realities* (Polity Press, 2010).

4 Examples of differentiation in international law abound: it can be reflected as special decision-making rights (e.g., the veto power for permanent members of the United Nations (UN) Security Council; or for the 'consultative parties' of the Antarctic Treaty); as specific obligations according to different country categories (e.g., the distinction between 'nuclear weapon countries' and 'non-nuclear weapon countries' in the Nuclear Non-Proliferation Treaty); or as preferential rights (such as the 'special and differential treatment' provisions of the World Trade Organization (WTO) agreements).

5 C. Voigt, 'Equity in the 2015 Climate Agreement: Lessons from Differential Treatment in Multilateral Environmental Agreements' (2014) 4(1–2) *Climate Law*, pp. 50–69.

6 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command': Rio Declaration on Environment and Development, adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26 (Vol. I), 12 Aug. 1992, Principle 7, available at: http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163.

7 J. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015).

fewer obligations. They have also led to obligations of developed countries to provide implementation assistance, finance, technology and know-how to developing countries. In this way, 'positive discrimination' in favour of developing countries has led to asymmetric environmental obligations coupled with arrangements and mechanisms which institutionalize this categorization.

As a growing number of developing countries become industrialized and increase their pressure on the global environment along with their capabilities, the expectation grows that they also assume greater responsibilities in international environmental law. The question is thus how to design legal instruments that can reflect the different 'situations' of states in an equitable and dynamic fashion, as they develop over time. The experience from 1992 to 2016 tells us that such differentiation cannot be static; it needs to allow the structure and content of international agreements to evolve dynamically.[8]

2. CLIMATE CHANGE AS A GLOBAL COMMONS PROBLEM

In order to understand the complexity of differentiation in the climate context, it is important to recall that climate change has the characteristics of a 'global commons problem'. Greenhouse gases (GHGs) accumulate over time and mix globally in the atmosphere. Emissions by any state contribute to the problem and can affect all other states. No individual state has the capacity to single-handedly achieve effective mitigation; nor does it have incentives to act unless other states also take action – otherwise it would bear a larger relative cost. As in a 'prisoner's dilemma' involving 197 prisoners, therefore, participation of all states is necessary for effective and fair cooperation.

Furthermore, climate change results from the stock of accumulated concentrations of GHGs in the atmosphere. The largest contribution to observed warming and positive radiative forcing is caused by the increase in the atmospheric concentration of GHGs, in particular carbon dioxide (CO_2), since 1750.[9] CO_2 emissions can remain in the atmosphere for hundreds or even thousands of years and have a cumulative effect on temperature increase. However, the past and future contributions of countries to the accumulation of GHGs in the atmosphere are different; countries also face varying challenges and circumstances, and have different capacities to address mitigation and adaptation. Climate change therefore raises issues of equity, justice and fairness on a global scale.[10]

As with any commons problem, the solution lies in collective action.[11] Effective international cooperation relies on workable notions of equitable burden and

[8] G. Ulfstein & C. Voigt, 'Rethinking the Legal Form and Architecture of a New Climate Agreement', in C. Todd, J. Hovi & D. McEvoy (eds), *Toward a New Climate Agreement: Conflict, Resolution and Governance* (Routledge, 2014), pp. 183–98, at 191.

[9] Intergovernmental Panel on Climate Change (IPCC), 'Summary for Policymakers', in T. Stocker et al. (eds), *Climate Change 2013: The Physical Science Basis – Contribution of Working Group I to the Fifth Assessment Report of the IPCC* (Cambridge University Press, 2013), pp. 3–29, at 15.

[10] IPCC, 'Summary for Policymakers', in O. Edenhofer et al., *Climate Change 2014: Mitigation of Climate Change – Contribution of Working Group III to the Fifth Assessment Report of the IPCC* (Cambridge University Press, 2014), pp. 1–30, at 5.

[11] E. Ostrøm, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990); see also E. Ostrøm, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change (2010) 20(4) *Global Environmental Change*, pp. 550–7.

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effort sharing. In the context of climate change, these notions are even more important given that states are not equal, and significant asymmetries and inequalities exist. The Intergovernmental Panel on Climate Change (IPCC) identifies four categories of inequality: (i) asymmetry in contribution to climate change (past and present); (ii) vulnerability to the impacts of climate change; (iii) capacity to mitigate the problem; and (iv) power to decide on solutions.[12] Scholarship suggests that outcomes seen as equitable can lead to more effective cooperation.[13] With respect to climate change, it has long been noted that a regime that many members find inequitable or unfair will face severe challenges to its adoption or be vulnerable to festering tensions that jeopardize its effectiveness.[14]

Different principles could come into play to address these issues.[15] Some of them relate to theoretical notions of distributive justice, such as causal and moral responsibility. The former refers to the responsibility for contributing to climate change via emissions of GHGs, the latter to the responsibility for solving the problem – noting that these two aspects are not always connected. Other principles invoke compensatory justice, such as the polluter-pays principle, the community-pays principle or the beneficiary-pays principle; and a third set involves procedural justice based on the way in which outcomes are brought about. Applied ethics hold persons (or states) responsible for harm or risks they knowingly impose or could have reasonably foreseen and, in certain cases, regardless of whether they could have been foreseen. However, there is no scientific or ethical foundation for prioritizing one equity principle over another.[16]

What can be concluded from all this is that, while effectiveness depends on participation, participation in turn depends on states' *own* perception of fairness and equity with regard to other states' contributions towards addressing the problem – and therein lies the fundamental importance of finding a workable solution for differentiation in the climate regime.

3. DIFFERENTIATION IN THE UNFCCC AND THE KYOTO PROTOCOL

In the United Nations Framework Convention on Climate Change (UNFCCC),[17] differentiation between the parties is based on the principle of 'common but

12 M. Fleurbaey & S. Kartha, 'Sustainable Development and Equity', in Edenhofer et al., n. 10 above, Ch. 4, pp. 283–350, at 295.

13 With regard to effective climate mitigation action, Young has identified three general conditions for equitable burden sharing under which the successful formation and eventual effectiveness of a collective action regime may hinge: (i) the absence of actors who are powerful enough to coercively impose their preferred burden-sharing arrangements; (ii) the inapplicability of standard utilitarian methods of calculating costs and benefits; and (iii) the fact that regime effectiveness depends on a long-term commitment of members to implement its terms: O. Young, 'Does Fairness Matter in International Environmental Governance? Creating an Effective and Equitable Climate Regime', in Todd, Hovi & McEvoy, n. 8 above, pp. 16–28.

14 Fleurbaey & Kartha, n. 12 above, p. 295.

15 For an overview see C. Kolstad & K. Urama, 'Social, Economic, and Ethical Concepts and Methods', in Edenhofer et al., n. 10 above, pp. 207–82, at 215–9.

16 Fleurbaey & Kartha, n. 12 above, pp. 318–9.

17 New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: https://unfccc.int.

differentiated responsibilities and respective capabilities' (CBDR-RC), along with an acknowledgement that developed countries should take the lead in the joint effort to combat climate change and its adverse effects.[18] Based on the premise that climate change is a common concern of humankind which requires the widest possible cooperation by all countries, the UNFCCC recognizes different contributions to environmental harm ('causality'), as well as different capacities to take mitigation measures ('capability'). Accordingly, the UNFCCC has addressed differentiation not only by enshrining CBDR-RC in its principles, but also by establishing more demanding and substantively stronger obligations for those parties explicitly listed in its Annexes.[19]

All parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, have the common obligation under Article 4.1 UNFCCC to, inter alia, take measures to address GHG emissions and facilitate adaptation, conserve sinks and reservoirs, as well as prepare and update national GHG inventories. Article 4.2 commits parties included in Annex I (developed country parties and those with economies in transition) to adopt policies and measures to *limit* emissions and protect and enhance sinks and reservoirs. It is further understood that these policies and measures will demonstrate that developed countries are taking the lead in modifying emissions trends consistent with the objective of the UNFCCC. In a similar manner, Article 12 further elaborates on the reporting obligations assumed by all parties and establishes more specific and detailed obligations for developed countries, as well as additional time for developing countries' initial national communication.

Under Article 4.3 UNFCCC, those developed countries listed in Annex II have further assumed the obligation to provide finance and technology to developing countries. This is complemented by Article 4.7, which establishes a relationship between the fulfilment of developing countries' commitments and the obligations of developed countries to provide finance and technology. Several parties have narrowly interpreted this relationship as a conditionality (developing countries would take action only if provided with means of implementation), whereas other parties understand 'the extent to which' as creating a degree of effectiveness (developing countries would be able to be more effective in the context of support).

Throughout the implementation of the Convention, this 'positive discrimination' in favour of developing countries has led to what has been referred to as 'bifurcated' obligations and processes, coupled with several institutional arrangements for capacity building, transfer of financial resources and technology, and assistance to developing countries.[20]

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18 Art. 3.1 UNFCCC, ibid.: 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof'.

19 L. Rajamani, 'The Doctrinal Basis for and Boundaries of Differential Treatment in International Environmental Law', in Rajamani, n. 2 above, pp. 129–75.

20 There are other forms of category-based differentiation under the UNFCCC, such as the flexibility given to 'economies in transition' under Art. 4.2, and the 9 types of developing country that have specific needs listed in Art. 4.8.

The Kyoto Protocol to the UNFCCC[21] took this approach even further. Based on an interpretation of the UNFCCC that relied almost exclusively on the historical and then (in 1997) current responsibility of developed countries,[22] the Berlin Mandate for negotiating the Kyoto Protocol stated explicitly that the instrument would 'not introduce any new commitments for Parties not included in Annex I'. Its priority would be to 'strengthen the commitments' of Annex I Parties.[23] Accordingly, the Kyoto Protocol established quantified emissions limitation and reduction obligations only for those Annex I Parties listed in its Annex B.[24] It created a strict 'binary'[25] differentiation system, where only developed country parties and countries with economies in transition assumed legally binding, quantified, absolute economy-wide mitigation commitments, while developing country parties were exempted from doing so. In this sense, the Kyoto Protocol is mainly and foremost an operationalization of Article 4.2 UNFCCC. Its focus is the establishment of individual quantified obligations of result (QELROs) *only* for those parties who, under the UNFCCC, had an obligation to limit their emissions, that is, Annex I Parties.

Between 2007 and 2012, the decisions adopted under the Ad-Hoc Working Group for Long-Term Cooperative Action (AWG-LCA) significantly raised the level of climate action. In parallel with the Kyoto Protocol, the AWG-LCA offered a political space for developing countries and non-Kyoto parties to negotiate their participation in the global response to climate change. This process generated several developments in the implementation of the UNFCCC and its institutional framework – most notably the creation of the Green Climate Fund.[26] The approach to differentiation under the AWG-LCA, nevertheless, followed strictly the approach under the UNFCCC and its Annexes.

4. DIFFERENTIATION IN THE NEGOTIATION HISTORY OF THE PARIS AGREEMENT

The negotiating mandate for the Paris Agreement[27] was to 'develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention

21 Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: http://unfccc.int/resource/docs/convkp/kpeng.pdf.

22 P. Pauw et al., 'Different Perspectives on Differentiated Responsibilities', Deutsches Institut für Entwicklungspolitik, Discussion Paper 6/2014, available at: https://www.die-gdi.de/uploads/media/DP_6.2014..pdf.

23 Decision 1/CP.1, 'The Berlin Mandate: Review of the Adequacy of Art. 4, paras 2(a) and (b), including Proposals related to a Protocol and Decisions on Follow-up', UN Doc. FCCC/CP/1995/7/Add.1, 6 June 1995, paras 2(a) and (b). The Berlin Mandate was the outcome of the review referred to in Art. 4.2(d) UNFCCC.

24 Kyoto Protocol, n. 21 above, Art. 3 in conjunction with Annex B.

25 The authors note that 'bifurcated' and 'binary' have been widely used as synonyms in the negotiations for the Paris Agreement (n. 27 below). For the sake of precision and recognizing that developing countries also have obligations under the UNFCCC, it is useful to distinguish these terms. This article refers to 'binary' as a differentiation approach that sets an obligation or process for a category of countries and exempts the other category (like '1' and '0' in a binary system); while 'bifurcated' refers to differentiation that sets different obligations or processes for each category.

26 Decision 1/CP.16, 'The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention', UN Doc. FCCC/CP/2010/7/Add.1, 15 Mar. 2011, para. 102.

27 Paris Agreement, Paris (France), 13 Dec. 2015, not yet in force (in UNFCCC Secretariat, Report of the Conference of the Parties on its Twenty-First Session, Addendum, UN Doc. FCCC/CP/2015/10/Add.1, 29 Jan. 2016).

applicable to all Parties'.[28] While the Durban mandate of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) itself did not contain any references to developed or developing countries, the phrase 'under the Convention' made clear that the new agreement had to be seen in the context and against the normative background of the UNFCCC, including its basis for differentiation: the CBDR-RC principle. At the same time, the phrase 'applicable to all' indicated the need to increase the collective level of ambition and ensure the highest possible mitigation efforts by *all* parties.[29]

'Bifurcated' or 'binary' differentiation, however, proved to be a contentious issue in the negotiations for the Paris Agreement. On the one hand, there was a general understanding that the immense climate challenges can be tackled only by global, cooperative large-scale remedial action to include key agents, most notably the United States (US) and China. The former was not a party to the Kyoto Protocol; the latter did not have mitigation obligations under the Protocol. The characteristic of climate change as a global commons problem necessarily requires the participation of key actors in the global response in order to ensure participation by other relevant states.

On the other hand, the responsibilities of states, their development stages and factual circumstances differ considerably. Country categories such as 'developed' and 'developing' are no longer homogeneous, but marked by stark internal differences as well as dynamic changes.

By the time parties started negotiating under the ADP mandate, the strict antagonistic dividing line between developed and developing countries had, in effect, resulted in a stalemate that prevented meaningful mitigation action. Developing countries invoked CBDR-RC as a 'firewall', while developed countries demanded that developing countries assume mitigation targets as a precondition to further mitigation actions of their own.[30]

To resolve this challenge, differentiation in the context of the Paris Agreement needed not only to build on the existing approach, but also to reform by adopting a more nuanced, diversified way of differential treatment.[31] The Paris Agreement, therefore, had to strike a very careful balance between raising ambition and ensuring universal participation on the one hand, and equitable differentiation on the other.[32] It had to address the tension of being guided by the principles of the UNFCCC, while reflecting those very principles in a constructive and dynamic fashion that not only leads to broader but also to deeper participation (that is, higher ambition).

The tension between 'under the Convention' and 'applicable to all' remained unresolved until the very end of the negotiations. It manifested itself mainly as two

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28 Decision 1/CP.17, 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action', UN Doc. FCCC/CP/2011/9/Add.1, 15 Mar. 2012, para 2.

29 Ibid., paras 6 and 7.

30 The negotiations during the second commitment period of the Kyoto Protocol, the Bali Action Plan (Decision 1/CP.13, UN Doc. FCCC/CP/2007/6/Add.1, 14 Mar. 2008) and the conditionalities expressed in the Copenhagen pledges clearly illustrate this point.

31 Voigt, n. 5 above, p. 50; and Ulfstein & Voigt, n. 8 above, p. 191.

32 H. Winkler & L. Rajamani, 'CBDR&RC in a Regime Applicable to All' (2013) 14(1) *Climate Policy*, pp. 102–21, at 103.

distinct and antagonistic positions: those who argued for a diverse 'spectrum' of 'self-differentiated' commitments, and those who defended strict abidance with the principles, provisions and the structure (the Annexes) of the UNFCCC.

It is possible to point to some specific moments that marked the evolution of the differentiation debate in the ADP. The nationally determined contributions (NDCs) approach that was agreed at the 19th Conference of the Parties (COP-19) in Warsaw (Poland) in 2013, as a result of the 'self-determined' approach already initiated by the Copenhagen pledges,[33] established that parties would choose their level of effort, providing comfort that no country would be required to do more than it was ready to do. However, this failed to address the matter of equitable effort sharing. Several parties feared that other countries could backtrack from previously assumed commitments, while others were concerned that the overall level of ambition would be neither adequate nor fair. In the light of the ascendance of a bottom-up approach to international cooperation through NDCs and the increased fluidity of commitments, differentiation was therefore seen as a vital corrective concept to ensure that distributive fairness remained part of the international climate change agenda.

In the run-up to COP-20 in Lima (Peru) in 2014, differentiation became a central issue of the negotiations. Brazil was one of the most vocal countries in this debate, eventually making a submission based on the so-called 'concentric circles' approach to differentiation.[34] The proposal called for a set of more stringent obligations for developed countries, particularly by assuming economy-wide, absolute mitigation targets, while ensuring that developing country parties also move in the same direction over time and with flexibility. Brazil was neither the only nor the first country to call for different types of mitigation commitment for developed and developing countries; it had already been a practice under the AWG-LCA.[35]

The Brazilian proposal, however, had at least two innovative aspects. It associated the *type* of target in the NDCs with the idea of progression at each regular review of the Agreement. This added a dynamic aspect to differentiation. More importantly, while building on the categories of 'developed' and 'developing' countries that characterize the climate change regime, the proposal provided a visual image of differentiation that moved away from a bifurcated or binary approach and could eventually lead to common types of mitigation efforts for all parties.[36]

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[33] D. Bodansky, 'Reflections on the Paris Conference', *Opinio Juris*, 15 Dec. 2015, available at: http://opiniojuris.org/2015/12/15/reflections-on-the-paris-conference.

[34] Brazil was not the only country to propose specific concepts to address differentiation. Other proposals included New Zealand's 'bounded flexibility' and Switzerland's 'circumstance-based' proposal: see the submissions available at: http:// unfccc.int/documentation/submissions_from_parties/items/5900.php.

[35] The Copenhagen Accord established 'targets' for Annex I Parties and 'actions' for developing countries, while the Cancun Agreements further elaborated this by requesting developed countries to raise the ambition of their 'quantified economy-wide emission reduction targets', and developing countries to put forward their 'nationally appropriate mitigation actions' (NAMAs).

[36] The image of the concentric circles may also have originated through some subconscious process – the COP-20 logo consisted of several concentric circles, the seats at the main plenary in Bonn (the former German Parliament) are also roughly arranged in circles, causing ADP co-chair Kishan Kumarsingh to joke that 'we are now seeing circles everywhere!'.

Decision 1/CP.20, adopted in Lima (Peru) in December 2014,[37] is key to understanding how differentiation came to be treated in the Paris Agreement. Its paragraph 3 underscored the parties' 'commitment to reaching an ambitious agreement in 2015 that reflects the principle of CBDR-RC, in light of different national circumstances'. The language drew from the US–China joint announcement of November 2014, which represented an unprecedented approximation between the world's top two emitters.[38] It was the first time that a decision under the ADP mentioned CBDR-RC. The qualifier 'in light of different national circumstances', which was the way that the principle would be reflected in the Paris Agreement, had broad implications, including a change of course from a strict, explicit differentiation expressed in annexes.

In Lima, another relevant development in respect of differentiation emerged in the context of finance. Less recalled, but almost equally important, is the last sentence of paragraph 4 of Decision 1/CP.20, recognizing 'complementary support by other Parties' – that is, those that are not developed countries. It indicated then that developing countries could have a role to play in the provision of support and mobilization of climate finance.

The negotiation meetings that preceded COP-21 in Paris (France), in 2015, slowly consolidated the notion that differentiation would be addressed in a context-specific manner appropriate to each element of the Agreement, rather than by a dichotomy that cuts across all sections.[39] The understanding evolved that certain differentiating parameters (or 'modulators', as they were referred to by negotiators) could inform the implementation of the provisions of the Agreement.[40] Finally, during the second week of COP-21, when parties assembled no longer under the ADP but as the Comité de Paris, the Agreement took form under the authority and diplomatic craftsmanship of the French presidency after week-long minister-led informal consultations.

5. THE PARIS AGREEMENT

5.1. *Reflecting the Principle of CBDR-RC in the Light of Different National Circumstances*

The Paris Agreement clearly recognizes the normative legacy of the UNFCCC. It is guided by principles of the Convention, including equity and CBDR-RC,[41] and will reflect them throughout its implementation in the light of different national

[37] Decision 1/CP.20, 'Lima Call for Climate Action', UN Doc. FCCC/CP/2014/10/Add.1, 2 Feb. 2015.

[38] White House, Office of the Press Secretary, 'U.S.-China Joint Announcement on Climate Change', Beijing (China), 12 Nov. 2014, available at: https://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change.

[39] 'Practical application of differentiation will vary depending on the element of the agreement (mitigation, adaptation, support, transparency)': First Informal Ministerial Consultations to Prepare COP21, Paris (France), 20–21 July 2015: Aide-Mémoire Produced by France and Peru, Paris (France), 31 July 2015, available at: http://www.actu-environnement.com/media/pdf/news-25145-note-france-perou.pdf.

[40] See the handout by the facilitator of the informal meeting on 'differentiation' for the facilitated group on mitigation: Annex I of ADP 2.10 Working Document (version of 8 Sept. 2015 at 18:00h), available at: http://unfccc.int/files/bodies/awg/application/pdf/adp2-10_8sep2015t1500_cwd.pdf.

[41] Paris Agreement, n. 27 above, Annex, Preamble, para. 3.

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circumstances.[42] The approach to differentiation under the Paris Agreement is far more diversified than it is under the UNFCCC. While categories of countries, such as 'developed' and 'developing', are still relevant, these categories are nowhere defined; nor does the Agreement make any reference to the Annexes of the UNFCCC. This is a big shift. The Paris Agreement aims to reflect the responsibilities, capacities, and circumstances of all parties.[43] As will be shown, differentiation is operationalized in several ways, some explicit, some more implicit, balancing different considerations for each element of the Agreement.

From the outset, Article 2.2 restated the Lima language that the Agreement 'will be implemented to reflect equity and the principle of CBDR-RC, in the light of different national circumstances'.[44] The overall approach to differentiation, therefore, is not premised on 'causality' alone, but on an amalgamation of country-specific responsibilities, capabilities and circumstances – and serving the purpose of the Agreement to keep temperature increases well below 2 degrees Celsius (2ºC).

The qualifier 'in the light of different national circumstances' introduces a dynamic and flexible element to interpreting both responsibilities and capabilities, broadening the parameters for differentiation.[45] It allows for a much more complex approach, taking into account not only a wider array of criteria – such as past and current, as well as projected, future emissions – but also financial and technical capabilities, human capacity, population size and other demographic criteria, abatement costs, opportunity costs, skills, etc.[46]

In this way, the principled-based approach to differentiation in the Paris Agreement is more nuanced, while building upon the UNFCCC.[47] The Agreement allows for the creation of an evolutionary 'policy space' under the Convention in various ways. Firstly, the references to the principle of CBDR-RC are general in character and are not explicitly linked to any article of the UNFCCC, nor its Annexes. The references in the Preamble and Articles 2.2 and 4.3 signal that the CBDR-RC principle of the UNFCCC applies in a manner that is not static, but open to change. The general, principled character is a means to adjust and adapt the parties' obligations to be responsive to an evolutionary understanding of accountability for temperature increases and also to changing political, social and economic

42 Ibid., Annex, Art. 2.2.

43 It is worth noting that the category 'economies in transition' is not referred to in any provision of the Agreement or the accompanying decision. This is clearly an example of how differentiation can evolve in response to changing circumstances – countries that formerly belonged to the Soviet Republic are now either part of the European Union or identify themselves as developing countries, with the exception of the Russian Federation, of course, which stands in a category of its own.

44 Paris Agreement, n. 27 above, Annex, Art. 2.2.

45 L. Rajamani, 'Differentiation in a 2015 Climate Agreement', *Center for Climate and Energy Solutions (C2ES) Papers*, June 2015, p. 2, available at: http://www.c2es.org/docUploads/differentiation-brief-06-2015.pdf.

46 H. Winkler et al., 'What Factors Influence Mitigation Capacity' (2007) 35(1) *Energy Policy*, pp. 692–703.

47 The Agreement serves to '*enhance* the implementation of the Convention' (Art. 2.1), which allows for the interpretation that the terms of the UNFCCC are not 'set in stone', but that the UNFCCC is a living document; it is not 'static' in its content but is rather, by further implementation of the Paris Agreement, evolutionary.

circumstances.[48] Because responsibilities, capabilities and national circumstances not only differ significantly but are in a flux, they will have to be taken into account in a dynamic fashion.

There is, arguably, another important implication. While Article 3.1 UNFCCC expands on CBDR-RC by stating that '[a]ccordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof', to 'take the lead' now relates specifically to the type of mitigation target (that is, economy-wide and absolute, in Article 4.4 of the Paris Agreement) and to the commitment of developed countries to mobilize finance (Article 9.3 of the Paris Agreement).

Secondly, the Paris Agreement does not operate with a single, across-the-board approach to differentiation based on explicit pre-set categories of countries. Many of the obligations which will become legally binding once the Agreement enters into force will apply to *all* parties.[49] Where references to 'developed' and 'developing' countries occur, they do not lead to a static placement of countries. Rather, the absence of annexes and of definitions of 'developed' and 'developing' allow countries to move towards greater ambition over time without the need to 'graduate' from one category to the other.

This allows for a further observation. The Kyoto Protocol operated on a stringent type of differentiation where only developed country parties included in Annex I of the UNFCCC had quantified emissions limitation and reduction commitments. The Paris Agreement leaves this track of strict, 'binary' differentiation on mitigation commitments and builds differentiation on the more open, principled-based approach of the UNFCCC. If the Kyoto Protocol can be seen as the operationalization of Article 4.2 UNFCCC, as argued above, the Paris Agreement, at least in part, could be seen to build on Article 4.1 of the Convention, which includes commitments by all parties.

5.2. *The Principles of Highest Possible Ambition and Progression as Means to Differentiate over Time*

The Paris Agreement also contains two new principles, *highest possible ambition* and *progression* to inform the level of ambition of the parties' efforts and, implicitly, the differentiated placement of countries in the overall heterogenic and diverse picture. The balance between sheer self-determination of effort and equitable effort sharing is, inter alia, struck by having each party commit to undertaking *ambitious* efforts, as defined in the provisions of the Agreement. With respect to mitigation, this is expanded to having an NDC which reflects its 'highest possible ambition, reflecting CBDR-RC, in the light of different national circumstances' (Article 4.3).

While this language seems unassuming at first glance, it is, in fact, a potent and powerful tool. This provision reflects an expectation that all parties will deploy their best efforts in setting their national mitigation targets and in pursuing domestic

[48] See also T. Deleuil, 'The Common but Differentiated Responsibilities Principles: Changes in Continuity after the Durban Conference of the Parties' (2012) 3(21) *Review of European Community and International Environmental Law*, pp. 271–81.

[49] Legally binding obligations for all parties are contained in Paris Agreement, n. 27 above, Arts 4.2, 4.3, 4.8, 4.9, 4.13, 7.1, 13.7.

measures to achieve them. Article 4.3 is reflective of a standard of care that states now need to exercise: to strive for their highest possible ambition in a manner that their efforts reflect their common responsibilities, respective capabilities and national circumstances.[50] It is reminiscent of a due diligence standard in international law which requires governments to act in proportion to the risk at stake and to the extent of the capacity they employ.[51] With that, each and every party (once the Agreement enters into force) has committed to take all appropriate and adequate climate measures according to its responsibility and its best capabilities in order to progressively achieve the objective of the Agreement – to keep the increase in global temperature well below 2ºC in order to avoid dangerous anthropogenic interference with the climate system. *Highest possible ambition* is responsive to states' differing responsibilities, capabilities and circumstances, while at the same time striving to match ambition with the overall aim. It thereby combines effectiveness and fairness.

This concept represents both a formal departure from the strict and equal treatment of states, and a departure from the strict two-fold differentiation model contained in the UNFCCC and its Kyoto Protocol. Importantly, the concept is a flexible and dynamic means of differentiation which allows for the determination of what constitutes an equitable and proportionate contribution in any given case and at any given point of time.

What constitutes an equitable and proportionate effort is a (yet to be settled) debate under the UNFCCC. It is, however, worth noting that the 'nationally determined' approach of the Paris Agreement has already led to a research agenda and several tools developed by civil society to assess, assist and/or to inform countries' NDCs with regard to fairness and ambition.[52] The locus of this debate has potentially moved to the national level, during the preparation of each successive contribution. At the international level, this nationally informed understanding of 'highest possible ambition' may provide relevant inputs to the consideration of the collective level of ambition through the global stocktake which will take place every five years.

Articles 3, 4.3 and 4.4 of the Paris Agreement further establish a requirement that the efforts of all parties will represent a progression over time, meaning that every new effort will go beyond previous efforts. This is connected with another central aspect of the Agreement: the logic of regularly preparing *successive* contributions, informed by the outcomes of a collective assessment of progress towards the goal of the Agreement – the global stocktake defined in Article 14.

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[50] See, e.g., C. Voigt, 'The Paris Agreement: What is the Standard of Conduct for Parties?', *Questions of International Law*, 24 Mar. 2016, available at: http://www.qil-qdi.org/paris-agreement-standard-conduct-parties; and C. Voigt, 'The Potential Roles of the ICJ in Climate Change-related Claims', in D. Farber & M. Peeters (eds), *Climate Change Law* (Edward Elgar, 2016), pp. 152–66, at 159–61.

[51] See, e.g., the first report of the International Law Association (ILA) Study Group on Due Diligence: D. French (Chair) & T. Stephens (Rapporteur), 'Due Diligence in International Law', 7 Mar. 2014; available at: http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045.

[52] See, e.g., the CAIT Equity Explorer, by the World Resources Institute (WRI), available at: http://cait.wri.org/equity; and the methodology of the Climate Action Tracker, by Ecofys and Climate Analytics, available at: http://climateactiontracker.org/methodology/85/Comparability-of-effort.html.

Inherent in these parameters is the understanding that both ambition and progression are reflective of and responsive to the parties' national responsibilities, capabilities and circumstances, allowing for a more diversified way of differentiation over time. This makes the due diligence-based standard of care referred to above a *continuum*. Parties will be required, on a regular basis through iterative processes, to revisit their actions and support and to assess their levels of ambition in accordance with their CBDR-RC, in the light of different national circumstances. This encourages an unprecedented dynamism in differentiation, which preserves the commitments of developed countries, while allowing for developing countries to assume more responsibilities – without the need to 'graduate' to another category.

5.3. *Differentiation as Reflected in the Elements of the Paris Agreement*

Mitigation

The nuanced approach to differentiation is most evident in the mitigation provisions. Article 4 of the Paris Agreement sets common, general provisions and specifies parameters to guide developed and developing countries in their implementation, allowing more flexibility to the latter and, within these, additional flexibility to least developed countries and small island developing states.

For instance, Article 4.1 defines the global trajectory: all parties have committed to contribute to the global peaking of GHG emissions as soon as possible, reducing emissions rapidly thereafter, and achieving a balance of emissions and removals in the second half of this century. While this global trajectory applies to all parties in a joint effort, it recognizes that developing countries will take longer to peak their emissions.

Similarly, the legally binding obligation to 'prepare, communicate and maintain successive NDCs', in Article 4.2, applies to all parties. Yet, it is followed by several modulators that allow for differentiation in the content (level of ambition) and form (type of target) of NDCs. The self-determined aspect of the parties' level of effort is accompanied by obligations of conduct in Article 4, paragraphs 3 and 4.[53] All parties' NDCs will reflect their 'highest possible ambition', but such level of ambition should also reflect their respective responsibilities, capabilities and circumstances, as well as represent a progression in relation to the previous contribution. In terms of *types* of mitigation target, Article 4.4 stipulates that developed countries should continue to take the lead by undertaking economy-wide absolute targets. Developing countries should enhance their efforts and are expected to assume economy-wide targets when

[53] Cf. the language in Art. 4.3 and 4.4 with para. 20 of the 'Geneva Negotiating Text' (UN Doc. FCCC/ADP/2015/1, 25 Feb. 2015), proposed by Norway in ADP 2.8, Geneva (Switzerland), 8–13 Feb. 2015; paras 8 and 11 of the 20th BASIC Ministerial Meeting on Climate Change Joint Statement (New York, NY (US), 27–28 June 2015, available at: http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=12378:20th-basic-ministerial-meeting-on-climate-change-new-york-27-28-june-2015-joint-statement&catid=578&lang=en&Itemid=718); as well as para. 5 of the China–France Joint Presidential Statement on Climate Change (Beijing (China), 2 Nov. 2015, available at: http://www.diplomatie.gouv.fr/en/french-foreign-policy/climate/2015-paris-climate-conference-cop21/article/china-and-france-joint-presidential-statement-on-climate-change-beijing-02-11).

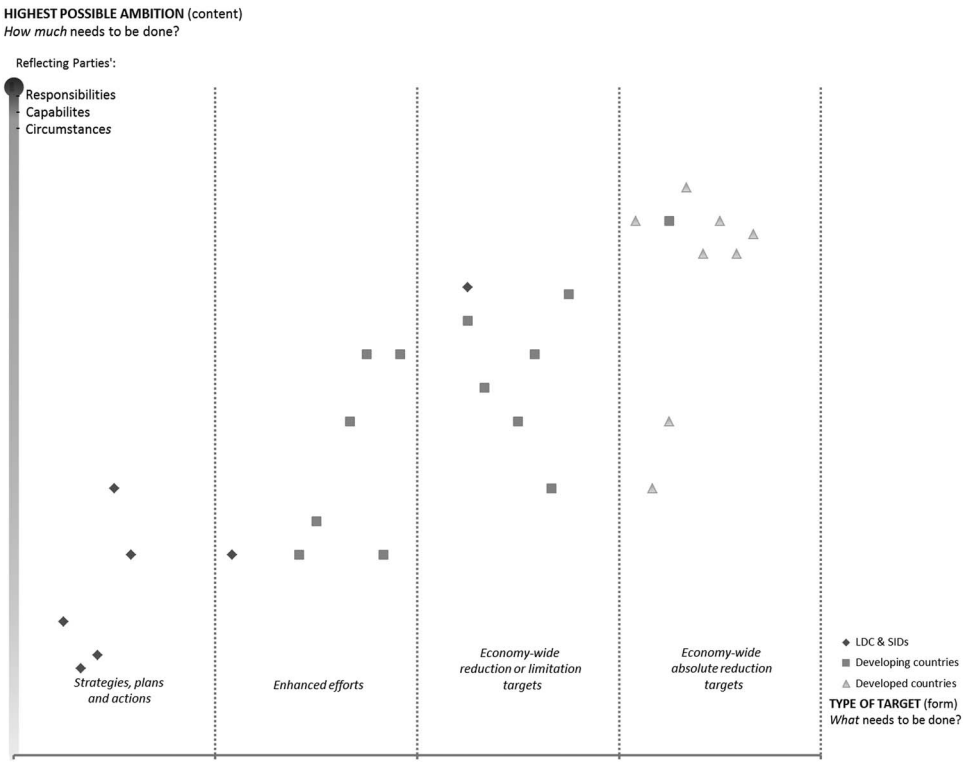

Figure 1 Differentiation in Mitigation Efforts
Note: Each party's NDC will reflect its highest possible ambition, in light of its responsibility, capability and circumstances (y-axis) and correspond with one of diverse types of target (x-axis). Developed countries should start at the upper right side of the diagram. Each time a successive NDC is communicated, it will progress beyond previous versions. Such a parameter-based determination of mitigation efforts leads to more diversified and dynamic differentiation.

their circumstances allow. This is a significant evolution from the UNFCCC, which did not contain prescriptive guidance for the type of mitigation effort on the part of developing countries.

In fact, only when Article 4, paragraphs 3 and 4, are seen in conjunction, does a comprehensive picture of differentiation in the context of mitigation commitments emerge. Differentiation applies both to the content ('how much') and the form ('what') of the parties' level of effort. These two elements can be represented as axes in a Cartesian coordinate system which allows for the equitable determination of each party's contribution at any point in time (see Figure 1). Together, they provide the flexibility and fluidity necessary to capture the parties' diverse and changing realities, while aiming for an effective response to the climate challenge.

The basis for differentiation in the mitigation provisions, therefore, is a complex balance between the parties' responsibilities, capabilities and circumstances rather than any particular definition of 'developed' or 'developing' country. Consequently, this approach is fully consistent with the agreed global mitigation trajectory: all parties

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have an obligation to continuously contribute to achieving the temperature goal, but they should do so with their highest possible ambition, in a diversified and equitable manner, and reflecting their responsibilities, capabilities and circumstances.

Adaptation

Adaptation provisions under Article 7, on the other hand, have more general, common characteristics; there is actually no specific obligation for, or even an explicit reference to 'developed countries' in this article.[54] Nonetheless, Article 7 gives preferential treatment to developing countries and, within this group, to the most vulnerable. It establishes that the implementation of the Agreement should take into account the needs of developing countries that are particularly vulnerable (Article 7.2); provide recognition and assistance to the adaptation efforts of developing countries (Articles 7.3, 7.7 and 7.13), while avoiding the creation of additional reporting burdens on developing countries (Article 7.10). The basis for differentiation under Article 7 relies mostly on parties' vulnerabilities and capabilities. The Agreement, however, does not specify which developing countries are particularly vulnerable. As any attempt to list them under the Paris Agreement has proven unfruitful, one can only assume, by way of reference, the types listed in Article 4.8 UNFCCC.

Finance

The provisions on financial support are arguably how the Paris Agreement addresses differentiation between developed and developing countries most directly and explicitly. Article 3 recognizes the need to support developing countries for the effective implementation of the Agreement. Articles 4.5 and 7.13 state that 'support shall be provided' to developing countries for their mitigation and adaptation actions, respectively. On the receiving end, therefore, the Paris Agreement clearly entitles developing countries to support. It does not, however, condition developing countries' actions on support. Rather, as Article 4.5 makes clear, enhanced support for developing countries will allow for higher ambition in their actions. Read in conjunction, Articles 3, 4.5 and 7.13 establish a strong link between support and the degree of effectiveness and ambition in the actions of developing countries. Yet, this does not exempt them from fulfilling their obligations under the Agreement.

On the giving end, Article 9 offers the most clear-cut, bifurcated version of differentiation in the Paris Agreement. Article 9.1 reaffirms developed countries' legally binding commitments under the Convention to provide financial resources to developing countries. Support from other parties is voluntary, as per Article 9.2. Proposals to commit those developing countries 'in a position to do so' or even 'willing to do so' to provide finance were flatly rejected. This, nevertheless, represents a considerable increment to previous practice under the Convention, in which

[54] Art. 7.13, nevertheless, contains an indirect reference to developed countries, in the context of support.

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developing countries simply had no formal role in climate finance or in supporting other countries; nor did they receive any recognition for doing so.

Mobilization of climate finance – a concept that is considerably broader than the provision of financial resources and includes 'a wide variety of sources, instruments and channels' – is described in Article 9.3 as a 'global effort'. It can therefore be interpreted as a common commitment of all parties. In this effort, however, developed countries should continue to take the lead.

Article 9, therefore, differentiates financial obligations under the Paris Agreement in distinctive ways. It is quite explicit and strict with regard to the provision of support, attributing a strong normative weight to developed countries' obligations, while other parties are encouraged to provide support on a voluntary basis only. However, Article 9 approaches the mobilization of climate finance in a more nuanced way, mirroring to some extent the approach used for mitigation: a provision applicable to all, accompanied by an obligation of conduct for developed countries to continue taking the lead.

Transparency

If finance is where differentiation is expressed more explicitly, transparency provisions under Article 13 are arguably where provisions for developed and developing countries converge most significantly. Since the purpose of transparency provisions is to increase trust and confidence among countries, it is arguably harder to legitimize any partner being entitled to less stringent obligations. Differentiated mitigation and financial commitments based on considerations of equity and responsibilities, capacities and circumstances may be perfectly justifiable, but all parties should report on these commitments as transparently and comprehensively as possible.

Accordingly, the 'enhanced transparency framework for action and support' established in Article 13 of the Paris Agreement sets parties' capacities as the basis for differentiation. Different types of commitment and obligation under the other provisions of the Agreement have distinct transparency requirements – for instance, as a reflection of Article 9, developed countries have mandatory reporting obligations with regard to the provision of support, while other parties only 'should' do the same (see Article 13.9). Accordingly, the technical expert review as well as the multilateral consideration of progress with respect to providing support is compulsory only for developed countries (Article 9.11). Over time, however, these remaining elements of differentiation in the transparency framework will become less pronounced as all parties will be subject to common modalities, procedures and guidelines, as stated in Article 13.13.

In what promises to be one of the most difficult negotiations prior to the entry into force of the Agreement, these yet to be agreed common rules will express differentiation mainly by providing flexibility to those developing countries that need it in the light of their capacities.[55] An interesting feature of this particular

[55] To this end, Decision 1/CP.21 establishes a 'capacity-building initiative for transparency' to support developing countries in meeting enhanced transparency requirements: Decision 1/CP.21, 'Adoption of the Paris Agreement', UN Doc. FCCC/CP/2015/10/Add.1, 29 Jan. 2016, paras 85–89.

approach is that it recognizes a preferential treatment of developing countries, but at the same time softens the strict categorization by limiting flexibility only to those developing countries that lack the capacity to implement common modalities on reporting, including those regarding the scope, frequency and level of detail.[56] In doing so, the Agreement recognizes that *within* the group of developing countries differences exist that lend themselves to a more heterogeneous (internal) treatment of developing countries in accordance with their capacities.

Other Provisions

The references above do not exhaust the examples of how the Paris Agreement differentiates among parties.

Differentiation can also be found in the context of the legal implications of the Agreement. For example, the mandate of the compliance and implementation committee (Article 15) states that the committee 'shall pay particular attention to the respective national capabilities and circumstances of Parties'.

The Agreement further allows implicit differentiation by using norms which accommodate a large degree of discretion. Such norms may, for example, permit the consideration of criteria, characteristics or circumstances that differ from country to country. Implicit differentiation can occur where the Agreement permits flexibility and/or discretion in the implementation, when using terms such as 'as far as possible', 'highest possible', 'best possible', 'as soon as possible' or 'where/as appropriate'. Of importance in this context is that 'appropriateness' or 'possibility' or 'flexibility' are in constant flux and allow both dynamic as well as temporary differentiation.

6. SUMMARY AND REFLECTIONS

This article provides an analysis of the careful balance struck in the Paris Agreement between differentiation among parties and the need to raise collective ambition. This balance is reflected in five *systemically interconnected* features of the Agreement.

Firstly, the Paris Agreement adopts a *more diversified way of differential treatment*, allowing a wider array of parameters to be taken into account when parties determine their national contributions, while being set against the normative background of the UNFCCC. The Agreement does not define differentiation in a singular way. Rather, it approaches it in at least three complementary ways:

1. It builds upon the principled approach to differentiation as contained in the CBDR-RC principle of the UNFCCC in a more nuanced and dynamic fashion by recognizing that the (application of the) principle is responsive to differing national circumstances – that is, not tied to the Annexes.
2. Each article of the Agreement reflects differentiation in context-specific ways, ranging from universal, non-differentiated obligations, to provisions that provide

[56] Decision 1/CP.21, ibid., para. 90.

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for implicit differentiation through norms the application of which permits consideration of characteristics that vary from country to country, to starkly contrasted and explicit differentiation between developed and developing countries.

3. The Agreement sets out parameters that will inform parties' choices of ambition of both action and support, including the principles of progression and highest possible ambition, which consequentially also contribute to determining the differentiated commitments of parties.

Secondly, the principle of highest possible ambition establishes the standard of care now to be exercised in climate affairs. It implies a *due diligence standard* which requires each government to act in proportion to the risk at stake, and reflects its common but differentiated responsibilities and capabilities. Each single party has committed to taking all appropriate and adequate climate measures in order to progressively achieve the objective of the Agreement: to keep global temperature increases well below 2°C in order to avoid dangerous anthropogenic interference with the climate system. 'Highest possible ambition' implies recognizing states' differing national circumstances while at the same time aiming to match ambition with the overall aim, thereby combining effectiveness and fairness. The principle represents both a formal departure from the strict and equal treatment of states, and a departure from the historical, binary or bifurcated differentiation model. Importantly, the concept offers a flexible and dynamic means of differentiation by allowing the determination of what constitutes a proportionate measure in any given case and at each successive cycle of NDCs.

Thirdly, the principled-based approach to differentiation is combined with *iterative processes* (those presenting a successive contribution every five years, after a global stock-take), and with the establishment of an enhanced transparency framework. This, in turn, is an important ingredient to establish mutual trust. Not only will parties' NDCs change over time the 'differentiated placement' of parties, but they will do so with *repetitiveness* and an *unprecedented degree of transparency and openness*.

Fourthly, the characteristics above enable the Paris Agreement to create a *collective learning environment*. Collective learning might be a way to overcome the 'prisoner's dilemma' that characterizes climate change as a collective action problem. In fact, iterative, cooperative and facilitative processes have been identified as a way to address the risk of 'free riding'.[57]

The Paris Agreement has set up an architecture that promotes the evolution of voluntary, cooperative behaviour. Conditions for such evolution include transparency, trust and credibility that parties actually do what they said they would ('pledge'). According to game theory, three elements are necessary to fulfil such conditions:

1. The pledging process needs to be broken down to a series of small steps. Such a succession of pledges will increase the acceptance by parties of cooperative strategies, as they can adjust the content of their pledges in subsequent rounds.

[57] R. Axelrod, *The Evolution of Cooperation* (Basic Books, 1984), pp. 135–47, and Ch. 9, pp. 169–91, at 177.

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2. Common timelines need to be established for parties to individually communicate new pledges, but also to assess collective progress towards the overall aim.
3. The international regime should have a long, perhaps indefinite, time horizon, creating the conditions to 'trust, but verify' the actions of other parties over time.[58]

The Paris Agreement meets all of these conditions. The pledging of an NDC every five years, informed by the outcome of the stocktake of collective progress, allows subsequent upward enhancement of ambition in a gradual manner. There is a robust transparency system consisting of reporting and review of actions and support, which adds credibility to parties' pledges.

Fifth and finally, the Agreement creates a *reflexive approach* to parties' determination of their climate action by establishing the duty of parties to revisit their actions and periodically assess whether their levels of ambition indeed correspond with their best possible effort, reflecting their responsibilities, capabilities and circumstances. This stimulates parties to improve their response to climate change by learning about their actions and the global effort, using this information to make appropriate changes. Perhaps in these aspects lies the greatest strength of the Agreement – enabling greater political relevance and durability, as well as fairness.

In sum, this article argued that differentiation under the Paris Agreement is much more diversified and less categorical than it is under the UNFCCC's Annexes and the Kyoto Protocol. References to 'developed' and 'developing' countries are still relevant, but in a context-specific manner, rather than a 'two fold' approach. While the Agreement echoes the principle of CBDR-RC, it adds that it will be reflected 'in the light of different national circumstances'. Along with the principles of *progression* and *highest possible ambition*, this allows a dynamic upward adjustment of parties' efforts in a manner that is recognizant of the unique and changing responsibilities, capacities and circumstances of 197 diverse states at each successive cycle of NDCs. The articulation of the principles of CBDR-RC, progression and highest possible ambition at each successive NDC provides an innovative, comprehensive and dynamic way to match ambition with the overall aim of the Agreement, in a practical framework for combining effectiveness and fairness.

Differentiation under the Paris Agreement has the potential to function as a catalyst for a race to the top on climate action, rather than merely a burden-sharing concept. It must lend itself to strengthening collective action to hold temperature increases to well below 2°C. This requires ambitious mitigation action by all parties, as well as due consideration of the issues of equity, justice and fairness that arise from the global response to climate change. Given the important role that differentiation has to play, it can be stated safely that the Paris Agreement has succeeded in using differentiation as a means for enhancing ambition, as opposed to stalemating it. Rather than setting countries apart, differentiation could become a tool for bringing countries closer together in serving the purpose of the Agreement.

[58] Ibid.

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Annex ZG

7 Paris Agreement

From: International Climate Change Law
Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani

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4.1, which is neutral as between carbon dioxide and other GHGs and as between reduced emissions and enhanced removals.

These global mitigation goals are to be achieved ‘on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty’.[164] As noted before, these terms are framed differently in the Paris Agreement than in the FCCC.[165] The Paris Agreement also recommends that parties ‘strive to formulate and implement’ long-term low GHG emission development strategies.[166] These are likely to play a critical role in shifting development trajectories and investment patterns toward meeting the long-term temperature goal. In a regime that permits countries to choose the nature, form and stringency of their contributions, this provision provides a mechanism for catalyzing national strategic thinking to ensure short-term actions are in line with long-term goals, and for aggregating the efforts of the parties.[167]

In order to address all of the elements of the Durban Platform in a balanced manner, the Paris Agreement also defines aims for adaptation and finance, albeit in general, qualitative terms (rather than in quantitative terms, as proposed by the African Group). For adaptation, Article 2 expresses the aim of increasing adaptive capacity, fostering climate resilience, and reducing vulnerability—aims reiterated in Article 7, which deals specifically with adaptation. The finance aim—namely, to make ‘finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development’—addresses private as well as public flows, and provides support for efforts to phase out climate-unfriendly investments.

(p. 231) V. Mitigation (Article 4)

A. Obligations in relation to nationally determined contributions (NDCs)

The most significant legal obligations in the Paris Agreement are to be found in its mitigation article. In order to meet the long-term temperature goal, parties are subject to binding obligations of conduct in relation to their nationally determined mitigation contributions.[168] The most significant of these are contained in Article 4.2, which reads:

> Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

There are many drafting treasures to be mined in this carefully negotiated text. First, unlike the majority of provisions in the Paris Agreement that apply to ‘Parties’,[169] the first sentence of this provision applies to ‘each Party’, thus creating individual obligations. Second, this provision, like selective provisions in the Paris Agreement, uses the imperative ‘shall’ both in relation to preparing, communicating and maintaining national contributions, as well as pursuing domestic mitigation measures. Third, while these are binding obligations, they are obligations of conduct rather than result. The term ‘intends to achieve’ in the first sentence establishes a good faith expectation that each party intends to achieve its NDC, but stops short of requiring it to do so. The second clause in the second sentence performs a similar function. It requires parties to pursue measures ‘with the aim of achieving the objectives of [their] contributions’.[170]

Parties thus have binding obligations of conduct to prepare, communicate and maintain contributions, as well as to pursue domestic measures. There is also a good faith expectation that parties intend to and will aim to achieve the objectives of their contributions. In the lead up to Paris, many parties, including the EU, South Africa, and the small island states, had argued that parties should be required to achieve their NDCs, thus imposing an obligation of result. This was strenuously opposed by the US, China, and India, among others, who did not wish to subject themselves to legally binding obligations of

result. The Paris Agreement deferred to the latter in this respect. However, to help ensure that parties act in good faith, the agreement requires each party to provide the information necessary to track (p. 232) progress in implementing and achieving its nationally determined contribution,[171] and subjects parties to a 'facilitative, multilateral consideration of progress' with respect to such implementation and achievement.[172]

The NDCs parties have submitted are formulated in a variety of ways. Some are quantitative (such as absolute emission reduction targets)[173] and others are qualitative (such as goals to adopt climate friendly paths);[174] some are conditional (as for instance on the provision of international support)[175] while others are unconditional.[176] In the circumstances, an obligation of result, if one had been created, may not have lent itself to enforcement.

In addition to the binding obligation to prepare, communicate and maintain contributions as well as to take domestic measures, parties are subject to further procedural obligations. Each party is required to communicate a contribution every five years.[177] When communicating their NDCs, parties are required to provide the information necessary for clarity, transparency, and understanding.[178] These provisions are phrased in mandatory terms ('shall'), and thus constitute binding obligations for parties. Some also oblige parties to act in accordance with 'relevant decisions' to be taken by the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA), thus effectively giving the CMA authority to adopt legally binding decisions.[179] It is worth noting, however, that the 'relevant decisions' may provide parties with discretion. For instance, decision 1/CP.21 provides that parties '*may* include, as appropriate, inter alia' several listed pieces of information, but does not require them to do so.[180]

The Paris Agreement also requires parties to account for their NDCs in accordance with 'guidance' adopted by the CMA.[181] Although this provision is phrased in mandatory terms ('shall'), the use of the word 'guidance' could be interpreted (p. 233) as implying that a CMA decision containing accounting guidance would not bind parties. Alternatively, it could be interpreted as meaning that CMA decisions on accounting should provide general guidance rather than impose detailed rules. Given this ambiguity, the way in which the accounting decision is drafted may provide clues as to whether the parties regard it as binding—for example, whether it is drafted in mandatory or discretionary terms.[182]

The strength of these provisions, as well as the transparency framework, discussed below, can be attributed to the concerted efforts of an informal group of key negotiators from developed and developing countries, including the EU, Australia, New Zealand, South Africa, Switzerland, the US, and others, as well as the Singaporean diplomat who facilitated the formal negotiations. This informal group, which came to be called 'friends of rules', formed after Lima when its members realized that the rules of the game, of profound importance to the integrity of the agreement, were getting short shrift in a process focused primarily on the headline political issues.

B. Registering NDCs

The NDCs referred to in Article 4.2 are to be recorded in a public registry maintained by the secretariat.[183] The US, Canada, and New Zealand, among others, favored this approach, arguing that housing contributions outside the treaty would enable their speedy and seamless updating. Others were concerned that if contributions were housed outside the agreement, parties would enjoy excessive discretion in revising their contributions, potentially even downwards. To address this concern, the Paris Agreement permits parties to adjust their contributions only with a view to enhancing the level of ambition and subject to CMA guidance.[184] The Paris decision also calls on the CMA to adopt modalities and procedures for the operation and use of the public registry,[185] which could potentially circumscribe the discretion parties have. In any case, notwithstanding the fact that

[158] See T. Jayaraman and Tejal Kanitkar, 'The Paris Agreement: Deepening the Climate Crisis', *Economic and Political Weekly*, 51/3 (2016): 10.

[159] Paris Agreement, Art 4.1.

[160] See ADP, Draft agreement and draft decision on workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Work of the ADP contact group (6 November 2015, reissued on 10 November 2015) ADP.2015.11.InformalNote, Art 3.

[161] See Kelly Levin, Jennifer Morgan, and Jiawei Song, 'Insider: Understanding the Paris Agreement's Long-term Goal to Limit Global Warming' (World Resources Institute, 15 December 2015) <http://www.wri.org/blog/2015/12/insider-understanding-paris-agreement%E2%80%99s-long-term-goal-limit-global-warming> accessed 20 January 2017.

[162] IPCC, *Climate Change 2014: Synthesis Report* (Cambridge University Press, 2014) Summary for Policy Makers, 20.

[163] G-7 Leaders' Declaration (Schloss Elmau, Germany, 8 June 2015) <https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration> accessed 20 January 2017. See Chapter 8, Section IV.E.2 for a discussion of 'G clubs'.

[164] Paris Agreement, Art 4.1.

[165] See nn 83–90 above and accompanying text.

[166] Paris Agreement, Art 4.19.

[167] For examples of such strategies, see the Deep Decarbonization Pathways Project, *Synthesis Reports* <http://deepdecarbonization.org/ddpp-reports/> accessed 20 January 2017.

[168] See contra, Richard Falk, ' "Voluntary" International Law and the Paris Agreement' (16 January 2016) <https://richardfalk.wordpress.com/2016/01/16/voluntary-international-law-and-the-paris-agreement/> accessed 20 January 2017.

[169] Paris Agreement, Arts 3, 4.1, 4.2, 4.8, 4.13, 4.15, 4.16, 4.19, 5.1, 5.2, 6.1, 6.3, 6.8, 7.2, 7.4, 7.5, 7.6, 7.7, 8.1, 8.3, 9.2, 10.1, 10.2, 11.4, 12, and 14.3.

[170] The comma ensures that the final clause modifies parties who 'pursue' those measures rather than the measures themselves. Thus the 'with' functions not as a preposition qualifying 'measures' but as a conjunction qualifying 'pursue'.

[171] Paris Agreement, Art 13.7(b).

[172] Ibid, Art 13.11.

[173] See eg United States' Intended Nationally Determined Contribution (31 March 2015) <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx> accessed 20 January 2017.

[174] India's Intended Nationally Determined Contribution (1 October 2015) <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx> accessed 20 January 2017. In addition to quantitative emissions intensity targets, India's INDC identifies qualitative objectives such as to 'propagate a healthy and sustainable way of living based on traditions and values of conservation and moderation'.

[175] Arguably India's. See India's INDC, ibid.

[176] See eg Brazil, Intended Nationally Determined Contribution Towards Achieving the Objective of the United Nations Framework Convention on Climate Change (28 September 2015) <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx> accessed 20 January 2017. It is worth noting that parties considered the possibility of requiring all contributions to be unconditional. No agreement proved possible on this in Paris, but the Ad hoc Working Group on the Paris Agreement (APA) has been tasked with

developing further guidance on ‘features’ of nationally determined contributions for consideration and adoption by the CMA. See Decision 1/CP.21 (n 19) para 26.

177 Paris Agreement, Art 4.9.

178 Ibid, Art 4.8.

179 These decisions are to be negotiated in the next few years and adopted by the CMA in 2018.

180 Decision 1/CP.21 (n 19) para 27 (emphasis added).

181 Paris Agreement, Art 4.13. See also Decision 1/CP.21 (n 19) paras 31 and 32. It is worth noting that the guidance on accounting applies only to second and subsequent contributions, although parties could choose to apply it before.

182 See Chapter 3, Section II.D.3 for a full discussion of the status of COP decisions.

183 Paris Agreement, Art 4.12.

184 Ibid, Art 4.11.

185 Decision 1/CP.21 (n 19) para 29.

186 Paris Agreement, Art 4.3.

187 The notion of progression first found reflection in the Lima decision. See Lima Call for Climate Action, para 10.

188 See Views of Brazil on the Elements of a New Agreement under the Convention Applicable to All Parties (6 November 2014) <http://www4.unfccc.int/submissions/Lists/OSPSubmissionUpload/73_99_130602104651393682-BRAZIL%20ADP%20Elements.pdf> accessed 20 January 2017.

189 Paris Agreement, Art 3.

190 Ibid, Art 4.2.

191 Ibid, Art 7.9.

192 Ibid, Art 9.1.

193 Ibid, Art 9.3.

194 See Synthesis Report on the aggregate effect of the INDCs (n 37).

195 Decision 1/CP.21 (n 19) para 20.

196 Ibid, paras 23 and 24.

197 Ibid, para 35.

198 Paris Agreement, Art 14.2.

199 Decision 1/CP.21 (n 19) para 25.

200 Paris Agreement, Art 4.10.

201 International Carbon Action Partnership (ICAP), *Emissions Trading Worldwide: International Carbon Action Partnership: Status Report 2016* (Berlin: ICAP, 2016) (64 INDCs said they planned to use markets, and 25 said they were considering using markets); Environmental Defense Fund and International Emissions Trading Association, ‘Carbon Pricing: the Paris Agreement’s Key Ingredient’ (April 2016) <http://www.ieta.org/resources/Resources/Reports/Carbon_Pricing_The_Paris_Agreements_Key_Ingredient.pdf> accessed 20 January 2017.

202 Paris Agreement, Art 6.8.

Annex ZH

Oxford Public International Law

Human Rights, Remedies

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A. Overview

1 A → *human rights* remedy has two aspects or dimensions. The term encompasses, first, the procedures and institutions that may be utilized to enforce a right and, second, the actions or measures taken to prevent, redress or compensate the violation of a right. The ancient adage *ubi ius, ibi remedium* (where there is a right there is a remedy) reflects the importance given in international human rights law to the existence of effective → *remedies*, which are seen as necessary in order to ensure the full enjoyment of other rights. The international attention to remedies reflects concern with upholding and ensuring the effective enjoyment of guaranteed rights.

2 Global and regional human rights instruments expressly guarantee the right to a remedy and oblige States Parties to provide a remedy when human rights are violated, whether or not State agents (→ *Representatives of States in International Relations*) are responsible for the violation. In addition, the UN General Assembly (→ *United Nations, General Assembly* ; see also → *United Nations [UN]*) has adopted two → *declaration [s]* on the right to a remedy, giving greater detail and precision to the obligations of States. International human rights tribunals reviewing complaints of human rights violations (→ *Human Rights, Individual Communications/Complaints*) have assessed State compliance with both aspects of remedies: the duty to provide access to justice and the adequacy of substantive measures taken to prevent or redress violations of rights, in the process condemning → *amnesties* and similar actions that grant impunity to violators (→ *Individual Criminal Responsibility*). Recently, human rights tribunals, recognizing that a State law or policy may give rise to a large number of similar cases, have indicated the general measures the State must take to prevent and redress the systemic problem, in addition to providing redress to the individual applicants. In this way, duplicative or repetitious international procedures may be avoided and similarly situated victims afforded more rapid redress.

3 International human rights law has established that the attributes of an effective remedy include the institutional independence of the remedial body from the authority responsible for the violation, ability to invoke the guaranteed right, procedural fairness, the capability of the remedial body of affording redress, and effectiveness in fact (see also → *Fair Trial, Right to, International Protection*). Some international agreements explicitly call for the development of judicial remedies for the rights they guarantee, although effective remedies also may be supplied by non-judicial bodies.

4 If a State which is a party to the relevant treaty fails to afford the necessary redress, an individual who has exhausted local remedies may apply to a global or regional human rights tribunal to hear the matter (→ *Local Remedies, Exhaustion of*). UN human rights treaties require a separate ratification or declaration accepting the competence of the treaty body to hear individual complaints, but this is not required by regional agreements, except with respect to the → *Inter-American Court of Human Rights (IACtHR)*. UN treaty bodies (→ *Human Rights, Treaty Bodies*) may express their views or recommend reparative actions when they find a State has violated the rights of the applicant. The mandate of regional courts to order States to pay → *compensation* or afford other redress to applicants varies according to the provisions of the different regional human rights conventions. A judicial decision on remedies is part of the binding judgment of the courts.

B. The Right to a Remedy in Global Legal Instruments

5 Art. 8 → *Universal Declaration of Human Rights (1948)* ('UDHR') provides that '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. The → *International Covenant on Civil and Political Rights (1966)* ('ICCPR') contains three separate articles on remedies. The first, Art. 2 (3) ICCPR, obliges the States Parties to the covenant to afford an effective remedy to a victim notwithstanding that the violation has been committed by persons acting in an official capacity (→ *Victims' Rights*); to ensure that claims are heard by competent judicial, administrative or legislative authorities; and to ensure that the competent authorities shall enforce such remedies when granted. Arts 9 (5) and Arts 14 (6) ICCPR add that anyone unlawfully arrested, detained, or convicted shall have an enforceable right to compensation or be compensated according to law. The → *Human Rights Committee* has identified the kinds of remedies required, depending on the type of violation and the victim's condition. The committee has indicated that a State that has engaged in human rights violations, in addition to treating and compensating the victim financially, must undertake to investigate the facts (→ *Fact-Finding*), take appropriate action, and bring to justice those found responsible for the violations. The committee has recommended to States Parties: public investigation to establish the facts; bringing to justice the perpetrators; paying compensation; ensuring non-repetition of the violation; amending the offending law; providing → *restitution*; and providing medical care and treatment.

6 The → *International Covenant on Economic, Social and Cultural Rights (1966)* ('ICESCR') contains no right to a remedy, but General Comment No 3 (→ *General Comments/ Recommendations*) issued by the → *Committee on Economic, Social and Cultural Rights (CESCR)*, concerning the nature of State obligations pursuant to Art. 2 (1) ICESCR, proclaimed that appropriate measures to implement the covenant might include judicial remedies with respect to rights that may be considered justiciable (see also → *Human Rights, Domestic Implementation*). It specifically pointed to the non-discrimination requirement of the treaty and referenced the right to a remedy in the ICCPR. A number of other rights also were cited as 'capable of immediate application by judicial and other organs' (see also → *Self-Executing Treaty Provisions*).

7 Access to justice may require affording individuals recourse to tribunals to prevent a threatened violation (see also → *Individuals in International Law*). Art. 6 Convention on the Elimination of Racial Discrimination requires that States Parties assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination in violation of the convention (→ *Racial and Religious Discrimination*), as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination. The language of this provision anticipates the use of injunctive or other preventive measures against discrimination, as well as compensation or other remedies for consequential damages. A similar provision requiring effective protection of women from discrimination is found in Art. 2 (c) Convention on the Elimination of All Forms of Discrimination against Women (→ *Women, Rights of, International Protection*). The UDHR and several global and regional treaties similarly refer to the right to legal protection for attacks on privacy, family, home or correspondence, or attacks on honour and reputation.

8 Several texts require compensation to be paid to victims. Art. 14 (1) UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (→ *Torture, Prohibition of*) specifies as follows: 'Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.' Among treaties adopted by the specialized agencies, the ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries (→ *Indigenous Peoples*; → *International Labour Organization [ILO]*) also refers to 'fair compensation for damages' (Art. 15 (2)), to 'compensation in money' (Art. 16 (4)) and to full compensation for 'any loss or injury' (Art. 16 (5)).

9 The payment of money may not be the most appropriate form of redress for human rights violations, especially where there are underlying systemic problems, and some human rights bodies have suggested that non-monetary remedies, ie those that require a State to take specified actions rather than pay compensation, may be required to ensure adequate redress. Such actions can be useful not only in giving satisfaction to the victim, but in eliminating the cause of the violation and promoting respect for the human right that was violated. In General Recommendation No 5 (UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 5' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' [4 March 1988] UN Doc HRI/GEN/1/Rev.6 at 232 [2003]) the Committee on the Elimination of All Forms of Discrimination against Women announced that States Parties should make more use of temporary special remedial measures such as positive action, preferential treatment, or quota systems to advance women's integration into education, the economy, politics, and employment. The Working Group on Involuntary or Enforced Disappearances (→ *Disappearances)* also made reference to non-monetary remedies in a commentary to Art. 19 UN Declaration on the Protection of All Persons from Enforced Disappearance. The working group noted that the declaration imposes a primary duty to establish the fate and whereabouts of disappeared persons as an important remedy for victims. The State should also provide measures of rehabilitation, including medical and psychological care, rehabilitation for any form of physical or mental damage, legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty, family life, citizenship, employment or property, return to the place of residence, and similar forms of restitution, satisfaction and reparation that may remove the consequences of the enforced disappearance.

10 The General Assembly has twice adopted general texts calling on States to provide remedies, in the first instance for victims of criminal conduct or 'abuse of power', and in the second for those who have suffered from → *gross and systematic human rights violations*. The first text, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, contains broad guarantees for those who suffer pecuniary losses, physical or mental harm, and 'substantial impairment of their fundamental rights' (at para. 18) through acts or omissions, including abuse of power. The declaration specifies that victims are entitled to redress and to be informed of their right to seek redress, including restitution from the State whose officials or agents are responsible for the harm inflicted. Abuse of power that is not criminal under national law but that violates internationally recognized norms relating to human rights should be sanctioned and remedies provided, including restitution and/or compensation, and all necessary material, medical, psychological, and social assistance and support. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which took place in 1990 in Havana, Cuba, recommended that States base national legislation upon the declaration. More recently, the UN General Assembly adopted by → *consensus* basic principles and guidelines on the right to remedy and reparation for victims of gross violations of

international human rights law and serious violations of → *international humanitarian law* (UNGA Res 60/147 [16 December 2005] UN Doc A/RES/60/147; *Humanitarian Law, International*). The text is a non-binding resolution (see also → *International Organizations or Institutions, Secondary Law*), but it expressly claims in its → *preamble* to restate existing law and not to create any new substantive international or domestic legal obligations. The report of the Chairperson-Rapporteur on the consultative meeting on the drafting noted that 'shall' was used where a binding international norm is in effect; otherwise the term 'should' was used (UN Commission on Human Rights 'Report of the Chairperson-Rapporteur on the consultative meeting on the draft 'basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law' [2002] UN Doc E/CN.4/2003/63). The various forms of reparation identified are restitution, rehabilitation, compensation, satisfaction, and guarantees of non-repetition. The General Assembly declarations, in drawing the attention of each Member State to obligations under human rights treaties to ensure access to justice and adequate redress for those whose rights the State has violated, reflect a renewed concern with combating impunity and promoting compliance with human rights obligations. The Declarations serve to identify mechanisms, modalities, procedures and methods for implementing existing legal obligations.

11 Humanitarian law also contains norms relating to remedies in case of a breach. Art. 3 Hague Convention Regarding the Laws and Customs of Land Warfare (see also → *Warfare, Methods and Means*) obliges contracting parties to indemnify for a violation of the regulations. Similarly, Art. 91 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I; → *Geneva Conventions Additional Protocol I [1977]*), states that any party to a conflict who violates the provisions of the Geneva Conventions or the Protocol 'shall … be liable to pay compensation'. Unlike human rights instruments, these treaties do not provide for individual rights and claims, but remain enforceable on the inter-State level (see also → *State Responsibility*).

12 States have often sought reparation for violations of international humanitarian law through post-conflict settlements. There is also an increasing trend in favour of enabling individual victims of violations of humanitarian law to seek reparation directly from the responsible State through the State's courts and, if that avenue is unsuccessful, through application to international human rights tribunals, most of which may apply humanitarian law norms. In addition, various bilateral agreements allow for individual claims. A unique procedure was mandated by the UN Security Council (→ *United Nations, Security Council*) following the 1991 Iraqi invasion of Kuwait (→ *Iraq-Kuwait War [1990–91]*). The → *United Nations Compensation Commission (UNCC)* that was created reviewed claims for compensation for direct loss and damage arising as a result of Iraq's invasion, including individual claims for violations of international humanitarian law. The → *Eritrea-Ethiopia Claims Commission*, established by the 2000 Peace Agreement between the two countries, also has the power to decide all claims for loss, damage or injury caused to nationals of one party by the government of the other. Finally, compensation in some cases has occurred through the unilateral political act of a State (→ *Unilateral Acts of States in International Law*).

C. The Right to a Remedy in Regional Human Rights Treaties

13 At the regional level, the → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* ('ECHR') modelled its general remedial provision—Art. 13—on Art. 8 UDHR. The Committee of Ministers of the → *Council of Europe (COE)* reinforced Art. 13 ECHR with a recommendation adopted in 1984 that calls on all COE Member States to provide remedies for governmental wrongs. In addition to Art. 13 ECHR,

Art. 5 (5) ECHR requires compensation for breach of the right to be free from arrest in violation of the provisions of Art. 5 ECHR (see also → *Detention, Arbitrary*). When applicable, it requires a legally binding award of compensation (*Brogan v United Kingdom* [Series A No 145-B] and *Fox, Campbell and Hartley v United Kingdom* [Series A No 182]). The State may require proof of damage resulting from the breach and—the holdings in *Wassink v Netherlands* (Series A No 185-A) can be interpreted in this way—has a wide margin of appreciation in regard to the quantum (at para. 25 [3]).

14 The → *European Court of Human Rights (ECtHR)* has interpreted Art. 13 ECHR to guarantee an effective remedy 'to everyone who *claims* that his rights and freedoms under the convention have been violated' (*Klass v Germany* [Series A No 28], para. 64). In respect to a violation of Art. 2 ECHR, the remedies must be guaranteed for the benefit of the relatives of the victim (see also → *Life, Right to, International Protection*). Where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Art. 13 ECHR entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure. The ECtHR has also interpreted both Art. 2 ECHR, on the right to life, and Art. 3 ECHR, the prohibition of torture, to contain a positive obligation for the State to conduct an effective investigation when the circumstances under which someone has died or been abused potentially involve the responsibility of the State (*Oneryildiz v Turkey* [2004-XII 48938/99]).

15 The ECtHR has also begun to focus on restitution as a necessary remedy that the State must provide where it remains possible to restore the applicant's prior situation. In *Papamichalopoulos v Greece (Article 50)* (Series A No 330-B), the Court expressed its opinion that the ECHR imposes a duty on each State to do more than compensate the victim. A breach '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' (at para. 34 [1] ECHR). Each State can choose the manner of execution of the judgment, but '[i]f the nature of the breach allows of *restiutio in integrum*, it is for the respondent State to effect it' (ibidpara. 34 [2] ECHR). In *Assanidze v Georgia*, the Court determined that securing the release of a wrongfully detained individual was by its very nature the only appropriate remedy and the State must therefore secure the applicant's release at the earliest possible date.

16 In the Inter-American system, Art. 17 American Declaration of Rights and Duties of Man (1948) → *American Declaration of the Rights and Duties of Man (1948)* guarantees every person the right to resort to the courts to ensure respect for legal rights and to obtain protection from acts of authority that violate any fundamental constitutional rights. The → *American Convention on Human Rights (1969)* ('ACHR') goes further, entitling, in Art. 25, American Convention on Human Rights (1969), everyone to effective recourse for protection against acts that violate the fundamental rights recognized by the constitution 'or laws of the state concerned or by the Convention', even where the act is committed by persons acting in the course of their official duties. The States Parties are to ensure that the competent authorities enforce the remedies granted and, indeed, are obliged to respect and ensure the free and full exercise of all rights guaranteed by the convention (Art. 1 (1) ACHR). These obligations are linked to the fair trial provisions of Art. 8 ACHR, which require the State to provide a fair hearing before a competent, independent and impartial tribunal. Art. 10 ACHR further provides that every person has the right to be compensated

in accordance with the law in the event that he has been sentenced by a final judgment through a miscarriage of justice.

17 The IACtHR has stated that under the convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25 ACHR), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1) ACHR), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the convention to all persons subject to their jurisdiction (Art. 1 ACHR; → *Velásquez Rodríguez v Honduras Case [Preliminary Objections]*, para. 91; *Las Palmeras Case [Judgment]* Inter-American Court of Human Rights Series C No 90 [6 December 2001], para. 60; *Case of 19 Merchants v Colombia [Judgment]* Inter-American Court of Human Rights Series C No 109 [5 July 2005], para. 194; *Case of Serrano-Cruz Sisters v El Salvador [Preliminary Objections]* Inter-American Court of Human Rights Series C No 118 [23 November 2004], para. 194; *Moiwana Village v Suriname*, para. 142). The Court has also concluded that the obligation of convention parties to ensure rights generally requires that remedies include due diligence on the part of the State to prevent, investigate, and punish any violation of the rights recognized by the convention (*Velásquez Rodríguez v Honduras Case [Merits]*, para. 166).

18 The → *African Charter on Human and Peoples' Rights (1981)* ('AChHPR'), has several provisions on remedies. Art. 1 (1) AChHPR guarantees every individual the right to have his cause heard, including 'the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'. In addition, Art. 21 AChHPR refers to 'the right to adequate compensation' in regard to 'the spoliation of resources of a dispossessed people'. Art. 26 AChHPR imposes a duty on States Parties to the charter to guarantee the independence of the courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed by the charter. The → *African Commission on Human and Peoples' Rights (ACommHPR)* emphasizes the need for independence of the judiciary and the guarantees of a fair trial, calling attacks on the judiciary 'especially invidious, because while it is a violation of human rights in itself, it permits other violations of rights to go unredressed' (*Civil Liberties Organization v Nigeria* [African Commission on Human and People's Rights, March 1995] Comm No 129/94 para. 14).

D. The Competence of International Tribunals to Afford Remedies

19 A State that breaches its human rights obligations has the primary duty to afford redress to the victim of the violation. The role of international tribunals is subsidiary. Their involvement only becomes necessary and possible when the State has failed to afford the required relief. None of the permanent UN treaty or internal bodies has legal competence to order compensation or other remedies but the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and other bodies that review individual complaints may make recommendations or express views to the State concerned. The recommendations sometimes call on the State to pay compensation or afford other remedies, but they do not specify amounts that may be due or other forms of redress.

20 Regional human rights bodies have the power to designate remedies that the State must afford to the victims of human rights violations. If it finds a violation of the ECHR, the ECtHR renders judgments in which it may afford 'just satisfaction' to the injured party, including compensation for both pecuniary and non-pecuniary damages. The ECtHR has repeatedly stated that applicants are not entitled to an award of just satisfaction, rather the Court has discretion to grant a remedy based on equitable considerations and the facts of

each case. Art. 41 ECHR empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (*Assanidze v Georgia*). The court has awarded one or more of the following remedies in application of the convention: a declaration that the State had violated the applicant's rights; compensation for pecuniary losses; compensation for non-pecuniary harm; and costs and expenses.

21 The ECtHR has held on various occasions that it has no jurisdiction to make 'consequential orders' in the form of directions or recommendations to the State to remedy violations. It rejected requests, for example, that the State be required to refrain from corporal punishment of children or to take steps to prevent similar breaches in the future (see also → *Children, International Protection*). It also refused to insist that a State judged to have wrongfully expelled an alien, allow the victim to rejoin his family (see also → *Aliens, Expulsion and Deportation*). The practice is evolving, however. In *Broniowski v Poland [GC]*, the Court concluded that the violation was not an isolated incident, but 'originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons' (at para. 189 [1]). The court decided to indicate the general measures the State should take at the national level to execute the judgment and redress all remaining claims. Only one month prior to the judgment, the Committee of Ministers adopted a resolution calling on the Court to identify the causes of systematic violations and to indicate the necessary remedial measures (Counsel of Europe [Committee of Ministers] Resolution on judgments revealing an underlying systemic problem [COE Strasbourg 12 May 2004] Res [2004] 3). The *Broniowski* judgment was the first to give effect to the committee's direction.

22 The IACtHR has consistently made use of the broad powers granted it by Art. 63 (1) ACHR. Art. 63 (1) ACHR provides that if the Court finds that there has been a violation, it shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated; rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied; and award fair compensation to the injured party. The Court has held that Art. 63 (1) ACHR constitutes a rule of → *customary international law* that enshrines one of the fundamental principles of contemporary international law on State responsibility (*Moiwana Village v Suriname)*. Thus, when an illicit act is imputed to the State, there immediately arises State responsibility for the breach of the international norm involved, together with the subsequent duty to make reparations and put an end to the consequences of said violation. The reparation of harm caused by the violation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in restoring the situation that existed before the violation occurred. When this is not possible, the Court's task is to order the adoption of a series of measures that, in addition to guaranteeing respect for the rights violated, will ensure that the damage resulting from the infractions is repaired, by way, inter alia, of payment of an indemnity as compensation for the harm caused. All aspects of reparations (scope, nature, modalities, and designation of beneficiaries) are governed by international law.

23 The IACtHR has regularly ordered the State before it to take specific action to remedy a breach of the convention, as well as to pay compensation. The Court has been innovative in controlling all aspects of the awards, including setting up trust funds, appointing experts, designing non-monetary remedies, and maintaining cases open until the awarded remedies have been fully carried out.

E. Assessment

24 Given the widespread recognition of the right to a remedy in law and practice, many consider it to be a norm of customary international law. Where States fail to provide the necessary remedies for human rights violations, international institutions are the forum of last resort. The authority of human rights tribunals to afford remedies is uncontested. Judicial bodies have inherent power to remedy breaches of law in cases within their jurisdiction. In addition, human rights treaties sometimes confer explicit competence to afford redress on the organs they create to hear cases.

25 International human rights law and practice on remedies is evolving with the need to ensure the → *rule of law* and promote compliance by States with their human rights obligations. International tribunals are also increasingly concerned with reducing their growing caseloads by emphasizing remedies at the national level. There is thus a new emphasis on eliminating systemic violations through changes in domestic laws, in addition to compensating the individual applicant who brings a case to an international tribunal. International tribunals are promoting and using innovative and specific non-monetary remedies, including requirements that the government acknowledge its responsibility and issue an apology, create a memorial to the victims, establish development or scholarship funds, build and operate medical clinics and schools, and provide medical treatment or other forms of rehabilitation. The notion of 'aggravated violations' recognized in the IACtHR and European courts is also having an impact on the nature of remedies and the quantum of compensation. Each decision contributes to the growing jurisprudence that guides States and assists in providing individualized justice to victims of human rights violations.

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Annex ZI

AMBITION AND DIFFERENTIATION IN THE 2015 PARIS AGREEMENT: INTERPRETATIVE POSSIBILITIES AND UNDERLYING POLITICS

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AMBITION AND DIFFERENTIATION IN THE 2015 PARIS AGREEMENT: INTERPRETATIVE POSSIBILITIES AND UNDERLYING POLITICS

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Abstract The 2015 Paris Agreement represents a historic achievement in multilateral diplomacy. After years of deeply discordant negotiations, Parties harnessed the political will necessary to arrive at a climate change agreement that strikes a careful balance between ambition and differentiation. The Paris Agreement contains aspirational goals, binding obligations of conduct in relation to mitigation, a rigorous system of oversight, and a nuanced form of differentiation between developed and developing countries. This article will explore the key building blocks of the Paris Agreement—ambition and differentiation—with an eye to mining the text of the Agreement for its interpretative possibilities and underlying politics.

Keywords: climate change regime, Framework Convention on Climate Change (FCCC), global stocktake, nationally determined contributions, obligations of conduct, Paris Agreement, transparency.

I. INTRODUCTION

UN Secretary General Ban Ki-moon characterized the 2015 Paris Agreement, adopted after years of deeply contentious multilateral negotiations, as a 'monumental triumph'.[1] Indeed, it is—but not because it decisively resolves the climate crisis, it does not, but because the Paris Agreement represents a historic achievement in multilateral diplomacy. Negotiations rife with fundamental and seemingly irresolvable disagreements wound their way to a successful conclusion in Paris on 12 December 2015. These negotiations, driven by unprecedented political will,[2] were expected to reach an agreement. However the fact

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[1] 'COP21: UN chief hails new climate change agreement as "monumental triumph"' (UN News Centre, 12 December 2015) <http://www.un.org/apps/news/story.asp?NewsID=52802#.Vrh45fl96Uk>.

[2] 150 Heads of State and Government attended the leaders event, see 'Leaders Event and High Level Segment' (Paris COP Information Hub) <http://newsroom.unfccc.int/cop21parisinformationhub/cop-21cmp-11-information-hub-leaders-and-high-level-segment/>.

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that they reached a finely balanced and highly ambitious agreement, despite the many criss-crossing red lines of Parties, is a testament to the powers of multilateral diplomacy.

In the years leading up to Paris, an understanding emerged on the critical relationship between the ambition of global efforts to lower greenhouse gas (GHG) emissions, differentiation between developed and developing countries, and mobilization of the financial resources needed to support climate change efforts. The greater the overall ambition, the greater the need for differentiation in efforts between developed and developing countries, as well as for increased financial resources to support these ambitious efforts. Developed countries—scarred by the Kyoto Protocol that obliged them alone to take on absolute emission reduction targets[3]—were fiercely resistant to another differentiated climate agreement. They were also reluctant, with their faltering economies, to finance global efforts to combat climate change. Developing countries, for their part, were loath to relinquish the differential treatment that had benefitted them thus far, and to assume a share of the financial burden for lowering emissions. Something had to give. Ambition, it was assumed.

The resulting Paris Agreement, however, is ambitious, containing aspirational goals, binding obligations of conduct in relation to mitigation, a rigorous system of oversight, and a nuanced form of differentiation between developed and developing countries. While it may not have satisfied those who sought to replicate the 1992 Framework Convention on Climate Change[4] or those who believed this agreement alone would halt global climate change, the Paris Agreement represents the most ambitious outcome possible in a deeply discordant political context. And, it became possible because it struck a fine balance between ambition and differentiation. This article will explore these key building blocks of the Paris Agreement—ambition and differentiation—with an eye to mining the text of the Agreement for its interpretative possibilities and underlying politics.

II. THE ROAD TO PARIS

The international climate change regime is comprised principally of the 1992 Framework Convention on Climate Change, the 1997 Kyoto Protocol and the decisions of Parties under these instruments. Although these instruments are important first steps towards addressing climate change and its impacts, they are widely regarded as inadequate, as well as inadequately implemented. At the Durban Conference in 2011, Parties launched a process, known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), to negotiate a new climate agreement by 2015 that would come into effect from 2020.[5] This agreement would be expected to govern, regulate and incentivize the next generation of climate actions.

The Durban Platform provided limited guidance on the form and content of the 2015 Agreement.[6] Primarily, it should take the form of a 'Protocol, another legal instrument or

[3] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 10 December 1997, entered into force 16 February 2005) FCCC/CP/1997/7/Add.1 (Kyoto Protocol) art 3.

[4] United Nations Framework Convention on Climate Change (adopted 29 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (FCCC).

[5] UNFCCC, 'Decision 1/CP.17 Establishment of an Ad Hoc Working Group on a Durban Platform for Enhanced Action, 2011' (15 March 2012) FCCC/CP/2011/9/Add.1 (Durban Platform).

[6] L Rajamani, 'The Durban Platform for Enhanced Action and the Future of the Climate Regime' (2012) 61(2) ICLQ 501; and see also, D Bodansky, 'The Durban Platform Negotiations:

agreed outcome with legal force',[7] be agreed 'under the Convention' and 'applicable to all'.[8] Each of these terms is a work of art and has been explored elsewhere.[9] Suffice it to say, disagreements emerged over these terms and the extent of their influence on the 2015 agreement. The Durban Platform also indicated the coverage of the 2015 agreement —'inter alia, mitigation, adaptation, finance, technology development and transfer, transparency of action and support, and capacity-building'.[10] These came to be characterized as the Durban 'pillars'.

At the Warsaw Conference in 2013, Parties were invited to prepare and submit 'intended nationally determined contributions' in 2015,[11] marking a key moment in the negotiations. Until then, an architectural battle had been raging between those favoring a Kyoto-style top-down prescriptive agreement and those favouring a Copenhagen-style bottom-up facilitative agreement. The Warsaw decision firmly posits the bottom-up approach as the starting point. The framing of national contributions—their scope, coverage, stringency, and whether they will be conditional —at least in the first instance, is left solely to the discretion of nations. At the Warsaw Conference, the ADP was also mandated to 'identify ... the information that Parties will provide when putting forward their contributions'.[12] There was general agreement that these contributions would need to be accompanied by information sufficient to generate clarity about the nature, type and stringency of the contributions.

The Lima Conference in 2014, however, could only provide tentative guidance on the information that Parties were to put forward with their nationally determined contributions.[13] The Lima decision listed, in a non-prescriptive manner, the types of information to be provided by Parties while communicating their contributions. This included information relating to the base year, time frames, scope and coverage, assumptions and methodologies, and information on how a state considers its contribution to be 'fair and ambitious, in light of its national circumstances, and how it contributes towards achieving the objective of the Convention' in Article 2.[14] The Lima decision requested the FCCC Secretariat to prepare a 'synthesis report on the aggregate effect of the intended nationally determined contributions'.[15]

The Lima Conference also produced the 'elements of a draft negotiating text' for the 2015 agreement.[16] Parties built on this text and adopted the Geneva Negotiating Text in February 2015.[17] This text and a series of 'non-papers' prepared by the ADP Co-Chairs provided the basis for negotiations in 2015.[18] In addition, Parties began to submit their

Goals and Options' (Harvard Project on Climate Agreements, Massachusetts July 2012) <http://belfercenter.ksg.harvard.edu/files/bodansky_durban2_vp.pdf>.

[7] Durban Platform (n 5) para 2.

[8] ibid.

[9] L Rajamani, 'The Devilish Details: Key Legal Issues in the 2015 Climate Negotiations' (2015) 78(5) MLR 826.

[10] Durban Platform (n 5) para 5.

[11] UNFCCC, 'Decision 1/CP.19 Further Advancing the Durban Platform' (31 January 2014) FCCC/CP/2013/10/Add.1 (Warsaw Decision) para 2(b).

[12] ibid, para 2(c).

[13] UNFCCC, 'Decision 1/CP.20 Lima Call for Climate Action' (2 February 2015) FCCC/CP/2014/10/Add.1 (Lima Call for Climate Action) para 11.

[14] ibid, para 14.

[15] ibid, para 16.

[16] ibid, Annex: 'Elements for a draft negotiating text'.

[17] UNFCCC, Ad Hoc Working Group on the Durban Platform for Enhanced Action, Second session, part eight, Geneva (8–13 February 2015) Agenda item 3: Implementation of all the elements of decision 1/CP.17 Negotiating text (25 February 2015) FCCC/ADP/2015/1 (Geneva Negotiating Text).

[18] See eg Ad Hoc Working Group on the Durban Platform for Enhanced Action, 'Non-paper: Note by the Co-Chairs' (5 October 2015) ADP.2015.8.InformalNote; and Ad Hoc Working Group

intended nationally determined contributions. A total of 119 contributions from 147 Parties covering 86 per cent of global emissions were submitted and considered in the Secretariat's Synthesis Report produced on 30 October 2015.[19] A further 14 contributions have been submitted since.

Parties arrived in Paris armed with a 54-page informal note covering the full breadth of issues and range of Parties' proposals.[20] Two weeks of late nights and frenetic negotiations later, and with skilled leadership from the French, Parties reached the historic 2015 Paris Agreement.

III. AMBITION: GOALS, OBLIGATIONS AND OVERSIGHT

The Paris Agreement is ambitious in several respects. It sets an ambitious 'direction of travel' for the climate regime and complements this with extensive obligations, including binding obligations of conduct in relation to mitigation contributions for Parties. It also establishes a rigorous and binding regime of oversight.

A. Ambitious Goals

The Paris Agreement resolves to hold the increase in global average temperature to 'well below 2°C' above pre-industrial levels, and to pursue efforts towards a 1.5°C temperature limit.[21] This was a key demand of the small island States and least developed countries—for them even a 'well below 2°C' temperature increase poses an existential threat. The world is not currently on a pathway to 1.5°C, far from it. Such a pathway would dramatically shrink the remaining carbon space, with troubling implications for countries like India that have yet to lift the vast majority of their citizens from the scourge of poverty.[22] Nevertheless, the 'well below 2°C' target and aspirational 1.5°C goal sets an ambitious direction of travel for the climate regime. It also signals solidarity with the small island States on the frontlines of climate impacts.

This ambitious long-term temperature goal is to be achieved, inter alia, through global peaking of GHG emissions as soon as possible, and rapid reductions thereafter 'so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of GHGs in the second half of the century'.[23] Although Parties had proposed quantitative global mitigation goals such as those identifying specific peaking dates or percentage reductions from 2010 levels,[24] in the end only this qualitative goal that built on FCCC

on the Durban Platform for Enhanced Action, 'Non-paper on elements for a draft negotiating text: Updated non-paper on Parties' views and proposals' (11 November 2014) ADP.2014.11.NonPaper.

[19] See UNFCCC, Synthesis report on the aggregate effect of the intended nationally determined contributions: Note by the secretariat (30 October 2015) FCCC/CP/2015/7. 'INDCs as communicated by Parties' <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>.

[20] Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft agreement and draft decision on workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action Work of the ADP contact group (6 November 2015, reissued on 11 November 2015) ADP.2015.11. InformalNote.

[21] UNFCCC, 'Decision 1/CP.21 Adoption of the Paris Agreement' (29 January 2016) FCCC/CP/2015/10/Add.1, Annex (Paris Agreement) art 2(1).

[22] See G Ananthakrishnan, '1.5°C target is a tall order', *The Hindu*, 9 December 2015.

[23] Paris Agreement (n 21) art 4(1).

[24] See Informal note (n 20) art 3.

language and tipped a hat to the 'net zero' concept proved possible. The net zero GHG emissions concept requires anthropogenic GHG emissions to be reduced as far as possible with the remainder made up through enhanced removals of GHGs.[25] In addition, Parties are to 'strive to formulate and implement' long-term low GHG emission development strategies,[26] as these would play a critical role in shifting development trajectories and investment patterns towards meeting the long-term temperature goal.

The extent to which Parties are able to effectively embark on a pathway to meeting the long-term temperature goal will determine the extent of adaptation Parties will need to engage in. The Paris Agreement thus adopts a qualitative 'global goal on adaptation' to enhance adaptive capacity, strengthen resilience and reduce vulnerability to climate change.[27] The Africa Group had proposed a quantifiable goal that would assess adaptation impacts and costs flowing from the agreed temperature goal.[28] Although the notion of a quantifiable adaptation goal did not garner sufficient support, the Paris Agreement recognizes the critical interlinkages between the achievement of long-term goals, including in relation to temperature, and efforts related to mitigation, adaptation and means of implementation.[29]

B. Extensive Obligations

In order to meet the long-term temperature goal, Parties are subject to binding obligations of conduct in relation to national mitigation contributions.[30] The most significant of these is contained in Article 4(2), which reads: 'Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.'

There are many treasures to be mined in this carefully negotiated text. First, unlike the majority of provisions in the Paris Agreement that apply to 'Parties',[31] this provision applies to 'each Party', thus creating individual obligations for Parties. Second, this provision, like selective provisions in the Paris Agreement,[32] uses the imperative 'shall' both in relation to preparing, communicating and maintaining national contributions, as well as pursuing domestic measures. Third, while these are binding obligations, they are obligations of conduct rather than result. The term 'intends to

[25] See, K Levin, J Morgan and J Song, 'Insider: Understanding the Paris Agreement's Long-term Goal to Limit Global Warming' (World Resources Institution, 15 December 2015) <http://www.wri.org/blog/2015/12/insider-understanding-paris-agreement%E2%80%99s-long-term-goal-limit-global-warming>.

[26] Paris Agreement (n 21) art 4(19).

[27] ibid, art 7(1).

[28] See Submission by Swaziland on behalf of the African Group on adaptation in the 2015 Agreement (8 October 2013) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_adaptation_20131008.pdf>.

[29] Paris Agreement (n 21) art 14.

[30] See contra, R Falk, '"Voluntary" International Law and the Paris Agreement' (16 January 2016) <https://richardfalk.wordpress.com/2016/01/16/voluntary-international-law-and-the-paris-agreement/>.

[31] Paris Agreement (n 21) arts 3, 4(1), 4(2), 4(8), 4(13), 4(15), 4(16), 4(19) 5(1), 5(2), 6(1), 6(3), 6(8), 7(2), 7(4), 7(5), 7(6), 7(7), 8(1), 8(3), 9(2), 10(1), 10(2), 11(4), 12, and 14(4).

[32] ibid, arts 4(2), 4(5), 4(8), 4(9), 4(13), 4(15), 4(16), 4(17), 7(9), 7(13), 9(1), 9(7), 10(2), 10(6), 11(4), 12, 13(7), 13(9), 13(11), 13(13) and 13(14).

achieve' in the first sentence establishes a good faith expectation that Parties intend to achieve their contributions, but stops short of requiring them to do so. The second clause in the second sentence, 'with the aim of achieving the objectives of such contributions', performs a similar function. It requires Parties to aim at achieving the objectives of their contributions.[33]

Parties thus have binding obligations of conduct to prepare, communicate and maintain contributions, as well as pursue domestic measures. There is also a good faith expectation that Parties intend to and will aim to achieve the objectives of their contributions. In the lead-up to Paris many Parties, including the European Union (EU) and small island States, had argued that Parties should be required to implement and/or achieve their contributions, thus imposing an obligation of result on them. This was strenuously opposed by the US, China and India, among others, who did not wish to subject themselves to legally binding obligations of result. The Paris Agreement deferred to the latter in this respect, but ensured that Parties had binding obligations of conduct coupled with a good faith expectation of results. The good faith expectation of results is further underlined in provisions later in the Agreement that require each Party to provide the information necessary to track progress in implementing and achieving its nationally determined contribution,[34] and subject Parties to a 'facilitative, multilateral consideration of progress' with respect to such implementation and achievement.[35]

The term 'objectives' in this provision also merits scrutiny. The nationally determined contributions Parties have submitted thus far contain a range of objectives—some quantitative, such as absolute emission reduction targets,[36] and others qualitative, such as goals to adopt climate friendly paths.[37] Some contributions are conditional (as for instance on the provision of international support),[38] while others are unconditional.[39] In the circumstances, an obligation of result, had one existed, may not lend itself to enforcement.

The nationally determined contributions referred to in Article 4(2) are to be recorded in a public registry maintained by the Secretariat.[40] The US, Canada and New Zealand, among others, favoured this approach, arguing that housing contributions outside the treaty would enable speedy and seamless updating of contributions. Others were concerned that if contributions were housed outside the treaty, Parties would enjoy excessive discretion in revising their contributions, potentially even downwards. The

[33] The comma ensures that the final clause modifies Parties who 'pursue' those measures rather than the measures themselves. Thus the 'with' functions not as a preposition qualifying 'measures' but as a conjunction qualifying 'pursue'.

[34] Paris Agreement (n 21) art 13(7)(b).

[35] ibid, art 13 (11).

[36] eg United States' Intended Nationally Determined Contribution (31 March 2015), all INDCs at <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>.

[37] India's Intended Nationally Determined Contribution (2 October 2015) 28–9. In addition to quantitative emissions intensity targets, India's INDC identifies qualitative objectives such as to 'propagate a healthy and sustainable way of living based on traditions and values of conservation and moderation'.

[38] Arguably India's. See India's INDC, ibid.

[39] eg Brazil's Intended Nationally Determined Contribution (28 September 2015) 2. It is worth noting that Parties considered the possibility of requiring all contributions to be unconditional. No agreement proved possible on this in Paris, but the Ad Hoc Working Group on the Paris Agreement (APA) has been tasked with developing further guidance on 'features' of nationally determined contributions for consideration and adoption by the CMA. See Decision 1/CP.21 (n 21) para 26.

[40] ibid, art 4(12).

Paris Agreement, however, provides for the development of modalities and procedures for the operation and use of the public registry.[41] These modalities and procedures will presumably circumscribe the discretion Parties have. The Agreement also permits Parties to adjust their contributions, but only with a view to enhancing their level of ambition.[42] In any case, notwithstanding the fact that contributions are housed outside the instrument, Article 4(2) implicitly signals that national contributions are an integral part of the Paris Agreement.

In addition to the binding obligation to prepare, communicate and maintain contributions as well as to take domestic measures, Parties are subject to further obligations of conduct. Parties are required to communicate their contributions every five years.[43] While communicating their nationally determined contributions, Parties are required to provide the information necessary for clarity, transparency and understanding.[44] These provisions are phrased in mandatory terms ('shall'), and thus constitute binding obligations for Parties. These provisions also oblige Parties to comply with decisions to be taken by the supreme decision-making body for the new agreement, known as the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA). The Paris Agreement requires Parties to communicate contributions every five years[45] and provide information necessary for their clarity, transparency and understanding[46] in accordance with decision 1/CP.21[47] and 'relevant decisions' of the CMA.[48] It could be argued that the Paris Agreement by incorporating these decisions makes them binding per se,[49] or it may be possible to read the Paris Agreement as having authorized the CMA to engage in binding law-making. In either case Parties are obliged to comply with the relevant decisions. It is worth noting that the 'relevant decisions' may provide Parties with discretion. In relation to information, for instance, decision 1/CP.21 agrees that Parties 'may include, as appropriate, inter alia' several listed pieces of information.[50]

The Paris Agreement also requires Parties to account for their nationally determined contributions in accordance with 'guidance' adopted by the CMA.[51] Although the Agreement requires Parties to do so in mandatory terms, the use of the word 'guidance' may militate against an argument that the decision containing the guidance is intended to bind Parties. Much will depend on the terms—mandatory or discretionary—in which the decision is drafted.

Multilateral environmental agreements do not typically permit their supreme bodies, often referred to as the Conference of Parties (COP) to make legally binding decisions.

[41] Decision 1/CP.21 (n 21) para 29.

[42] Paris Agreement (n 21) art 4(11). [43] ibid, art 4(9). [44] ibid, art 4(8).

[45] ibid, art 4(9). [46] ibid, art 4(8). [47] This is the decision accompanying the Paris Agreement.

[48] These decisions are to be negotiated in the next few years and adopted after the Paris Agreement enters into force.

[49] See eg for a similar provision, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted on 4 August 1995, entered into force 11 December 2001) A/CONF.164/37, art 10(c).

[50] Decision 1/CP.21 (n 21) para 27.

[51] Paris Agreement (n 21) art 4(13). See also Decision 1/CP.21 (n 21) paras 31 and 32. It is worth noting that the guidance on accounting applies only to second and subsequent contributions, although Parties could choose to apply it before.

The legal status of COP decisions[52] depends on their enabling clause,[53] the language and content of the decisions, and Parties' behaviour and legal expectations. All of these are typically prone to varying interpretations. From a formal legal perspective COP decisions are not, absent explicit authorization in the treaty, legally binding.[54] Neither the FCCC nor the Kyoto Protocol explicitly authorize binding law-making by the COP. The FCCC requires Parties to use 'comparable methodologies' to be agreed upon by the COP.[55] The Kyoto Protocol requires Parties to use 'guidelines' to be adopted by the Meeting of the Parties.[56] Both these provisions could be read to provide implied authority to the COP to engage in binding law-making, and the decisions, should they be phrased in mandatory terms, could be binding.

The fact that the Paris Agreement provides for potentially binding law-making in relation to five-yearly communication, provision of information and accounting is reflective of the fact that these rules of the game are crucial elements of the Paris package for some Parties, in particular the EU. It was not possible, however, to finalize them in Paris. These provisions permit Parties to continue the law-making exercise. The strength of these provisions, as well as the transparency framework, discussed below, can be attributed to the concerted efforts of an informal group of key negotiators from developed and developing countries, including South Africa, the EU, the US, Switzerland, New Zealand, Australia and others, as well as the Singaporean diplomat who facilitated the formal negotiations. This informal group that came to be called 'Friends of Rules' formed after Lima when they realized that the rules of the game, of profound importance to the integrity of the agreement, were getting short shrift in a process focused primarily on the headline political issues.

In addition to this array of obligations, the Paris Agreement sets a firm expectation that for every five-year cycle Parties must put forward contributions more ambitious than their last. The relevant provision reads: '[e]ach Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution, and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in light of different national circumstances'.[57]

This provision applies to 'Each Party' not to 'Parties' in general. The use of the auxiliary verb 'will' signals a strong expectation, albeit not a mandatory obligation, that each Party will undertake more ambitious actions over time. This notion, that finds reflection in the Lima decision,[58] had come to be characterized in the

[52] COP decision may be considered as a 'subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions', Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31 (3)(a). See *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226, 248 (para 46).

[53] The enabling clause in the relevant treaty may authorize a COP decision to be binding as in the case of Article 2(9), Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3, or explicitly require further consent for it to be binding, as for example in the case of art 18, Kyoto Protocol, see J Brunnée, 'COPing with Consent: Law-Making under Multilateral Environmental Agreements' (2002) 15 LJIL 1, 24.

[54] See, Brunnée (n 52) 32.

[55] FCCC (n 4) art 4(1).

[56] Art 7(1) read with art 7(4), Kyoto Protocol, and Decision 15/CMP.1. UNFCCC, 'Decision 15/CMP 1 Guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol' (30 March 2006) FCCC/KP/CMP/2005/8/Add.2.

[57] Paris Agreement (n 21) art 4(3).

[58] Lima Call for Climate Action (n 13) para 10.

negotiations as 'no-backsliding'. Many developing countries advocated it as a way to ensure that developed countries did not take on commitments less rigorous than their Kyoto commitments. It also formed the basis for Brazil's 'concentric differentiation' approach that envisioned gradual progression towards more ambitious type and scale of commitments over time for all Parties.[59]

It is worth noting that the provision still leaves to national determination what Parties contributions will be and how these will reflect their 'highest possible ambition' and 'common but differentiated responsibilities and respective capabilities, in light of different national circumstances'. Progression could be reflected in several ways. It could be demonstrated through more stringent numerical commitments of the same form, ie a decrease in emissions intensity from a base year over a previous intensity target, or an increase in absolute reductions over an earlier absolute reduction target. It could also be reflected in the form of commitments. For instance, Parties that have currently undertaken sectoral measures could be expected to take on economy-wide emissions intensity or business as usual (BAU) deviation targets, those that currently have economy-wide emissions intensity or BAU deviation targets could be expected to take on economy-wide absolute emissions reduction targets. The provision on progression is not prescriptive in relation to how progression (ie in form or rigour) is determined, and it is ambiguous on who determines progression, thus implicitly leaving progression to self-determination.

In addition to the requirement that Parties are to undertake more ambitious mitigation contributions over time, the Paris Agreement provides that '[t]he efforts of all Parties will represent a progression over time'.[60] This cross-cutting provision extends the progression requirement beyond mitigation to areas such as adaptation and support. This provision is distinct from the mitigation progression provision in two respects. First, it applies to 'all Parties' not 'each Party' indicating that it could be interpreted as a collective rather than individual requirement. Second, its uses the term 'efforts' rather than 'nationally determined contributions'. This is because the term 'efforts' captures a range of actions that includes mitigation contributions,[61] adaptation planning and implementation,[62] and provision of financial resources to developing countries.[63] Both these provisions, however, are similar in that they use the auxiliary verb 'will' and at a minimum set strong expectations of more ambitious actions over time. Indeed, given the negotiating context, the rigorous system of oversight and the expectation of good faith implementation, Parties will be constrained to comply with these provisions.

Whether they place collective or individual expectations on Parties, and even if progression is self-determined, together these provisions bear tremendous significance, as they are designed to ensure that the regime as a whole is moving towards ever more ambitious and rigorous actions from Parties—that there is a 'direction of travel' for the regime, as it were. These provisions are also designed to ensure there will be continuing differentiation in the near future, since developed and developing countries, given the current balance of responsibilities in the FCCC and Kyoto Protocol, are at different starting points.

[59] See 'Views of Brazil on the Elements of a New Agreement under the Convention Applicable to All Parties' (6 November 2014) <http://www4.unfccc.int/submissions/Lists/OSPSubmissionUpload/73_99_130602104651393682-BRAZIL%20ADP%20Elements.pdf>.

[60] Paris Agreement (n 21) art 3.

[61] ibid, art 4(2).

[62] ibid, art 7(9).

[63] ibid, art 9(1).

The Paris Agreement also places requirements on Parties in relation to adaptation, albeit softer ones peppered with phrases like 'as appropriate' that permit discretion. Parties are obliged to engage in adaptation planning and implementation of adaptation actions ('Each Party shall'), and nudged to ('Parties should') submit and update adaptation communications,[64] strengthen cooperation on adaptation,[65] and enhance understanding, action and support with respect to loss and damage.[66]

C. Rigorous Oversight

The Paris Agreement establishes a rigorous system of oversight to ensure effective implementation of the many requirements it places on Parties. This system of oversight is vital to the conceptual apparatus of the Agreement. In the lead- up to the Paris Conference, common ground emerged amongst Parties that the Paris Agreement, unlike the Kyoto Protocol, should reflect a hybrid architecture combining 'bottom up' nationally determined contributions with 'top down' elements such as rules on transparency. Battle lines were drawn, however, on how prescriptive the top-down elements should be. Although some Parties were keen to retain as much autonomy as possible, others fearing that boundless self-determination would be exercised in self-serving ways sought a more prescriptive regime. The more autonomy Parties enjoy, they believed, the less certain it is that the regime will meet its long-term temperature goal. The Paris Agreement strikes a balance between these competing demands—it preserves autonomy for States in the determination of their contributions but strengthens oversight of these contributions through a robust transparency system, a global stocktake process, and a compliance mechanism. In so doing, it circumscribes the self-serving nature of self-determination and generates normative expectations.

1. Transparency

The Paris Agreement creates a robust 'transparency framework for action and support' that places extensive informational demands on all Parties,[67] and subjects information on mitigation and finance to close scrutiny.[68] This transparency framework, unlike the existing arrangements,[69] is a framework applicable to all countries albeit with 'built-in flexibility' tailored to Parties' differing capacities.[70] In the lead-up to Paris, and until the end of the conference, many developing Parties, in particular the Like Minded Developing Countries (LMDCs),[71] argued for a bifurcated system that placed differing transparency requirements on developed and developing countries. The Umbrella Group and the EU eventually prevailed on the LMDCs, and the Paris Agreement contains a framework applicable to all.

[64] ibid, art 7(10) read with art 13(8). [65] ibid, art 7(7). [66] ibid, art 8(3).
[67] ibid, art 13. [68] ibid, art 13(11).
[69] Communication of Information under FCCC (n 4) Article 12, and UNFCCC, 'Decision 1/CP.16 The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' (15 March 2011) FCCC/CP/2010/7/Add.1 (Cancun Agreements (LCA)) paras 40 and 44 (Annex I Parties) and paras 60 and 63 (non-Annex I Parties). [70] Paris Agreement (n 21) art 13(1) and 13(2).
[71] The LMDCs are a coalition of developing countries comprising Bolivia, China, Cuba, Dominica, Ecuador, Egypt, El Salvador, India, Iran, Iraq, Malaysia, Mali, Nicaragua, Philippines, Saudi Arabia, Sri Lanka, Sudan and Venezuela.

The purpose of the transparency framework is to ensure clarity and tracking of progress towards achieving Parties' nationally determined contributions and adaptation actions,[72] as well as to provide clarity on support provided and received by Parties.[73] Towards this end, all Parties are required biennially[74] to provide: a national inventory report of GHG emissions and removals;[75] information necessary to track progress in implementing and achieving mitigation contributions;[76] and information related to climate impacts and adaptation.[77] Further, developed countries are required to provide information on financial, technology and capacity building support they provide to developing countries,[78] and developing countries are to provide information on the support they need and receive.[79] It is worth noting that there is a hierarchy in the legal character of the informational requirements placed on Parties. Informational requirements in relation to mitigation are mandatory individual obligations applicable to all ('each Party shall'). Informational requirements in relation to finance are mandatory collective obligations for developed countries ('developed country Parties shall') and recommendations for developing countries ('developing country Parties should'). Informational requirements in relation to adaptation are recommendations ('each Party should'), and allow Parties discretion ('as appropriate').

The information submitted by all Parties in relation to mitigation and by developed country Parties in relation to the provision of support will be subject to a technical expert review.[80] This review will consider the support provided to Parties, the implementation of their contributions, and the consistency of the information they provide with common modalities, procedures and guidelines for transparency of action and support.[81] In addition each Party is expected to participate in a 'facilitative, multilateral consideration of progress' with respect to its efforts in relation to finance, and the implementation and achievement of its mitigation contributions.[82] Both expert reviews[83] and multilateral assessments[84] build on elements of the existing transparency arrangements. It is unclear at this point, however, how these processes will be conducted, who will conduct them, what its outputs will be, and how these outputs will feed into the global stocktake. The modalities, procedures and guidelines, elaborating on these processes that will supersede the existing arrangements, are to be developed by 2018 and applied after the Paris Agreement enters into force.[85]

2. *Global Stocktake*

The transparency framework is complemented by a 'global stocktake' every five years to assess collective progress towards long-term goals.[86] The global stocktake is crucial to the system of oversight. In its absence it would be impossible to gauge if national efforts add up to what is necessary to limit temperature increase to 2°C. It will also be difficult to

[72] Paris Agreement (n 21) art 13(5).
[73] ibid, art 13(6).
[74] Decision 1/CP.21 (n 21) para 90.
[75] Paris Agreement (n 21) art 13(7)(a).
[76] ibid, art 13(7)(b).
[77] ibid, art 13(8).
[78] ibid, art 13(9).
[79] ibid, art 13(10).
[80] ibid, art 13(11), read with Decision 1/CP.21 (n 21) paras 97 and 98.
[81] ibid, art 13(12).
[82] ibid, art 13(11).
[83] Kyoto Protocol (n 3) art 8.
[84] Cancun Agreements (LCA) (n 68) paras 44 and 63.
[85] Paris Agreement (n 21) art 13(12).
[86] ibid, art14.

assess if States are contributing as much as they should given their responsibilities and capabilities.

The Paris Agreement provides broad guidance on the nature, purpose, tasks for and outcome of the stocktake, and leaves the mechanics to be finalized by Parties before entry into force.[87] The Paris Agreement envisions the stocktake as a 'comprehensive and facilitative'[88] exercise—thus reinforcing the notion that the Paris Agreement addresses not just mitigation but also adaptation and support, and that it is a facilitative rather than a prescriptive instrument. Further, the Agreement is expressively silent on whether the stocktake extends only to the implementation of Parties' current contributions or also to the ambition of proposed contributions; arguably it covers both.

The purpose of the stocktake is to 'assess the collective progress towards achieving the purpose of this Agreement and its long term goals'.[89] The 'purpose' of the Agreement is in Article 2, which includes the long-term temperature goal, and the context for implementation.[90] It is unclear what the 'long term goals' are. While mitigation[91] and adaptation[92] (albeit qualitative) goals have been identified in the Agreement, there are no clearly identifiable goals in relation to finance, technology and capacity-building. This introduces an element of uncertainty into the assessment of progress. Moreover, the stocktake is only authorized to consider 'collective' progress, thus insulating individual nations from any assessments of adequacy in relation to their actions.[93]

The agreement sets various tasks for the stocktake, as for instance reviewing the overall progress made in achieving the global goal on adaptation.[94] It also identifies initial inputs to the stocktake, including information provided by Parties on finance,[95] available information on technology development and transfer[96] and information generated through the transparency framework.[97] Others inputs will be identified in the years to come.[98]

The global stocktake is required to assess collective progress 'in the light of equity and the best available science'.[99] The inclusion of 'equity' was a negotiating coup for several developing countries, in particular the Africa Group, that had long championed the need to consider Parties' historical responsibilities, current capabilities and development needs in setting expectations for nationally determined contributions.[100] It is unclear at this point how equity, yet to be defined in the climate regime, will be understood and incorporated in the global stocktake process. Nevertheless, the inclusion of equity in the global stocktake leaves the door open for a dialogue on equitable burden sharing. Finally, the outcome of the stocktake is required to inform Parties in updating and enhancing their actions and support 'in a nationally determined manner'.[101] This is a

[87] Decision 1/CP.21 (n 21) paras 99–101.
[88] Paris Agreement (n 21) art 14(1).
[89] ibid.
[90] Art 2 is identified as the 'purpose' of the Agreement by art 3, ibid.
[91] ibid, art 4(1).
[92] ibid, art 7(1).
[93] The transparency system does not assess adequacy either.
[94] Paris Agreement (n 21) art 7(14)(d).
[95] ibid, art 9(6).
[96] ibid, art 10(6).
[97] ibid, art 13(5) and 13(6).
[98] Decision 1/CP.21 (n 21) para 99 identifying sources of input 'including but not limited to'.
[99] Paris Agreement (n 21) art 14(1).
[100] See, Submission by Swaziland on behalf of the African Group Under Workstream I of the ADP (8 October 2013) <https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_20131008.pdf>.
[101] Paris Agreement (n 21) art 14(3).

carefully balanced provision. On the one hand, it links the outcome of the stocktake with the process of updating Parties' contributions,[102] thus generating strong expectations that Parties will enhance the ambition of their actions in line with the findings of the stocktake. On the other hand, it underscores the 'nationally determined' nature of contributions, thus addressing concerns over external ratchets for enhanced actions and loss of autonomy.

The first stocktake is set to take place in 2023,[103] once the mechanics of the stocktake have been worked out, and the Agreement has entered into force. There was a felt need for an earlier stocktake to guide Parties, especially those with contributions set to five-year time frames, in updating and revising their contributions. Parties agreed therefore to convene a 'facilitative dialogue' in 2018 to take stock of the collective efforts of Parties in relation to the long-term mitigation goal identified in the Agreement, and for this stocktake to inform the preparation of their nationally determined contributions.[104]

The global stocktake is cleverly designed to ensure both that it subtly constrains national determination in service of the long-term goals, and that it is palatable to all. Even to the LMDCs, for whom any assessment process (as it would necessarily impinge on sovereign autonomy) was an anathema. The global stocktake is a facilitative process. It assesses collective not individual progress. It assesses collective progress on mitigation as well as on support. It will consider not just science but also equity in determining adequacy of collective progress. And, finally, ratcheting of contributions as a result of the stocktake, if any, will be left to national determination.

3. *Compliance*

The Paris Agreement establishes a mechanism to facilitate implementation of and promote compliance with its provisions. The skeletal provision establishing this mechanism provides only minimal guidance on the nature of the compliance mechanism, leaving the modalities and procedures to be negotiated in the years to follow.[105] The relevant provision requires the mechanism to address both implementation of and compliance with the Agreement. This mechanism is to consist of an expert-based facilitative committee that is to function in a transparent, non-adversarial and non-punitive manner.[106] This guidance addresses concerns of those who feared—across the developed–developing country divide—that the Paris Agreement would recreate a Kyoto-like compliance committee with an enforcement branch and severe compliance consequences.

IV. DIFFERENTIATION: ARTICULATION AND OPERATIONALIZATION

The ambitious goals, extensive obligations and rigorous oversight of the Paris Agreement, if applied uniformly, would act as a straitjacket for most developing countries. The Paris Agreement therefore is firmly anchored in the principle of common but differentiated responsibilities and respective capabilities, albeit in the

[102] See also ibid, art 4(9).
[103] ibid, art 14(2).
[104] Decision 1/CP.21 (n 21) para 20.
[105] Paris Agreement (n 21) art 15(3), and Decision 1/CP.21 (n 21) paras 102 and 103.
[106] Paris Agreement (n 21) art 15(2).

light of different national circumstance. It also captures a nuanced form of differentiation in favour of developing countries, and extends financial, technological and capacity-building support to developing countries. It is this compromise on differentiation and support that untied the proverbial Gordian knot and cleared the way for the Paris Agreement to be adopted.

Prior to the Paris Conference, Parties had locked horns on three interrelated issues: the relationship of the 1992 Framework Convention on Climate Change, a deeply differentiated instrument, to the Paris Agreement 'applicable to all';[107] the articulation of the principle of common but differentiated responsibility and respective capabilities, a much cited and beloved principle for some, in the Paris Agreement; and the operationalization of this principle across the Durban pillars.

A. Relationship of the 2015 Paris Agreement to the 1992 Framework Convention on Climate Change

The 1992 Framework Convention on Climate Change is unabashedly favourable to developing countries—from the recognition in its preamble that the share of emissions from developing countries will grow to meet their social and development needs[108] to annex-based differentiation that exempts developing countries from emission reduction obligations.[109] Developed countries ensured in Durban that the Paris Agreement would be 'applicable to all',[110] while developing countries ensured that the Paris agreement would be 'under the Convention'.[111] Developed and developing countries were pitched against each other in Paris. While the former envisioned the Paris Agreement as containing a distinct vision, representing a paradigm shift from the FCCC, the latter were keen to ensure that the Paris Agreement flows from the FCCC, and is guided by and interpreted in the light of it. This disagreement rippled through negotiations on the entire text, but was in evidence in particular in the negotiations on the chapeau to the purpose of the agreement, which reads: '[t]his Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty'.[112]

Parties disagreed on whether the Paris Agreement should enhance the implementation of the Convention, as most developing countries argued it should, or just the objective of the Convention,[113] as most developed countries favoured. The former would engage the entirety of the Convention, including its conceptual architecture of which differentiation is such an important part. The latter would only engage the GHG stabilization objective of the Convention, thus implicitly permitting a different set of arrangements, including on differentiation, in service of the objective of the Convention. The final resolution, excerpted above, a carefully balanced compromise between China and the Umbrella Group,[114] is cloaked in ambiguity. The phrase 'in enhancing the implementation of

[107] Durban Platform (n 5) para 5.
[108] FCCC (n 4) preambular recital 3.
[109] See ibid, art 4 read with Annex I and II.
[110] Durban Platform (n 5) para 5.
[111] ibid. It is worth noting that until the final days of the Paris negotiations, China continued to urge Parties to title the 2015 Agreement, the 'Paris Agreement under the UN Framework Convention on Climate Change'.
[112] Paris Agreement (n 21) art 2(1) chapeau.
[113] FCCC (n 4) art 2.
[114] The Umbrella Group usually includes Australia, Canada, Japan, New Zealand, Kazakhstan, Norway, the Russian Federation, Ukraine and the US.

the Convention, including its objective' could be read as an acceptance of the developing country position that this Agreement *will enhance* the implementation of the Convention. This would permit the entirety of the Convention to be engaged in interpreting the provisions of the Paris Agreement. The phrase could also be read as a statement of fact that the Agreement, such as it is, *enhances* the implementation of the Convention. Thus limiting, by implication, the engagement of the entirety of the Convention in interpreting the Paris Agreement. In this reading, the Convention is engaged only in so far as it is specifically referred to in the Paris Agreement.[115]

The Paris Agreement, adopted pursuant to the Durban Platform,[116] is an agreement 'under the Convention'. It is a related legal instrument, as is the Kyoto Protocol. Some provisions of the Convention explicitly apply to related legal instruments.[117] In addition, the negotiating history and context to the term 'under the Convention' in the Durban Platform decision suggests that the principles of the Convention, in particular the principle of common but differentiated responsibilities and respective capabilities, apply to the Paris Agreement. Further, specific provisions of the Convention are engaged when the Paris Agreement so provides.[118] Beyond this, there is a general legal imperative to interpret agreements in good faith in accordance with their ordinary meaning,[119] in context,[120] and harmoniously in relation to legal instruments covering the same subject matter.[121] The ambiguous nature of many provisions in both the Paris Agreement and the FCCC will make it easier to achieve harmonious construction between them, and to avoid normative conflicts.

B. Articulating the CBDRRC Principle in the Paris Agreement

The principle of common but differentiated responsibilities and respective capabilities—the CBDRRC principle—finds expression in the FCCC, and is the basis of the burden-sharing arrangements crafted under the FCCC and its Kyoto Protocol. As it is considered the ideological inspiration for the contentious annex-based differentiation, every instance of its articulation in the Paris Agreement is a product of careful negotiation.

The Durban Platform that launched the negotiating process towards the 2015 agreement, unusually so for the time, contained no reference to common but differentiated responsibilities and respective capabilities. Developed countries had argued that references to 'common but differentiated responsibilities' must be qualified with a statement that this principle must be interpreted in the light of contemporary economic realities. Many developing countries, argued in response that this would be tantamount to amending the FCCC. The text was thus drafted such that this new agreement was to be 'under the Convention'[122] thereby implicitly engaging its principles, including the CBDRRC principle. The Doha and Warsaw decisions in 2012 and 2013 contained a general reference to 'principles' of the

[115] See eg Paris Agreement (n 21) arts 1, 4(14), 5, 7(7), 9(1), 9(8) and 9(10).
[116] ibid, preambular recital 2.
[117] FCCC (n 4) arts 2, 7(2) and 14(2).
[118] For instance the financial mechanism of the Convention serves as the financial mechanism of the Agreement, Paris Agreement (n 21) art 9(8).
[119] VCLT (n 51) art 31(1).
[120] ibid, art 31.
[121] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (13 April 2006) A/CN.4/L.682, 25 (noting 'a strong presumption against normative conflict' in international law and that 'treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict'.).
[122] Durban Platform (n 5) para 2.

Convention,[123] but no specific reference to the CBDRRC principle. The Lima Call for Climate Action of 2014 contains an explicit reference to the CBDRRC principle, but it is qualified by the clause 'in light of different national circumstances'.[124] This qualification—which represents a compromise arrived at between the US and China[125]—arguably shifts the interpretation of the CBDRRC principle. The qualification of the principle by a reference to 'national circumstances' introduces a dynamic element to the interpretation of the principle. As national circumstances evolve, so too will the common but differentiated responsibilities of States. It is this version of the principle of common but differentiated responsibilities with the qualifier 'in light of different national circumstances' that features in the Paris Agreement.

The Paris Agreement contains references to the CBDRRC principle in a preambular recital,[126] and in provisions relating to the purpose of the agreement,[127] progression[128] and long-term low greenhouse gas development strategies.[129] The most significant of these references is Article 2 that sets the long-term temperature goal and frames the implementation of the entire agreement. It reads: '[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.[130] It grew evident in the lead-up to Paris that any reference to CBDRRC would include the Lima qualifier 'in light of different national circumstances', however, the battle over the extent to which the Paris Agreement would mainstream this principle was still being waged in Paris. Most developing countries, in particular the LMDCs and the Africa group were keen that equity and CBDRRC should form the context for implementing the Paris Agreement. They proposed mandatory language to this end ('shall be implemented on the basis of').[131] The Umbrella group and the EU were reluctant to introduce equity and CBDRRC, with its unwieldy 'annex' baggage, into an operational paragraph of the agreement. They also argued that the meaning and implications of these terms are uncertain, and it would not be appropriate to introduce a note of uncertainty in the implementation of the agreement. They favoured language recognizing that the agreement 'reflects' equity and CBDRRC.[132] This, however, would have been problematic for developing countries, as it would have implied that the particular balance of responsibilities captured in the Paris Agreement would henceforth be synonymous with CBDRRC. Since their preferred interpretation of CBDDRC is in line with the expression of CBDDRC in the Kyoto Protocol rather than in the Paris Agreement, such a provision would have narrowed the range of interpretative possibilities of CBDDRC. The compromise eventually struck was to generate an expectation that the agreement will

[123] See UNFCCC, 'Decision 1/CP.18 Agreed outcome pursuant to the Bali Action Plan' (28 February 2013) FCCC/CP/2012/8/Add.1, recital to Part I; and Warsaw Decision (n 11) preambular recital 9.

[124] Lima Call for Climate Action (n 13) para 3.

[125] See the White House, US-China Joint Announcement on Climate Change, Beijing, China, 12 November 2014 (Office of the Press Secretary, 11 November 2014) para 2.

[126] Paris Agreement (n 21) preambular recital 3.

[127] ibid, art 2(2).

[128] ibid, art 4(3).

[129] ibid, art 4(19).

[130] ibid, art 2(2).

[131] As reflected in Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft Paris Outcome: Revised draft conclusions proposed by the Co-Chairs (5 December 2015) FCCC/ADP/2015/L.6/Rev.1 .

[132] As reflected in the Non-paper of 5 October 2015 (n 18).

reflect equity and CBDRRC ('will be implemented to reflect'). This preserves the range of interpretative possibilities of CBDDRC for developing countries yet stops short of prescribing equity and CBDRRC in the implementation of the agreement.

It is worth noting that the CBDRRC principle in Article 2 of the Paris Agreement could arguably be interpreted as distinct from the Convention's CBDRRC principle, both because of the inclusion of the Lima qualifier, 'in light of different national circumstances' as well as the nature of differentiation in the Paris Agreement. To the extent that the Paris Agreement reflects an operationalization of the principle different to that in the Convention, it is arguable that the Paris Agreement actually contains a distinct rather than derivative version of the principle.

In addition to the CBDRRC principle, the Paris Agreement contains reassuring references to the related notions of equity,[133] sustainable development,[134] equitable access to sustainable development,[135] poverty eradication[136] and climate justice.[137] While some of these notions feature in the FCCC and others in COP decisions, they have arguably acquired a distinct character in the Paris Agreement. For instance, the references in the FCCC to poverty eradication recognize it either as a 'legitimate priority need'[138] or an 'overriding priorit[y]',[139] whereas in the Paris Agreement it is recognized merely as part of the 'context' for action.[140]

C. Operationalizing the CBDRRC principle in the Paris Agreement

The FCCC and the Kyoto Protocol operationalize the CBDRRC principle by requiring developed countries (alone), identified in its Annexes, to assume ambitious GHG mitigation targets. This form of differentiation has proven deeply controversial over the years, and the troubled waters the Kyoto Protocol has navigated in the last decade stand testimony to this. The Paris Agreement represents a step change from the FCCC and Kyoto in relation to differentiation. The Paris Agreement operationalizes the CBDRRC principle not by tailoring commitments to categories of Parties as the FCCC and the Kyoto Protocol do, but by tailoring differentiation to the specificities of each of the Durban pillars—mitigation, adaptation, finance, technology, capacity-building and transparency. In effect this has resulted in different forms of differentiation in different areas. It has also resulted, arguably, in transitioning differentiation from an ideological to a pragmatic basis.

1. Differentiation in Mitigation

The mitigation provisions of the Paris Agreement embrace a bounded self-differentiation model. The Warsaw decision invited parties to submit 'intended nationally determined contributions' in the context of the 2015 agreement.[141] In submitting these contributions, Parties were able to determine the scope of their contributions, their form, their rigour,

[133] Paris Agreement (n 21) preambular recital 3, arts 2(2), 4(1) and 14(1).
[134] ibid, preambular recital 8, arts 2(1), 4(1), 6, 7(1), 8(1) and 10(5).
[135] ibid, preambular recital 8.
[136] ibid, preambular recital 8, arts 2(1), 4(1) and 6(8).
[137] ibid, preambular recital 13.
[138] FCCC (n 4) preambular recital 21.
[139] ibid, art 4(7).
[140] See eg Paris Agreement (n 21) arts 2(1), 4(1) and 6(8).
[141] See Warsaw Decision (n 11) para 2(b).

and the information that will accompany them. In so far as Parties chose their own contributions and tailored these to their national circumstances, capacities and constraints, they differentiated themselves from every other nation. This form of differentiation has come to be characterized as self-differentiation. And, it is the starting point for differentiation in the mitigation section of the Paris Agreement.

First, it is worth noting that many of the provisions in the mitigation section are undifferentiated, in particular key provisions prescribing individual binding obligations of conduct for Parties.[142] Second, the provisions that incorporate differentiation are couched either in recommendatory terms[143] or phrased to set expectations rather than bind.[144] Even these cede to sovereign autonomy. For instance, in relation to the requirement placed on Parties that every successive mitigation contribution will represent a progression beyond their current contribution, as discussed above,[145] it is for Parties to determine what constitutes progression, and reflects its highest possible ambition and its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. In relation to the requirement that all Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies,[146] it is for Parties to determine what these are to be, taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

There are, however, normative expectations attached to the flexibility afforded to Parties, which may function to discipline self-differentiation. Article 4(4), which seemingly endorses a Conventional form of differentiation, reads: 'Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.'[147]

The use of the terms 'developed country Parties' and 'developing country Parties' and the notion of leadership is reminiscent of the Convention. These terms evoke the burden-sharing arrangements of the Convention. And, this provision sets strong normative expectations on Parties. However, it is neither intended to nor does it create any new obligations for Parties. It urges developed countries to continue to undertake absolute emission reduction targets, which they had undertaken under the Cancun Agreements, and have pledged in their intended nationally determined contributions. It urges developing countries to continue to enhance their mitigation efforts, which they have done in leaps and bounds in the last decade. It further encourages them to move over time towards economy-wide targets in the light of different national circumstances. Since mitigation contributions are nationally determined, this is a normative expectation that Parties will exercise a particular choice, not a requirement that they do so.

Indeed it is precisely because this provision creates no new obligations that the US agreed to the Paris package. This provision was at the centre of the 'shall/should' controversy that

[142] See text accompanying nn 30–32.
[143] Paris Agreement (n 21) art 4(4) and 4(19).
[144] ibid, art 4(3).
[145] See text accompanying nn 56–66.
[146] Paris Agreement (n 21) art 4(19).
[147] ibid, art 4(4).

nearly unravelled the Paris deal in the final hours.[148] The 'take it or leave it' text presented by the French contained mandatory language ('shall') in relation to developed country targets, and recommendatory language ('should') in relation to developing country mitigation efforts. In addition to the lack of parallelism in the legal character of requirements placed on developed and developing countries, the use of mandatory language for developed countries' targets posed a problem for the US. In the light of long-standing and intractable resistance to climate treaties in the Senate, the US had been priming the Paris Agreement to ensure that it could be accepted as a Presidential-executive agreement. This would likely only be possible if the Paris Agreement is consistent with existing US domestic laws, and can be implemented through them.[149] Since the US does not currently have a domestic emissions target, it could not accept an international agreement obliging them to have one through a Presidential-executive agreement.[150] The 'shall' had to go if the US were to stay, but the prospect of changing such a critical word in a 'take it or leave it' text, endangered the entire deal. The LMDCs in particular threatened to revisit other compromises in the text if this word were to change. Eventually, after furious huddling in the room, and high-level negotiations outside it, the 'shall' was declared a typographical error and changed to a 'should' by the FCCC Secretariat.

Thus the mitigation section of the Paris Agreement operationalizes the CBDRRC principle through self-differentiation, but sets normative expectations in relation to the types of actions developed and developing country Parties should take, and in relation to progression through successive cycles of contributions. Thus arguably disciplining self-differentiation. Self-differentiation is the pragmatic choice for mitigation, the most contentious section of the Paris Agreement, because it provides flexibility, privileges sovereign autonomy and encourages broader participation. However, while it respects 'national circumstances' and 'respective capabilities', it leaves little room for tailoring commitments to differentiated responsibilities for environmental harm. In this it represents a departure from the FCCC and its Kyoto Protocol.

2. *Differentiation in transparency*

The transparency provisions of the Paris Agreement are premised on provision of flexibility to Parties based on their capacities. Parties rejected a bifurcated transparency system, on the table until the end, in favour of a framework applicable to all countries albeit with 'built-in flexibility' tailored to Parties' differing capacities.[151] These provisions place uniform informational requirements on Parties in relation to mitigation and adaptation,[152] but differentiated requirements in relation to support.[153] Since Parties have differentiated obligations in relation to support the informational requirements are accordingly differentiated. Developed countries report on support they provide, developing countries on the support they receive and need. Information provided by all Parties, developed and developing, on mitigation and support is

[148] J Vidal, 'How a 'typo' nearly derailed the Paris climate deal' (The Guardian, 16 December 2015) <http://www.theguardian.com/environment/blog/2015/dec/16/how-a-typo-nearly-derailed-the-paris-climate-deal>.

[149] D Bodansky, 'Legal Options for U.S. acceptance of a new Climate Change Agreement' (Centre for Climate and Energy Solutions, May 2015).

[150] ibid, 3–4.

[151] Paris Agreement (n 21) art 13(1) and (2).

[152] ibid, art 13(7) and (8).

[153] ibid, art 13(9) and 13(10), and text accompanying nn 77–78.

subject to a 'technical expert review' and 'facilitative, multilateral consideration of progress'. However, for those developing country Parties that need it, the review shall include assistance in identifying capacity-building needs.[154] Further, the review is tasked with paying particular attention to 'respective national capabilities and circumstances of developing country Parties'.[155] And, support is provided to developing countries for implementing transparency requirements,[156] and building transparency-related capacity.[157]

Differentiation in the transparency provisions is thus a pragmatic tailoring of informational demands to capacities. While distinct from self-differentiation in the mitigation provisions, this too represents a departure from the FCCC that places different informational burdens set to different time frames on developed and developing countries.[158]

3. *Differentiation in finance*

The finance provisions of the Paris Agreement are perhaps the most 'Conventional' in the form of differentiation they embody. Developed countries are required in mandatory terms ('shall') to provide financial resources to developing country Parties[159] 'in continuation of their existing obligations under the Convention'. It is the latter clause that permitted the US to accept this mandatory construction of their financial obligations. Developed countries are also required to continue to take the lead in mobilizing climate finance.[160] This obligation is given concrete content in the decision accompanying the Paris Agreement which captures an agreement to continue the collective developed countries' mobilization goal through 2025, and to set before 2025, a 'new collective quantified goal from a floor of USD 100 billion per year'.[161] Developing countries had negotiated to include such a goal in the Paris Agreement, however, in light of the strong financial obligations developed countries agreed to in the text, developing countries agreed to move this quantified goal to the accompanying decision. The Paris Agreement also obliges developed countries to biennially communicate 'indicative quantitative and qualitative information' in relation to provision and mobilization of finance.[162] This information will feed into the global stocktake of collective progress.[163]

Although the responsibility for provision and mobilization of financial resources is placed primarily on developed countries, in a departure from the FCCC,[164] the Paris Agreement expands the donor base to '[o]ther parties'.[165] Other Parties, presumably, developing country Parties, are 'encouraged' to provide such support 'voluntarily'.[166] And, they have correspondingly less demanding reporting requirements placed on them in relation to such support.[167] In the lead-up to Paris, various options were explored for expanding the donor base, regarding the Parties it would apply to (Parties in a 'position' or 'with capacity' to do so) and the expectations that would be placed on them ('shall' or 'should').[168] However such options were met with fierce resistance from

[154] ibid, art 13(11). [155] ibid, art 13(12). [156] ibid, art 13 (14).
[157] ibid, art 13(15).
[158] FCCC (n 4) art 12; and Cancun Agreements (LCA) (n 68) para 40 (Annex I Parties) and para 60 (non-Annex I Parties). [159] Paris Agreement (n 21) art 9(1). [160] ibid, art 9(3).
[161] Decision 1/CP.21 (n 21) para 53. [162] Paris Agreement (n 21) art 9(5). [163] ibid, art 9(6).
[164] See FCCC (n 4) art 4(3). [165] Paris Agreement (n 21) art 9(2). [166] ibid.
[167] ibid, art 9(5) and 9(7). [168] Informal note (n 20) art 6, option 1.

many developing countries who believed that this would open the door to assessments of which countries were in a 'position' or had the 'capacity' to provide support. These countries would then be leaned on to provide support. Parties finally compromised on 'other parties', which was suitably neutral, and language encouraging voluntary provision of support by these parties. It is because of this expanded donor base in the Paris Agreement, that provisions on support across the Agreement are phrased in passive voice ('support shall be provided')[169] that precludes the need to identify who is to provide such support. Nevertheless, it is remarkable that the provision of support to developing countries is a central cross-cutting feature of the Paris Agreement. The Paris Agreement also recognizes in operational paragraphs that enhanced support for developing countries will allow for higher ambition in their actions,[170] and that developing countries will need to be supported to ensure effective implementation of the Agreement.[171]

Needless to say the terms 'developed' and 'developing' countries have not been defined in the Paris Agreement. In Paris, countries with 'economies in transition' as well as those whose 'special circumstances are recognized' by the COP, viz, Turkey, sought to ensure that they would be included in the category of 'developing countries' and thus entitled to any benefits that might flow thereon.[172] This proved contentious until the end, but the term 'developing countries' was eventually left open and undefined. To many developed countries the use of these terms raises the spectre of the Convention's Annexes. It remains to be seen if some developing countries will seek to engage the embattled Annexes to provide concrete content to these terms.

Differentiation in the finance provisions is thus relatively close to the type of differentiation seen in the FCCC. Although there is a departure in that the donor base has been gently expanded, it is a less radical departure from the Convention than, for instance, the self-differentiation (albeit bounded) seen in the mitigation provisions.

VI. CONCLUSION

The Paris Agreement represents a landmark in the UN climate negotiations. Notwithstanding enduring and seemingly intractable differences, Parties harnessed the political will necessary to arrive at an agreement that strikes a careful balance between ambition and differentiation. The Paris Agreement contains ambitious goals, extensive obligations and rigorous oversight. Admittedly the goals are aspirational, the obligations largely of conduct, and much of the mechanics of the oversight mechanisms have yet to be fleshed out. Further, the Paris Agreement in a show of solidarity with developing countries is also firmly anchored in the CBDR principle, and contains nuanced differentiation tailored to the needs of each Durban pillar—mitigation, adaptation, finance, capacity building, technology and transparency.

[169] See eg Paris Agreement (n 21) art 4(5), 7(13), 10(6) and 13(14).

[170] ibid, art 4(5).

[171] ibid, art 3.

[172] Draft Text on COP 21 agenda item 4 (b) Durban Platform for Enhanced Action (decision 1/CP.17)

Adoption of a protocol, another legal instrument, or an agreed outcome with legal force under the Convention applicable to all Parties, Version 1 of 9 December 2015 at 15:00, Draft Paris Outcome, Proposal by the President <http://unfccc.int/resource/docs/2015/cop21/eng/da01.pdf> fn 7.

Admittedly, the nature of differentiation in the Paris Agreement is distinct from that in the FCCC and its Kyoto Protocol, beloved of developing countries, and differentiation once inspired by principle is now firmly in the realm of practical politics.

Nevertheless, its many tenuous compromises and infirmities aside, the Paris Agreement represents hard-fought agreement between 196 nations. Countries across the developed and developing country divide made significant concessions from long-held positions in the dying hours of the conference to make the final agreement possible. The remarkable political will on display if not the regime created by the Paris Agreement will over time overcome the climate challenge.

Annex ZJ

The Human Rights Law of the Charter

LOUIS B. SOHN*

I. THE CHARTER OF THE UNITED NATIONS

The Charter of the United Nations presents a radical departure from previous approaches to the international protection of human rights. For some 3,000 years the concern of the international community was restricted to the treatment of foreigners, and various procedures were devised for dealing with claims of a citizen of one country against another country for wrongs suffered in the territory of the second country, or due to violations of international law by its officials, citizens or inhabitants.[1] Only a hundred years ago, the international community expressed its interest in the fate of minorities in limited areas of Europe, and in the fate of people inhabiting certain parts of Africa.[2]

The League of Nations established special regimes for the protection of minorities in a few countries of Eastern and Southern Europe and the Middle East,[3] and for the promotion of the well-being of inhabitants of territories under mandate,[4] but suggestions to broaden the system to other countries received practically no support.[5] The climate changed completely during the Second World War, when totalitarian regimes not only grossly violated human rights both at home and in occupied territories but also practiced wholesale extermination of groups of people because of their race, nationality or religion.[6] Thus one of the basic goals of the United Nations became the preservation of "human rights and justice in their own lands as well as in other lands."[7]

While various drafts of an international bill of human rights were prepared during the war,[8] the San Francisco Conference did not find time to discuss

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1. L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 23-96 (1973).

2. C. MACARTNEY, NATIONAL STATES AND NATIONAL MINORITIES 157-75 (1934); Q. WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 15-23 (1930).

3. P. DE AZCÁRATE, LEAGUE OF NATIONS AND NATIONAL MINORITIES 92-136 (1945).

4. H. HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIP 165-233 (1948).

5. R. CLAUDE, NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM 31-50 (1955).

6. Sohn, *A Short History of United Nations Documents on Human Rights*, in COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 37, 44-56 (1968).

7. Declaration by United Nations, Jan. 1, 1942 reproduced at U.S. DEPARTMENT OF STATE, 1 FOREIGN RELATIONS OF THE UNITED STATES, 1942 at 25-26 (1943).

8. *See, e.g.*, H. LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 69-

such a bill.[9] Nevertheless, the Charter of the United Nations contains a variety of provisions on human rights. 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."

The Charter of the United Nations also contains significant grants of power to various organs of the United Nations. Thus, under article 13, 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 (2), "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all"; under article 68, the Council has an obligation to set up a commission "for the promotion of human rights," which is the only functional commission the establishment of which is 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 the steps which they have taken to give effect to the recommendations of the General Assembly and of the Council. Moreover, article 76 lists among the basic objectives of the United Nations trusteeship system the duty "to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"; and article 87 provides for the supervision of the administration of trust territories through a system of reports, examination of petitions and periodic visits to these territories. Finally, in the declaration re-

74 (1945); H.G. WELLS, GUIDE TO THE NEW WORLD 48-54 (1941). For an early U.S. draft, *see* U.S. DEPARTMENT OF STATE, POSTWAR FOREIGN POLICY PREPARATION, 1939-1945, at 483-85 (1949).

9. R. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 780 (1958).

garding other non-self-governing territories, which is embodied in article 73 of the Charter, the Administering States accept "as a sacred trust" the obligation to promote to the utmost "the well-being of the inhabitants of these territories," and to this end to ensure "their just treatment and their protection against abuses."

These provisions express 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 fulfil 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. For this purpose, they have pledged themselves to take such joint and separate action as may be necessary. The General Assembly and, under the Assembly's authority, the Economic and Social Council are responsible, under article 60 of the Charter, for the discharge of the functions of the United Nations in this area, and for this purpose may initiate such studies and make such recommendations as they may deem necessary. Any refusal to participate in the United Nations program to promote the observance of human rights constitutes a violation of the Charter.[10] The General Assembly may recommend, under article 14 of the Charter, "measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations." As the obligation to promote and encourage respect for human rights is set forth in the statement of purposes in article 1 of the Charter, the broad powers of the General Assembly under article 14 clearly apply in case of a violation of the duty to cooperate with the United Nations in this area.

The Charter is the cornerstone of international *jus cogens*, and its provisions prevail over all other international and domestic legislative acts.[11]

10. In the advisory opinion relating to the legal consequences for states of the continued presence of South Africa in Namibia, the International Court of Justice declared that "to establish . . . and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter." Advisory Opinion of the International Court of Justice, June 21, 1971, [1971] I.C.J. 16, 57.

11. The Charter expressly provides that the obligations under it prevail over "obligations under any other international agreement." (Art. 103.) Art. 27 of the Vienna Convention on the Law of Treaties of 1969 confirms the principle recognized by several international tribunals that a "party may not invoke the provisions of internal law as justification for its failure to perform a treaty." U.N. Conference on the Law of Treaties, Official Records, Documents of the Conference 293 (U.N. Publ. E.70.V.5). Art. 53 of the same convention defines *jus cogens* as a peremptory norm of international law "from which no derogation is permitted." *Id.* 296. Among the treaties considered by some members of the International Law Commission as conflicting with *jus*

Should a state conclude a treaty or issue a legislative act or regulation which constitutes a gross violation of human rights, such a treaty or act would be clearly invalid as contrary to a basic and overriding norm of the Charter, and any tribunal, international or domestic, which might be asked to apply such a treaty, act or regulation, should refuse to do so.[12] In addition, the provisions of the Charter and the continuous world wide debate about their implementation have brought a change in the moral and political climate, making it easier for public opinion to press for changes in old customs that are no longer consistent with the public policy enunciated in the Charter.[13] Not only the letter of the Charter but also the spirit of its human rights provisions have thus had a profound influence on the changes in the human rights field which have occurred in many parts of the world since 1945.[14]

II. UNIVERSAL DECLARATION OF HUMAN RIGHTS

It has been contended that the provisions of the Charter are too general and cannot be applied to concrete situations, and that before the Charter can have practical consequences the human rights and fundamental freedoms mentioned in the Charter must be more specifically defined through an International Bill of Human Rights.[15] The first step toward such a definition was taken when the General Assembly adopted in 1948 the Universal Declaration of Human Rights which provides an agreed upon list of such rights and freedoms. This list is a broad one, containing not only rights traditionally guaranteed by national constitutions but also such modern economic, social and cultural rights as the right to work and the right to education. Taking into account the realities of the situation and the variety of national circumstances, the Declaration did not impose a duty of immediate implementation but expressed the hope that this "common standard of achievement for all peoples and all nations" will be secured "by progressive measures, national and international."[16]

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cogens were treaties violating human rights. *Id.* 68. *See also,* Kearney & Dalton, *The Treaty on Treaties,* 64 AM. J. INT'L L. 495, 535-38 (1970); separate opinion of Judge Ammoun in the Barcelona Traction Case, [1970] I.C.J. 1, 304.

12. Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission,* 61 AM. J. INT'L L. 946, 950-51 (1967).

13. *See, e.g.,* Namba v. McCourt, 204 P.2d 569, 579 (Ore. 1949); *In re* Drummond Wren, 1945 Ont. 778, [1945] 4 D.L.R. 674; 1943-1945 ANN. DIG. PUB. INT'L L. CASES 178.

14. *See, e.g., Human Rights in the World Community: A Call for U.S. Leadership, Report of the Subcommittee on International Organizations and Movements of the Committee on Foreign Affairs, House of Representatives,* 93d Cong., 2d Sess. (1974); *see also,* T. BUERGENTHAL & J. TORNEY, INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL EDUCATION 86-101 (1976).

15. E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 31-32 (1964).

16. G.A. Res. 217A, U.N. Doc. A/810, at 71-77 (1948); L. SOHN & T. BUERGENTHAL, BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 30-34 (1973).

While there was at the beginning some disagreement on the legal effect of the Declaration,[17] twenty years later the International Conference on Human Rights, held at Teheran in 1968, was able to proclaim unanimously that the Declaration "states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for all members of the international community."[18] Today the Declaration not only constitutes an authoritative interpretation of the Charter obligations but also a binding instrument in its own right, representing the consensus of the international community on the human rights which each of its members must respect, promote and observe.

The practice of the United Nations confirms this conclusion.[19] Even states which originally expressed doubts about the legal force of the Declaration have not hesitated to invoke it and to accuse other states of having violated their obligations under the Declaration. The United States, for instance, invoked the Declaration in the so-called *Russian Wives Case* even before the ink on the Declaration was dry.[20] The General Assembly adopted a resolution on the subject, in which it declared that the Soviet measures preventing Russian wives from leaving the Soviet Union with their foreign husbands were "not in conformity with the Charter"; it cited articles 13 and 16 of the Declaration in support of this conclusion.[21]

The Soviet Union, on the other hand, has voted for most of the resolutions relating to southern Africa in which the Declaration was invoked by the General Assembly. To this group belong several resolutions relating to the treatment of people of Indian and Pakistani origin in South Africa,[22] the adminis-

17. Sohn, *supra* note 6, at 60-72.

18. Final Act of the International Conference on Human Rights 3, at 4, para. 2, U.N. Doc. A/CONF.32/41 (U.N. Pub. E.68.XIV.2) (1959). *See also* the statement of the unofficial Montreal Assembly for Human Rights, that the "Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary international law." 9 J. INT'L COMM. JUR. (no. 1) 94, 95 (1968); the statement by the Secretary-General of the United Nations emphasizing the proclamation by the Teheran Conference that the Universal Declaration constitutes "an obligation for the members of the international community." 23 U.N. GAOR, Supp. (1A) 13, U.N. Doc. A/7201/Add.1 (1968).

In 1974, the General Assembly adopted by consensus a resolution relating to the International Court of Justice in which the Assembly recognized that "the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice." G.A. Res. 3232, 29 U.N. GAOR, Supp. (31) 141-42, U.N. Doc. A/9631 (1974).

19. *See generally*, UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS, 9-19, U.N. Doc. ST/HR/2 (U.N. Publ. E.74.XIV.2) (1974); van Asbeck, *Universal Declaration of Human Rights and Its Implementation in International Organizations*, in INTERNATIONAL SOCIETY IN SEARCH OF A TRANSNATIONAL LEGAL ORDER 554-75 (van Panhuys & van Leeuwen Boomkamp eds. 1976).

20. 3(1) U.N. GAOR, C.6 (137th mtg.) 735-39 (1948).

21. G.A. Res. 285, U.N. Doc. A/900, at 34-35 (1949).

22. *See, e.g.*, G.A. Res. 395, 5 U.N. GAOR, Supp. (20) 24, U.N. Doc. A/1775 (1950).

tration of South West Africa,[23] and the policies of apartheid in South Africa.[24] The Security Council requested South Africa "to cease forthwith its continued imposition of discriminatory and repressive measures which are contrary to the principles and purposes of the Charter and which are in violation of its obligations as a Member of the United Nations and of the provisions of the Universal Declaration of Human Rights."[25] In a more general fashion, the General Assembly condemned "all manifestations and practices of racial, religious and national hatred in the political, economic, social, educational and cultural spheres of the life of society as violations of the Charter of the United Nations and the Universal Declaration of Human Rights."[26]

The duty to "observe faithfully and strictly" not only the provisions of the Charter but also of the Universal Declaration was proclaimed by the General Assembly in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.[27] Similarly, the 1963 Declaration on the Elimination of All Forms of Racial Discrimination recognized that every state shall "fully and faithfully observe the provisions of . . . the Universal Declaration of Human Rights."[28] Both declarations were adopted unanimously.

As one of the chief framers of the Declaration, Charles Malik (Lebanon), pointed out on its twenty-fifth anniversary, many "United Nations resolutions—maybe hundreds of them—base their arguments jointly on the Charter and the Declaration, and mention the two in the same breath." He also noted that "when people anywhere search for any authoritative listing of human rights and fundamental freedoms that will serve as a 'standard of achievement' for themselves and their cultures, they can find nothing of the depth, the authoritativeness and comprehensiveness of the Universal Declaration."[29]

III. THE COVENANTS ON HUMAN RIGHTS

The two Covenants on Human Rights, dealing respectively with civil and political rights, and with economic, social and cultural rights, were long in

23. *See, e.g.*, G.A. Res. 1142B, 12 U.N. GAOR, Supp. (18) 25, U.N. Doc. A/3805 (1957).

24. *See, e.g.*, G.A. Res. 1598, 15 U.N. GAOR, Supp. (16A) 5, U.N. Doc. A/4684/Add.1 (1961).

25. S.C. Res. 182 of Dec. 4, 1963, U.N. SCOR, Supp. (Oct.-Dec. 1963) 103-105, U.N. Doc. S/5471 (1964).

26. G.A. Res. 1510, 15 U.N. GAOR, Supp. (16) 21-22, U.N. Doc. A/4684 (1960). *See also* G.A. Res. 1779-81, 17 U.N. GAOR, Supp. (17) 32-33, U.N. Doc. A/5217 (1962); U.N. OFFICE OF PUBLIC INFORMATION, THE UN AND HUMAN RIGHTS 13-15 (U.N. Publ. E.73.1.13).

27. G.A. Res. 1514, 15 U.N. GAOR, Supp. (16) 66-67, U.N. Doc. A/4684 (1960).

28. G.A. Res. 1904, art. 11, 18 U.N. GAOR, Supp. (15) 35-37, U.N. Doc. A/5515 (1963).

29. *Conference of Non-Governmental Organizations in Observance of the 25th Anniversary of the Universal Declaration of Human Rights, Report [of the] Human Rights Committee* 10 (1973).

preparation but were finally adopted by the General Assembly on December 16, 1966.[30] For the first time, the international community reached an agreement not only on a list of basic human rights, but also on the content of each right and on the most important limitations to such rights. The Covenants differ in several respects from the Declaration. In the first place, they are more precise, providing detailed guidelines for the conduct of governments, specific legal protection for individuals, and an enumeration of instances in which public safety, order, health, morals, etc., can be invoked to limit individual freedoms. Secondly, the Covenants contain various measures of implementation; though some of them are optional in character, they recognize the right of individuals to seek redress of their grievances on the international plane. Thirdly, while the Declaration was a cautious attempt, disparaged at the beginning, to exercise the quasi-legislative powers of the General Assembly, the Covenants constitute a mixture of old and new methods of international legislation. They were drafted by the General Assembly and its subsidiary bodies and were adopted without the benefit of a special diplomatic conference; at the same time, they were not proclaimed by the General Assembly as immediately applicable instruments, but were made subject to ratification and the further stipulation that they would enter into force only when ratified, or acceded to, by 35 states. Both Covenants entered into force in 1976.[31]

Though the Covenants resemble traditional international agreements which bind only those who ratify them, it seems clear that they partake of the creative force of the Declaration and constitute in a similar fashion an authoritative interpretation of the basic rules of international law on the subject of human rights which are embodied in the Charter of the United Nations. This conclusion is supported by the fact that the Covenants are even more universal in their origin than the Declaration. While the Declaration was adopted by less than fifty votes, with some important abstentions,[32] 105 states voted for the Covenants and only a few states (such as Portugal and South Africa) absented themselves at the time of the vote, not daring to interfere with the unanimous vote of the General Assembly.[33] Consequently, although the

30. G.A. Res. 2200, 21 U.N. GAOR, Supp. (16) 49-58, U.N. Doc. A/6316 (1966); L. SOHN & T. BUERGENTHAL, *supra* note 1, at 35-62.

31. The Covenant on Economic, Social and Cultural Rights entered into force on Jan. 3, 1976; the Covenant on Civil and Political Rights entered into force on Mar. 23, 1976. By Jan. 1, 1977, 42 states had ratified or acceded to the Covenant on Economic, Social and Cultural Rights, and 40 states had become parties to the Covenant on Civil and Political Rights. The Optional Protocol on communications by individuals, which required only ten acceptances to bring it into effect, was ratified by 15 states and entered into force on Mar. 23, 1976. For the list of states, *see* U.N. Doc. A/31/202 (1976) and U.N. Press Releases L/T/2021 (1976) and L/T/2083 (1977).

32. The Universal Declaration was adopted by 48 votes to none, with eight abstentions (Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukrainian SSR, USSR, and Yugoslavia). El Salvador and Yemen were absent.

33. They may have also wished to avoid any implication of tacit consent.

Covenants apply directly to the states that have ratified them, they are of some importance, at the same time, with respect to the interpretation of the Charter obligations of the non-ratifying states.

It would not be surprising, therefore, if in further developing the procedure relating to reports on the implementation of the Declaration,[34] the General Assembly should someday ask states which are not parties to the Covenants to submit information similar to that to be presented under the Covenants. It is also possible that some states might agree voluntarily to submit Covenant-type reports even without such prodding by the General Assembly. The General Assembly might also devise other implementation procedures for non-parties to the Covenants that would parallel those under the Covenants, at least with respect to gross violations of human rights. The arrangements with respect to complaints relating to trade union freedoms, which were established by the United Nations for states which were not members of the International Labor Organization, might be followed on this occasion.[35]

IV. OTHER DECLARATIONS AND CONVENTIONS

It is not practicable to deal in this short survey with the many special declarations and conventions on human rights adopted by the General Assembly of the United Nations or by the specialized agencies of the United Nations,[36] nor is it practicable to discuss here the additional instruments which are in various stages of preparation (such as the draft Declaration on Religious Intolerance).[37] What is important is the relationship of these instruments to the Charter, the Covenants and the Universal Declaration.

The main function of these declarations and conventions is to spell out specific obligations with respect to particular human rights. There is of course a hierarchy of international obligations. The specialized instruments can only add precision to the obligations existing under the Charter, the Universal Declaration and the Covenants; they cannot subtract from these obligations.[38] In case of an irreconcilable divergence, the general instruments must prevail over the specific ones. The effect is thus cumulative, each new

34. On the present voluntary reporting system, instituted by the Economic and Social Council in 1956, *see* Humphrey, *Report of the International Committee on Human Rights* in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 53RD CONFERENCE 437, 440-42 (1968). *See also* Sohn, *supra* note 6, at 74-94.

35. E.S.C. Res. 277, 10 U.N. ESCOR, Supp. (1) 9-10, U.N. Doc. E/1661 (1950). For the Council's actions under this resolution, *see, e.g.*, Report of the Economic and Social Council, 1952-1953, 8 U.N. GAOR, Supp. (3) 98-100, U.N. Doc. A/2430 (1954); *id.*, 1966-1967, 22 U.N. GAOR, Supp. (3) 77, U.N. Doc. A/6703 (1968).

36. Most of these international instruments are published by the United Nations in HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS, U.N. Doc. ST/HR/1 (1973, U.N. Publ. E.73.XIV.2).

37. For a history of the drafting of the religious intolerance instruments, *see* U.N. Doc. A/9690, at 97-100 (1974).

38. One could argue, perhaps, that in defining an obligation more exactly, a new

instrument adding depth and scope to the more general obligations previously contracted. On the other hand, the general instruments may not be used to circumscribe rights defined in the specific instruments. The Covenants provide expressly that there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any state pursuant to other conventions, on the pretext that the particular Covenant "does not recognize such rights or that it recognizes them to a lesser extent."[39] In each case, the individual is entitled to benefit from the instrument which gives him better protection against interference with his rights. This most-favorable-to-individual clause should apply with respect to both conventions of a universal scope and regional ones. This interpretation is confirmed by the European Convention on Human Rights which provides expressly that nothing in that Convention "shall be construed as limiting or derogating from any of the human rights or fundamental freedoms which may be ensured" under any other international instrument.[40]

Consequently, if the more precise international instrument puts certain limits on the exercise of a particular right, and if in a specific situation such a limitation deprives an individual of protection under that instrument, the individual can resort to a more general instrument which does not embody that limitation.[41] Of course, the more general provisions of the latter instrument may not provide the same amount of protection as might have been available under the more detailed instrument if it were applicable, but they may provide at least some protection in a case in which the limitations em-

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instrument may narrow down the obligation to some extent; *e.g.*, by making clearer certain exemptions and limitations. But in such a case it is usually considered that these exceptions or limitations were inherent or implied in the more general basic text.

39. Art. 5(2), International Covenant on Economic, Social and Cultural Rights, and art. 5(2), International Covenant on Civil and Political Rights.

40. Art. 60, European Convention for the Protection of Human Rights and Fundamental Freedoms, *signed at Rome* Nov. 4, 1950, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 221; L. SOHN & T. BUERGENTHAL, *supra* note 14, at 138. On the relationship between regional and universal instruments, *see* Eissen, *The European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights: Problems of Coexistence*, 22 BUFFALO L. REV. 181-216 (1972); HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 72-96 (A. Robertson ed. 1968); Tardu, *Quelques questions relatives à la coexistence de procédures universelles et régionales de plainte individuelle dans le domaine des droits de l'homme*, 4 REVUE DES DROITS DE L'HOMME 589-613 (1971).

41. In a parallel case, the Permanent Court of International Justice declared that "the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the Contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ulitmate result that no jurisdiction would remain." The Court found, in particular, that the applicant State did not comply with certain conditions specified in the more detailed Treaty of conciliation, arbitration and judicial settlement of 1931, but that the Court had jurisdiction under the more general declarations of adherence to the Optional Clause of the Court's Statute. Electricity Company of Sofia and Bulgaria Case, [1939] P.C.I.J., ser. A/B, No. 77, at 76, 80, 83.

bodied in the more detailed instrument have cut down the protection available thereunder.

V. THE ROAD AHEAD

In looking ahead, it might be useful to recapitulate the progress already made. We must measure the accomplishments of the last thirty years not against utopian dreams but against the accomplishments of the last 3,000 years of recorded history. For most of that period, except for a minute elite, mankind lived in slavery and serfdom. The end of feudalism permitted some increase in the rights of the new merchant elite in the cities, but the rest of the world remained in serfdom. The industrial revolution permitted some serfs to escape into cities but they were soon enslaved there in the chains of a debilitative factory life. At the same time, colonial empires expanded over the face of the planet, putting most of the Afro-Asian world under the colonial yoke.

It is only a century ago that slavery and serfdom were formally abolished, though their repercussions have persisted until the present day. The relationships between industrial employers and their workers have graduated from semi-slavery only some fifty years ago, and colonialism has been drastically cut down less than two decades ago. Half of the countries of the world have not known freedom before the current generation was born, and their new nationhood is only precariously established, due to poverty, tribalism, and the paucity of an educated elite.

When a government's survival is at stake, in periods of revolution and counterrevolution, some violations of human rights are usually tolerated. As the world is not yet ready to guarantee the form of government existing in each state, the government's right of self-defense has to be accepted, as long as it does not result in a savage slaughter of innocent civilians. An attempt to expand the norms which regulate the conduct of states in civil war situations has only recently begun,[42] and is not likely to be successful as long as so many of the governments of the world have not been able to assure a minimum of order and stability to their peoples. We are living in a period of transition and, until it is over, one cannot expect the kind of protection of human rights which even stable and mature societies have difficulty achieving. It is not feasible to demand that all new states immediately provide human rights guarantees of the type which it took the Western world many generations, many revolutions and many sacrifices to evolve. Comparisons should not be between the Europe and the North America of today and the new states of Africa and Asia, but between those states and the states of

42. For reports on the first three sessions of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, *see* U.N. Docs. A/9669 (1974), A/10195 and Corr.1 and Add.1 (1975), and A/31/163 and Add.1 (1976).

Europe prior to 1800. If such comparisons were made, many new states would come off better than most European states of that period.

Given the speed of modern developments, the technological ability to provide all nations of the world with a minimum of social amenities, and the growth of managerial skills on the international level, a way may be found to distribute the world's goods more rationally and more equitably. The new nations would then be able to turn their attention to human rights sooner than many of their older brethren did and, having already accepted the United Nations Declaration formally, give it application in practice. It is not inconceivable that before the end of the twentieth century the level of international protection of human rights will greatly increase, unless such progress is stopped by a nuclear war or by a series of internecine struggles of international or domestic character. Human rights and peace are closely connected; neither can thrive in the absence of the other. War is the greatest destroyer of human rights; and it is quite common that those who do not respect the human rights of their own citizens do not respect the right of other nations to live in peace. But if the last quarter of this century proves to be one of relative peace, human rights should have a chance to blossom in a more congenial atmosphere.

Even in the present interlude between storms, progress is being made with respect to human rights. The two Covenants on Human Rights entered into force in 1976 and immediate steps were taken to implement them.[43] For the first time, the right of an individual to petition an international committee has been recognized on a global scale, though at this time only by fifteen states from Africa, Europe and the Americas.[44]

The momentum thus achieved should not be lost, and human rights proponents should concentrate their efforts on the main goal, the pivotal documents, the Covenants, on their wider ratification and meaningful implementation. In the countries which have not yet ratified them, the opposition to their ratification is not likely to be any greater than that encountered by the Genocide Convention, or that might be directed against the Convention on Racial Discrimination. But even if we should succeed in the smaller efforts, connected with special, limited conventions, and spend on them all our re-

43. The Economic and Social Council agreed on a procedure and time-table for its consideration of the reports of States parties and the specialized agencies on the measures which they have adopted and the progress made in achieving the observance of the rights recognized in the International Covenant on Economic, Social and Cultural Rights. E.S.C. Res. 1988, 60 U.N. ESCOR, U.N. Doc. E/RES/1988 (1976). The States parties to the International Covenant on Civil and Political Rights met on Sept. 20, 1976 and elected the eighteen members of the Human Rights Committee. U.N. Docs. CCPR/SP/SR.1 and 2 (1976).

44. These States are: Barbados, Canada, Colombia, Costa Rica, Denmark, Ecuador, Finland, Jamaica, Madagascar, Mauritius, Norway, Surinam, Sweden, Uruguay and Zaire. U.N. Doc. A/31/202 (1974); U.N. Press Releases L/T/2021 (1976) and L/T/2083 (1977).

sources, the accomplishments will be minimal, more psychological than practical. On the other hand, if we would focus our efforts on the Covenants, we may find that the opposition will not be much greater but the success will be so much more rewarding. As long as the coming into force of the Covenants was in the distant future, one could afford the luxury of dissipating our efforts on more restricted instruments. But now that they have entered into force, it is doubly important to get moving in the direction of this primary goal, especially in the United States.

Quick action needs to be taken to obtain the necessary domestic understanding which is a prerequisite to ratification. This process has hardly begun, and to some extent this delay is due to the preoccupation of the leading non-governmental organizations with other, less important issues. The whole climate of public opinion on the subject needs to be changed, and all human-rights-oriented organizations should be in the forefront of a major effort in this direction. If the United States and other countries could be persuaded to ratify the Covenants, we might discover some twenty years from now that international protection of human rights has become a matter of routine and that states have found it easier to comply with their obligations than to defend themselves constantly before the competent international bodies. That process took some fifty years in the International Labor Organization; perhaps it can also be accomplished in fifty years in the United Nations. While it is an axiom of international pessimists that if anything can go wrong it will, even a cursory glance at history shows that in practically every important period positive steps have been taken at crucial moments, allowing mankind to move forward and upward.

Annex ZK

2

The Establishment of the Legal Right to Self-Determination[1]

I. HISTORICAL INTRODUCTION

Verzijl has remarked that 'seldom has there been advanced as a legal right a claim so obviously of a political nature and of such a sloganlike quality as the so-called "right of self-determination".'[2] Despite this phraseology self-determination has clearly proved to be a principle of the utmost importance in international relations since 1945.

The history of the principle can be traced to the French revolution at the close of the eighteenth century with its twin proclamations of human rights and popular sovereignty. Its peculiar blend of nationalism and democracy profoundly influenced the political development of Europe[3] and ultimately produced the concept of self-determination. This was interpreted as the capacity of the nation to decide for itself its own political structure, for nationalism appeared as a framework for the operation of the new theory of sovereignty called democracy.[4] Although this 'principle of nationalities', as it was sometimes known, was not recognized as an integral part of European law,[5] it has a profound effect, particularly upon the nations of central and eastern Europe.

However, the three constituent elements of this concept, i.e. people, the nation, and the State, did not always coalesce in the same fashion and the role of the democratic factor often fluctuated. In many instances in central Europe it re-emerged as a form of national determinism, whereby the fact of birth alone determined the issue and the idea of subjectivity was rejected as irrelevant. The individual could not operate in a manner inconsistent with the mystical concept of the nation.[6] On the other hand, western European liberal thought emphasized the subjective element and the element of choice over the pull of the nation.[7] But self-determination was in no sense thought of as legally binding.[8]

It was the events and views precipitated by the outbreak of the First

Title to Territory in Africa. Malcolm Shaw.

World War[9] that thrust the principle on to the centre of the stage. President Wilson of the United States declared before Congress in 1916 that 'every people has a right to choose the sovereignty under which they shall live',[10] and this idea was developed in the following years. In 1918 he promised that 'all well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old demands of discord and antagonism'.[11]

In spite of such protestations, it was clear that the 1919 Peace Conference did not treat national self-determination as an overwhelmingly important principle. It did not appear in the final draft of the Covenant of the League of Nations,[12] and it was treated 'as a purely political factor and not as a legal principle applicable to all peoples whose fate has to be determined'.[13]

Nevertheless, its impact upon the legal constitution of the world community can be detected in the various provisions for minority protection,[14] which can be regarded as a restricted application of self-determination in its creation of protective norms for certain cultural and language groups. It was even conceivable that minority rights could rise to secession, but this was considered an 'altogether exceptional situation, a last resort where the State lacks the will or the power to enact and apply just and effective guarantees'.[15]

Self-determination also made its mark in the institution of the mandate system[16] which replaced the annexation of territories belonging to the defeated States outside Europe and was founded on the proposition that 'the well-being and development of such non-independent peoples form a sacred trust of civilisation'.[17]

In the inter-war years there was relatively little practice dealing with the application of self-determination.[18] In the leading discussion of its juridical character that did take place it was emphasized that 'the recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations' and stated that international law 'does not recognise the right of national groups as such to separate themselves from the State of which they form part by the simple expression of a wish'.[19]

Verzijl regarded the decision in the Aaland Islands question as based upon the acceptance by the Commission of Jurists that positive international law did not know of the asserted 'right' of self-determination.[20] Although the idea of self-determination probably

helped encourage the growing nationalist movements in the Arab and Asian worlds, Brownlie points out that this had 'no immediate counterpart on the legal plane'.[21]

The Second World War stimulated further consideration of this concept. The Atlantic Charter, 1941, declared 'the right of all peoples to choose the form of government under which they will live' and the desire to see no 'territorial changes that do not accord with the freely expressed wishes of the people concerned.'[22]

Self-determination was not mentioned in the Dumbarton Oaks proposals of 1944, but it came into prominence at the San Francisco Conference at the instigation of the Soviet Union[23] and was incorporated into Article 1(2) of the Charter of the United Nations. This noted that one of the purpose of the Organization was the development of friendly relations among nations 'based on respect for the principle of human rights and self-determination of peoples' and was echoed in Article 55.

Although widely accepted before 1945 as a political moral principle entailing no legal obligation,[24] its inclusion in the UN Charter raised questions as to its juridical character.[25] However, the Charter only refers to self-determination as a 'principle' and not a 'right' and this induced the Australian delegate to the Commission on Human Rights to point out that 'where the Charter laid down a principle, it did not necessarily signify a right, and it must be left to the authority responsible for the administration of a given dependent territory to determine the extent to which the principle of self-determination could be applied to it'.[26]

The view is reinforced by a consideration of the context in which the principle is proclaimed, that is, as a basis for friendly relations among States. Article 1(2) comes within the section dealing with the purposes of the UN and not the more important section concerned with the principles of the Organization and appears merely as a guidance framework for UN activities rather than prescribing legal norms.[27]

A further factor is the absence of definition or clarification of the concept in the Charter, and this leaves one to question its legal validity as proclaimed in the Charter.[28] This is reinforced by the coupling of self-determination of peoples with equal rights. Not every expression of a political concept in the Charter can be taken as creating legal obligations, notwithstanding the character of the Charter as a multilateral treaty, since the Charter is not only the constitution of the UN but a document of political faith.

The majority of writers have taken the view that the combined effect of Articles 1(2) and 55 is not such as to create binding legal obligations upon States to grant self-determination to nonindependent peoples. Bentwich and Martin regard Article 1(2) merely as 'a declaration of goodwill towards peoples who have not yet achieved self-determination',[29] while Fawcett considers self-determination as formulated in the Charter as a 'directive principle' similar in essence to Part IV, Article 37 of the Indian Constitution which lays down principles fundamental to the government of the country but nevertheless unenforceable by the courts.[30] In other words, the Charter provisions could not provide the legal basis for claims to self-determination by non-independent peoples.[31]

Kelsen adopted a different approach and took self-determination as expressed in the Charter as simply emphasizing the concept of the sovereignty of States. Since 'self-determination of the people usually designated a principle of internal policy, the principle of democratic government' and Article 1(2) referred to relations among States, and since 'the terms "peoples" too . . . in connection with "equal rights" means probably States since only States have "equal rights" according to general international law . . . then the self-determination of peoples in Article 1(2) can mean only sovereignty of the States'.[32]

This conservative interpretation, strongly influenced by traditional positivist philosophy, can no longer be accepted today in view of the wealth of State practice relating to the development of rights under international law for persons other than States. The view that the combination of equal rights and self-determination amounted only to a reinforcement of the sovereign equality of States can only be regarded as a misunderstanding of the basic trends in international law, while the idea that self-determination refers only to internal political situations has been contradicted by the evolution of the principle. However, there is a strong current of irony involved here, since Kelsen's conclusion that self-determination reinforces State sovereignty is not far off the mark in the light of the subsequent interpretation of the principle, although his reasoning is flawed. If one takes self-determination to be the right of non-independent peoples to sovereignty within accepted territorial limits (usually those defined by the administering power) and that alone, then the sanctity of the territorial sovereign is enhanced, the principle of territorial integrity underlined, and the right of minorities to secede from independent States eliminated.

Quincy Wright, however, has argued that the Charter did introduce

binding duties for member States with respect to self-determination. He bases this opinion upon the proviso in Article 56 whereby all members 'pledge themselves to take . . . action for the purposes set forth in Article 55'. By ratifying the Charter, States have, according to Wright, undertaken such legal obligations.[33] But the point has to be made that the purposes in Article 55 are many and various, and it is by no means sure that the principle of the self-determination of peoples could be included as such a purpose.

In addition it is not certain that the expression 'pledge' alone can convert the humanitarian aims set out into binding legal obligations. For example, it would be difficult to say that the aim of 'full employment' is a legal duty on the State, indeed that it could be, merely by virtue of this provision in the UN Charter.

Although the discussion as to the legal status of the principle in the Charter has revolved around Articles 1(2) and 55, Bowett has noted that it is permissible 'to regard the entirety of Chapters XI and XII of the . . . Charter as reflections of the basic idea of self-determination'.[34] Chapter XI deals with non-self-governing territories, while Chapter XII deals with the trusteeship system. In neither is the concept expressly referred to, but those administering non-self-governing territories have by Article 73(b) to 'develop self-government, to take due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions', and among the basic objectives of the trusteeship system in Article 76 is 'progressive development towards self-government or independence'. The freely expressed wishes of the people concerned have to be taken into account in fulfilling these objectives.

Van Asbeck has written that Chapter XI being in the form of a declaration imposes international duties,[35] but this was decidedly a minority viewpoint.[36]

The question as to the establishment of a legal right to self-determination has to be answered rather in the light of developments subsequent to the UN Charter. Practice since 1945 reveals certain trends towards regarding self-determination as a rule of international law. Declarations and resolutions adopted by the United Nations relating to the concept both in general theoretical terms and in specific cases have been numerous and have manifested a definite approach to the problem. But the issue as to whether such expressions have been sufficient to establish self-determination as a legal right lies at the heart of the matter and must be disentangled from the political aspects of the question.

It is generally accepted that its inclusion in the Charter did not *per se* transform it into a binding obligation as distinct from a non-legal guideline,[37] but the relevant provisons possessed considerable potential for development.[38]

The point should also be made that the fact that a particular purpose of the United Nations is not deemed to constitute a legally binding rule does not mean that it is devoid of effect within the sphere of law. It will be relevant as regards the interpretation of the Charter of the United Nations and may contribute towards the development of customary law.

There are basically two methods by which self-determination may have subsequently attained the status of law.[39]

The first derives from the character of the Charter as a multi-lateral treaty and the consequent capacity of the parties thereto to interpret its provisions. Could it be stated that subsequent practice has revealed the interpretation of the relevant Charter provisions in terms of self-determination as a legal right? The second manner in which State conduct could construe self-determination as a binding rule is by virtue of its development as a rule of customary law. Both methods utilize to some extent the same material, namely UN declarations and resolutions, but comprehend their role slightly differently.[40]

II. CHARTER INTERPRETATION

(a) General

The development of International legal rules through the medium of the United Nations has been one of the most striking and controversial aspects of post-1945 norm creation. The problem has already been considered at length,[41] but what we need to note here is a difficulty that has arisen as regards the relevance and application of the traditional sources of law to this phenomenon. The international community has recognized as law-creating mechanisms conventions, custom, and general principles of law recognized by civilized nations,[42] but it is clear that many of the activities connected with the UN Organization may be implicitly or explicitly creative of law in a manner which straddles the traditional classifications, and this is particularly so with regard to the political organs of the United Nations.[43] This has led Higgins to refer to the blurring in the United Nations of the historically separate sources of law and to emphasize the twilight zone between custom and treaty in the development of international law in the Charter and in the Organization as a whole.[44]

This arises primarily because of the tremendous amount of State practice generated through the UN Organization and produced by virtually all the independent States of the international community in an ever-increasing variety of situations, ranging from debates on colonialism in plenary session to discussion in committees such as the Commission of Human Rights and the International Law Commission. This vast array of State behaviour pattern has inevitably led to an increased awareness and emphasis upon such practice as norm-creative in given circumstances. One result of this has been the faster emergence of rules of customary law, while another has been the enhanced potentialities of Charter interpretation by State practice.

However, since the Charter as a multilateral treaty may be amended or interpreted by treaty action (i.e. by following the prescribed methods of amendment stipulated by Chapter XVIII), by custom, and (it is suggested) by State practice not amounting to custom, it is hardly surprising that the precise boundaries between the different processes are frequently difficult to clarify. Similarly, it is often hard to pin-point the exact legal manner in which a rule has emerged in the United Nations, since it could conceivably arise by virtue of Charter interpretations or amendment or customary international law or even as a general principle of law. In addition, an emerging proposition may be a legal norm or a principle by reference to which existing rules are to be interpreted.

This apparent flexibility in the methods of international law creation in the framework of the international organization has contributed to the relative decline of the consent theory of law and the rise of the consensus approach,[45] and this has some bearing upon the issue of the emergence of self-determination as a legal right through the process of General Assembly resolutions and declarations. The blurring of the division between the sources of law has led to great confusion as to whether or not a particular proposition is or is not law and to greater difficulties in identifying the criteria of norm-creation. It has also meant the comparative neglect of Charter interpretation as a separate category distinct from customary law. A number of writers, in fact, have discussed the role of UN resolutions as interpretations of the Charter in terms of the development of customary law,[46] and this had led to insufficient attention being paid to this process in the development of legal rules.

The parties to a treaty may subsequently interpret its provisions and could possibly be legally bound by such interpretations.[47] This proposition is illustrative of the principles of consent and good faith and reflects an old-established concept of international law. Article 31 of the

Vienna Convention on the Law of Treaties, 1969, notes that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purposes', while 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' should be taken into account (Article 31(3)b).

It is this concept of subsequent practice interpreting the treaty which marks, as it were, the frontier between treaty and custom in the emergence of new international legal norms. It may be valid as a straightforward act of treaty interpretation or it may constitute State practice evidencing or leading to a new customary rule.

By Article 5, the Vienna Convention is deemed applicable to any treaty which is the constituent instrument of an international organization.[48] Such multilateral treaties are clearly in a special category since they create international entities with defined powers and purposes and go beyond the bounds of ordinary treaties. They invariably operate on a higher level of complexity as they specify not only the rights and duties of the signatories but also the function and aspirations of the newly created organization, and the intended pattern of its relationships with the member States. Nevertheless, in form such instruments are treaties and as such as subject *mutatis mutandis* to the law of treaties.[49]

Such treaty-charters incorporate a dynamic element which increases the likelihood of interpretation by subsequent practice, since the operations of the organizations of which they are the constitutional instruments invariably provide evidence and examples of the understanding of their charters by the member States.[50] Invariably the activities of international organizations emphasize the role and importance of interpretation by subsequent practice even if this is not always expressly recognized.

Higgins has pointed out that the notion of subsequent practice is ambiguous since it may refer either to treaty interpretation or to developing custom, but she appears to adopt the prevalent attitude by stressing that 'it seems to me that the repeated practice here of the organ interpreting the treaty establishes a *practice* and ultimately *custom*'.[51]

The Charter of the United Nations is a multilateral treaty and has been subjected to over thirty-five years of discussion, interpretation, and judicial opinion. It is unique in its universality of membership and function, and the wide range of subsequent practice relating to its role and powers places it in a category of its own. The question of the

interpretation of the UN Charter, therefore, must be prefaced with a few words illustrating the general approach adopted.

It appears clear that, in the light of the special nature of the treaty-charters, the ordinary rules of interpretation of treaties may not suffice. This is primarily because of the powers and purposes ascribed to the organization, which have the effect of altering the emphasis of interpretation from the intention of the original parties to the intention of member States on the contemporary plane as manifested by practice and in the light of a collective appreciation of the purposes of the organization. This point was clearly put by Judge De Visscher, who noted that 'one must bear in mind that in the interpretation of a great international constitutional instrument like the UN Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties do not suffice.'[52]

Thus, a shift in the time-frame of reference from the past, i.e. the date of the treaty, to the present, coupled with an added emphasis upon a consensus perception of the purposes of the organization, constitute the main differentiating factors regarding the interpretation of treaty-charters as distinct from ordinary treaties.[53]

The intentions of the original contracting parties remain important[54] but as the amount of subsequent practice increases and the membership grows, the need for a wider base for interpreting the Charter becomes more apparent.[55] This process inevitably emphasizes the teleological approach to treaty interpretation, by which the treaty is comprehended in the light of its aims and objects[56] as against the textual and 'founding fathers' methods.[57] This approach has found favour with most of the representatives in UN debates,[58] and been propounded by a number of Judges of the International Court.[59] Such an approach means that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.[60] This phrase, together with the statement that the concepts embodied in Article 22 of the Covenant of the League of Nations were 'by definition evolutionary',[61] appeared to mark the demise of the school emphasizing the predominant role to be played by the intentions of the original parties in treaty-charter interpretations.[62]

Judge De Castro declared that 'the teaching of the court is, in fact, that for the interpretation of the Charter, account must be taken of its fundamental purposes and it must be recognized that it has the powers which are necessary to achieve them "by necessary implication".'[63] This must be accepted as correct and the teleological approach to charter

interpretation as the most important by far of the various schools and the one most productive of viable development. As De Castro pointed out

> it should not be forgotten that the General Assembly and the Security Council have the responsibility for promoting the purposes laid down in the Charter. They cannot remain bound by the possible intentions of the draftsmen, not only because it is difficult to know what those intentions were . . . but also because interpretation necessarily undergoes a process of development and as in municipal law must adapt itself to the circumstances of the time and to the requirements so far as they are foreseeable of the future. The text breaks away from its authors and lives a life of its own.[64]

The nature of the United Nations as an active political structure has reinforced these tendencies, particularly since the balance of membership has moved drastically since 1945.[65] International organizations are competent to interpret their own constitutions, but this is not an unrestricted capacity. They must have regard to the terms of the instrument and the aims and powers of the organisation. As far as the United Nations is concerned, the prime-facie scope for interpretation by subsequent practice is extensive in view of the essential characteristics and purpose of the Organization. Committee IV/2 of the San Francisco Conference reported that 'in the course of operations of the various organs of the organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions . . . Accordingly it is not necessary to include in the Charter a provision authorising or approving the normal operation of this principle'.[66]

One question which is of particular concern is whether any special procedure is necessary to bring about a binding interpretation. Vallat, for example, takes the view that authoritative interpretations can only be by way of amendment,[67] while others consider that General Assembly resolutions on their own are quite sufficient.[68] Yet other jurists declare that where resolutions purporting to be interpretations are rejected by some other member States amendments would then be required.[69]

In any event, it appears to be accepted by most writers that at the very least, as noted by Judge Nervo, 'the General Assembly has competence in respect of the interpretation of the Charter'.[70]

The teleological approach has permitted a certain amount of flexibility within the basic structure of the UN Organization and its constitution and has been supported by judicial opinion. In the *Expenses* case, the International Court discussed the meaning of the word 'action' as it appeared in Article 11(2) of the Charter,[71] and came to the conclusion

that it referred not to any kind of action, which would effectively reduce the General Assembly's function to simple recommendation, but to coercive or enforcement action alone.[72] In other words, 'action' meant only 'such action as is solely within the province of the Security Council',[73] and in deciding whether the actual expenses authorized were within the meaning of Article 17(2),[74] one had to test them by their relationship to the purposes of the United Nations. Such purposes, though broad, are not unlimited, 'but when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action was not ultra vires the Organization'.[75] Thus the General Assembly was able to establish peace-keeping forces.[76]

The recognition by the ICJ of the competence of the General Assembly to make determinations as to the meaning and scope of Charter provisions, albeit not unlimited with regard to the stated purposes of the Organization, is valuable, but a few guidelines are proposed. The issue basically relates to the political structure and interrelationships of the United Nations and, as the court pointed out,

> in the legal system of States there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted . . . therefore each organ must, in the first place at least, determine its own jurisdiction.[77]

Accordingly, therefore, one must examine the practice of the organ in question in order to see how it has tackled the problem of interpreting the various provisions of the Charter.

The problem is also raised that it is the UN's organs themselves that will usually constitute the fora for the determination of the constitutionality of their own acts.[78] As the court itself remarked in the statement quoted above, attempts to make the ICJ a final authority regarding the interpretation of the Charter were rejected. Recourse to the court will depend upon a positive decision by the particular organ, and the opinions of the International Court are only advisory in this field, though in practice usually adopted by resolution.[79]

This means that in practice a very high proportion of questions relating to the constitutionality of, for example, General Assembly resolutions will be considered only by the Assembly itself, and this has had a blurring effect on the subject of Charter interpretation and its limits.[80] There are

indeed dangers inherent in the situation where organs are deemed to be the final authority as regards the constitutionality of their own acts, since majority voting could validate, as it were, provisions manifestly contrary to the stipulations enshrined in the Charter. Some safeguards therefore are necessary to prevent the process from degenerating into licence. These will take the form of determining the requirement of authoritativeness surrounding Charter interpretations in such a way as to protect the interests of the minority as well as to preserve some elements of continuity and stability in evolution of international legal principles.[81]

There have been varying views expressed as to the way in which the Charter may be amended, altered, and interpreted, and such views range widely. At this point we shall take a brief look at some of them in order to clarify the role and potentialities of Charter interpretation, particularly with regard to self-determination.

Chapter XVIII of the Charter prescribes two ways in which the Charter may be changed. The first (Article 108) is by way of amendments, which are to come into force for all UN members when adopted by a vote of two-thirds of the members of the General Assembly and ratified by at least two-thirds of UN members including all the permanent members of the Security Council. The second (Article 109) is by way of alteration, which is to follow upon a general conference for the review of the Charter and a recommendation by a two-thirds vote of the conference ratified by two-thirds of the members of the United Nations, including all the permanent members of the Security Council. These methods are the declared constitutional procedures enshrined in the constituent document of the UN Organization and there is a minority view to the effect that they are the sole means available for the modification of the Charter.[82]

However, despite this view it is possible to achieve some measure of change in the Charter. An instrument may be amended by the subsequent practice of the States parties to it. It is clear that custom may modify a previous treaty norm just as a treaty may alter a previous customary rule,[83] but practice not amounting to custom may accomplish the same objective. As Fitzmaurice has written, 'the way in which the parties have actually conducted themselves in relation to the treaty affords legitimate evidence as to its correct interpretation',[84] and the International Court has on a number of occasions had recourse to subsequent practice in order to aid in the process of treaty interpretation.[85] However, subsequent practice may not only clear up doubts and ambiguities in the text of the treaty, that is, act as an extraneous means of elucidation in the absence of clarity in

the ordinary meaning of the words, but may also result in actual revision of the treaty itself.[86] This, as we have already noted, is particularly evident in the case of the international organizations where changing conditions and a wealth of day-to-day practice cannot but result in some modification of the original constituent documents.[87]

The question then arises as to the conditions under which this procedure might operate. It is generally accepted that the conduct involved will have to encompass a large number of the parties to the treaty[88] though conduct by one party might be relevant as regards the doctrines of acquiescence and estoppel. One cannot go so far, however, as to insist upon universal compliance since this could result in one State out of about 150 frustrating an agreement reached by all the others.[89]

Tunkin emphasizes that a further element must be that the practice in question is evidence of an agreement by the relevant parties to the intended modification.[90] This follows from his well-known views of custom as a form of tacit agreement and his emphasis upon the importance of the concordance of States' wills in the formation of rules of international law.[91] To the extent that the subsequent practice must clearly relate to a particular provision or set of provisons in the relevant treaty and that the States involved in the practice clearly wish to amend the treaty, Tunkin's opinion is valid. However, it is felt that the requirement that the practice should evidence the existence among the parties of an agreement respecting the attempted amendments is going too far and fails to recognize the point that the conduct need not amount to a custom before achieving a modification in the terms of the treaty.[92] Of course, a customary norm may alter a previous treaty provision if the necessary conditions apply, but conduct not amounting to custom may operate to alter treaty norms so long as it is clearly aimed as modifying such norms.[93]

General Assembly resolutions are in this instance particularly suited in form for this purpose. They constitute State practice and they are inherently linked to the UN Organization and its Charter. This does not mean that other practice is irrelevant but by the very nature of things Charter modification, by way of amendment or interpretation, may be more readily accomplished by General Assembly resolutions than by other methods.[94]

Judge Spender declared that although members of international organizations have the right to interpret the constituent instruments in good faith, 'their right to interpret . . . gives them no power to alter'.[95] This strict positivist viewpoint is predicated upon the need to preserve the

consensual aspect of international law creation and lays excessive emphasis upon the actual wording of the text of the particular instrument. It ignores the fact that to interpret is to create and that the line to be drawn between interpretation *stricto sensu* and actual alteration is hazy and incapable of precise definition.[96]

Fitzmaurice appears to be moving towards this, and tentatively suggests that where subsequent practice has brought about a change or development in the meaning of a treaty through a revision of its terms by conduct, 'it is permissible to give effect to this change or development as an agreed revision but not as an interpretation of its original terms'.[97] Although this may seem confusing in introducing a concept of agreed revision and treating interpretations as equivalent (it would appear) to amendment, it is a recognition that subsequent conduct may reinterpret a treaty, particularly the UN Charter, within certain limits. But the problem still remains; that is, where to draw the line between interpretation and alteration (or, in Fitzmaurice's phrase, agreed revision), if indeed a line has to be drawn.

Tunkin takes the view that custom may amend treaties but not change the basic provisions of the treaty[98] and he gives as an example the modification of Article 27 of the UN Charter,[99] but he criticizes the Uniting for Peace resolution of 1950 as a violation of the Charter since it purported to amend basic provisions of the Charter.[100] In practice this distinction could prove elusive since perceptions as to such basic provisions may well alter with the passage of time and lead to complex problems of determination, while in theory it creates difficulties since it is arguable that even rules of *jus cogens* may be changed by virtue of the tacit consent of the vast majority of the members of a universal organization.[101]

However, one distinction does remain, and that is between amendments by subsequent practice and interpretations. It is a distinction that is in practice extremely difficult to define precisely, since the mechanics of change will be the same and States will rarely specify whether they feel that by a series of, for example, resolutions, they are amending or interpreting the Charter. Nevertheless, it is possible for a Charter provision to be interpreted by a majority of UN members in circumstances that might not amount to an amendment, for example, with respect to the members voting for it. In such cases, the persuasiveness of the interpretation would depend upon the number and identity of the States voting for it. Schachter, however, regards virtual unanimity as the true test of interpretation,[102] and this demonstrates again the process of merging amendment and interpretation in Charter modification.[103] This

raises the question of the authoritativeness of such interpretations. Whereas an amendment by subsequent practice will be binding, whether a particular interpretation of a Charter provision contained in one or more resolutions of the General Assembly possesses a persuasive quality, and to what extent, will be determined on the basis of the numbers and identity of States voting for the proposed interpretation. Thus, Charter interpretation in this narrow sense constitutes one element of Charter modification by practice and is subsumed under the generally recognized heading of Charter interpretation. The advantage of this latter process is that it enables the majority of States to modify the Charter to accord with contemporary conditions, while imposing certain limitations as to the quantity of States proposing the change, and thus providing some protection to minorities. It is also necessary for the proposed modification to be directly referable to a particular provision of the Charter.

Such changes may be, and generally will be, accomplished by Assembly resolutions, which may either be related to a specific situation or be more generally framed. Thus, Charter interpretations may occur other than as responses to particular disputes. Not all such resolutions will be of the same persuasive nature and a series of resolutions over a period of time will usually be required.

(b) Self-Determination

1. *General Approach*

At this point we shall turn to examine the question of whether the right of self-determination can be regarded as established through the medium of Charter interpretation as a result of practice subsequent to the creation of the UN Organization. As an introduction, one should note the Universal Declaration of Human Rights. This was adopted on 10 December 1948, in the form of an Assembly resolution by 48 votes to 0, with 8 abstentions. It built upon Charter provisions regarding human rights (for example, Articles 1, 55, 56, 62, and 76) and enumerated a list of human rights and fundamental freedoms 'as a common standard of achievement for all peoples and all nations'.[104] Although the principle of self-determination was not referred to in this Declaration, which concentrated upon the elucidation of individual rights, its path forward was cleared in the same way in that democratic rights seemed to lead inevitably in international society to consideration of the rights of peoples to define their own cultural and national status.[105]

The Declaration was not legally binding as such in view of the terms in which it is expressed and the circumstances surrounding its adoption,[106] but has come to have a significant effect within the international community. Some of its provisions might be taken as reflecting general principles of law, others as relatively new international stipulations. However, it can be regarded in essence as an influential interpretation by the General Assembly of the relevant Charter provisions upon human rights and fundamental freedoms, and as such of legal value as part of the law of the United Nations.[107]

There have been a number of resolutions dealing with self-determination both generally and with regard to particular situations, and it is possible to point here to what appears to be a significant distinction. Resolutions and declarations that posit principles of law may be regarded as valid interpretations of the Charter if the necessary requirements of unanimity (or near-unanimity) and referral have been met. However, resolutions and other UN and State practice referable to the specific situations are often limited by two factors. Firstly, such practice in concentrating upon a particular situation is of restrictive value since it deals only with one aspect of the principle under discussion which may be modified or even distorted by virtue of other principles, deemed relevant in that particular situation,[108] and secondly by the greater likelihood of opposing votes and behaviour that will rob the practice of its claim to universality.[109] However, it is possible for such defects to be remedied by a consideration of the temporal element. In other words, a series of resolutions, for example calling for self-determination in different colonial territories, may be regarded as subsequent practice relevant to the interpretation of the particular Charter provisions in question. Examples of such practice will be noted in the following section,[110] but it will be useful in this context to recall the views of the ICJ regarding Article 27 of the Charter. The court declared that 'the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the position taken by members of the Council . . . have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions . . . . This procedure followed by the Security Council . . . has been generally accepted by members of the United Nations and evidences a general practice of that Organization.'[111]

A similar process can be seen with regard to Article 2(7) of the Charter, concerning domestic jurisdiction, which has over the years been increasingly restrictively interpreted[112] while the General Assembly has

progressively widened the scope of its jurisdiction under Chapter XI of the Charter by asserting its competence both to request political information on non-self-governing territories under Article 73(e) and to decide which territories may be regarded as non-self-governing.[113] The Assembly has also proclaimed its authority to decide between competing aspirations of the right to self-determination and to declare whether territories have exercised or should exercise the right to self-determination.[114]

In all of these instances State practice over a period of time has been consolidated into Charter interpretation. Whether such practice can be treated as a valid interpretation will depend on all the circumstances of the case, but the presumption would be that the larger the number of resolutions, for instance applying the principle of self-determination to different territories, and the longer the period during which such practice has been operating, the greater would be the likelihood that a persuasive or even binding view of the Charter term has been expressed.

Resolution 421 (V) of 4 December 1950 embodied the request of the General Assembly for a study of the ways and means 'which would ensure the right of peoples and nations to self-determination', and this was taken further by resolution 545 (VI), which stated that the proposed article on self-determination in the International Covenants on Human Rights should be expressed in the terms that all peoples have the right to self-determination. It also noted that the article should stipulate that all States should promote the realization of the right in conformity with the principles and purposes of the United Nations. Resolution 637 (VII) proclaimed that self-determination was a fundamental human right.[115] This resolution also declared that UN member States 'shall recognise and promote the realization of the right' with regard to the peoples of trust and non-self-governing territories under their administration 'according to the principles and spirit of the Charter of the United Nations'.[116] The Commission on Human Rights considered the concept of self-determination over a number of sessions[117] and submitted recommendations to the UN Economic and Social Council, including a suggestion for the establishment of a Special Commission to examine situations resulting from alleged denials or inadequate realizations of the right to self-determination in certain circumstances.[118] This was, however, opposed and the matter was referred back to the Commission on Human Rights for reconsideration.[119] During the reconsideration a number of representatives pointed out that self-determination was only a principle and not a right. It was declared that the Charter had not granted

the General Assembly competence to implement self-determination, although by way of contrast, implementation of Article 1(1) was provided for by Article 11 and that of Article 1(3) by Article 13.

Such objections were overridden, as was the view that the realization of self-determination fell essentially within the domestic jurisdiction of States, and the Commission reaffirmed its previous recommendation which was sent to the General Assembly.[120] The General Assembly at its eighth session asked the Commission to give priority to recommendations regarding international respect for the right of self-determination,[121] and by the next session the Assembly already had before it the draft International Covenants on Human Rights prepared by the Commission and transmitted by the Economic and Social Council.[122]

The Commission suggested that both International Covenants should have an identical first article[123] and this article, according to the draft of the Third Committee of the Assembly, read as follows:

> 1. All peoples have the right to self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development . . . .
>
> 3. All States parties to the Covenant including those having responsibilities for the administration of non-self-governing and trust territories shall promote the realization of the right of self-determination and shall respect that right in conformity with the provisions of the UN Charter.[124]

At the Twelfth Session, the Assembly declared in resolution 1188 (XII) that member States were to give due respect to the right of self-determination. From this point, the proposed Covenants became enmeshed in UN discussions from which they were only to emerge nine years later.

At this point we shall turn to two General Assembly declarations that might be treated as authoritative interpretations of the Charter.[125]

The Declaration on the Granting of Independence to Colonial Countries and Peoples (the Colonial Declaration) was adopted by the General Assembly of 14 December 1960 in resolution 1514 (XI) by 89 votes to 0 with 9 abstentions. This has had a profound impact upon international affairs and has been treated with particular reverence by the States of the Third World. It has been regarded by many as the 'second Charter' of the United Nations drawn up for the subjugated peoples of Africa and Asia.[126] Indeed, Parry has written that the Declaration by itself has had the effect of modifying that part of international law that deals with territorial sovereignty.[127]

The Declaration emerged after a debate in the Assembly initiated by the Soviet premier[128] and was drafted by forty-three States.[129] The preamble noted that 'all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory' and proclaimed the necessity of 'bringing to a speedy and unconditional end colonialism in all its forms and manifestations'. The Declaration laid down seven principles, stressing that 'all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. Inadequacy of political, economic, social, or educational preparedness was not to serve as a pretext for delaying independence. Immediate steps were to be taken to transfer power to the peoples of non-independent countries, but attempts aimed at the partial or total disruption of the national unit and territorial integrity of a country were deemed incompatible with the purposes and principles of the UN Charter.

The Declaration has been treated by a number of countries as constituting a binding interpretation of the Charter, or a restatement of principles enshrined in the Charter,[130] and it has been similarly regarded by some writers.[131] However, there are others who dispute this. One view already discussed is that any action by the General Assembly could only be recommendatory in such circumstances and that therefore the Declaration could be nothing more than a general statement of objectives.[132]

But the most significant criticism of the Declaration as an authoritative interpretation of the Charter is concerned with the inconsistencies that are noticeable between the two instruments. Paragraph 1 of the Declaration proclaimed that 'the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights [and] is contrary to the Charter of the United Nations'. However, this is not too clear in the Charter itself, for Chapters XI and XII legitimize certain relationships of dependence regarding non-self-governing and trust territories,[133] subject to defined conditions.

The Declaration in paragraph 3 notes that 'inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence', while Article 73(b) declares that States administering non-self-governing territories must 'assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement' and Article 76(b) underlines that among

the basic objectives of the trusteeship system is the 'progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples'.

Paragraph 5 of the Declaration emphasizes that 'immediate steps' should be taken in all non-independent territories to transfer power to the people, and this seems inconsistent with Articles 73 and 76. However, the call by the USSR, in particular, for immediate independence or the proclamation of a date at the end of 1961 for this to be achieved was not accepted[134] and this provision should perhaps be regarded rather as a change of pace than as a change of essence. The Declaration also blurs the distinction between trust and non-self-governing territories by positing the same provisions for all territories that have not yet attained independence. In addition, the Declaration in paragraph 5 appears to regard independence as the only legitimate goal of the whole process. This latter provision runs counter to a number of UN resolutions, for example those recognizing the exercise of self-determination involved in the relationship of dependence between the USA and the Commonwealth of Puerto Rico,[135] and between New Zealand and The Cook Islands[136] and Niue[137] after elections had been held in the respective dependent territories. In fact, the UN Secretary-General noted in 1963 that 'the emergence of dependent territories by a process of self-determination to the status of self-government either as independent sovereign States or as autonomous components of larger units has always been one of the purposes of the Charter and one of the objectives of the United Nations'.[138]

Such inconsistencies have led Bokor-Szego[139] and Martine,[140] for example, to deny that the Colonial Declaration is an authoritative interpretation since it appears actually to amend the Charter, the argument turning on where the line between interpretation and amendment should be drawn. Fifteen years of State practice in the process of decolonization formed the background to the Colonial Declaration and enabled it to bring up to date the relevant Charter provisions in a way marking contemporary consensus views as to, for example, the effect of inadequacy of political, social, economic, or educational preparedness. All interpretations refine and develop the concept under consideration, in a manner acceptable to those concerned, and may be no less influential or binding because of that.[141]

However, it does not follow that everything contained in the Declaration (or in similar resolutions, for that matter) constitutes a

binding obligation. Some elements would remain upon a purely hortatory level, for example the solemn proclamation in the preamble to the Declaration stressing 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'. On the other hand, there may be statements which are inconsistent with instruments interpreting the Charter—for instance, the apparent acceptance in the Declaration that independence is the sole object of self-determination. This contrasts with UN practice, as noted above, recognizing other relationships, and with the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (resolution 2625 (XXV)), which noted that 'the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people'.[142]

It would therefore seem that where one is faced by conflicting interpretations of equal standing, resort must be had to the intentions of the members of the United Nations, as revealed in their practice, and upon this basis it would seem that the stipulation in the 1960 Declaration restricting self-determination to the attainment of independence must be regarded as only a suggestion and not an authoritative interpretation of the Charter. Nevertheless the core of the Declaration does constitute an interpretation of the Charter and one that has underpinned the end of colonialism.[143]

Higgins has noted that it 'must be taken to represent the wishes and beliefs of the full membership of the United Nations'.[144] As to the juridical character of the Declaration, Higgins stresses that in it the right of self-determination is regarded 'as a legal right enforceable here and now'.[145]

This approach is underlined by the action taken by the United Nations to implement the Declaration. On 27 November 1961 the General Assembly created a subsidiary organ entitled the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence,[146] which was enlarged from seventeen to twenty-four member States the following year.[147] It has gradually widened its sphere of activity so that, apart from the Trusteeship Council (which is only concerned now with the trust territory of the Pacific Islands), it is the only organ responsible for issues dealing with dependent territories. The Committee has been very active and has done much to

pressure the colonial powers and the administering powers.[148] It has also stressed the position that the United Nations intended the Colonial Declaration to act as a juridical signpost to complete decolonization and not merely as a solely hortatory pronouncement.

Virtually all UN resolutions proclaiming the right to self-determination of particular peoples expressly refer to the 1960 Declaration.[149] Judge De Castro particularly noted in the *Western Sahara* case how the African group at the United Nations that prepared a draft resolution on the Sahara problems for discussion in the Fourth Committee was at pains to refer four times to resolution 1514 (XV) in reaffirming the right of the people of Western Sahara to self-determination.[150] The International Court has specifically referred to the Colonial Declaration as an 'important stage' in the development of international law regarding non-self-governing territories,[151] and as 'the basis for the process of decolonization'.[152]

On 16 December 1966 the General Assembly adopted the International Covenants on Human Rights, which consisted of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the latter. Both Covenants have an identical first article which declares *inter alia* that 'all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development' and that 'the States parties to the present Convention including those having responsibility for the administration of non-self-governing and trust territories shall promote the realization of the right of self-determination and shall respect that right in conformity with the provisions of the Charter of the United Nations'.

The inclusion of the right to self-determination in the International Covenants occurred because the General Assembly in resolution 545 (VII) recommended that the proposed Covenants should incorporate such a provision and in resolution 637 (VII) declared that the right to self-determination was a 'fundamental human right'. It is to be noted that the preambles to both the Covenants refer to the 'obligation of states under the Charter of the United Nations to promote universal respect for and observance of human rights and freedom'.[153]

The International Covenants came into force in 1976[154] and are thus binding as between the parties, but it would seem that they are of legal value over and above that, not only as practice leading to or reflecting a customary rule, but also as a persuasive interpretation of the notion of human rights as embodied in the Charter.[155]

This appears so in view of the drafting history of the Covenants through the various organs of the United Nations, culminating in the adoption of resolution 2200 (XXI), and the emphasis in the many discussions and resolutions and in the Covenants themselves upon the actual provisions of the Charter.[156] The preambles to the Covenants specifically recall various Charter provisions (particularly Articles 1, 55, and 56) and the Universal Declaration of Human Rights.

The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations was unanimously adopted without a vote on 24 October 1970 and is contained in the annexe to General Assembly resolution 2625 (XXV). It proclaims seven principles, including the principle of equal rights and self-determination of peoples. And the question that is raised at this stage is whether this Declaration may be regarded as a binding interpretation of the Charter. The Declaration was specifically stated to deal with certain international legal principles 'in accordance with the Charter of the United Nations' and the preamble includes the phrase 'considering the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles'. This suggests not only that such resolutions are relevant in a Declaration of principles 'in accordance with the Charter', thus impliedly reinforcing the importance of the interpretative role of such resolutions, but also that the Declaration itself constitutes an interpretation of the Charter provisions. The reason for the interpretation is emphasized in the preamble, which notes that 'the great political, economic and social changes and scientific progress which have taken place in the world since the adoption of the Charter of the United Nations give increased importance to these principles and to the need for their more effective application in the conduct of States wherever carried on'. The Declaration stresses that 'nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of member States under the Charter or the rights of peoples under the Charter, *taking into account the elaboration of these rights in this Declaration*'.[157]

The Declaration states that 'by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine . . . their political status and to pursue their economic, social and cultural development', while 'every State has the duty to respect this right in accordance with the provisions of the Charter'. Arangio-Ruiz strongly asserts the non-legal

status of the Declaration since it was effected at the merely organic or institutional level rather than on a formal, legally binding inter-State level[158] and concludes that 'there can hardly be any doubt . . . that the Declaration embodied in Resolution 2625 (XXV) . . . is to be considered from a legal point of view as an instrument of a purely hortatory value'.[159] This approach, however, cannot be supported. The Declaration was intended to act as an elucidation of certain important Charter provisions, although not as an actual amendment of the Charter, and was adopted by member States on that basis.[160]

State practice within and outside the United Nations also supports the view that the right to self-determination exists in international law. State practice, other than resolutions and declarations purporting to express principles of law, can be important in the process of Charter interpretation provided it is linked to particular Charter stipulations and provided over a period of time sufficient practice has accumulated for it to be treated as a valid and general interpretation rather than as strictly limited conduct specifically related to a particular situation.

It is realized that this formulation may fail to provide an adequate guide as to whether a proposition can be accepted as an authoritative Charter interpretation in a number of instances, but it is clearly impossible to lay down firm conditions as to the time that should be encompassed or the number of relevant resolutions that must be adopted. In each case much will depend upon acceptance and acquiescence by an increasing number of States regarding the propositions involved in particular situations constituting general principles interpreting the Charter.

One must be careful not to deny the members of an organization the capacity to harmonize its constitution with contemporary needs by means of their subsequent practice. After all, the aim of interpretation is to enable the overwhelming majority to determine the nature and extent of the obligations and rights they have agreed to in circumstances minimizing adverse effects upon dissentient members.[161]

State practice that does not fall within the categories mentioned may nevertheless be relevant in the process of Charter interpretation as evidence of recognized interpretations, and thus may be of value in emphasizing the form and content of a particular interpretation. It may also play a vital role in pointing out which interpretations are to be regarded as valid, binding ones, much as State practice may also constitute evidence of particular rules of customary law. State practice, of course, may also lead to a new customary law. One should note that those member States that abstain with regard to such interpreting resolutions as

the 1960 and 1970 Declarations discussed above may well still be bound by them.[162]

2. *Specific Approach*

State practice, particularly as manifested in the United Nations, concerning the status and application of self-determination in specific situations exceeds the abstract, general expression of self-determination as a right, in terms of both frequency and diversity, and accordingly must be considered as a significant factor.

General Assembly resolutions proclaiming that specific territories should be entitled to the exercise of the right of self-determination are ultimately founded upon the established competence of the Assembly to determine which territories are non-self-governing. This is partly because self-determination has been deemed non-applicable to independent territories and partly to side-step the doctrine of domestic jurisdiction.

Article 2(7) of the Charter declares that 'nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State' and the history of the first decade and a half of the UN Organization largely centres around attempts to establish a balance between this provision and the perceived need to end colonialism. This latter aim was achieved, at least as far as the United Nations was concerned, through establishing a clear divison between the administering State and its administered territories, contrary to the wishes of a number of colonial powers, particularly France with regard to Algeria and Portugal with regard to its African possessions. Having instituted this division and provided an exception to Article 2(7), the Assembly proceeded to make recommendations regarding the future of these non-self-governing territories.[163] Based upon its recognized competence to decide which territories were non-self-governing territories, the General Assembly successfully asserted its competence to determine whether or not a non-self-governing territory had attained a full measure of self-government as referred to in Chapter XI of the Charter, and to this end a series of resolutions were adopted expressing the Assembly's views as regards specific cases.[164] Despite the objections of the colonial powers, the doctrine of domestic jurisdiction as declared in Article 2(7) has been interpreted by the subsequent practice of the UN Organization and its members so that the affairs of non-self-governing territories may be discussed within the Organization and rendered subject to UN resolutions and declarations as to their political status.

The competence of the Assembly was initially founded upon Chapter XI of the Charter, but later resolutions disregarded this Chapter and concentrated instead on the concept of self-determination as the basic relevant principle.

The large number of Assembly resolutions calling for self-determination in specific cases represents international practice regarding the existence and scope of a rule of self-determination in customary law. They also constitute subsequent practice relevant to the interpretation of particular Charter provisions. For example, resolutions proclaiming that an obligation exists under Article 73(e) of the Charter to transmit information in a particular case may be regarded as a binding interpretation of the Charter provision in that specific instance since the competence of the General Assembly to determine such matters has been clearly recognized.[165] The change from Chapter XI to self-determination with the Colonial Declaration as the juridical basis for the process marks the stronger line taken by the Assembly as a whole but the effect remains broadly similar—that is, the determination by the General Assembly of a factual situation within which the declared norm will be deemed to operate. By such methods, of course, the outlines of the norm itself will be elucidated, and to that extent factual determinations by the Assembly will be juridically relevant.

However, unlike Assembly resolutions of a general nature, they cannot themselves authoritatively interpret a principle as a legally binding norm; their function in this sphere rests rather upon delimitation,[166] though such determinations may also provide for the application of non-legal principles to a particular situation.

The Algerian problem[167] was first included on the agenda of the assembly in 1955, and it was claimed that France had broken the provisions of the Charter on self-determination.[168] The Assembly, however, decided not to pursue the matter[169] and the Security Council did not place it upon its agenda.[170] In succeeding sessions, resolutions proclaiming the right of the Algerian people to self-determination failed to be adopted although support for the proposition was growing.[171] In fact, it was only in 1960 that a resolution was adopted which referred to the right of the Algerian people to self-determination.[172] Despite this hesitant start, and in view of the changed climate of opinion in France itself, the Assembly passed without opposition in the following session resolution 1724 (XVI) which called for the implementation of 'the right of the Algerian people to self-determination and independence respecting the unity and territorial integrity of Algeria'.

This resolution, which significantly referred to the Colonial Declaration of 1960, also asserted that the United Nations had a part to play in the fulfilment of this right.

A large role has been performed in this process by the Special Committee established after the adoption of the Colonial Declaration.[173] For example, the Special Committee was requested to study the situation in Southern Rhodesia by General Assembly resolution 1745 (XVI) and its report formed the basis of an Assembly resolution criticizing the failure of the United Kingdom to carry out the Colonial Declaration, and affirming that Southern Rhodesia was a non-self-governing territory.[174] The Assembly adopted resolution 1755 (XVII) proclaiming the right of the people of Southern Rhodesia to self-determination, and the problem has been discussed at the United Nations at great length.[175] The claim of the United Kingdom that the problem was an internal matter and that therefore the United Nations could not consider it, was clearly rejected, and resolution 1747 (XVI) affirmed that 'the territory of Southern Rhodesia is a non-self-governing territory within the meaning of Chapter XI of the Charter of the United Nations'.[176] This situation was altered, at least as far as the United Kingdom was concerned, by the unilateral declaration of independence by the government of Southern Rhodesia, but the General Assembly vigorously attacked 'any agreement reached between the administering power and the illegal racist minority regime which will not recognise the inalienable rights of the people of Zimbabwe to self-determination and independence in accordance with General Assembly resolution 1514 (XV)'[177]

In its first six years, the Special Committee considered some seventy territories,[178] and in 1974, for example, it discussed thirty-nine territories, the majority being Pacific or Atlantic islands.[179] In virtually all cases the Special Committee has recommended that the territory become independent in the light of its right to self-determination, although in some instances association with another State was accepted, for example, Niue and the Cook Islands.

Throughout the years of the existence of the UN Organization a great number of resolutions have been adopted calling for self-determination in particular situations and these constitute State practice and international practice of overwhelming importance. The majority of such resolutions have referred specifically to the 1960 Colonial Declaration, thus strengthening its claim to be the fount of legality as far as the right to self-determination is concerned. It has been noted that 'if this right [of self-determination] is still not recognized as a juridical norm in the practice of

a few rare States or the writings of certain even rarer theoreticians, the attitude of the former is explained by their concern for their traditional interests, and that of the latter by a kind of extreme respect for certain long-entrenched postulates of classical international law'.[180]

It is submitted in conclusion that the right to self-determination has been accepted by the United Nations by virtue of the process of Charter interpretation as a basic principle in the law of the United Nations, and that from this proposition certain legal effects flow with regard to, for example, the definition of the determining unit, the capacity of the people of the territory in question to decide its political, economic and social status, the role of force in the process, and the *locus standi* of the colonial power.[181] Some of these notions will be examined in later chapters.[182]

III. CUSTOMARY INTERNATIONAL LAW

The practice supporting the right of self-determination as emanating from Charter interpretation may also be of relevance in establishing the existence of a right to self-determination as a rule of customary law. Custom differs from treaty interpretation in a number of vital ways. It is founded on State practice, whereas treaty interpretation relates to practice construed with reference to a treaty provision, and it is dependent upon the *opinio juris*, the belief or expression of an accepted legal obligation. This, as we have seen, is not necessarily the case with respect to the interpretation of treaty-charters, for practice not amounting to custom may have the effect of interpreting a particular stipulation.

The International Court of Justice is directed by Article 38(1) of its statute to apply 'international custom as evidence of a general practice accepted as law' and Brierly emphasized this in terms of a 'usage felt by those who follow it to be an obligatory one'.[183] Oppenheim notes that 'whenever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law'.[184]

Precisely how one is to interpret and balance the two factors of State practice and *opinio juris* is subject to conflicting analyses,[185] but it is commonly recognized that both elements are required. Usage is needed as the source material delineating the content and scope of the proposed rule, while the *opinio juris* is essential in differentiating norms of customary international law from State behaviour embarked upon for

reasons of courtesy, morality, or expediency alone, since the latter forms of conduct are clearly intended to have no legal effect at all.

As far as self-determination is concerned, practice is extensive both within and outside the United Nations. Tied to the issue of colonialism as it has been virtually since the adoption of the Charter, it has constituted one of the major concerns of the Organization as any analysis of debates, resolutions, and declarations will attest. Kay notes that between 1960 and 1967 the number of speeches by representatives of the new nations devoted to decolonization outweighed those relating to any other topic in plenary and main committee meetings, with the exception of the Assembly's Twentieth Session when the issue of economic aid received marginally more attention.[186]

If one includes the topic of South Africa, which has been treated by many nations as an aspect of the general problem of decolonization, the emphasis becomes even more evident. It is clear that the interest of the Third World nations of Africa and Asia has focused primarily upon the decolonization issue, with the problems of economic aid and development coming more to the fore as the number of countries still under colonial rule rapidly declines. This issue has been broadly defined and extended so that it has assumed the status of a general category incorporating a number of specific questions. The Ghanaian representative to the Sixteenth Session of the General Assembly declared that 'in our view, colonialism is the greatest evil of the modern world, the source of all the troubles which presently afflict mankind. It is the root-cause of the arms race and the problem of disarmament. Colonialism and neo-colonialism are a perpetual threat to the peace and sovereignty of the world. Colonialism is the cause of war and conflict among nations and is, therefore, the greatest danger to world peace.'[187]

The number of resolutions directly concerned with self-determination is high and forms a vital part of the UN attitude to the decolonization process. Of necessity, therefore, one must consider whether such resolutions can be regarded as constituting State practice for the purposes of customary law formation.

Resolutions may be relevant in the context of norm creation or determination in a number of differing ways. They may constitute binding or persuasive interpretations of the UN Charter. They may evidence and reflect recognized rules of international law whether created through the medium of treaty or custom or as general principles of law recognized by civilized nations.[188] In this case, resolutions merely underline the accepted position and have no norm-creating functions to fulfil. More

crucial is the role played by resolutions within the process of customary law formation. This may take the form either of a stimulus to State practice[189] or of actual State practice or indeed of manifesting the *opinio juris*.

In the first case, that of a resolution encouraging the growth of usage, what is involved is clearly an extra-legal factor and one which does not need to be considered further, since many activities may perform such an encouraging role, ranging from resolutions of private bodies to opinions of legal writers. But the second and third possibilities must be considered briefly. Whether a usage is solely a practice or also incorporates within itself the expression of *opinio juris* is often difficult to decide. A State which makes a claim asserted as a legal right is not only exhibiting a practice but is also evidencing the *opinio juris*, thus the borderline between the material and psychological requirements of customary law created is blurred. This is particularly true with respect to Assembly resolutions, since they are often assertions of rights under international law. An example of this would be the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, adopted unanimously on 13 December 1963.[190] It was regarded as a declaration of existing law by many States, including the most important in the field,[191] as well as by a number of writers.[192]

The expression of State support for a particular declaration or resolution, however, whether by statement or voting, constitutes State practice,[193] while the assertion of the legality of the principles outlined therein is clear evidence of the *opinio juris*.[194] Thirlway has emphasized the need to maintain a clear distinction between usage and *opinio juris* in order to prevent alleged rules lacking both components from becoming part of customary law,[195] but the fact remains that the two are closely intertwined, particularly with regard to UN practice. The difficulty of unravelling the two with respect to Assembly resolutions is one more aspect of the changes brought about by the institution and operations of the United Nations within the sphere of international law.[196] Self-determination was clearly not a rule of customary law prior to the Charter[197] and the overwhelming bulk of practice regarding the concept has clearly occurred in connection with the United Nations.[198] Thus one must focus on this aspect.

The concern of the United Nations with regard to self-determination has been two-pronged. On the one hand, the Organization has affirmed the right to self-determination of all peoples in general terms and consistently since 1952. This has been included not only in a number of

Assembly resolutions and declarations but also in the International Covenants on Human Rights adopted in 1966. On the other hand, the right has been declared in a number of specific situations and disputes. This had tended to increase the plausibility of the entry of self-determination into the panoply of international customary rules, since the greater the practice relating to a particular proposition, the greater the likelihood that it has been accepted as a custom. This also applies to the length of time during which the principle has been affirmed as a right. The longer the process has taken the greater the chances that it has hardened into a rule. In any event, it is clear that more practice affords more opportunity from which to infer the *opinio juris*. It is interesting to note that Judge Dillard has stated that 'even if a particular resolution of the General Assembly is not binding, the accumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time, may give rise to a general *opinio juris* and thus constitute a norm of customary international law'.[199]

IV. CONCLUSIONS

It is thus concluded that the right to self-determination is a legal right as a result of Charter interpretation and that the possibility, additionally, is raised of the right constituting also a customary right, although UN practice appears to have strongly favoured the former approach.

Recent judicial pronouncements on self-determination are surprisingly rare and centre around the *Namibia* case of 1971 and the *Western Sahara* case of 1975.[200] The court, in the former case, noted that 'the subsequent development of international law in regard to non-self-governing territories as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all of them'[201] without really specifying how this has occurred or what possibly is involved,[202] and proceeded to refer to the Colonial Declaration as 'a further important stage in this development'[203] without further clarification. In interpreting the mandate, therefore, the court had to consider 'the changes which have occurred in the supervening half-century . . . by the subsequent development of law, through the Charter of the UN and by way of customary law'.[204] However, the court failed to confirm whether or not self-determination was a binding legal principle in its own right.

The court's observations of self-determination in the *Namibia* case were quoted extensively in the *Western Sahara* case, where the court

similarly refrained from a clear declaration. The Colonial Declaration was referred to as 'the basis for the process of decolonization',[205] and the essence of self-determination was discussed in relation to resolution 1541 (XV) and the 1970 Declaration on Principles of International Law.[206] Such instruments constituted the 'basic principles governing the decolonization policy of the General Assembly'.[207] Judge Dillard regarded the opinion as forthright in proclaiming the existence of the rights as far as the proceedings were concerned, but he went further and declared that 'the pronouncements of the Organization thus indicate . . . that a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations'.[208] Although he does not expressly bring out the process by which this has occurred, Judge Dillard draws attention to the long list of resolutions dealing with self-determination following in the wake of the Colonial Declaration.[209] The result, therefore, appears to be that the opinion recognizes that self-determination is a legal right[210] but is unclear as to how that has arisen exactly.[211]

A norm created as a result of Charter interpretation, it should be noted, will bind all members of the United Nations, while a customary rule will bind all States save those objecting *ab initio*. Thus, the former method would appear the more advantageous, particularly as regards, for example, South Africa. Indeed, the fact that self-determination applies virtually exclusively within the colonial sphere (although with some potential for development) is a further argument favouring the Charter interpretation approach, since the distinction between colonies and metropolitan territories is one made by the Charter.

One further point remains, and that is the possibility that self-determination constitutes a rule of *jus cogens*, and thus a peremptory norm of international law from which no derogation is permitted. The question of the existence and nature of *jus cogens* is one that has received much attention in recent years, being partly stimulated by discussions and debates leading up to the Vienna Convention on the Law of Treaties in 1969.[212] The basis of such rules, which cannot be changed save by contradictory rules of the same status, has been variously ascribed to natural law[213] and to international public policy.[214]

However, despite differences as to the origin of *jus cogens*, its essence is generally accepted.[215] The International Law Commission discussed the concept[216] and incorporated it into the final draft on the law of treaties in 1966.[217] Article 53 of the Vienna Convention specifies that

a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

O'Connell has written that 'the inclusion of the concept of *jus cogens* in the Vienna Convention constitutes an important recognition of the fact that contemporary society is bound together by the acceptance of fundamental principles constituting the rule of law'.[218]

If the concept of *jus cogens* is generally accepted, no such agreement is manifested with regard to the creation of rules of *jus cogens* or their scope or, indeed, which rules can be included as rules of *jus cogens*. However, there is a body of juristic opinion which declares that the rules of *jus cogens* are formed in the same way as other norms of international law, that is, primarily by way of custom and treaty, and can be modified by such means,[219] thereby placing the concept firmly within the ambit of positive law and away from any variant of natural law thinking.[220]

The problem of the emergence of a new rule of *jus cogens* is centred upon the conduct of States as a whole and a new principle might arise by way of inference from State practice.[221] How one might decide whether a new rule appertains to *jus dispositivum* or to *jus cogens* is open to question and would depend to a large extent upon the intentions of the international community and the universality of the rule involved.

One may illustrate this point by noting some examples of *jus cogens*.[222] The most recognizable relate to the proscription of aggression[223] and the prohibition of crimes against humanity and peace,[224] while other possibilities include the banning of slavery, piracy, and genocide.[225] Some jurists regard the rule against racial discrimination as an aspect of *jus cogens*.[226]

It is arguable that the principle of self-determination also falls within the category of *jus cogens*[227] and a number of members of the International Law Commission appeared to be of this opinion.[228] It would indeed be difficult to conceive of a treaty providing for the continuation of a colonial relationship against the wishes of the inhabitants of the territory being upheld as valid. Self-determination is a basic principle of international law of universal application, while the weight of international opinion appears to suggest that the right may be part of *jus cogens*.

Annex ZL

Introduction to the International Human Rights Regime

By

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Convention on the Law of Treaties (VCLT), which states that treaties are to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The general linguistic usage (**ordinary meaning of a term**) may only be deviated from if the parties involved have intended a special meaning. For **systematic interpretations** (terms in their context) it is necessary not only to consider the entire text of a treaty including its preamble and annexes, but the deeds and agreements between the parties relating to the treaty, as well as all subsequent agreed **practices in the application of the treaty**.

Supplementary means of interpretation (the **travaux préparatoires** in particular) may only be resorted to in accordance with article 32 VCLT where the general rules of interpretation leave the meaning ambiguous or obscure, or lead to a result that is manifestly absurd or unreasonable. Essentially the emphasis is on interpreting treaties under international law in the light of their **object and purpose**. Where different yet authentic linguistic versions deviate from each other, precedence is to be given to the version that comes closest to the object and purpose of the treaty as a whole. With human rights treaties, naturally the main object is for states parties to protect the rights set out in the treaties. Especially with human rights treaties, however, it is often difficult to say whether interpretations, that limit the protection of human rights, are still in harmony with the object and purpose of the treaty as a whole.

TEXTBOX 34

RULES OF INTERPRETATION OF HUMAN RIGHTS TREATIES

- Interpretation 'in light of object and purpose'
- Dynamic interpretation (living instrument)
- *Effet utile* ('not theoretical and illusory, but practical and effective')
- Autonomous interpretation
- Restrictive interpretation of national human rights limitations
  - In dubio pro libertate et dignitate
  - Proportionality principle
  - Prohibition of discrimination

Thus, the UN Human Rights Committee decided in the case of *Kennedy* v. *Trinidad and Tobago* in 1999, that the object and purpose of the 1st Optional Protocol to the CCPR was to monitor the obligations of the treaty by an individual complaints procedure. Consequently, a reservation that excludes a particular group of persons (i.e. prisoners sentenced to death) from the right to file an individual complaint was not reconcilable with the object and purpose of the 1st Optional Protocol to the CCPR. International monitoring bodies are generally of the opinion that in **cases of doubt as to object and purpose, interpretation should favour the protection of the individual**, i.e. their freedom and dignity (*in dubio pro libertate et*

dignitate). This is why limitation clauses (3.2.4.), in case of doubt, are to be interpreted restrictively taking into account the proportionality principle (3.2.5.) as well as the prohibition of discrimination (3.2.6.)

This pro human rights interpretation maxim provides the basis for a number of more specific interpretation rules, which, among others, the European Court of Human Rights developed during its many years of practice with the ECHR and which today in principle are recognized for all human rights treaties. These rules include the **principle of dynamic interpretation**. Back in 1978, the Court decided in the case *Tyrer* v. *the United Kingdom* that even fairly mild corporal punishment as still practiced then with adolescents on the Isle of Man, had to be considered a degrading punishment and therefore a violation of article 3 of the ECHR. It was then that the Court first introduced the formula of the ECHR as a living instrument not to be interpreted separately from the circumstances at the time. In other words, once terms such as torture, inhuman and degrading treatment or punishment change their meaning in the everyday usage of European societies, it is no longer admissible to rigidly stick to the meaning of a term coined in 1950 when most European states still did not consider corporal punishment degrading.

In 1979, a judgment was rendered in the case of *Airey* v. *the Republic of Ireland*, which concerned the question of whether, from the right to fair trial as laid down in article 6 of the ECHR, it was possible to derive the right of access to a court, whereby states parties would have a positive obligation to ensure that right. Since then, the Court has been using the interpretation rule of the '***effet utile***', which means that the Convention does not guarantee rights which are theoretical and illusory but those which are practical and effective. Thus, the Irish government in the concrete case of a procedure for legal separation of a marriage, would have had to make available to the applicant legal aid, irrespective of the fact that such claims, under the Convention, are explicitly intended for criminal proceedings only. Although the ECHR repeatedly refers to national legal systems (as with the limitation clauses), the terms for defining the scope of application of specific rights must be interpreted autonomously if protection is not to remain illusory. Interpretation of the terms 'civil rights and obligations' and 'criminal charge' as in article 6(1) of the ECHR, for example, cannot be subject to the meaning of these terms under civil and penal law of the states parties or the competence of national courts. After all, the purpose of a human right of access to an independent tribunal is to define at the level of international law which matters are too important to be decided on by an administrative authority bound by instructions, and rather have to be taken before an independent and impartial court. A treaty, however, will have to use fairly vague terms to arrive at such definitions. Ultimately the Court itself has to give an **autonomous interpretation** of the meaning of 'civil rights and obligations' and 'criminal charge'. This in fact required extensive changes in the laws in continental European states with a highly developed system of administrative law and administrative procedures not subject to judicial review, and therefore was the cause of heavy criticism on the part of governments and scholars.

directly on the UN Charter and increasingly diffused the argument of inadmissible interference in national matters (at least with gross and systematic human rights violations). This gradual development was endorsed by the express recognition of the legitimacy of international measures for the protection of human rights during the 1993 Vienna World Conference on Human Rights (4.6.1.). At the same time, the **UN High Commissioner for Human Rights** (4.4.8.2.) was established, hailing a new era for the UN human rights system, which from promotion and protection was to move on to international enforcement, and finally, to the prevention of human rights violations (2.8.).

With these new tasks of enforcement and prevention, human rights have moved closer, and are in fact inseparably linked to the UN's other main objectives which are those of **securing peace** and **development** (3.1.5. and 3.1.6.). Human rights protection is no longer a case for the conference rooms of Geneva and New York, but is increasingly becoming a field operation. This is illustrated by a new generation of peace operations (16.), a new philosophy of development cooperation based on the human being (3.1.6, 4.4.8.7.), preventive field operations of the High Commissioner for Human Rights (14.2.), a new type of humanitarian relief operations, as well as humanitarian interventions for the protection of human rights. International criminal law, which after the Cold War was suddenly aroused from its long sleep, no longer serves international humanitarian law only, but has become a main pillar of international human rights protection (15.). Human rights are the only normative basis for a new world order, and as such have permeated almost all fields of activity of the United Nations. Many of its bodies that used to act primarily on humanitarian grounds, such as the United Nations Children's Fund (UNICEF) (4.4.8.6.), today have found a new and more solid legal foundation in the relevant human rights treaties, such as the Convention on the Rights of the Child (4.3.6.). This **mainstreaming of human rights** is also reflected in the fact that virtually all of the UN's principal organs, including the Security Council (4.4.7.), have now assumed some of the tasks of human rights protection. With this integration function, human rights are gradually assuming the significance the authors of the UN Charter and the Universal Declaration of Human Rights intended for them, but which then got lost in the times of the Cold War.

4.2. Universal Declaration of Human Rights (UDHR)

The UN Charter did not define the term 'human rights', but rather presupposed it. The first task of the Human Rights Commission founded in 1946 was, therefore, to develop a universally valid definition. The idea was to proceed in three successive steps: to pronounce a non-binding **declaration** as a basis for a legally binding **convention**, and create international **implementation** mechanisms (2.8.). Looking back, it is quite remarkable that in the course of two years the international community was able to agree on a universal declaration, while the adoption of two human rights covenants took two decades and their efficient implementation is still pending. This success is due on the one hand to the personal commitment of individual delegates in the Human Rights Commission like *Eleanor Roosevelt*

(United States) and *René Cassin* (France), but also to the fact that the international community in the 1940s was fairly small, and rigid ideological differences had yet to surface.

While the Universal Declaration of Human Rights of 10 December 1948 (UDHR) primarily reflects the human rights concept of the Age of Enlightenment, in other words, the 'first generation' of civil and political rights (articles 1 – 21), it is remarkable that at the time of its drafting, the 'second generation' of human rights (economic, social and cultural rights) was accepted more or less on equal footing with the first generation by western states (2.6.). In doing so, they pre-empted the doctrine of interdependence and indivisibility of all human rights, which was not formally recognized until the 1993 Vienna World Conference, and in fact, is still a matter of controversy for most industrialized countries (2.7.). More surprising still, the states at the time, obviously still under the shock of the Nazi holocaust, recognized in article 28 that everyone was entitled to a 'social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'. This regulation today not only provides the basis for the 'third generation' of collective rights, but also is considered the foundation for the legitimacy of the international human rights regime in general. The Declaration still includes rights, which were not codified in the two subsequent UN Covenants, such as the right of asylum (article 14) and the right to property (article 17). On the other hand, it does not include peoples' right of self-determination and protection of minorities, which prompted the Soviet Union and its allies to abstain from voting at the General Assembly.

Even though the Universal Declaration – which is formally a resolution of the General Assembly – is not binding under international law, it still represents an **authoritative interpretation of the term 'human rights' in the UN Charter**, and thus can be considered indirectly constituting international treaty law. All human rights activities and mechanisms of the Human Rights Commission and other bodies of the United Nations, which are directly based on the Charter, refer to the Universal Declaration as universally recognized standards by all states. Furthermore, many African and Asian states, which gained their independence after 1948, refer to the Declaration in their constitutions, thus emphasizing its moral, political and legal significance.

No doubt some of its provisions, such as the prohibition of torture and slavery, today enjoy the status of customary international law, yet despite certain legal opinions to the contrary, it is still doubtful whether the Declaration as a whole can be considered as having achieved this status. However, with the increase in ratifications of the two UN Covenants, this academic debate on the status of the Declaration in international law is gradually losing ground.

Annex ZM

7

Self-Determination

*Marcelo G. Kohen**

I INTRODUCTION

Alongside the prohibition of the use of force, self-determination constitutes the most important fundamental principle of contemporary international law. It can certainly be described as the most revolutionary of all existing fundamental principles. For the first time in the history of international law, one of its rules recognises the right of certain human communities, the 'peoples', to freely decide their international status, which includes the possibility of independence. In other words, the right to create their own State.[1] Before the emergence of such a right, all struggles for independence were considered to be internal conflicts or civil wars, for which international law had little to say. They were merely envisaged as 'domestic matters'.

The road to such a legal revolution has been long, even if the period in which the norm crystallised and deployed its effects was relatively short, speaking in historical terms. This assertion presupposes a specific stance on a number of issues; in particular, that self-determination as a *right of peoples* must not be conflated with other uses of the same term that were in vogue before its actual incorporation into the *corpus juris gentium*, and indeed with some uses of the term still in use today. What will be considered in this chapter is the right of peoples to self-determination as enshrined in the UN Charter, and the legal developments that occurred as a result of such inclusion. For the first time in history, a treaty – and indeed the very treaty creating an international organisation with a universal scope of action – incorporated self-determination among the principles governing the institution thus created. This does not mean that our analysis will begin in 1945. The struggle for its recognition began well before the end of the Second World War and other related political or legal principles played a role – with varying

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[1] The ICJ expressly acknowledged that:'[d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation'. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403, 436, para 79 (20 July) (referring to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Res 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, 31–32, paras 52–53 (21 June); *East Timor (Portugal* v *Australia)*, Judgment, ICJ Reports 1995, 90, 102, para 29 (30 June); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 171–72, para 88 (9 July).

degrees – in the historical process that led to the emergence of the right to self-determination and its recognition as one of the fundamental principles of international law.

Given its revolutionary nature, conceptually and in practice, it is unsurprising that, until very recently, some colonial powers and authors have continued to deny its legal character, despite paying formal tribute to it as a – mere – 'aspirational' concept (i.e. not one that would possess concrete legal force). Neither is it surprising that the manner in which it is sometimes invoked by some powers is '*à géométrie variable*', fiercely defending its application in one case and completely disregarding it in another. Also, all political groups advancing secessionist claims will duly remember to claim that their community constitutes a 'people' and hence is entitled to the right to self-determination. And we should not overlook some demagogic presentations of the principle, which combine a generous recognition of a broad category of 'right-holders' with, at the same time, a substantial limitation of its content, which practically removes much of its substance. Even if today no one denies its existence as a legal right, self-determination apparently remains an obscure concept, with vague contours and possible right-holders. Highlighting these difficulties, contradictions and different practices is important to appraise the contribution of the Friendly Relations Declaration to the characterisation and operation of the principle of self-determination. It is probably the principle whose formulation in the Declaration contributed the most to the clarification of its content and scope, even if, unsurprisingly, contradictory approaches and claims remain.

In this context, this chapter first attempts to provide an archaeology of the principle, from its roots in the early stages of the science of international law up to the very introduction of the term 'self-determination' in the international political language and to its formal inclusion in the UN Charter. From that moment, the chapter surveys the discussions within and outside the United Nations about its legal character and content, with a particular focus on the *travaux préparatoires* of the Friendly Relations Declaration. The chapter then moves to the characterisation of the principle, first in the Friendly Relations Declaration, and then in the wider body of international law. The latter examination is intended to clarify key questions relating to the legal basis and nature of the principle, its recognition as a 'right', the contexts in which it has deployed its effects, the question of identifying the right-holder under international law and the relations between self-determination and other fundamental principles. The last two sections of the chapter refer to some common 'loose' uses or outright misuses of the principle in international practice, before concluding on the evolution and prospects of self-determination.

II AN ARCHAEOLOGY OF THE IDEA OF SELF-DETERMINATION

The idea that sovereignty resides in the people and not in the prince or king is certainly an important precedent for the idea of self-determination, although it remains distinct from it. The backdrop of popular sovereignty is the pre-existence of a State. This doctrine concerns indeed the identification of the ultimate holder of power within the State as a political organisation. By contrast, whereas the basic meaning of self-determination is the idea that the people decide their own status, its main content resides in the external capacity to decide, a matter that was not of concern for the doctrine of popular sovereignty. It is then for the 'people' to decide whether they will constitute an independent State or be part of on existing State or, still, otherwise determine their international status. As such, the principle was incorporated into international law in the twentieth century, but the idea, and even a parody of 'self-determination' by which some peoples 'decided' to lose their capacity to decide, was already present long before.

When Spain started its colonial expansion in the Americas, the Salamanca School considered that there were no *terrae nullius* and that the sovereignty over such territories was vested in their inhabitants.[2] The Spanish government disregarded this stance and invoked instead the Papal Bull *Inter Ceatera* and then the Treaty of Tordesillas as the basis to acquire sovereignty over the 'new continent'.[3] The practice of European powers to conclude treaties with local entities in order to acquire sovereignty in Asia and Africa demonstrates the recognition by such powers of the legal capacity of such entities to be holders of sovereignty over their territory. Paradoxically, those agreements both implied such recognition and, at the same time, subjected these peoples to the status of colonies or protectorates deprived of the possibility of deciding their destiny by themselves.[4]

In his most prominent work, Grotius examined the question of who is entitled to alienate sovereignty.[5] If sovereignty is vested in the king, only he has capacity to alienate it. If it is vested in the people, then the king could alienate sovereignty but only with the consent of the people. If only a part of the State's territory is alienated, the consent of that part would be necessary. A part of the State cannot secede from the rest, except in a situation of extreme necessity for its conservation. An uninhabited territory, on the contrary, can be alienated by a 'free people' or by the king with the consent of the people.

The French Revolution brought about two related but distinct political principles: popular sovereignty and the principle of nationalities. Condorcet's draft Constitution established a principle that still features in the contemporary French Constitution of the Fifth French Republic: '*Nulle cession, nul échange, nulle adjonction de territoire n'est valable sans le consentement des populations intéressées.*'[6] On this basis, plebiscites were organised in Savoy, Nice, Belgium and the Rhineland region in Germany.[7] This article did not preclude French colonialism all along the nineteenth century and later on and a rather contradictory practice by France in contemporary times.

According to the principle of nationalities, each nation is entitled to constitute its own State. Politically, it was one of the bases invoked in struggles for the emergence of nation-States in the European continent. It was also under this banner, together with that of human rights, that France attempted to conquer the whole continent, disregarding Robespierre's warning: 'Ce n'est pas à la pointe des baïonnettes qu'on porte aux peuples la Déclaration des Droits de l'Homme.'[8]

The first waves of what we would call 'decolonisation' today occurred at the end of the eighteenth and the beginning of the nineteenth centuries, with the independence of the United States of America in 1774, Haiti in 1804 and the Spanish American colonies starting in 1810. The

[2] Francisco de Vitoria, 'The First Reflection on the Indians Lately Discovered (Translation by John Pawley Bate)' in James Brown Scott (ed), *The Classics of International Law* (Carnegie Institution of Washington, 1917) 115–28.

[3] Pope Alexander VI, The Bull Inter Caetera, 4 May 1493 in Frances Davenport (ed), *European Treaties Bearing on the History of the United States and Its Dependencies to 1648* (Carnegie Institution of Washington, 1917) 61–63; Treaty between Spain and Portugal concluded at Tordesillas, 7 June 1494, ibid 93–100.

[4] See Mamadou Hébié, *Souveraineté territoriale par traité. Une étude des accords entre puissances coloniales et entités politiques locales* (PUF, 2015); and, by the same author, 'The Acquisition of Original Titles of Territorial Sovereignty in the Law and Practice of European Colonial Expansionism' in Marcelo G Kohen and Mamadou Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar, 2018) 36–86.

[5] Grotius, *De iure belli ac paci libri tres* (1625), bk 2, ch 6, V, VI and VII.

[6] Plan de Constitution présenté à la Convention nationale les 15 et 16 février 1793, Titre 13, Art 2; Constitution of the French Republic, 4 October 1958, Art 53.

[7] Over time, there was a degradation in the way in which such consultations took place, most of the times under the pressure and influence of the French authorities. See J Heimweh (probably a pseudonym), *Droit de conquête et plébiscite* (A Colin, 1896) 1–19.

[8] Cited in Jean Jaurès, *L'Armée nouvelle*, vol 1 (Impr Nationale, 1992 [1910]) 125.

bases underlying these independence claims were different. The British colonies based their independence on a matter of (lack of) representation. The Haitian revolution was essentially a matter of liberation from slavery. It was the Spanish American independence that was accomplished under the banner of national struggle inspired by the French revolutionary ideas and also based on local economic interests, which were curtailed by the Spanish monopoly of trade. All these struggles for independence were perceived from a legal perspective as a matter of civil war. The international law of the time did not grant any right to independence. On the contrary, since this was perceived as a pure matter of domestic concern, it entitled the colonial powers to suppress these aspirations by force and required other States not to lend support to the national liberation struggle. Only the success in their struggle allowed these newly independent States to become members of the still closed international legal system.

The idea that peoples, all of them, have a *right* to freely determine their destiny started to be developed as a political claim. On the international plane, it was the Congress of London of 1896 of the Second International which first asserted 'the rights of nations to self-determination'.[9] The matter was in the agenda of the socialist movement. They distinguished class struggle in what today would be called developed countries, including colonial powers, and national struggle in dependent territories or subjugated nationalities within multinational States. The debate was between those who considered that the independence of subjugated nations would favour the development of capitalism, thereby catalysing the advent of socialism, and those who argued that this issue should not be included in the socialist programme. Karl Kautsky was the main exponent of the former idea and Rosa Luxembourg of the latter. In his work *The Rights of Nations to Self-Determination*, Lenin strongly supported Kautsky and criticised Rosa Luxembourg. He provided the following definition:

> self-determination of nations means the political separation of these nations from alien national bodies, and the formation of an independent national state . . . it would be wrong to interpret the right to self-determination as meaning anything but the right to existence as a separate state.[10]

The Decree on Peace of the Soviet Provisional Government adopted the day following the Revolution (26 October 1917 according to the Julian calendar, equivalent to 8 November 1917) included a concrete manifestation of the principle of self-determination when defining what, in the view of the new government, would be a peace 'without annexations':

> In accordance with the sense of justice of democrats in general, and of the working class in particular, the government conceives the annexation of seizure of foreign lands to mean every incorporation of a small or weak nation into large or powerful state without the precisely, clearly, and voluntarily expressed consent and wish of that nation, irrespective of the time when such forcible incorporation took place, irrespective also of the degree of development or

[9] 'This Congress declares that it stands for the full right of all nations to self-determination [*Selbstbestimmungsrecht*] and expresses its sympathy for the workers of every country now suffering under the yoke of military, national or other absolutism. This Congress calls upon the workers of all these countries to join the ranks of the class-conscious [*Klassenbewusste* – those who understand their class interests] workers of the whole world in order jointly to fight for the defeat of international capitalism and for the achievement of the aims of international Social-Democracy.' See the official German report of the London Congress: *Verhandlungen und Beschlüsse des internationalen sozialistischen Arbeiter und Gewerkschafts-Kongresses zu London, vom 27. Juli bis 1. August 1896* (Berlin, 1896), S18. A Russian pamphlet has been published containing the decisions of international congresses in which the word 'self determination' is wrongly translated as 'autonomy'.

[10] Vladimir Ilych Lenin, 'The Right of Nations to Self-Determination (1914)', *Lenin's Collected Works*, vol 20 (Progress Publishers, 1972) 393–454, www.marxists.org/archive/lenin/works/1914/self-det/.

> backwardness of the nation forcibly annexed to the given state, or forcibly retained within its borders, and irrespective, finally, of whether this nation is in Europe or in distant, overseas countries.
>
> If any nation whatsoever is forcibly retained within the borders of a given state, if, in spite of its expressed desire – no matter whether expressed in the press, at public meetings, in the decisions of parties, or in protests and uprisings against national oppression – is not accorded the right to decide the forms of its state existence by a free vote, taken after the complete evacuation of the [aggressive] troops of the incorporating or, generally, of the stronger nation and without the least pressure being brought to bear, such incorporation is annexation, i.e., seizure and violence.[11]

The Decree granting independence to Finland specifically refers (as a ground) to the principle of the right of nations to self-determination.[12]

Another putative father of self-determination is the American President Woodrow Wilson. Much emphasis has been placed on his famous Fourteen Points.[13] However, his true direct references to self-determination can be found in three speeches delivered between 1917 and 1918. The first one, before the US Senate on 22 January 1917 is eloquent:

> No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property.[14]

The second one, before a joint session of the US Congress on 11 February 1918, explicitly mentions the term 'self-determination':

> There shall be no annexations, no contributions, no punitive damage. Peoples are not to be handed about from one sovereignty to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected; peoples may now be dominated and governed only by their own consent. 'Self-determination' is not a mere phrase. It is an imperative principle of actions which statesmen will henceforth ignore at their peril.[15]

President Wilson expounded these ideas for the peace that was to follow the First World War at his Mount Vernon's speech of 4 July 1918:

> The settlement of every question, whether of territory, of sovereignty, of economic arrangement, or of political relationship, upon the basis of the free acceptance of that settlement by the people immediately concerned, and not upon the basis of the material interest or advantage of any other nation or people which may desire a different settlement for the sake of its own exterior influence or mastery.[16]

Wilson's well-known Fourteen Points did not specifically address the idea of self-determination of peoples. Although they deal with territorial issues, they consist rather of a mix of ethnic and

[11] Second All-Russian Congress of Soviet of Workers' and Soldiers' Deputies, www.marxists.org/archive/lenin/works/1917/oct/25–26/26b.htm.

[12] Decree on Finnish State Independence, 18 (31) December 1917, in Russian, www.law.edu.ru/norm/norm.asp?normID=1118681.

[13] Woodrow Wilson, Fourteen Points, 8 January 1918, https://avalon.law.yale.edu/20th_century/wilson14.asp.

[14] Woodrow Wilson, Address of the President of the United Stated to the Senate, 22 January 1917, www-personal.umd.umich.edu/~ppennock/doc-Wilsonpeace.htm.

[15] Woodrow Wilson, Address of the President of the United Stated to the Congress, 11 February 1918, www.gwpda.org/1918/wilpeace.html.

[16] www.mountvernon.org/preservation/mount-vernon-ladies-association/mount-vernon-through-time/mount-vernon-during-world-war-i/woodrow-wilsons-july-4-1918-mount-vernon-speech/.

convenience criteria for the emergence of new independent States, such as Poland, or the drawing of boundary lines, which are not applied in a systematic way. The idea of autonomy was also envisaged in the cases of the Austro-Hungarian and the Ottoman Empires.[17] The Point relating to colonial issues deserves to be cited in full, as it shows that it was out of the question to let the colonised peoples decide their own fate:

> A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable government whose title is to be determined.

The idea of 'the consent of the governed', which is traditionally linked to Woodrow Wilson's name, can be found in this exact formulation already in the 1774 American Declaration of Independence. Woodrow Wilson had in mind this notion for the settlement of territorial conflicts after the First World War. It did not amount to a recognition of a collective right of a given community to freely decide its destiny. The plebiscites organised (or not) in the inter-war period are very telling in this regard. They were not systematically employed for the decision of the Peace Conference on the fate of certain territories (i.e. there were no plebiscites for the determination of the status of Alsace-Lorraine, Danzig or the Sudeten).

The Covenant of the League of Nations did not contain any reference whatsoever to self-determination in any explicit or implicit form, in any interpretation thereof. The novelty was the establishment of the Mandate regime for territories detached from the defeated States (i.e. within the Ottoman Empire and the German colonies).[18] The alternatives discussed were conquest, as it was the prior practice, or internationalisation of those territories.[19] The compromise, proposed by the South African General Smuts, was the Mandate regime and the establishment of three different categories of Mandates to be applied on the basis of the degree of 'civilisation'. The 'sacred mission of civilisation', the fact that according to the Covenant, the peoples inhabiting those territories were 'not yet able to stand by themselves under the strenuous conditions of the modern world' and the reference to a need for their 'tutelage by advanced nations' all demonstrate that the basis of this regime was not at all self-determination in any recognisable form. General Smuts himself was of the idea that self-determination, understood as the need to have 'the consent of the governed', was exclusively applicable in Europe.[20] Consequently, independence was envisaged for some of the Mandates only (those of type 'A') and not as a right, but as a decision of the States parties to the Covenant and the Mandate agreements.

The debate within the League of Nations concerning the Aaland Islands is perhaps the most representative illustration of the meaning of self-determination and its (lack of) legal value in the inter-war period. The case has been mentioned during the advisory procedure concerning the unilateral declaration of independence of Kosovo, and it was even referred to by some participants as the *locus classicus* on self-determination.[21] The islands belong to Finland but their population is Swedish. A body of jurists was instituted within the League of Nations to study the

[17] See particularly Points VI to XIII.
[18] Covenant of the League of Nations, 29 June 1919, Art 22.
[19] Norman Bentwich, 'Le Système des mandats' (1929) 29 *Recueil des Cours* 121.
[20] Jan C Smuts, *The League of Nations: A Practical Suggestion* (Hodder & Stougthon, 1918) 12–20.
[21] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion, Verbatim Record, 8 December 2009, Ms Kaukoranta (Finland), CR 2009/30, 56, para 12.

issue and make recommendations. The second paragraph of the Committee's Report,[22] reaffirmed in the Commission's Report,[23] clearly stated that self-determination was not a positive rule of the Law of Nations.[24] In the words of the Committee, 'positive International Law does not recognise the right of national groups, as such, to separate themselves from the State to which they form part by the simple expression of a wish'.[25]

The Commission also examined the question from the angle of the right to minorities and explained its rejection of the applicability of the right to self-determination because:

> [t]o concede to minorities ... or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life.[26]

The Commission also questioned the very need for separation when minority rights are respected. It stated the following in this respect:

> what reasons would there be for allowing a minority to separate itself from the State to which it is united, if this State gives it the guarantees ... for the preservation of its social, ethnical or religious character? Such indulgence, apart from every political consideration, would be supremely unjust to the State prepared to make these concessions.[27]

Indeed, if something characterises the impact of international law on collective rights during the inter-war period, this is the focus on the protection of the rights of national minorities in Europe through specific rules and procedures dealing with each of them.

The fight against Nazism during the Second World War was a trigger for the idea of self-determination. The 1941 Atlantic Charter signed by F. D. Roosevelt and Winston Churchill contained two related points carefully drafted to make only limited room for genuine self-determination. The second and third points read as follows:

> Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;
>
> Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them.[28]

The 1942 Declaration by United Nations simply endorsed the points of the Atlantic Charter and did not contain any reference to self-determination. The Declarations adopted in the 1943 Moscow Conference did not mention the principle either. The Four Powers Dumbarton Oaks Proposals of 1944, which contained the embryo of the purposes and principles of the future Charter did not refer to self-determination. Article 1, paragraph 2, just mentioned the aim '[t]o develop friendly relations among nations, and to take other appropriate measures to strengthen universal peace'. It was only at the San Francisco Conference in 1945, on the proposal of the

[22] 'Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question', League of Nations Official Journal, October 1920, Special Supp No 3, 5, para 2.

[23] 'The Aaland Islands Question', Report submitted to the Council of the League of Nations by the Commission of Rapporteurs, 16 April 1921, League of Nations Doc 21/68/106, 27.

[24] 'Report of the International Committee of Jurists' (n 22) 5, para 2.

[25] ibid.

[26] 'The Aaland Islands Question' (n 23) 28.

[27] ibid 28.

[28] Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom, 14 August 1941, www.nato.int/cps/en/natohq/official_texts_16912.htm.

USSR, that this article was revised to state that the friendly relations are 'based on respect for the principle of equal rights and self-determination of peoples'. Yet, the real question concerned the determination of the content of this formula as well as of its legal scope.

In a summary of the discussions within the Committee in charge of the preparation of a draft of the preamble, purposes and principles of the United Nations, the general view was that the principle of self-determination:

> corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the Chapter; on the other side, it was stated that the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession.[29]

The Rapporteur of this Committee, M. Farid Zeineddine of Syria observed in this regard that:

> It was understood: That the principles of equal rights of people [*sic*] and that of self-determination are two component elements of one norm. That the respect of that norm is a basis for the development of friendly relations, and is in effect, one of the appropriate measures to strengthen universal peace. It was understood likewise that the principle in question, as a provision of the Charter, should be considered in function of other provisions. That an essential element of the principle in question, is a free and genuine expression of the will of the peoples; and thus to avoid cases like those alleged by Germany and Italy. That the principle as one whole extends as a general basic conception to a possible amalgamation of nationalities if they so freely chose.[30]

And, explaining the rejection of a proposal, and the link between self-determination and the principle of equality of rights, the rapporteur further noted that the latter principle 'extends in the Charter to states, nations, and peoples'.[31]

Another reference to self-determination in the UN Charter is found in Article 55, linking self-determination with economic and social progress and human rights.[32] Again, the idea repeated here is that this right means self-government and not secession. No mention of the principle appears in Chapter XI, dealing with Non-Self-Governing Territories,[33] and Chapter XII, dealing with the regime of Trusteeship, that replaced that of the Mandates of the League of Nations. However, Article 76 of the UN Charter established that the basic objectives of the latter regime were, in accordance with the purposes laid down in Article 1 (which include self-determination), to promote the progressive development of the inhabitants of the trust territories 'towards self-government or *independence* as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned'. Unlike the

[29] Commission I, Committee 1, General Provisions, UNCIO, Doc 343 I/1/16, 16 May 1945, 1.

[30] Commission I, Committee 1, General Provisions, UNCIO, Doc 723, I/1/A/19, 1 June 1945, 8–9.

[31] ibid 9.

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

[33] Nevertheless, in 1975, the Court made a link between Art 1, para 2 and Arts 55 and 56 with Chapter XI in the following manner: 'The Charter of the United Nations, in Art 1, para 2, indicates, as one of the purposes of the United Nations: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . ." This purpose is further developed in Arts 55 and 56 of the Charter. Those provisions have direct and particular relevance for non-self-governing territories, which are dealt with in Chapter XI of the Charter.' *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 31, para 54.

mandates system, this objective applied to all territories and was not qualified by the type of mandate.

It can be concluded that, at the time of the adoption of the Charter, the principle of self-determination of peoples was recognised as such for the first time in a treaty of general character and constitutive of an international organisation of universal vocation. However, the text itself did not explicitly settle the divergence of views regarding its legal character and scope. For some Member States it was a right and included the right of colonial peoples to independence, whereas for others (the colonial powers), it had a limited scope and did not confer such a right. The only major area of consensus was that the principle did not apply to, and consequently did not favour, secession from existing States. Over the years, the evolution of practice following the application of the UN Charter through the work of the organisation, both in the field of human rights and on the application of Chapter XI, allowed the principle to consolidate, as discussed next.

III THE PRACTICE OF THE UNITED NATIONS: A 'CHAPTER XI *BIS*'

Soon after the entering into force of the Charter in 1945 the question of self-determination came to the forefront. The discussion leading to the adoption of the Universal Declaration of Human Rights saw the opposition between the Soviet Union and the Western countries in this regard. The insistence of the former to include the right of self-determination, with the understanding that it was applicable to colonial peoples, met the opposition of most of the members of the United Nations, leading the USSR to abstain from voting on the adoption of the Declaration.[34] Instead, a British proposal was accepted, emphasising individuals and their rights, irrespective of the status of the territory concerned.[35]

Another context where the scope of self-determination was raised concerned the information transmitted by Administering Powers of Non Self-Governing Territories under Article 73 of the UN Charter. Article 73 of the Charter sets out a number of goals to be achieved for these territories and obligations for the colonial States (administering powers) that have been extensively developed by the practice of the General Assembly. The International Court of Justice (ICJ) recognised this practice in its 1971, 1975 and 2019 advisory opinions.[36] It was with the strong participation of the United Nations in general and the General Assembly in particular that many current members of the organisation achieved their independence. More than eighty former colonies comprising some 750 million people have gained independence since the creation of the United Nations.[37] As early as 1950, the UN General Assembly recognised the 'right of peoples and nations to self-determination' as a fundamental human right.[38] Then it decided to include the right of peoples to self-determination in the future Covenant (or Covenants) on Human Rights and explicitly mentioned that self-determination was applicable to non-self-governing territories.[39] Thereafter, the General Assembly adopted, on a yearly basis, resolutions declaring that Member States 'shall recognize and promote the realization of the right to

[34] A/PV183, 926.

[35] The following text was added to Art 2: 'Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'

[36] *Western Sahara*, Advisory Opinion (n 33) 32, para 56 (referring to its 1971 Namibia Advisory Opinion).

[37] www.un.org/en/decolonization/.

[38] UNGA Res 421 D (V) (4 December 1950).

[39] UNGA Res 545 (VI) (5 February 1952) (42–7–5).

self-determination of peoples of Non-Self-Governing and Trust Territories who are under their administration'.[40] This law of decolonisation developed not without resistance from some colonial powers. In some cases, they denied that particular territories fell within the classification of non-self-governing or colonial territory. The General Assembly considered that it was not for the administering power to unilaterally determine whether the territories fall under Chapter XI. Rather, it was for the General Assembly itself to make this ascertainment. That was for instance the case of the colonies held by Portugal, since the Portuguese government of that time denied that they had such status, claiming they were mere overseas provinces.[41] Through the analysis of the situation in the colonies, the General Assembly also established the general rules for the administration of the territory during the transitional period as well as the modalities for the decolonisation of different territories.

Following the adoption, on 14 December 1960, of the landmark General Assembly Resolution 1514 (XV), 'Declaration on the Granting of Independence to Colonial Countries and Peoples',[42] the monitoring of the decolonisation process was entrusted to the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. Known as the 'Decolonisation Committee', this body was created in 1961 as the subsidiary organ of the General Assembly exclusively devoted to the issue of decolonisation.[43] In addition to these important developments, other General Assembly resolutions also played an important role in the development of the law of decolonisation. Referring to this growing body of resolutions, the late French jurist Michel Virally spoke of a veritable rewriting of the UN Charter to include 'Chapter XI *bis*'.[44] Of particular significance are the following:

Resolution 1541 (XV) of 15 December 1960: Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter.

Resolution 2621 (XXV) of 12 October 1970: Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, which states inter alia that 'Members shall intensify their efforts to promote the implementation of the resolutions of the General Assembly and the Security Council relating to Territories under colonial domination', considers that 'military activities and arrangements by colonial Powers in Territories under their administration . . . constitute an obstacle to the full implementation of resolution 1514 (XV)' and states that the Decolonization Committee 'shall continue to examine the full compliance of all States with the Declaration and with other relevant resolutions on the question of decolonization' and '[w]here the resolution 1514 (XV) has not been fully implemented with regard to a given Territory, the General Assembly shall continue to bear responsibility for that Territory until such time as the

[40] UNGA Res 637 (VII) (16 December 1952), 738 (VIII) (28 November 1953), 833 (IX) (4 December 1954), 1188 (XII) (11 December 1957).

[41] See Transmission of information under Art 73 (e) of the Charter, UNGA Res 1542 (XV) (15 December 1960), para 1.

[42] This resolution is a turning point, and its importance has been recognised by the ICJ in several occasions. See *Western Sahara* (n 33), para 57; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (n 1) 436, para 79 and 438, para 82; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ, Advisory Opinion (25 February 2019), paras 150–53.

[43] The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1654 (XVI) (27 November 1961).

[44] Michel Virally, 'Droit international et décolonisation devant les Nations Unies' (1963) 9 *Annuaire français de droit international* 508, 526.

people concerned has had an opportunity to exercise freely its right to self-determination and independence in accordance with the Declaration'.

Resolution 2625 (XXV) of 24 October 1970: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Resolution 35/118 of 11 December 1980: Plan of the Action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted at the twentieth anniversary of Resolution 1514 (XV) and being a development of Resolution 2621 (XXII). For the purposes of this case, the condemnation of measures of disruption of the demographic composition of the colonial territories and the request for the immediate and unconditional withdrawal from colonial territories of military bases and installations of colonial powers are specifically relevant.

Resolution 65/119 of 10 December 2010: Third International Decade for the Eradication of Colonialism, which declared the period 2011–20 as the Third International Decade for the Eradication of Colonialism.[45]

In this regard, it can be said that resolutions of the General Assembly establishing which territories are subject to decolonisation, as well as the determination of the manner in which these territories must be decolonised, and when the process has come to an end and consequently the territory ceases to be a 'non-self-governing' one, are more than simple recommendations. Since the General Assembly has the competence to make these ascertainments, its resolutions are authoritative in this regard.

It is against this background and developments that the discussions on the scope of the principle of self-determination within the Committee in charge of the elaboration of what became the Friendly Relations Declaration occurred.

IV SELF-DETERMINATION IN THE FRIENDLY RELATIONS DECLARATION

1 *Introduction*

The process which, between 1963 and 1970, led to the debate, formulation and adoption by consensus of the Friendly Relations Declaration is of major significance for the principle of self-determination. Although the principle had already received in 1960 what became, over time, its canonical formulation, the Friendly Relations Declaration placed it at the heart of the post-war international legal order, alongside other fundamental principles of international law. The process that led to such an achievement was difficult and only completed at the very last session of the intersessional Special Committee established in December 1963, which took place in Geneva from 31 March to 1 May 1970. The purpose of the following sections is to situate self-determination within both the debates of the Special Committee and the broader context of the Friendly Relations Declaration.

2 *The* Travaux Préparatoires

The Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States was initially established in 1964 by the UN General Assembly to deal with the principles of the prohibition of the threat or use of force, the peaceful settlement of

[45] See *Chagos* (n 42), Written Statement of Argentina, para 19.

disputes, non-intervention and sovereign equality of States. It was reconstituted in 1966 and enlarged to thirty-one Member States for the purpose of completing the study of the above-mentioned principles and considering the remaining ones, notably, the principle of equal rights and self-determination of peoples.[46] The Special Committee considered this principle at its 1966, 1967, 1968, 1969 and 1970 sessions, issuing a yearly report that was later discussed within the UN General Assembly, especially its Sixth Committee.

From the very beginning of discussions, there was a general agreement on the fact that self-determination constituted a rule of international law and not a mere moral or political precept.[47] However, States differed on how to give expression to it. If the so-called socialist and non-aligned States formulated it as a right,[48] other States such as the United States of America and the United Kingdom preferred to frame it in terms of an obligation, resting upon States, to respect the principle of self-determination on territories under their jurisdiction, pointing out the difficulty of defining the beneficiaries of the right, namely the 'peoples'.[49] Ultimately, the Drafting Committee of the Special Committee decided to adopt both views by enunciating the principle of self-determination as a 'right of peoples' and a 'duty to respect' imposed on every State.[50]

Member States also disagreed on the scope of the principle of self-determination, including its beneficiaries. For some, the right to self-determination had to be limited to peoples under colonial rule while for others, it had to be either limited or at least extended to the population of already independent and sovereign States.[51] It had also been advanced that the term 'peoples' should correspond to the majority of the population of generally accepted political units or be extended to those living in a zone of military occupation.[52] The case of federal unions whose constitutional law explicitly refers to the principle of self-determination as well as that of territories in free association with the former administering power were mentioned.[53] Finally, the possibility of granting the right of self-determination to the distinct peoples of multinational States was also raised.[54]

The final text of the Declaration did not define the term 'peoples'. However, it stated that '*all* peoples have the right' to self-determination. The proposal by the representative of Nigeria to use the expression 'all *subject* peoples' instead of 'all peoples' was not followed.[55] In the same vein, the suggestion by the United States of America, later endorsed by the United Kingdom, to include an exhaustive list of territories to which the principle of self-determination applies was finally not retained by the Drafting Committee.[56]

The applicability of the principle to both colonial peoples and peoples already possessing a State is confirmed by the discussions related to the content of the right to self-determination. Since the first sessions of the Special Committee that were devoted to this principle, several representatives argued that the right to self-determination had two aspects, an external and a domestic one. It encompassed the right of peoples to freely determine their international

[46] UNGA, Res 2103 (XX).
[47] A/C.6/SR.926, para 9 (USA); Report of the Sixth Committee (1966), para 69.
[48] Report of the Special Committee (1966), paras 457 and 458.
[49] ibid, para 459; Report of the Special Committee (1967), paras 176 and 192.
[50] Report of the Special Committee (1970), para 83; UNGA Res 2625 (XXV) (24 October 1970).
[51] Report of the Special Committee (1967), para 195, A/C.6/SR.928, para 5 (Canada); A/C.6/SR.1002, para 33 (Central African Republic); A/C.6/SR.1160, para 38 (Burma).
[52] Report of the Special Committee (1968), para 163; Report of the Special Committee (1969), para 156 A/5725, p 28 (Cyprus); A/C.6/SR.1182, para 46 (Libya).
[53] Report of the Special Committee (1969), para 156.
[54] Report of the Sixth Committee (1969), para 26.
[55] A/C.6/SR.996, para 28.
[56] Report of the Special Committee (1966), para 459; Report of the Special Committee (1967), para 176.

political status, which includes the establishment of an independent State, but also their right to choose their political, economic and social systems without external interference.[57] This second aspect was understood as permanent in nature. After their independence, peoples remained entitled to internal self-determination, in conformity with other fundamental principles of international law such as the sovereign equality of States and non-intervention.[58]

With regard to the exercise by peoples of their internal self-determination within independent States, some representatives argued that the democratic dimension of the principle of self-determination had to be recognised, for it is based on the free will of peoples.[59] This was further strengthened by the development of human rights at the international level which prohibit discrimination and prescribe that the will of the people shall be the basis of the authority of government.[60] In this respect, the United States proposed to include in the Declaration, a paragraph which reads as follows: 'The existence of a sovereign and independent State possessing a representative Government, effectively functioning as such to all distinct peoples within its territory, is presumed to satisfy the principle of equal rights and self-determination as regards those peoples.'[61]

Some representatives welcomed this formulation. Others expressed their fear about the disruption of the territorial integrity and political unity of States and wanted to make clear that self-determination does not grant to ethnic, racial, national or religious minorities a legal ground for secession.[62] To overcome this difficulty and mitigate the risks, Italy suggested in 1970, drawing upon a previous draft prepared by the Drafting Committee, to add a saving clause right after the US based proposal: 'Nothing in the foregoing paragraphs shall be construed as authorizing any action which would impair, totally or in part, the territorial integrity, or political unity, of such States.'[63] As will be discussed below, the final text adopted by the UN General Assembly included that general safeguard or saving clause. The *a contrario* reading of this clause led some authors and States to invoke a 'remedial secession' exception. A close look at the *travaux préparatoires* of the Declaration discards such interpretation. Statements made by the representatives of States directly involved in the drafting of the saving clause clearly indicate that its object and purpose was to safeguard the territorial integrity and political unity of States. The representative of Italy declared that the inclusion of the saving clause ensured 'that the principle would not be interpreted in such a way as to undermine the territorial integrity of independent States, which was safeguarded as fundamental by the Charter'.[64] In the same vein, the representative of Canada – who assumed, within the Drafting Committee, the chairmanship of the working group on the implementation of self-determination by a State with respect to peoples within its jurisdiction – stated that, thanks to the adoption of the saving clause, there was 'no danger that some might be misled in attempting to invoke the principle to justify the dislocation of a State within which various communities had been cohabitating successfully and peacefully

[57] Report of the Special Committee (1967), para 198; Report of the Sixth Committee (1968), para 47; A/5725, 47 (Romania); A/C.6/SR.998, para 9 (Congo, Brazzaville).
[58] Report of the Special Committee (1966), paras 480–81.
[59] ibid, paras 515 and 518; Report of the Special Committee (1969), para 176.
[60] Report of the Special Committee (1967), para 222.
[61] Report of the Special Committee (1966), para 459. The United Kingdom presented exactly the same proposal one year later: UN Doc A/AC.125/L.44, part VI, repr in Official Records of the General Assembly, Twenty-Second Session, annexes, agenda item 87, UN Doc A/6799 (19 July 1967), para 176.
[62] Report of the Special Committee (1967), paras 221 and 223.
[63] Report of the Special Committee (1970), para 63.
[64] Report of the Special Committee (1969), para 187.

for a considerable period of time'.[65] This interpretation was backed by other States in the last debates preceding the adoption of the final text of the Declaration.[66] In fact, the *a contrario* reading of the saving clause was only evoked by the representative of South Africa, still under the apartheid regime, for the purpose of criticising the clause and expressing reservations.[67]

The interpretation of the saving clause as a provision aiming primarily at protecting the territorial integrity of States is further confirmed by the statements of many States, which considered explicitly during the whole process that the right to self-determination was not applicable to national, ethnic, tribal, racial or religious minority groups.[68] It is also further strengthened by the last paragraph of the Declaration which stipulates that 'Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.'[69] This paragraph was adopted without much debate or difficulties, notably because it 'reassured those who feared that the universal application of the principle might favour secessionist movements inside independent States'.[70]

It is worth noting that the emphasis of the Declaration on the principle of territorial integrity does not undermine or weaken the right of peoples to self-determination, since the sixth paragraph of the text in question sets out that 'the territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it'. This rule was initially advocated by the so-called Socialist and Non-aligned States and opposed by mainly colonial States which contended that it was in contradiction with the established doctrine of international law.[71] It has been nonetheless included in the final text thereby confirming that the accession of a colony to independence does not amount to a violation of the territorial integrity of the administering power.

The *travaux préparatoires* of the Declaration also reveal that States differed on the modes of implementation of the right to self-determination. Some of them were of the view that the principle could only be regarded as fully implemented when the people concerned had attained the status of a sovereign State. For these States, the prior access to independence was a necessary condition for a truly free choice of peoples regarding their future political, economic and social status.[72] However, drawing upon Resolution 1541 of the UN General Assembly and pointing out the differences that might exist in terms of resources, size and population between the different Non-Self-Governing Territories, other States considered that self-determination could also be achieved through free association or integration with an independent State.[73]

The work of the Special Committee on the principle of self-determination was marked by strong opposition over two further aspects: the legal assessment of colonialism and the question of the right of peoples to self-defence. From the very beginning of the process, several States advocated the inclusion of a clear statement that colonialism in all its forms, including racial discrimination, amounted to a violation of international law in general and the principle of self-

[65] Report of the Special Committee (1970), para 177.
[66] ibid, para 219 (India), A/C.6/SR.1183, para 11 (India) and 39 (Ecuador).
[67] A/C.6/SR.1184, para 15.
[68] A/C.6/SR.1002, para 33 (Central African Republic); A/C.6/SR.1003, para 55 (Ecuador); A/C.6/SR.1163, para 18 (Philippines).
[69] UNGA, Res 2625 (XXV).
[70] Report of the Special Committee (1968), para 190.
[71] Report of the Special Committee (1967), para 216.
[72] ibid, para 212; A/C.6/SR.1158, para 31 (Czechoslovakia).
[73] Report of the Special Committee (1967), para 213; A/C.6/SR.1181, para 8 (New Zealand).

determination in particular.[74] Other States, notably the United Kingdom, objected to this proposal, claiming that not all colonial relationships were illegal per se, and pointing out that the Charter did not outlaw colonialism but regulated it instead and provided for its orderly termination in Chapters XI, XII and XIII.[75] The final text of the Declaration borrowed the terms of Resolution 1514 of the UN General Assembly by stating that the 'subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter'. It also called for a 'speedy end to colonialism'.[76]

From the outset too, the so-called socialist and non-aligned countries stressed that self-determination entailed the right of peoples to self-defence against colonial oppression and their right to receive appropriate assistance in their struggle for liberation.[77] Other States considered that such position was incompatible with other fundamental principles of the UN Charter such as the prohibition of the threat or use of force or the principle of non-intervention.[78] The outcome of this debate was a compromise formula recognising the right of peoples to resistance against the forcible actions of the coloniser but limiting the assistance and support to which these peoples are entitled to those which are 'in accordance with the purposes and principles of the Charter'.[79]

3 *The Final Outcome*

The formulation of the self-determination principle in the Friendly Relations Declaration is, with the benefit of hindsight, a major achievement. Although it does not expressly refer to the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, it largely relies on it, thus striking a compromise in the absence of which it would have been impossible to complete the work on the Friendly Relations Declaration. Unsurprisingly, the formulation of the principle was one of 'the most difficult tasks the Committee faced',[80] given the deep and various dividing lines across Committee members and the revolutionary character of this norm.

The final text, with its many nuances and compromises, owes much to the calibre of the international lawyers who took part in the negotiations and drafting. Its significance cannot be underestimated. Self-determination is not only recognised but also woven into the fabric of post-1945 international law and, more specifically, of its fundamental principles. Indeed, the 'principle of equal rights and self-determination of peoples' was now fleshed out in significant detail, including by reference to other principles of the Friendly Relations Declaration. In its eight paragraphs, the Declaration defines the content of the right, the possible outcomes of its exercise, the obligation to put an end to any situation contrary to that right and to promote its

[74] Report of the Special Committee (1966), paras 457, 458 (Written Proposal by Czechoslovakia, para 2), 458 (Joint Written Proposal by Algeria, Burma, Cameroon, Dahomey, Ghana, India, Kenya, Lebanon, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia, para 2(a)) and 482; A/C.6/SR.999, paras 63–65 (United Republic of Tanzania).

[75] A/C.6/SR.1000, para 32 (United Kingdom).

[76] UNGA, Res 2625 (XXV).

[77] Report of the Special Committee (1966), para 458 (Joint Written Proposal by Algeria, Burma, Cameroon, Dahomey, Ghana, India, Kenya, Lebanon, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia, para 2(b)); A/C.6/SR.997, para 17 (Poland); A/C.6/SR.999, paras 42–43 (Ukrainian Soviet Socialist Republics).

[78] Report of the Special Committee (1966), para 497; A/C.6/SR.1000, paras 32–33 (United Kingdom).

[79] UNGA Res 2625 (XXV).

[80] See the article by the US representative to the Special Committee, R Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey' (1971) 65 *American Journal of International Law* 713, 730.

respect, the different legal status of colonial territories, the safeguard or saving clause against dismemberment and the obligation to respect the territorial integrity of States and other countries:

> [Paragraph 1] By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> [Paragraph 2] Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
>
> (a) To promote friendly relations and co-operation among States; and
> (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;
>
> and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.
>
> [Paragraph 3] Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.
>
> [Paragraph 4] The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.
>
> [Paragraph 5] Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.
>
> [Paragraph 6] The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.
>
> [Paragraph 7] Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.
>
> [Paragraph 8] Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

The final text has eight paragraphs, identified between square brackets in the above quotation for ease of reference. The first paragraph expressly recognises a 'right' of 'all peoples' to self-determination, which includes, according to the paragraph 'the establishment of a sovereign and

independent State' as one of the 'modes of implementing the right of self-determination by that people'. All States have a 'duty to respect this right in accordance with the provisions of the Charter' (paragraph 1) as well as other more specific duties, including 'to promote . . . realization of the principle' and 'to render assistance to the United Nations in carrying out' its responsibilities inter alia 'to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned' (paragraph 2), 'to promote . . . universal respect for human rights' (paragraph 3), 'to refrain from any forcible action' against the exercise of such right (paragraph 5) but also from 'any action' against 'the partial or total disruption of the national unity and territorial integrity of any other State or country' (paragraph 8).

The recognition of a 'right' to self-determination in a text adopted by consensus was a major step in the codification process. Since the adoption of Resolution 2625 (XXV), there has been no challenge of the legal character of the principle. The ICJ has rightly considered that such right was already binding as a matter of general international law in the 1960s, as will be discussed below.[81] The Friendly Relations Declaration largely contributed to the determination of its content.

Two issues of particular importance concern the wider relations between, on the one hand, the right to self-determination and, on the other hand, the prohibition of the use of force and the principle of territorial integrity. The first issue (use of force) is addressed in paragraph 5, whereas the second is covered by paragraphs 6 and 7. Paragraph 8 is relevant for both issues. The issue of secession and, more generally, the relations between self-determination and territorial integrity will be discussed in some detail in sections V.2.3 and 2.4 below. Regarding the use of force, paragraph 5 recognises that forcible actions to prevent peoples exercising their right to self-determination are illegal. However, the final text does not recognise the doctrine of 'self-defence against colonialism', fiercely opposed by the West.[82] According to paragraph 5, peoples are 'entitled to seek and to receive support', and this support cannot be considered as a breach of the principle of non-intervention.[83] Western powers required the addition of the formula 'in accordance with the purposes and principles of the Charter', in order to prevent reliance on paragraph 5 to justify the 'export of revolution', a doctrine in vogue during the 1960s after the triumph of Castro's revolution in Cuba.[84] After the adoption of Resolution 2625 (XXV), it was uncontested that what were popularly called 'wars of national liberation' against colonialism and alien domination had an international character and were not mere internal conflicts. Seven years later, the Additional Protocol I to the four 1949 Geneva Conventions confirmed this categorisation, with an explicit reference to the Friendly Relations Declaration.[85]

V SELF-DETERMINATION IN INTERNATIONAL LAW

1 *Legal Basis and Hierarchy of the Norm*

After the inclusion of self-determination in the UN Charter, the position of some colonial powers and some authors was still to consider the principle a mere aspiration without implying

[81] *Chagos* (n 42), para 152.
[82] See the chapter by O Corten in this volume.
[83] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America)*, Merits, Judgment, ICJ Reports 1986, 108, para 206.
[84] Rosenstock (n 80) 733.
[85] Art 1(4) reads: 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'.

legal obligations.[86] This position has reached the present day in some more refined variations. During the proceedings relating to the advisory opinion in *Chagos* before the ICJ, the United Kingdom (the colonial power) and the United States (the beneficiary of the lease over the Chagos occupied territory) argued that decolonisation was a political rather than a legal process,[87] that the right to self-determination had not yet become a customary norm at the time of the separation of the Chagos island from the territory of the colony in 1965[88] and, for that reason, the UK was not bound to respect the territorial integrity of Mauritius.[89] Indeed, exactly the same arguments had been invoked by the UK during the Chagos Marine Protected Area Arbitration.[90] These arguments called for a clarification by the ICJ of the moment in time when the right to self-determination had entered general international law.

The Court began by recalling Article 1(2) and Chapter XI (particularly Article 73) of the UN Charter and premised its analysis on the observation that 'the Charter included provisions that would enable non-self-governing territories ultimately to govern themselves'. Such was the context in which 'the Court must ascertain when the right to self-determination crystallized as a customary rule binding on all States'.[91] Thereafter, in a few paragraphs that provide both a historical survey of the most relevant instruments and an analysis of their content, the Court observed that Resolution 1514 (XV) of 1960 was 'declaratory' as regards 'the right to self-determination as a customary norm'.[92] The relevant paragraphs read as follows:

> The adoption of resolution 1514 (XV) of 14 December 1960 represents a defining moment in the consolidation of State practice on decolonization. Prior to that resolution, the General Assembly had affirmed on several occasions the right to self-determination (resolutions 637 (VII) of 16 December 1952, 738 (VIII) of 28 November 1953 and 1188 (XII) of 11 December 1957) and a number of non-self-governing territories had acceded to independence. General Assembly resolution 1514 (XV) clarifies the content and scope of the right to self-determination. The Court notes that the decolonization process accelerated in 1960, with 18 countries, including 17 in Africa, gaining independence. During the 1960s, the peoples of an additional 28 non-self-governing-territories exercised their right to self-determination and achieved independence. In the Court's view, there is a clear relationship between resolution 1514 (XV) and the process of decolonization following its adoption … The Court considers that, although resolution 1514 (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption.[93]

Thereafter, the Court observed that common Article 1 to the two 1966 Covenants on Human Rights 'reaffirm[ed]' this right and, importantly for present purposes, that 'the nature and scope of the right to self-determination of peoples … were reiterated' in the Friendly

[86] Among the authors who did not consider self-determination as a legal right, see Boris Mirkine-Guetzevitch, 'Quelques problèmes de la mise en œuvre de la Déclaration Universelle des Droits de l'Homme' (1953-II) 83 *Recueil des Cours* 351; Ivor Jennings, *The Approach to Self-Government* (Cambridge University Press, 1956) 56; Gerald Fitzmaurice, 'The Future of the International Legal System in the Circumstances of Today' in Institut du droit international (ed), *Livre du Centenaire 1873–1973: Evolution et perspectives du droit international* (S Karger, 1973) 233; Wolfgang Friedmann, 'General Course in Public International Law' (1969–II) 127 *Recueil des Cours* 187.

[87] UK, Written Observations, para 4.4.

[88] US, Written Statement, paras 4.46, 4.61 and 4.64, Written Observations, para 3.27; UK, Written Statement, para 8.65, Written Observations, paras 4.18–4.28.

[89] UK, Written Statement, paras 8.55–8.58, Written Observations, para 4.48.

[90] Chagos Marine Protected Area Arbitration, UK, Counter-Memorial, paras 7.14, 7.17 and 7.25. The arbitral award did not discuss this issue. See https://pca-cpa.org/en/cases/11/.

[91] *Chagos* (n 42), para 148.

[92] ibid, para 152.

[93] ibid, paras 150, 152.

Relations Declaration, which further recognised this right as one of the 'basic principles of international law'.[94]

Regarding the hierarchy of the right to self-determination, there is substantial authority to conclude that this right both generates correlative obligations that must be respected by all States (*erga omnes*) and is a peremptory norm of international law.[95] The terminology used for such recognition has varied, however. In the *East Timor* case, the ICJ famously observed that '[t]he assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable' and that self-determination is 'one of the essential principles of contemporary international law'.[96] Also in connection with East Timor, both the UN General Assembly and the Security Council has recognised 'the inalienable right of the people of Portuguese Timor to self-determination', calling upon all States to respect it.[97] While in the *Chagos* advisory opinion the Court did not pronounce about the *jus cogens* character of self-determination, it made explicit the point of the legal interest of all States in the respect of this right and their obligation to co-operate to put it into effect:

> Since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right (see *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; see also *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). The Court considers that, while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect.[98]

Of particular note, the Court referred to the Friendly Relations Declaration (specifically to paragraph 2 of the statement on the right to self-determination) to flesh out the obligations arising for all States.[99]

Today, there can be no doubt about the peremptory norm character of the right to self-determination.[100] The establishment of protectorates or colonial domination in today's world under the cover of the law is simply unthinkable.

2 Scope of the Norm

2.1 A 'Principle' and a 'Right'

As early as 1952, the UN General Assembly decided to include the 'right' of peoples to self-determination in the future Covenant (or Covenants) on Human Rights and explicitly mentioned that self-determination was applicable to non-self-governing territories.[101] Thereafter, the

[94] ibid, paras 154–55.

[95] Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*), Dire Tladi, UN Doc A/CN.4/727, paras 108–15 (providing a comprehensive review of international and domestic practice).

[96] *East Timor* (n 1), para 29. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (n 1), paras 88, 149 and 155.

[97] See eg UNGA Res 3485 (XXX) (12 December 1975), UNSC Res 384 (1975), preamble and para 1.

[98] *Chagos* (n 42), para 180. In their declarations and opinions joined to the advisory opinions, the following judges expressly recognised the *jus cogens* character of the right of peoples to self-determination: Cançado Trindade and Robinson (joint declaration, para 8; Sebutinde (separate opinion, para 31), Robinson (separate opinion, paras 70–82).

[99] ibid, para 180.

[100] See Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*), Dire Tladi, UN Doc A/CN.4/727, 48–52, paras 108–15.

[101] UNGA Res 545 (VI) (5 February 1952) (42–7–5).

recognition of a 'right', not merely an 'aspirational principle', followed two parallel and interconnected pathways.

One culminated with the adoption in December 1960 of Resolution 1514 (XV). Paragraph 2 of the Declaration contains what has become the canonical formulation of the principle, both as regard the express recognition of a 'right' and the holders and contents of it: 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' Paragraph 1 gives the context of such right, namely the outlawing of colonialism: 'The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.' As noted earlier, the ICJ has recognised that it is in this formulation that the customary norm was 'declared' by Resolution 1514 (XV).

The second pathway led to the adoption of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966.[102] Article 1 common of the two Covenants reads:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Two traditional colonial powers, the United Kingdom and France, made reservations to this provision on the implicit grounds that the recognition of such right was not necessarily in conformity with the UN Charter itself. According to these two States, in case of contradiction between what is stipulated in Article 1 of the Covenants and Articles 1(2) and 73 of the Charter, the obligations under the Charter would prevail.[103] That amounted to an attempt both to play down the extent to which self-determination was recognised in the Charter and to make such restrictive interpretation prevail over common Article 1 to the two 1966 Covenants. The argument resurfaced in the context of the advisory proceedings relating to the Chagos Archipelago, but the ICJ rejected both premises, reasserting that self-determination is indeed a 'right' and it has been so under customary international as declared by Resolution 1514 (XV).[104]

[102] ICCPR, UNGA Res 2200A (XXI) (16 December 1966); ICESCR, UNGA Res 2200A (XXI) (16 December 1966).

[103] British reservation: 'First the Government of the United Kingdom declare their understanding that, by virtue of Article 103 of the Charter of the United Nations, in the event of any conflict between their obligations under Article 1 of the Covenant and their obligations under the Charter (in particular, under Articles 1, 2 and 73 thereof) their obligations under the Charter shall prevail.' French reservation: 'The Government of the Republic considers that, in accordance with Article 103 of the Charter of the United Nations, in case of conflict between its obligations under the Covenant and its obligations under the Charter (esp Articles 1 and 2 thereof), its obligations under the Charter will prevail.' https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec.

[104] *Chagos* (n 42), paras 152–54 (for the argument, see the Written Statement of the United Kingdom, 15 February 2018, paras 8.71–8.75).

The fact that the two Human Rights Covenants of 1966 begin with a common article that enshrines the right of self-determination of peoples does not mean that such right is an individual right, as the Human Rights Committee has observed on different occasions, rejecting requests from individuals who claimed to be victims of a violation of the right to self-determination.[105] By definition, it is a 'collective' right. Individuals participate as such in the exercise of this right together with the other members of the community to which he or she belongs. At the same time, in its General Comment on the first Article of the ICCPR, the Human Rights Committee noted that the realisation of the right to self-determination:

> is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as Articles 1 apart from and before all the other rights in the two Covenants.[106]

Thus, despite attempts by colonial powers to cast doubts on the recognition of a 'right',[107] such recognition is no longer in question today:

> The recognition of a right of 'peoples' to self-determination is, of course, not the end of the matter. Different views have been expounded regarding the content and the holders of this right, with some terminological confusion arising from the use of the term 'people' or 'peoples' to refer to different collective subjects with different rights.

2.2 *Content of the Right*

Opinion No. 2 of the Arbitration Commission established in the framework of the Peace Conference for Yugoslavia (the 'Badinter Commission') stated that 'international law as it currently stands does not spell out all the implications of the right to self-determination'.[108] It is a rather surprising statement coming from an organ whose function was to determine the applicable law to the different aspects of the collapse of the former Yugoslavia.

Despite its abstraction, the right of peoples to self-determination has a content and the interpreter can (and must, if it is a judge or arbitrator or someone performing similar functions) draw the current legal consequences. Of course, the legal scope of the principle as it exists today may or may not please the interpreter or the person who has to apply it, but this is a question of *lege ferendae*. Its salient features can be summarised by saying that (i) the holders of the right of self-determination are the 'peoples', (ii) that, as noted earlier, they can invoke it *erga omnes*, (iii) that the principle is a peremptory norm of international law (*jus cogens*), (iv) that it is applicable everywhere and not only in cases of colonial or foreign domination and (v) that it includes the right of the people concerned to determine their internal and external (or international) political status in complete freedom.

In its 'internal' aspect, the principle implies the freedom for the people to choose their form of government, their economic and social system and the way to freely pursue their economic, social and cultural development. In its 'external' aspect, it grants the freedom to decide their

[105] See *Kitok* v *Sweden* (CCPR/C/33/D/197/1985); *RL* v *Canada* (CCPR/C/43/D/358/1989).

[106] CCPR General Comment No 12 on the Right to Self-Determination (Article 1 of the Covenant), 13 March 1984, HRI/GEN/1/Rev.9 (vol I).

[107] The British position was summarised as follows: 'it was not before the 1970s, at the earliest, that the United Kingdom accepted that it could be said that the principle of self-determination had become a right under general international law' (Counter-Memorial of the United Kingdom, *Chagos Marine Protected Area Arbitration (Mauritius* v *UK)*, Perm Ct Arb, 15 July 2013, para 7.17.

[108] Conference on Yugoslavia, Arbitration Commission, Opinion No 2, 11 January 1992, (1992) 31 ILM 1488, 1498.

international political status, be it independence, free association, integration with another State or any other status. These two aspects are mere manifestations of one indivisible norm, and therefore they cannot be severed from one another. There is no legal basis, whether in treaty or customary law, as reflected by declaratory resolutions, to support the existence of two separate categories or 'rights' to self-determination, one broader than the other. Paragraph 4 of the statement of self-determination in the Friendly Relations Declaration leaves no ambiguity on this point:

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

The same is true of earlier statements. Both paragraph 2 of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and common Article 1 of the two 1966 Covenants on Human Rights use the same wording to state that 'by virtue of that right [all peoples] freely determine their political status', without any qualification of the scope of the right, which is one and indivisible.

The following sections discuss in some detail the relations between the right to self-determination and territorial sovereignty and then move to the examination of the meanings of 'people'.

2.3 *Implications for Territorial Sovereignty*

The principle of self-determination produces two main legal effects on territorial sovereignty. First, it extinguishes territorial titles of colonial powers, if they possessed it. For example, if colonial powers possessed sovereignty over their colonies, it extinguishes their sovereignty, even if their titles were validly acquired in the past. By virtue of the second rule of intertemporal law, colonial powers are recognised as mere administering States of the colonial territories that they still maintain under their control. Second, given the establishment of self-determination as a fundamental principle of international law, peoples that have not yet achieved statehood are also holders of territorial sovereignty. Because, by virtue of their right to self-determination, colonial peoples and peoples under military occupation or under foreign domination possess the right to determine their own status; as a corollary, they also possess the right to dispose of their territory.

One important implication is that their territory cannot be dismembered by the colonial power. As noted earlier, that argument was advanced by the UK in the advisory proceedings relating to the Chagos islands. Because the right was allegedly not yet consecrated, the dismemberment was an admissible reorganisation of the territories and Mauritius would only emerge as a sovereign State within the redesigned boundaries of the colonial power. The ICJ rejected this argument on the grounds that Resolution 1514(XV) protects territories from dismemberment in its paragraph 6, as does the Friendly Relations Declaration in its sixth paragraph.

The UK also invoked the principle of *uti possidetis juris*, which would guarantee territorial integrity of the newly independent State only to the extent of its territory at the time of independence. The question is whether, under this principle, a dismemberment by the colonial power made before independence would be possible and binding as regards the scope of the territory of a newly independent State. The examples furnished by the UK concerned cases of creation of two different colonial units from a single one, or the transfer of territory from one colonial unit to another. The situation of Chagos was completely different. The archipelago was separated from Mauritius with the purpose of being maintained under colonial rule.

The sixth paragraph of the Declaration clarifies the implications of self-determination for territorial sovereignty on this point by stating that:

> The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

In other words, the colonial power cannot claim that its sovereignty over its metropolitan territory extends to the territory of its colonies: the territorial status of the latter is different. This status is of international concern and its main purpose is to allow the exercise of the right to self-determination by the peoples concerned, with the aim of putting an end to colonialism in all its forms and manifestations as early as possible.

2.4 *Self-Determination and* Uti Possidetis Juris

In *Burkina Faso/Mali*, the ICJ envisaged the possibility of conflict between *uti possidetis* and self-determination but disregarded it in the following manner:

> At first sight this principle conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.[109]

For its part, the Badinter Commission categorically asserted that the right to self-determination must not involve changes to existing boundaries at the time of independence (*uti possidetis juris*), except where States concerned agreed otherwise.[110]

However, it was advanced at the doctrinal level that self-determination overrides *uti possidetis juris*. The primacy of self-determination would be due to the fact that it is a supervening peremptory norm, to which another rule not having this character cannot be validly opposed.[111] Indeed, there is no need to resort to this hierarchical approach. Self-determination addresses the right to create a State (or to freely choose a specific connection with an existing one), while *uti possidetis juris* defines the territorial extension of the new entity. If there are existing boundaries, these are the boundaries of the new State. If the boundaries are subject to dispute, this is the situation inherited by the newly independent State. Insofar as there are no prior established boundaries, because the new State is a completely new entity without any prior administrative antecedent, *uti possidetis juris* has no role to play. As will be seen below, if one follows a 'territorial approach' to the identification of the holders of the right to self-determination (the 'peoples'), there is, in fact, no room for any contradiction at all.

[109] *Burkina Faso/Mali*, ICJ Reports 1986, para 25.
[110] Self-Determination, Arbitration Commission of the Peace Conference on Yugoslavia, Opinion No 2, 11 January 1992.
[111] G Naldi, 'The Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali): *Uti Possidetis* in an African Perspective' (1987) 36 *International & Comparative Law Quarterly* 900 and 902–3.

2.5 *Secession*

The inclusion of self-determination in international law raised the question of its link with secession. As seen above, when this right was incorporated in the Charter and in later deliberations, the common view was that self-determination did not include a right to secession.

The term secession refers to the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter. Secession can also take the form of the separation of part of the territory of a State in order to be incorporated as part of another State, without the consent of the former.[112]

In the early nineteenth century, when the Spanish colonies in the American continent declared independence, there was neither a legal right to self-determination nor an international law of 'decolonisation'. Therefore, the process took the form of secession and the existence of the newly independent States was a matter of fact and of recognition by the other members of the more limited community of States of the time.

This legal approach drastically changed in the second half of the twentieth century, during the UN era. Decolonisation, the most important means of creation of new States during the second half of the twentieth century, was not viewed by the international legal order as a case of secession. One of the reasons for this is summarised in paragraph 6 of the Friendly Relations Declaration, namely the separate status of the territorial basis of the non-self-governing territory. Nevertheless, secession remained – actually or potentially – another factual possibility as a means of creating States in the contemporary world.

The end of the Cold War brought about new secessionist aspirations and the strengthening and re-awakening of existing or dormant separatist claims in nearly all regions of the world. These concerned mostly the territory of the former USSR and the Socialist Federal Republic of Yugoslavia in the 1990s, and have continued with varying degrees of success. Notably, when some of these attempts at creating new States were successful, they occurred with the consent of the parent State.

The separation of Eritrea from Ethiopia (1993) led to the emergence of important disputes and a bloody armed conflict. Unilateral declarations of independence were issued with respect to Kosovo in February 2008, and regarding Southern Ossetia and Abkhazia some months later. In January 2011, in a referendum held in South Sudan on the basis of the Peace Agreement of 2005 between the Sudanese government and the Sudan People's Liberation Movement/Army, the overwhelming majority of participants decided in favour of the creation of a new State,[113] which came into being on 9 July 2011, and was the last member to be admitted to the United Nations.[114] In the context of the Ukrainian crisis, Crimea and the city of Sebastopol were incorporated into Russia after having declared 'independence', and self-proclaimed independent entities appeared in the eastern part of the country in 2014. Referenda on independence were held in Quebec (1995) and Scotland (2014), with the participants having opted for keeping these territories within their respective States. Another referendum took place in New Caledonia at the end of 2018, in which the population decided to maintain the territory within the French

[112] When a new State is formed from part of the territory of another State with its consent, it is a situation of 'devolution' rather than 'secession'. This presupposes an agreement between both entities and, as such, is not a source of conflict, at least with regard to the existence of the new State itself.

[113] The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan's People's Liberation Movement/Sudan People's Liberation Army is available on the website of the United Nations Mission in Sudan at http://unmis.unmissions.org. The results of the referendum of 9 January 2011 are discussed in the Report of the Secretary-General on the Sudan, 12 April 2011, UN Doc D/2011/239.

[114] UNGA Res 65/308 (14 July 2011).

Republic. Other controversial referenda were organised unilaterally in Iraqi Kurdistan and in Catalonia (Spain) in 2017.

The question of secession was brought before the ICJ in connection with the unilateral declaration of independence of Kosovo. Yet, the advisory opinion rendered by the Court avoids the core issue and focuses, instead, on the aspirational character of declarations of independence and the fact that – in a controversial assertion contradicted by clear evidence – the authors of the Declaration of Independence were not the provisional institutions of self-government created on the basis of Resolution 1244 (1999) of the Security Council.[115]

The ambiguity of the Court has been exploited in other circumstances in which secession has been at stake. The Russian annexation of Crimea has been justified by Russia as a secession followed by integration with Russia on the grounds that international law does not prohibit unilateral declarations of independence.[116]

The question, of course, is not whether a specific rule prohibiting secession exists. The matter cannot be assessed in a vacuum and it remains governed by the fundamental principles of international law, including the prohibition of the use of force, respect for sovereign equality and territorial integrity, as well as the applicability or not of the right of peoples to self-determination. By focusing on declarations of independence as mere expressions of will not prohibited by international law, the *Kosovo* advisory opinion indirectly recognised that the right of peoples to self-determination was not applicable to the case.

2.6 *The Doctrine of Remedial Secession Based on the 'Saving Clause'*

The idea that a minority within a State that is victim of grave breaches of human rights is entitled to secede as a remedy of last resort has been discussed for a long while. It was officially invoked by some States and strongly rejected by others during the Kosovo advisory proceedings.[117]

To support the doctrine of 'remedial secession', an *a contrario* reading of paragraph 7 of the formulation in the Friendly Relations Declaration is advanced. The territorial integrity of States would be preserved insofar as the State concerned conducts itself 'in compliance with the principle of equal rights and self-determination' and thus possessing 'a government representing the whole people belonging to the territory without distinction as to race, creed or colour'. According to this doctrine, if the minority is oppressed and the government of the State does not include its representation, then the minority will be entitled to separate since the territorial integrity of the State would no longer be guaranteed.

As mentioned above, the *travaux préparatoires* do not allow such a conclusion to be reached. A careful reading of the seventh paragraph within its context and in the light of the object and purpose of the Declaration also leads to the disregarding of this doctrine. The object and purpose of paragraph 7 was to make clear that self-determination would not run against the

[115] *Kosovo*, Advisory Opinion (n 1), para 105. For a comment, see Marcelo Kohen and Katherine Del Mar, 'The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of "Independence from International Law"?' (2011) 24(1) *Leiden Journal of International Law* 109, 114–18.

[116] Vladimir Putin, Address of the President of the Russian Federation to State Duma deputies, Federation Council members, heads of Russian regions and civil society representatives in the Kremlin, 18 March 2014, http://en.kremlin.ru/events/president/news/20603.

[117] Unilateral Declaration of Independence of Kosovo, Finland, Written Statement, 4–5, paras 9–10; Ireland, Written Statement, 2, 8–10, paras 27–32; Poland, Written Statement, 26, para 6.10; United Kingdom, Written Statement, 92 (however, in its Written Comments, 5–6, para 10, the United Kingdom considers that the Court should not apply this concept in this case); *Contra*: Serbia, Written Statement, 214–30, paras 589–625, Written Comments, 142–49, paras 339–59; Argentina, Written Statement, 34, paras 85–86; Cyprus, Written Statement, 36–38, paras 140–47; Spain, Written Comments, 5–6, para 8; Iran, Written Statement, 6–7, para 4.1; Romania, Written Statement, 42, para 147 and 44, para 156; Russia, Written Statement, 36–38, paras 97–103; Slovakia, Written Statement, para 28.

territorial integrity of existing States. It is for this reason that it is called the 'safeguard' or the 'saving clause'. The historical context in which the Declaration was adopted cannot be neglected either. In the decade that ended with its adoption, the United Nations actively opposed Katangese separatism in the Congo as well as Biafra's attempted secession from Nigeria. Just some months before the adoption of the Declaration, Secretary-General U Thant made his famous statement:

> As far as the question of secession of a particular section of a State is concerned, the United Nations attitude is unequivocable. As an International Organization, the United Nations has never accepted and does not accept and I do not believe will ever accept the principle of secession of a part of its member States.[118]

The text of the paragraph is indeed an interpretation of the six foregoing paragraphs, nothing in them 'must be understood as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'. The addressees of this paragraph are the actual or potential entities or groups claiming to exercise the right to self-determination. The end of the paragraph recalls nevertheless that States so protected must conduct themselves in compliance with the principle and consequently their government must represent the whole people belonging to the territory without distinction. This is a clear reference to States in which policies such as apartheid – a main concern at that time – were contrary to the principle of self-determination. It was not concerned with secession at all. This interpretation is also reinforced by the eighth and last paragraph, which is a repetition of paragraph 6 of Resolution 1514 (XV) and its addressees are States.

In the *Kosovo* advisory opinion the ICJ decided not to take an explicit stance on the matter, although it ascertained that there were 'radically different views' among those having participated in the proceedings about a right to 'remedial secession'.[119]

3 *Holders of the Right to Self-Determination*

3.1 *The Legal Definition of 'Peoples'*

At the end of the day, the crucial aspect of the entire question of self-determination lies in determining who holds this right or, in other words, what is meant by 'peoples' in the sense of international law. The legal notion of 'people' may or may not coincide with any sociological ones. As a matter of course, it cannot simply adopt the definition any specific group gives itself. No legal system gives to its subject the possibility to decide for themselves whether they are subjects or not and in which category. It is the legal system itself that determines whether or not one is a subject and what one's rights and obligations may be. Hence, 'peoples' as holders of the right to self-determination in international law are neither defined through self-qualification nor through exclusively socio-cultural criteria.

The first conclusion then is that not every population inhabiting a territory constitutes a 'people' from this perspective. The Court reflected this basic premise in its *Western Sahara* and *Chagos* advisory opinions:

> [t]he validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly

[118] (1970) 7 *UN Monthly Chronicle* 36.
[119] *Kosovo*, Advisory Opinion (n 1), para 82.

> has dispensed with the requirement of consulting the inhabitants of a given territory. *Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self-determination* or on the conviction that a consultation was totally unnecessary, in view of special circumstances.[120]

International law distinguishes different types of human communities with different rights. 'Peoples', 'minorities'[121] and 'indigenous peoples'[122] are three legal categories whose existence in a given territory implies different consequences as to the possibility to decide about territorial sovereignty. Only 'peoples', in the international legal sense of the word, are holders of the right to self-determination. As an example, the ICJ's *Wall* advisory opinion, while discussing the applicability of the principle to the issue, noted that as regards the right of self-determination, 'the existence of a Palestinian "people" is no longer an issue'.[123]

National, religious, linguistic and other minorities enjoy their specific rights, which do not include the right to self-determination. If the opposite were true (i.e. if minorities were 'peoples' entitled to self-determination), there would be no need to make this legal distinction. It is worth mentioning the commentary to Article 27 of the ICCPR (related to individual belonging to minorities) made by the Human Rights Committee in this regard:

> 3.1. The Covenant draws a distinction between the right to self- determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part 1) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol.
>
> 3.2. The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party.[124]

The fact that there is no explicit definition of 'peoples' in any international instrument must not detract the interpreter, both practitioners and scholars, from the identification of the holder of a recognised right in international law. A look at the relevant instruments and practice followed allows such right-holders to be identified. In order to determine who is the holder of the right to self-determination, international law follows a 'territorial approach'. Undoubtedly, the right of self-determination applies to peoples in non-self-governing territories, including colonies,[125] mandates or trust territories recognised as such by the relevant international organ.[126] Still in these cases, it is for the relevant supervisory organ to recognise the existence (or not) of a people or even a plurality of them in the territory concerned. Beyond the decolonisation context,

[120] *Western Sahara*, Advisory Opinion (n 36) 12, 33, para 59 (16 October); *Chagos* (n 42), Advisory Opinion, para 158 (emphasis added).

[121] See Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; European Framework Convention for the Protection of National Minorities, Council of Europe, UNGA Res 47/135 (10 November 1994).

[122] See UN Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007).

[123] *Construction of a Wall on Occupied Palestinian Territory*, Advisory opinion (n 1), para 118.

[124] CCPR General Comment No 23 on the Rights of Minorities (Article 27 of the Covenant) CCPR/C/21/Rev.1/Add.5 (1994).

[125] The definition of non-self-governing territories given in principle IV of UNGA Res 1541 (XV) (15 December 1960) is normally used to define peoples subject to colonial domination: 'a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it'. The primary criterion is of a territorial nature, but ethno-cultural considerations are also taken into account, particularly to avoid including in the definition the own populations exported by the colonial power to the colonial territory.

[126] For a consistent view see Bernt Elsner, *Die Bedeutung des Volkes im Völkerrecht. Unter besonderer Berücksichtigung der historischen Entwicklung und der Praxis des Selbstbestimmungsrechts der Völker* (Duncker & Humblot, 2000).

the notion of a people applies to the entire population inhabiting an independent State, even when there are minorities within it. The exception to this is when the State itself recognises that it is composed of several peoples entitled to exercise their right of self-determination. Some examples include the former Yugoslavia, Serbia-Montenegro, Saint-Kitts and Nevis, Ethiopia and Uzbekistan.[127] Such recognition entitles these peoples to exercise a right to self-determination.

In addition, there are also cases in which human communities that were not considered as holders of the right to self-determination succeeded in creating new States. This was the case in Bangladesh and South Sudan. It was then their factual capacity to create a sovereign State that transformed these communities in 'peoples'. It is to be noticed that in the former case the recognition of the parent State came later, whereas in the latter case it came earlier, allowing the community to decide upon the creation of a new State. In its *Kosovo* advisory opinion, the ICJ noticed that, if many States were created during the second half of the twentieth century as a result of the exercise of the right to self-determination, there were other 'declarations of independence' outside of this context.[128]

At first sight, the territorial approach may appear to put more emphasis on geography than on the human factor. In *Western Sahara*, Judge Dillard wrote that 'it is for the people to determine the destiny of the territory and not the territory the destiny of the people'.[129] This assertion sounds sympathetic. However, as Judge Rosalyn Higgins commented in her Hague lectures, the territorial question must come first since until it is determined where territorial sovereignty lies, it is impossible to see if the inhabitants have a right of self-determination.[130] Indeed, it is impossible to define a 'people' in the international legal sense without a prior specific determination of its spatial scope.

The definition of 'people' in international law then is a legal one and practice in the last half-century shows that the key criterion is the territorial basis. It is the territory which defines the 'people' in legal terms rather than the other way around. Neither objective conceptions of 'peoples' (based on ethnic, religious, linguistic and other considerations) nor subjective ones (based on the 'self-qualification' of a group as a people) or any combination thereof provide clear guidance as to the definition of peoples in international legal practice. These different elements can of course be taken into account, but they are not decisive. It is on the basis of the territorial approach that the inhabitants of Taiwan, Hong Kong or Macau have not been considered a separate people. All these populations are technically part of the Chinese people. Similarly, the population of Mayotte, an island which is part of the Comoros Islands, is only a component of the Comorian people, despite its declared will to be considered as French.[131] Similarly, self-determination has not been applied to the inhabitants of the Falkland/Malvinas Islands by the UN General Assembly and its Decolonization Committee.[132] The *Chagos* advisory opinion also

[127] Constitution of Ethiopia, Art 47; Constitution of Saint Kitts and Nevis, Art 113; Constitution of Uzbekistan, Art 74; Constitution of Serbia-Montenegro, Art 60. In the latter case, Montenegro effectively exercised its right to self-determination and became independent in 2006 following a referendum.

[128] *Kosovo*, Advisory Opinion (n 1), para 79.

[129] *Western Sahara*, Advisory Opinion (n 36) 122.

[130] Rosalyn Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law' (1991) 230 *Recueil des Cours* 174.

[131] See UNGA Res 3385 (XXX) (12 November 1975), in which the Comoros is admitted as a member of the United Nations and which explicitly states that the four islands are part of the archipelago, and Res 32/7 (1 November 1977), on the 'Question of the Comorian island of Mayotte'.

[132] See among others UNGA Resolutions 2065 (XX) (16 December 1965), 3160 (XXVIII) (14 December 1973), 31/49 (1 December 1976), 37/9 (4 November 1982) and 38/12 (16 November 1983). The UK amendment project of what became Res 40/21 (27 November 1985), which referred to the applicability of the right to self-determination to the

offers an important insight in this regard: the people entitled to self-determination considered for the ICJ analysis were the Mauritian people, which includes the inhabitants of the Chagos Archipelago, not the latter separately.[133]

In this regard, international recognition by the relevant organ is much more important, even decisive, than the recognition of new States by their peers. The UN practice on decolonisation is, indeed, decisive. An example is the position of the UN General Assembly on the creation of two different States in the former Palestine, due to the recognition of two different peoples.[134] By contrast, the absence of a recognised separate people in the Falkland/Malvinas has led the General Assembly to recommend an end to this colonial situation through the settlement of the sovereignty dispute between Argentina and the United Kingdom, just taking into account the 'interests' of the population but not their 'will'.[135] This analysis is confirmed by instances in which some States have authorised the holding of referenda in parts of their territory to determine whether this territory will become independent. The holding of these referenda is the product of the decision of the State concerned, and not the result of an obligation imposed by international law. It is a matter that international law leaves to the discretion of the domestic law of States.

3.2 *Other 'Peoples' and Other 'Rights'*

The fact that some human communities that are not recognised as peoples under international law do not possess a right to decide the fate of the territory they inhabit does not mean that they do not possess other important collective rights. Certain populations within existing States, such as 'indigenous peoples', 'tribal peoples' and 'first nations' are holders of collective rights recognised by instruments such as the African Charter of Human and Peoples' Rights,[136] the International Labour Organization (ILO) 1989 Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries,[137] or the 2007 UN Declaration on the Rights of Indigenous Peoples.[138]

Yet, none of these instruments clearly confer a right to self-determination with the same scope as the one discussed so far on these other groups. Article 1(3) of the ILO Convention No. 69 expressly states that 'The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.' Thus, the Convention preserves the understanding of the right to self-determination of peoples developed under the aegis of UN practice.

The situation of Article 20 of the African Charter, although more complex, does not question the conclusion reached in the previous section of this chapter. Article 20 of the African Charter states:

> 1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status

inhabitants of the islands, was rejected by the UN General Assembly (see Doc A/40/L.20 of 22 November 1985. See also (1985) 56 *British Yearbook of International Law* 402–6 and (1985) 31 *Annuaire Français de Droit International* 560). For the Decolonization Committee, see the resolution adopted on 21 June 2018: A/AC.109/2018/L.8.

[133] Only two judges expressed a different view: see the declaration by Judge Abraham and the separate opinion of Judge Gaja, para 6.

[134] UNGA Res 181 (II) (29 November 1947).

[135] See n 132.

[136] African Charter of Human and Peoples' Rights, OAU, 27 June 1981.

[137] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO C169, 27 June 1989.

[138] UN Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007).

and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

The specific content of the right to self-determination in this provision does not mention 'independence' as a possible outcome, although that possibility is implicit in the free determination of their political status (paragraph 1) and right to 'free themselves' or 'to assistance . . . in their liberation struggle' (paragraphs 2 and 3). What remains undefined is the term 'peoples'. One prominent commentator has noted, in this regard, that this term 'varies in nature according to the right which is to be implemented'.[139] In *Mgwanga Gunme* v. *Cameroon*, the African Commission observed that the term had been deliberately left open so as to afford flexibility in the subsequent implementation of the African Charter.[140] In this context, the complexity comes from the use of the term 'peoples' and the term 'rights' to refer to different realities as explained by the African Court in the *Ogiek* case, although with some lack of clarity:

> It is generally accepted that, in the context of the struggle against foreign domination in all its forms, the Charter primarily targets the peoples comprising the populations of the countries struggling to attain independence and national sovereignty . . .
>
> In the circumstances, the question is whether the notion 'peoples' used by the Charter covers not only the population as the constituent elements of the State, but also the ethnic groups or communities identified as forming part of the said population within a constituted State. In other words, the question that arises is whether the enjoyment of the rights unquestionably recognised for the constituent peoples of the population of a given State can be extended to include sub-state ethnic groups and communities that are part of that population . . .
>
> In the view of the Court, the answer to this question is in the affirmative, *provided such groups or communities do not call into question the sovereignty and territorial integrity of the State without the latter's consent*. It would in fact be difficult to understand that the States which are the authors of the Charter intended, for example, to automatically recognize for the ethnic groups and communities that constitute their population, the right to self-determination and independence guaranteed under Article 20(1) of the Charter, which in this case would amount to a veritable right to secession. On the other hand, nothing prevents other peoples' rights, such as the right to development (Article 22), the right to peace and security (Article 23) or the right to a healthy environment (Article 24) from being recognised, where necessary, specifically for the ethnic groups and communities that constitute the population of a State.[141]

Thus, the collective rights recognised in respect of 'other' peoples are also 'other' rights, not including the right to self-determination as understood in UN practice.

Similar considerations are applicable to the right to self-determination recognised in the preamble and Articles 3 and 4 of the 2007 UN Declaration on the Rights of Indigenous Peoples, which was perhaps the most controversial issue of the drafting process and possibly responsible for a

[139] Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Development* (Martinus Nijhoff, 2002) 211.
[140] Communication 266/03, *Kevin Mgwanga Gunme et al* v *Cameroon* (2009), para 169.
[141] *African Commission on Human and Peoples' Rights* v *Republic of Kenya (Ogiek case)*, ACtHPR App 006/2012, Judgment of 26 May 2017, paras 197–99 (emphasis added).

delay of ten years in its adoption.[142] Indeed, whereas Article 3 applies to 'indigenous peoples' the wording used in common Article 1 to the two 1966 Covenants on Human Rights, Article 4 immediately adds that:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Moreover, Article 46(1) of the Declaration clearly states that:

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or *construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States*. [emphasis added]

This language is familiar. It is taken from the saving clause (paragraph 7) in the formulation of self-determination in the Friendly Relations Declaration. Since the adoption of this Declaration, one can conclude that, together with peoples and minorities, a third legal category has been delineated with specific rights: that of indigenous peoples. If one follows the Declaration, they are holders of the right to self-determination, but only in its internal dimension.

4 *The 'Human Factor' and 'Self-Determination' in Territorial Disputes*

Outside the principle of self-determination, the human factor still plays an important role in territorial disputes today, not with regard to the fate of the territory, but with respect to the rights and obligations that must be applied and respected with regard to the inhabitants. In the *El Salvador/Honduras* case, the ICJ held that:

> The effect of the Chamber's Judgment will however not be that certain areas will 'become' part of Honduras; the Chamber's task is to declare what areas are, and what are not, already part of the one State and the other. If Salvadorians have settled in areas of Honduras, neither that fact, nor the consequences of the application of Honduran law to their properties, can affect the matter.[143]

But the Chamber also recognised that:

> [T]he situation may arise in some areas whereby a number of the nationals of the one Party will, following the delimitation of the disputed sectors, find themselves living in the territory of the other, and property rights apparently established under the laws of the one Party will be found to have been granted over land which is part of the territory of the other. The Chamber has every confidence that such measures as may be necessary to take into account of this situation will be framed and carried out by both Parties, in full respect for acquired rights, and in a humane and orderly manner.[144]

[142] See Marc Weller, 'Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23 and 46(1)' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 116.

[143] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, ICJ Reports 1992 351, 419, para 97 (11 September).

[144] ibid at para 66. In *Croatia/Slovenia*, the tribunal also noted that 'in some limited areas (such as the situations described in paragraphs 565 and 630) the course of the boundary, as it results from an application of the law, may not be considered the most practical boundary, whether for reasons of physical or human geography. For the avoidance of

Similarly, in the *Cameroon* v. *Nigeria* case, the nationals of the parties had occupied villages located on the other side of the boundary. The Court reaffirmed in this context that:

> [I]t has no power to modify a delimited boundary line, even in a case where a village previously situated on one side of the boundary has spread beyond it. It is instead up to the Parties to find a solution to any resultant problems, with a view to respecting the rights and interests of the local population.[145]

In the same case, the Court dismissed the relevance of services that Nigeria had provided to the inhabitants of the disputed territory. Although they could be seen as *effectivités*, these Nigerian actions came up against the established title of Cameroon over the disputed territory. In such circumstances, preference is to be given to the title.[146]

The human factor can also play a role in territorial disputes when equity *infra legem* is applicable. Faced with its duty to make a decision in circumstances in which sovereignty does not appear in a clear manner from the available evidence, a tribunal can choose a solution that better reflects the human factor. For example, in *Burkina Faso/Mali*, the ICJ divided the pools in the disputed area in such a way as to allow equal access to water in these arid regions.[147] In the *Frontier Dispute (Burkina Faso/Niger)*, the Court was also guided by such considerations when deciding the point at which the boundary line reaches the 'River Sirba at Bossebangou'. The Court observed that it was unclear whether the boundary line stopped at one or the other of the banks of the river or that the river was attributed in its entirety to one of the parties. As a result, the Court held that:

> In this regard, the Court notes that the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other. Accordingly, the Court concludes that, on the basis of the Arrêté, the endpoint of the frontier line in the region of Bossébangou is located in the River Sirba. This endpoint is more specifically situated on the median line because, in a non-navigable river with the characteristics of the Sirba, that line best meets the requirements of legal security inherent in the determination of a boundary.[148]

When a decision on territorial sovereignty subjects a group or a private person to the sovereignty of another State, there is a rebuttable presumption that vested rights acquired in good faith in the area – or at least the narrower category of 'traditional rights' – are not affected. After reviewing the relevant case law, the arbitral tribunal in the *Abyei* case reached the following conclusion:

> The jurisprudence of international courts and tribunals as well as international treaty practice lend additional support to the principle that, in the absence of an explicit prohibition to the contrary, the transfer of sovereignty in the context of boundary delimitation should not be construed to extinguish traditional rights to the use of land (or maritime resources).[149]

doubt, the Tribunal reiterates that, while the present Award fixes the boundary in such areas with binding effect (as the Parties have requested), the Award does not preclude the Parties from subsequently reaching agreement between themselves on practical arrangements concerning the boundary.' *Croatia/Slovenia Arbitration*, Award, Perm Ct Arb, 29 June 2017, 1, 114, para 357.

[145] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v *Nigeria: Equitorial Guinea intervening)*, Merits, ICJ Reports 2002, 303, 373–74, para 123 (10 October). See also 370, para 107.

[146] ibid 415, paras 222–23.

[147] *Frontier Dispute (Burkina Faso/Mali)*, Judgment (n 109) 554, para 150.

[148] *Frontier Dispute (Benin/Niger)*, Judgment, ICJ Reports 2005, 90, 85, para 101 (12 July).

[149] *Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, Award, Perm Ct Arb, 22 July 2009, RIAA, vol XXX, 145, para 263. *Concerning maritime delimitation, reference may be*

VI SELF-DETERMINATION AS A REVOLUTIONARY PRINCIPLE

In what became his last written contribution, the former President of the ICJ, the late Sir Robert Jennings, questioned the legal character of the principle of self-determination due to its easy manipulation in territorial matters:

> International lawyers have tended not to look for better ways of making policy territorial decisions but have instead tried to extend the legal 'modes'; as for example by the transformation of 'self-determination' from being a useful political notion, into a 'right' of 'self-determination', apparently enjoyed by 'peoples'. This circular and question-begging 'right' still calls for a political decision about what is a 'people' for this purpose, as indeed also what status they self-determine on a scale varying between independence and dependence. How much better it would have been to recognize that wise or right policy sometimes makes certain changes desirable and that there should therefore be a regular legal machinery for making changes on grounds of policy, rather than a 'right' that actually by the 'self' element puts a premium on successful violence.[150]

The ostensible manipulations by some States of the right to self-determination are well known,[151] as is the fact that any separatist movement within States claims to be the representative of 'the people' and that 'the people' are entitled to self-determination. However, these situations must not lead to the denial of the legal existence of this right. This is not the first time that a right is misconstrued and will certainly not be the last.

Self-determination has become a fundamental principle of international law. All relevant texts affirm that 'all peoples have the right to self-determination'. This clear assertion contradicts the view that only peoples subject to colonial, racist or foreign domination are beneficiaries of the right to self-determination. Peoples who are not in these situations also hold the same right. Situations of colonial, racist or foreign domination are simply flagrant cases of violations of the right of peoples to self-determination. The fact of not being deprived of the exercise of one's right does not mean that one is not – or no longer – a holder of the right concerned. General Assembly Resolution 56/141 on the 'Universal realization of the right of peoples to self-determination' is correct when it reaffirms, on the one hand, the right of peoples 'under colonial, foreign or alien occupation' and, on the other hand, that foreign military intervention and occupation are threatening to suppress, or have already suppressed, the right to self-determination of sovereign peoples and nations'.[152] There are people who have already achieved statehood and others who have not. Both categories, however, hold the same right of peoples to self-determination.

The interpretation of self-determination followed here is the one that conciliates the right of peoples and the equality of human beings within existing States, no matter their origin, language, religion or other differences. Other alleged 'contemporary' interpretations of the principle are rather the expression of atavistic approaches based on ethnic considerations or on the simplistic idea that the way to solve ethnic, regional or cultural problems within States is by their division. For the time being, international law does not follow this dangerous path, while at the same time favours the liberation of those 'peoples' whose exercise of the right to self-determination continues to be denied. It is in this sense that it can be categorised as a revolutionary principle, not an anarchical one.

made, with certain reservations, to the award in Maritime Delimitation Procedure (Eritrea/Yemen) (Second Stage of the Proceedings), Award, 1999, RIAA, vol XXII, 335, 357–8, paras 92 and 95 (17 December).

[150] Robert Y Jennings, 'The Imbalance of the International Law System' (2004) 6 *Forum de droit international* 127–28.

[151] See Marcelo Kohen, 'Sur quelques vicissitudes du droit des peuples à disposer d'eux-mêmes' in N Angelet, O Corten and P Klein (eds), *Droit du pouvoir, pouvoir du droit, Mélanges offerts à Jean Salmon* (Bruylant, 2007) 961–82.

[152] UNGA Res 56/141 (11 February 2002).

Annex ZN

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CHAPTER

8 General Principles and Constitutions as Sources of Human Rights Law

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Abstract

This article examines influence of general principles of law and constitutions in the formulation of human rights standards and in their interpretation and application by international courts, particularly the Universal Declaration of Human Rights (UDHR). It describes and compares the application and interpretation of human rights by the International Court of Justice (ICJ), the European and Inter-American Courts of Human Rights, and the Court of Justice of the European Union (CJEU). This article also highlights the fact that majority of human rights instruments and provisions subsequently adopted at the national and international levels have built upon the guarantees elaborated by the UDHR.

Keywords: human rights standards, general principles of law, constitutions, UDHR, international courts, ICJ, Courts of Human Rights, CJEU

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1. Introduction

ALTHOUGH the term ‘human rights’ is often understood as a Western concept, many of the basic values underlying human rights—reason, justice, the inherent dignity of human beings, and the need to secure their welfare—have long been current in other civilizations and cultures, as well. Important historic texts, some of which are discussed below and elsewhere in this volume, include the Code of Hammurabi, the Charter of Cyrus (Persia), the Hungarian Golden Bull, and the Magna Carta. Acceptance of the need for
p. 195 enforceable human rights guarantees is, however, of ↳ more recent vintage. The first real breakthrough occurred with the adoption of human rights declarations in the late eighteenth century and their subsequent inclusion in the constitutions of France and the United States. A number of developments in international law, including the concept of diplomatic protection, the emergence of humanitarian law, and a growing awareness of the need for protection of minorities, further promoted human rights ideals. The progress made in human rights protection prior to the end of the Second World War, however, is dwarfed by the explosion in human rights instruments and jurisprudence which has occurred since the creation of the United Nations in 1945. The adoption of the Universal Declaration of Human Rights (UDHR) in 1948 marked a turning point in international human rights protection due to its comprehensive content and wide geographic remit, and it has since been at the root of the development of human rights at international, regional, and national levels.

This chapter will examine the role general principles and constitutions played both in the formulation of human rights standards, principally in the UDHR, and in their interpretation and application by international courts.

2. Preliminary Comments on General Principles and Constitutions

The term ‘general principles’ is a familiar, though elusive, concept. Article 38 § 1(c) of the Statute of the International Court of Justice (ICJ) refers to ‘the general principles of law recognized by civilized nations’ as one of the four sources of international law to be applied by the court.[2] However, two immediate complications arise.

The first concerns the meaning of the phrase ‘general principles of law’ in this context. As Lammers commented in 1980: ‘Few things have in the past given rise to so much diversity of opinion as precisely the nature and function of these principles.’[3] The thirty years which have passed since this comment have done
p. 196 little to bring clarity to this area.[4] General principles of law identified in the case law ↳ of international courts and arbitral tribunals, derived from commonly accepted domestic rules, include, inter alia, the principle of good faith, the obligation to make reparation for international wrongs, the principle of *res judicata*, the principle of estoppel, the principle of *jus novit curia*, equality of the parties to a dispute, the rights of the defence, and respect for fundamental rights.[5] They have served to fill the gaps resulting from the absence of any treaty or customary obligation. A basic distinction is often drawn between principles which arise from domestic or ‘municipal’ law (*foro domestico*) and principles proper to international law itself.[6] While the inclusion of the former in the ‘general principles of law’ to which Article 38 refers is widely accepted, the extent to which the latter are encompassed by that provision is the subject of doctrinal controversy. Alston and Simma argue that the development of international human rights law has had a significant impact on our understanding of the notion of ‘general principles’, and certain human rights principles have been progressively ‘accepted and recognized’ as binding, even peremptory, by the international community of states as a whole. Such a process does not necessarily lead to the formation of customary law—although this is also possible—but to the formulation of general principles within the meaning of Article 38 § 1(c) of the ICJ Statute.

The second difficulty arises from the fact that those drawing on 'general principles' as a source of human rights law do not always define them as such or distinguish them from principles of customary law. In the *Mavrommatis Palestine Concessions* case, for example, the Permanent Court of International Justice spoke of 'an elementary principle' of international law,[7] while the International Court of Justice in the *Corfu Channel* case referred to 'general and well-recognized principles' of international law.[8] The European Court of Human Rights, for its part, has invoked 'fundamental principles of law'[9] and 'generally recognised international standards' in some of its judgments.[10] These references may relate to the concept of general
p. 197 principles of law, but the ambiguity that the use of different terminology ↳ causes leaves a certain doubt and is probably meant to do so. Notably, the European Court of Human Rights has so far refrained from elucidating the content of the reference to 'general principles' in Article 7(2) of the ECHR, even when the nature of the case invites it to do so—perhaps to steer clear of the difficulties under discussion.[11] This chapter, in contrast, explores the extent to which general principles of law that neither originate in nor derive their validity from treaty or customary law can be said to have contributed to the elaboration of human rights standards.

It is clear that some overlap exists between general principles and constitutions in this context. If at least some of the general principles are said to derive from municipal law, then in the human rights context such law may well be of a constitutional nature. An examination of the constitutions of democratic states today reveals that the vast majority of them, if not all of them, contain human rights provisions. This is unsurprising given the significant developments in human rights protection which began with the adoption of the UDHR in 1948, followed by the formulation of other human rights standards, which both inspired and obliged states to mirror these provisions in their domestic constitutions. However, the presence of provisions guaranteeing respect for human rights in constitutions around the world cannot solely be attributed to the influence of international human rights instruments adopted, and obligations imposed, in the wake of the UDHR. Long before the Nazi atrocities of the Second World War had created the political impetus to put in place international human rights guarantees, human rights standards were present in constitutional documents across the globe. Some of these constitutional provisions remain in force today.

In the United Kingdom, the Magna Carta, adopted in 1215 by King John and the nobility, was intended to curb the excesses of monarchical power.[12] It stipulated, inter alia, that no one's rights or justice would be refused or withheld, nor would he be dispossessed of his property rights without the legal judgment of his peers. These provisions have been described as the precursors of the rights against arbitrary detention and unfair trials that many modern human rights instruments contain.[13] They also lay the foundation for the development of the rule of law and influenced constitution makers throughout the common law world and beyond. The subsequent English Bill of Rights of 1689 included a right to free elections and guaranteed freedom of speech in Parliament. It also prohibited cruel and unusual punishment. Much of the Bill of Rights remains in force today.[14]

France proclaimed the Declaration of the Rights of Man and of the Citizen in 1789. The text of its preamble
p. 198 refers to the natural, inalienable, and sacred rights of man, ↳ and stipulates, in its Article 1, that men are born and remain free and equal in rights. It also contains provisions prohibiting unlawful arrest and retroactive criminal law, as well as protecting freedom of expression and opinion and property rights. The Declaration was included in the 1791 French Constitution and, with one limited exception, all subsequent constitutions have protected the rights it contains. The current 1958 Constitution establishing the Fifth Republic refers to the Declaration in its preamble.

In the United States, the 1776 Declaration of Independence proclaimed that all men were created equal, that they were endowed with certain unalienable rights, and that among these rights were life, liberty, and the pursuit of happiness. The Bill of Rights of the United States, in the form of amendments to the federal Constitution, was ratified in 1791 and protects citizens from, inter alia, unreasonable search and seizure, double jeopardy, self-incrimination, and deprivation of property, liberty, or life without due process of law.

It also contains fair trial guarantees and prohibits cruel and unusual punishment. State constitutions, some containing more extensive guarantees than those of the federal Constitution, both preceded and followed the federal amendments.

The emergence of independent states in Latin American in the nineteenth century saw the enactment of further constitutional guarantees. In the first half of the twentieth century, an increasing number of states in other parts of the world began to include human rights provisions in their constitutions. As will be seen, the inclusion of human rights guarantees in constitutions had a significant impact on the content of the rights which were ultimately included in the UDHR.

3. The Universal Declaration of Human Rights

The adoption of the Universal Declaration of Human Rights constituted a landmark moment in human rights law. Its thirty articles cover civil, political, economic, social, and cultural rights. Two international covenants, under discussion at the same time and which together with the UDHR constitute the international bill of rights, further developed these rights. The drafting of the UDHR was heavily influenced by the provisions of national constitutions and the general principles of law derived from them, both of
p. 199 which formed the raw material out of which the rights were fashioned during the drafting process.[15] ↳

The UN Commission on Human Rights designated a drafting committee to be responsible for drafting a human rights instrument. At its first meeting, the drafting committee charged three of its members with responsibility for drafting a human rights instrument. The three members were Eleanor Roosevelt, the US member and chairman of the committee; Peng-Chun Chang, the member representing the Republic of China; and Charles Malik, the member for Lebanon. They were charged with preparing a preliminary draft of the Declaration with the assistance of the secretariat.[16]

The then Director of the United Nations Division of Human Rights, John Humphrey, prepared the initial text of the declaration, containing forty-eight articles.[17] In putting together his draft outline of the declaration, Humphrey drew on material from a number of sources. He had at his disposal, and made extensive use of, draft declarations submitted by governments and by non-governmental organizations.[18] Alongside the draft outline, the Secretariat also compiled a 408-page 'documented outline'[19] linking each of the rights in the Humphrey draft to provisions contained in the constitutions of the then fifty-five member states of the United Nations.[20] This document clearly underlines the important role constitutions played as sources of the rights contained in the Declaration. Each of the forty-eight articles in the original Humphrey draft was linked in the documented outline to a corresponding constitutional guarantee which existed, in some form, in world constitutions at that time. However, national constitutions played a greater role in the elaboration
p. 200 of some standards than others. ↳

The inclusion of civil and political rights in the UDHR was hardly surprising. As observed above, such rights were already well-established in eighteenth-century human rights texts, and these provisions had inspired similar constitutional texts in many of the member states.[21] As Morsink explains, most delegations had 'little difficulty' voting for many of the rights contained in the draft Declaration, because similar guarantees appeared in their own national constitutions.[22]

The inclusion of economic, social, and cultural rights in the UDHR was a more significant development, however.[23] These rights appeared in a large number of the constitutions, from Latin American and Communist states in particular, and the draft declarations submitted by Chile, Panama, and Cuba included the socialist rights guaranteed by their constitutions. Although other member states of the UN did not have corresponding constitutional provisions, Humphrey decided to include them in his first draft, based on the

draft declarations he had received and supported by the constitutional provisions of a large number of Latin American states. This was the first step towards ensuring their inclusion in the final text of the UDHR.[24]

After Humphrey had prepared his draft, the drafting committee met and agreed to set up a temporary working group composed inter alios of René Cassin (France), Geoffrey Wilson (the United Kingdom), and Mr Malik (Lebanon).[25] Its mandate was largely to suggest a 'logical rearrangement' of the articles of the draft outline the Secretariat supplied and to suggest a redraft of the various articles in the light of the discussions of the drafting committee.[26] The working group requested that René Cassin undertake the writing of a draft declaration based on the Secretariat draft outline. He prepared a draft with a preamble and forty-four articles, a draft discussed and revised in the working group before being presented to the drafting committee. The texts prepared at the various stages of the procedure were submitted to the Commission on Human Rights and formed the basis of negotiations for the final text.[27]

The fate of some of the economic rights first included in the draft outline by John Humphrey is instructive.
p. 201 The draft contained five work-related rights—the ↳ right of equal access to vocations and professions (draft Article 24); the right and duty to perform socially useful work (draft Article 37); the right to good working conditions (draft Article 38); the right to an equitable share of the national income as justified by a person's work (draft Article 39); and the right to the public help necessary to support a family (draft Article 40). As the documented outline indicates, a right of equal access to professions and vocations appeared in the Chilean draft declaration. Similar or related provisions could also be found in the constitutions of fifteen Latin American states, three Scandinavian countries, two Communist countries, Afghanistan, and Siam. The provisions subsequently appeared as Article 16 of the Cassin redraft. A right to work appeared in the three draft declarations Chile, Cuba, and Panama submitted and was guaranteed in the constitutions of ten Latin American states and five Communist states. Aside from these fifteen states, only China, France, and Turkey guaranteed a right to employment. The right and duty to work duly appeared in the Humphrey draft and in Article 29 of the Cassin revised text. The right to good working conditions also appeared in the three draft declarations submitted to the Secretariat by the Latin American states. In the documented outline, it is linked to constitutional provisions in fourteen Latin American states, as well as China, France, the Philippines, Poland, and Yugoslavia. It appears in a revised form in Cassin's Article 31. Humphrey's Article 39 originated exclusively in Latin American and Communist traditions; the documented outline links this article to provisions in two of the three Latin American drafts, as well as the constitutions of six Latin American and four Communist states. Article 40 had its roots in provisions contained in two of the drafts that the committee submitted. Related provisions appeared in a large number of constitutions: fifteen Latin American states, three Communist states, China, France, and the Netherlands. The same idea appeared in Article 31 of Cassin's redraft.

It can be seen that the five work-related rights that appeared in the original Humphrey draft, inspired largely by the Latin American tradition as manifested in the constitutional provisions of those states, are the foundation of the final provision which appears today in the UDHR. In large part as a result of their common constitutional traditions, Latin American states were in broad agreement as to the inclusion of these rights in the UDHR throughout the drafting process. Their general consensus was separately manifested in their adoption, together with the United States, of the American Declaration of the Rights and Duties of Man in April 1948, while the UDHR was still under negotiation. With the support of the Communist bloc, most of the economic, social, and cultural rights survived the drafting process in some form.[28] Article 23 of the Declaration is one of the lengthier articles in the Declaration and proclaims a number of work-
p. 202 related rights, including the right to ↳ work, to free choice of employment, to just and favourable work conditions, and to protection against unemployment; the right to equal pay for equal work; the right to just and favourable remuneration supplemented, if necessary, by other means of social protection; and the right to form and to join trade unions for the protection of one's interests. While it is important not to overstate the role that Latin American, and to a lesser extent Communist, state constitutions played in the final

inclusion of a detailed right to work in the UDHR, it is clear from the above analysis that the protection of a variety of rights in the constitutions of a large number of Latin American states strongly influenced both their inclusion and content in the Humphrey draft, as well as their eventual position in the final text.[29]

The influence of constitutions is all the more striking if one examines the drafting history of Article 24 of the Declaration, which guarantees the right to rest and leisure, including reasonable limitations on working hours and periodic holidays with pay. Such a provision did not appear in any of the draft declarations to which Humphrey referred in preparing his draft outline. However, the right to rest-days or to paid annual leave appeared in the constitutions of thirteen of the states surveyed: nine Latin American states and four Communist states. From these constitutional provisions, Humphrey accordingly drafted a provision on the right to rest and leisure, which was preserved in Article 36 of the Cassin draft and finally adopted in the Declaration text itself (Article 24).

More generally, the human rights instruments of the eighteenth century mark the overall tenor and language of the UDHR.[30] One of the principal similarities can be seen in the underlying rationale behind the UDHR, set out in the first recital of its preamble, namely the 'inherent dignity' and the 'equal and inalienable rights of all members of the human family', which reflect the provisions of the French Declaration, as well as the US Declaration of Independence. The inspiration these texts provided is also seen in the UDHR's first article, which stipulates that all men are born free and equal in dignity and rights.[31]

The Humphrey draft did not include a draft preamble, but merely made reference to what such a preamble should contain. There was no reference to human dignity or equality, nor did any article of the Humphrey
p. 203 draft contain language of the nature ↳ found in Article 1 of the UDHR. The inclusion of Article 1 in the text occurred during Cassin's re-working of the Humphrey draft. It is clear that in carrying out this task, Cassin drew inspiration from the provisions of the 1789 French Declaration, and in particular its preamble and first article. Indeed, Morsink describes the first sentence of Article 1 of the UDHR as 'a virtual rewrite' of Article 1 of the French Declaration.[32]

The drafting history of the UDHR demonstrates that a number of sources inspired its thirty articles. That the principal motivation for the declaration stemmed from the atrocities of the Second World War is indisputable; frequent reference was made during the deliberations to the human rights violations committed in Nazi Germany prior to and during the War.[33] However, the rights that national constitutions across the globe had already secured inspired the formulation and content of the rights. For certain topics, some of which have been discussed above, the influence of constitutional rights was considerable. If one accepts, as is often claimed,[34] that the first draft of the Declaration was prepared by John Humphrey, then the influence of constitutions on the rights it contains is indisputable. In any case, it can be concluded that constitutions were treated as a source of human rights in the drafting process of the UDHR and that their contribution was significant.

As noted above, the Universal Declaration has in turn inspired a wide range of human rights texts at the international level, as well as human rights provisions in national constitutions.[35] As such, the UDHR has been described as the constitution of the entire human rights movement,[36] a description which is arguably no exaggeration. Indeed, it has been suggested that the UDHR may well constitute an expression of the 'general principles of law recognised by civilised nations',[37] and many of its provisions are now considered
p. 204 to form part of customary international law.[38] ↳

4. The Application and Interpretation of Human Rights by International Courts

The adoption of human rights instruments is only one part of the story of the development of human rights to date. Human rights treaties by their nature often focus on broad principles; even when drafters provide some details regarding particular rights, their specific content and scope is generally left to national courts or international treaty bodies to develop. Aside from judicial bodies created with the specific role of ensuring the effective implementation of a particular human rights treaty, international courts more generally may be called upon to develop human rights standards in the context of their activities in other areas of international law.

The following section examines the practice of the Permanent Court of International Justice (PCIJ) and International Court of Justice (ICJ), as well as the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), in order to explore the extent to which general principles and constitutions play a role in the application and development of human rights standards today.

4.1 The Permanent Court of International Justice and the International Court of Justice

The PCIJ and, in its later incarnation, the ICJ are unique among the courts examined here, in that from the outset their respective statutes conferred on them a mandate to apply general principles of law recognized by civilized nations.[39] As noted above, despite the inclusion of the phrase in the statutes of the two courts, there was no agreement as to what it envisaged. Even the drafters of the PCIJ Statute were not united in their understanding of the meaning of the term.[40] Despite this uncertain origin, the courts have made regular reference to general principles in deciding the cases before them. Bearing in mind, however, that they are courts of public international law and not human rights courts, an examination of their jurisprudence ↳ paints a more nuanced picture of the extent to which the general principles they have invoked have contributed to the development of human rights law.

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One early example arose in the case of the *Minority Schools in Albania*.[41] Following the conclusion of the First World War and the redrawing of national boundaries in Europe, various states concluded a number of minority treaties to protect the newly created national minorities. Albania, home to a large Greek-speaking minority, had made a declaration before the Council of the League of Nations in 1921 to the effect that its racial, religious, and linguistic minorities would have the same rights as other Albanian nationals. The Council subsequently requested that the PCIJ express an opinion on whether the abolition of private schools in Albania, which included Greek schools, conformed to the letter and spirit of the 1921 Declaration. The PCIJ observed that the 1921 Declaration was intended to apply to Albania the general principles of the minority treaties, and it therefore approached the question before it from this perspective. It explained that the idea underlying the minority treaties was to secure for racial, linguistic, or religious minorities the possibility of living peaceably alongside the majority population, while at the same time preserving their distinctive characteristics and satisfying the special needs which resulted therefrom. The PCIJ found that in order to achieve this, two aspects were particularly necessary: first, a prohibition on discrimination; and second, putting in place measures permitting the minority group to preserve its minority culture and traditions.[42] Against this background, and after careful examination of the text of the 1921 Declaration, the PCIJ concluded that the general abolition of private schools, although a universal measure, failed to conform to the Declaration's letter and spirit.

This was not, strictly speaking, a case in which general principles lay at the heart of the court's reasoning. Nonetheless, its decision to situate the dispute within the general context of the minorities regime then in

place, and to examine the idea underlying the minorities regime, before considering Albania's obligations arising from the 1921 Declaration was an important signal that the court was willing to look beyond treaty law and custom and to take into account more general considerations arising in respect of minority rights in deciding the case before it.

The ICJ first referred to general principles in its judgment in the *Corfu Channel* case.[43] The United Kingdom brought the case against Albania as a claim for compensation following the death of naval personnel and damage to naval vessels resulting from hitting a minefield in Albanian waters in 1946. The court found that the laying of the minefield could not have been accomplished without the knowledge of the Albanian authorities. As a consequence, the Albanian authorities had a duty to warn of the imminent danger the
p. 206 British warships faced. The court found ↳ that this obligation arose not under the Hague Convention of 1907, which applied in times of war, but under 'certain general and well-recognized principles', which included 'elementary considerations of humanity, even more exacting in peace than in war'.[44] The principles to which the court was referring here appeared to be of the nature of fundamental principles of international law itself, which imposed a duty, independent of treaty or customary international law, to take steps to avert a serious threat to life and to property.

Subsequently, in its Advisory Opinion on the *Reservations to the Genocide Convention*, the court found that the principles underlying the Genocide Convention were principles which civilized nations recognized as binding on states, even without any conventional obligation.[45] In the formulation used, the court left open whether it was referring to general principles or to customary international law. In its 1973 Advisory Opinion on the *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal*, the ICJ referred to the content of the general principles of law as regards procedural rights and equality of arms, concluding that there did not appear to be any principle which required an opportunity to make oral representations in review proceedings, provided that both parties had an equal opportunity to present their cases in written submissions.[46]

In its judgment in the *United States Diplomatic and Consular Staff in Tehran* case, having concluded that Iran had breached its obligations towards the United States in respect of the seizure and occupation of the US embassy in Tehran, the court went on to say that:

> wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.[47]
>
> 47 *US Diplomatic and Consular Staff in Tehran Case* 42.

It is regrettable that this statement appeared in the judgment almost as a kind of postscript; the court had already concluded on the basis of a detailed examination in the earlier pages of its judgment that Iran had breached its international obligations.[48] However, the court's statement is nonetheless a welcome
p. 207 suggestion that the principles set out in the UDHR and the 'human rights' and 'fundamental freedoms' ↳ to which the Charter refers, are principles which may be capable of being invoked in future cases.[49]

More recently, in its 1996 Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, the ICJ indicated that states had to take environmental considerations into account when assessing necessity and proportionality in the pursuit of legitimate military objectives.[50] In support of its approach, it referred to provisions of the Rio Declaration[51] and to a General Assembly resolution on the protection of the environment in times of armed conflict.[52] In formulating this requirement to consider environmental considerations, the court based its approach on provisions of 'soft law', rather than on any legally binding instruments. Such soft law, constituting neither treaty law nor customary international law, is arguably one of the most significant sources of the general principles to which Article 38 § 1(c) refers. The ICJ's reference

to the Rio Declaration and the General Assembly resolution allowed it to develop its case law regarding environmental rights.

Notwithstanding these precedents, there is a remarkable absence of discussion of human rights principles in the case law of the ICJ. In recent cases in which human rights issues have, at least from a general perspective, been firmly in the foreground, the court has eschewed any reference to, or development of, general principles as an important element of its reasoning or as the foundation for its decisions.[53] The reluctance of the ICJ to develop general principles in the context of human rights has been the subject of comment in two weighty separate opinions.

In the *South-West Africa Cases*,[54] Liberia and Ethiopia commenced proceedings against South Africa, contending that the latter had, by its policy of apartheid, violated international law in the discharge of its obligations as mandatory in respect of what is now Namibia. The court ultimately rejected the claims on the grounds that Liberia and Ethiopia had no legal right or interest in the subject matter. Judge Tanaka dissented and set out his reasons in full in a 150-page opinion.[55] In his view, the cases essentially concerned the question of whether there existed a legal norm regarding equality or non-discrimination, which he explained was intimately related to the essence and nature of fundamental human rights, the promotion
p. 208 and encouragement of which was ↳ one of the purposes of the UN according to its Charter.[56] He considered that such an obligation arguably arose from the terms of the UN Charter and was a norm of customary international law. He then turned to examine whether it formed part of the general principles of law.[57] Drawing on the reasoning of the court in the *Reservations to the Genocide Convention* advisory opinion, he concluded that human rights are not created, but merely declared by treaties; they exist independently of the will of states. As a consequence, he considered that the general principles mentioned in Article 38 § 1(c) included the concept of human rights and of their protection. The principle of equality and non-discrimination, he noted, were stipulated in the list of human rights that the domestic systems of virtually every state recognized and had become an integral part of the constitutions of most of the world's civilized countries. As such, it constituted, in his view, one of the specific general principles to which Article 38 referred.[58] The Inter-American Court of Human Rights has developed the point further. In its Advisory Opinion on the *Juridical Condition and Rights of the Undocumented Migrants*, it considered the 'fundamental principles of equality and non-discrimination' to have entered the domain of *jus cogens* and to entail obligations *erga omnes* that bind all states and generate effects with regard to third parties, including individuals.[59]

In the *Pulp Mills* case,[60] the ICJ was asked to rule on a dispute between Argentina and Uruguay in respect of pulp mills constructed on the Uruguay River which forms the border between the two countries. Both parties contended that the 1975 Statute of the River Uruguay had to be interpreted in the light of principles governing the law of international watercourses and principles of international law ensuring protection of the environment, although they disagreed as to the content of those principles. The ICJ made a brief reference to the 'principle of prevention' and to a precautionary approach, but it did not afford either any particular attention in its judgment. In his separate opinion,[61] Judge Cançado Trindade lamented the fact that the ICJ had overlooked the general principles of law in deciding the case, despite the fact that they were invoked by both parties. He considered that in taking the approach it did, the ICJ had missed 'a unique occasion to give a remarkable contribution to our discipline'.[62] He discussed the use made of general
p. 209 principles by both the PCIJ and the ICJ in some depth, observing that considerably more ↳ attention was devoted to the principles of international law decades ago (including the times of the PCIJ) than at present.[63] As to the issues arising in the *Pulp Mills case*, he considered the applicable law to be composed of the 1975 Statute, together with the relevant principles of law. The latter encompassed, in his view, principles of international environmental law, which included the principles of prevention, precaution, and sustainable development.[64]

It seems clear, particularly in light of the opinions of Judges Tanaka and Cançado Trindade, that the ICJ has displayed a certain reluctance to invoke general principles of law in cases in which human rights issues arise. There is no doubt that the vast and complex network of international legal instruments provides, in many instances, a highly regulated framework within which to decide disputes, but there remain nonetheless areas in which general principles have a role to play. This is particularly so in cases, such as those touching upon issues of environmental law, where the rights in question have not been the subject of any detailed treaty obligations.[65] Referring to general principles, rather than treaty obligations, as a source of human rights obligations may also be particularly important in cases where the respondent state has not ratified any relevant treaty, or simply to make the point that the rights in question are fundamental. In this respect it is worth mentioning the court's case law attesting to the existence of *jus cogens*, which are peremptory norms of international law and are generally agreed to include a number of human rights principles.[66] Courts often refer to the prohibition of torture and genocide, the principles of equality and non-discrimination, the prohibition of racial discrimination and apartheid, the prohibition of slavery and the slave trade, the prohibition of massive pollution of the atmosphere or of the seas, and the right of self-determination as falling into this elevated category of human rights norms.[67] However, given the uncertain
p. 210 and evolving nature of *jus cogens* rules, claims in ↳ this area are to be treated with circumspection, and generally international human rights tribunals, with the notable exception of the Inter-American Court, have been cautious in their pronouncements. The UN Human Rights Committee in its General Comment on States of Emergency lists a series of principles, beyond the list of non-derogable provisions set out in Article 4(2) of the International Covenant on Civil and Political Rights, from which there can be no derogation under Article 4 because, in the Committee's view, they have become absolute norms of general international law.[68]

By finding the source of such obligations outside treaty law, the possibility of their universal application is ensured and their potential for contributing to the development of the ICJ's human rights case law enhanced. It would appear, therefore, that whatever the view held as to the contribution of general principles to the development of human rights by the ICJ to date, there remains much scope for such principles to be employed to greater effect in the future.

4.2 The European Court of Human Rights

In the European Convention on Human Rights, reference is made to 'general principles' in Article 7, which encapsulates the principle of *nullum crimen nulla poena sine lege*. Concerned with ensuring that the article did not impugn the validity of the Nuremberg judgments, the article reproduces the text of the corresponding article of the International Covenant on Civil and Political Rights, clarifying that: 'This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'[69] In its case law, the Court has not sought to develop the meaning of general principles in this
p. 211 context. In *Streletz, Kessler and Krenz v Germany*, which concerned the legal basis under ↳ German law for the convictions of senior officials held responsible for the policy of killing those seeking to escape from the GDR, the court found that the acts in question also constituted offences that the rules of international law on the protection of human rights defined with sufficient accessibility and foreseeability. It was thus not necessary to consider Article 7 § 2. Several judges concurring in the result considered, however, that the acts amounted to a crime against humanity which was a general principle of international law at the material time.[70] The United Nations Human Rights Committee, dealing with a similar case, noted that 'the disproportionate use of lethal force was criminal according to the general principles of law recognized by the community of nations already at the time when the author committed his acts'.[71]

Despite this limited reference to general principles in the text of the ECHR, the court has, from an early stage, drawn on the concept of general principles in order to interpret and apply the rights guaranteed by

the Convention. For example, it regularly relies on the general principle of estoppel in rejecting preliminary objections relating to admissibility.[72] The court also applies the principle of *res judicata* as an element of legal certainty, itself inherent in the rule of law. In *Brumarescu v Romania* it found a violation of Article 6 (right to a fair trial) on the grounds that the Supreme Court of Justice had set aside a judicial decision that was irreversible under Romanian law.[73] It is tempting to consider the principle of proportionality as a general principle that runs throughout the Convention, but the principle has no operation in cases concerning Article 3 (prohibition of torture, inhuman, and degrading treatment). The court has asserted the principle of 'fair balance' between the rights of the individual and the interests of the community in the *Soering* judgment,[74] but it is more a principle of interpretation rather than a general principle of law. In *Vilho Eskelinen and Others v Finland*, on the other hand, the court attached weight to the general principle of judicial control of administrative action—a principle of law underlying the constitutional traditions common to member states and reflected in Articles 6 and 13 (right to an effective remedy) of the ECHR—in finding that civil servants (in this case police officials) should be able to submit their disputes to a court. The right of access to a court has long been considered to be a general principle.

In the case of *Golder v United Kingdom*, the applicant, a serving prisoner, complained to the court under Article 6 § 1 that the UK authorities had refused to permit him to consult a solicitor with a view to bringing a civil action for libel against ↳ a prison officer. The applicant argued that the right to a fair trial that the
p. 212 ECHR guaranteed encompassed a right of access to court. Citing Article 31 § 3(c) of the Vienna Convention on the Law of Treaties (although not yet in force at the time), the court referred to the need to take into account any relevant rules of international law applicable between the parties, which in its view included general principles of law. Indeed, the court observed that during the negotiations on the drafting of the Convention, the Committee on Legal and Administrative Questions had foreseen in August 1950 that the court 'must necessarily apply such principles' in the execution of its duties and thus considered it unnecessary to insert a specific clause to this effect in the Convention.[75] The court found that the principle whereby a civil claim must be capable of being submitted to a judge ranked as one of the 'universally "recognised" fundamental principles of law'. It considered the same to be true of the principle of international law which forbade the denial of justice. It concluded that Article 6 § 1 had to be read in light of these principles, and on that basis concluded that it did include a right of access to a court.[76] Other notable examples can be given.

In *Marckx v Belgium* the court relied on the principle of legal certainty to dispense the Belgian state from reopening legal acts or situations that antedated the delivery of judgment finding inter alia that distinctions in succession law between 'legitimate' and 'illegitimate' children were discriminatory and in breach of Article 14 (prohibition of discrimination).

In *John Murray v United Kingdom*, the court, when asked by an applicant to interpret the right to a fair trial as including the right to remain silent and the privilege against self-incrimination, found that these were 'generally recognised international standards which [lay] at the heart of the notion of a fair procedure under Article 6'.[77] Also in *Scoppola (No 2) v Italy*, the court was influenced by the identification of the *lex mitior* as a fundamental principle of criminal law. Remarkably, it found that where the penalty for a crime had been lowered since the commission of the offence, Article 7 § 1 of the Convention required that the convicted person be given the benefit of the more lenient penalty. The court's interpretation is notable since the language of Article 7 § 1 is confined textually to the principle that penalties should not be greater than that existing at the time of the offence.[78] Nothing is said about lesser penalties. The court has thus relied on a general principle to implicitly amend a Convention provision, undoubtedly influenced by a similar provision
p. 213 in the EU Charter on Fundamental Rights.[79] ↳

It should also be mentioned that the court will interpret the ECHR against the background of international law (including general principles) and will seek to harmonize its interpretation of the ECHR with such principles.[80] It also operates a rebuttable presumption that Security Council resolutions do not impose a

requirement to breach fundamental rights.[81] In *Al-Adsani v United Kingdom*, the court further recognized the prohibition of torture to be a peremptory norm of international law (*jus cogens*), but it also held that it did not trump the principle of the sovereign immunity of states.[82]

It appears that even more significant in the development of the court's case law is its practice of reviewing the national laws and constitutions of member states when examining the scope and content of Convention rights. This practice is particularly evident in its assessment of the qualified rights contained principally in Articles 8 to 11 of the Convention, which expressly permit restrictions on rights, provided that these restrictions are in accordance with a legitimate aim and are necessary in a democratic society. In such areas, the court has developed the concept of the margin of appreciation, which essentially permits member states a certain degree of discretion in deciding how best to secure the rights set out in the Convention. The width of the margin depends on various factors, and one such factor is the presence or absence of a European consensus on the matter in question.[83] Aside from having regard to member states' constitutional provisions, the court also has regard to other international norms concluded in the relevant field in assessing the extent of any margin of appreciation which arises and the content of the obligations that a particular Convention provision imposes.

Examples of both practices can be seen in the court's 2008 judgment in *Demir and Baykara v Turkey*, a case in which the court was asked to examine the extent to which Article 11 (freedom of association) guaranteed rights of association to civil servants, including the right to join trade unions and the right to collective bargaining. The court reiterated its approach to interpreting the provisions of the Convention and referred to its practice of taking into account the relevant rules and principles of international law, quoting with approval its finding in the *Golder* case that the relevant rules of international law included 'general
p. 214 principles of law ↳ recognised by civilised nations'.[84] In this connection, it found that the common international or domestic law standards of European states, composed as they were of rules and principles accepted by the vast majority of states, reflected a reality which the court could not disregard when called upon to clarify the scope of a Convention provision.[85] Importantly, the court emphasized that the level of consensus established by the existence of norms of international law was not dependent on the respondent state in the case having ratified the international norm in question.[86] The court summarized its approach as follows:

> The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.
>
> ...In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.[87]
>
> 87 *Demir and Baykara* (n 84) paras 85–86.

In concluding that civil servants were entitled to the guarantees of Article 11, the court drew support from the practice of European states, observing that all member states of the Council of Europe recognized the right of such employees to join trade unions.[88] As to whether civil servants enjoyed the right to bargain collectively, the Court noted that such a right had been recognized as applicable to civil servants in the 'vast

majority' of the member states, albeit subject to certain restrictions.[89] This was one of the factors which led the court to conclude, in a landmark judgment, that its previous case law to the effect that the right to bargain collectively did not constitute an inherent element of Article 11 should be reconsidered.[90] In short the court found that such a right had become 'one of the essential elements' of the right to form and join trade unions that Article 11 guaranteed.[91]

The case law of the court is rich in examples of its practice of referring to member states' constitutions in order to determine the width of the margin of appreciation in a given case. Thus in *Ünal Tekeli v Turkey*,[92] the court considered the emergence of a consensus among the member states of the Council of Europe, which
p. 215 favoured allowing parties to a marriage to choose the family name, to be ↳ relevant to the applicant's complaint that the refusal of the Turkish courts to allow her to bear her maiden name after her marriage constituted a violation of Article 8 of the Convention (the right to respect for private life), read alone and in conjunction with Article 14. In *Evans v United Kingdom*,[93] a case involving the destruction of embryos, the court held that the issue of when the right to life began fell within the margin of appreciation of the respondent state (which did not recognize any independent rights or interests enjoyed by embryos), in light of the absence of any European consensus on the scientific and legal definition of the beginning of life. In its judgment in *Lautsi and Others v Italy*,[94] the court considered that the decision whether crucifixes should be present in state-school classrooms was a matter falling within the margin of appreciation of the respondent state, in the absence of any European consensus on the question of the presence of religious symbols in state schools. A very recent application of the court's approach can be seen in *Stübing v Germany*,[95] which involved a criminal conviction for incest, where the court considered that the data before it were demonstrative of a broad consensus that sexual relations between siblings were accepted by neither the legal order nor society as a whole. It concluded that there was insufficient empirical support for the assumption of a general trend towards decriminalization of such acts, and as a result, no violation of the Convention had occurred.

There is similarly a wealth of developing case law on the court's use of obligations set out in international instruments to assess the compatibility of states' acts or omissions with provisions of the Convention. In *Rantsev v Cyprus and Russia*,[96] the court borrowed heavily from the Palermo Protocol to the United Nations Convention against Transnational Organised Crime and the Council of Europe's Convention on Action against Trafficking in Human Beings in order to identify the positive obligations which arose under Article 4 (prohibition of slavery and servitude) in the context of human trafficking. In *Tnase v Moldova*,[97] which concerned the right of dual nationals to stand for election, the court reiterated that it was for it to decide which international instruments and reports it considered relevant and how much weight to attribute to them. In the case before it, such relevant instruments and reports included the European Convention on Nationality, the conclusions and reports of European Commission against Racism and Intolerance and the European Commission for Democracy through Law, as well as the resolutions of the Parliamentary Assembly of the Council of Europe.

The above examples show that the European Court of Human Rights consistently looks to both national constitutions and international instruments in order to identify general principles or common approaches when applying the provisions of the ECHR. Through its dynamic interpretation of the Convention, the court
p. 216 has ↳ made a significant contribution to the protection of human rights across Europe. As domestic legislatures review and modernize their approaches to human rights within the national arena, so too can the court continue to evolve by drawing on those standards in order to ensure the effective and practical protection of human rights across Europe and beyond.

5. The Court of Justice of the European Union

The founding treaties of the European Communities[98] contained no general provisions on the protection of human rights.[99] The Communities were conceived as essentially economic organizations, and as such their founders appear to have considered that there was no need for such provisions in the Community legal order.[100] In the absence of any treaty provision, the European Court of Justice,[101] the judicial body of the European Communities, was initially reluctant to accept that fundamental rights its member states' constitutions guaranteed could form part of any general principles that it was required to apply in its adjudication of cases brought before it.[102]

The court's approach raised a number of concerns in Germany, where a system of constitutional review existed in order to examine the constitutionality of legislation passed, about the absence of any human rights protection under Community law.[103] These concerns led to a decision of the German Constitutional Court in October 1967 that provisions of Community law had to be assessed at the national level in order to
p. 217 review their compliance with the German constitution. The decision had ↳ significant implications, as the European Court of Justice had only recently adopted its judgment establishing the primacy of Community law.[104] If national courts subjected Community law to internal scrutiny, and reserved to themselves the power to strike down provisions which they considered did not apply, the very foundations of the Community legal order could have been thrown into doubt.

Accordingly, in a series of rulings beginning in the late 1960s, the court was forced to review its approach to the question of the extent to which general principles, including considerations of human rights, formed part of Community law. The real turning point came with the Court's judgment in *Internationale Handelgesellschaft*. The Frankfurt Administrative Court referred the case to the court for a ruling on the validity of a system of deposits for issuing export licences for cereals, established by an EEC Regulation, under which the deposit was forfeited if exportation was not effected during the period of validity of the export licence. In its referral order, the Frankfurt Administrative Court emphasized that although Community Regulations were not German national laws, they had to respect the elementary fundamental rights guaranteed by the German constitution and the essential structural principles of national law. It further emphasized that in the event of an incompatibility with those principles, the primacy of supranational law conflicted with the principles of the German Basic Law.

The Court began by observing that the validity of a Community measure could not be challenged as being contrary to fundamental rights set out in national constitutions, because the Treaty of Rome was an independent source of law which could not be overridden by provisions of national law without the legal basis of the Community itself being called into question. However, it explained that it was necessary to examine whether any 'analogous guarantee inherent in Community law' had been disregarded.[105] It found:

> In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.[106]

106 *Internationale Handelsgesellschaft* (n 105) para 4.

Over the ensuing years, the Court of Justice continued to develop its case law on fundamental rights, adding to the catalogue of rights to be guaranteed as fundamental principles of Community law. In *Nold v Commission*, the applicant alleged a violation of his fundamental rights, invoking inter alia the right to property and the right to free pursuit of business activity guaranteed by the German Basic Law, by the constitutions of other member states, and by various international treaties, including the ECHR. The court reiterated that fundamental rights formed an integral part of the general principles of law, the observance

p. 218 of which the court ensured. ↳ It explained that in safeguarding these rights, it was 'bound to draw inspiration from constitutional traditions common to the member States', and that it could not uphold measures which were incompatible with fundamental rights that member states' constitutions recognized and protected.[107] It further indicated that international human rights treaties, such as the ECHR, could supply 'guidelines' which should be followed within the framework of Community law. As to the extent of the rights in question, it noted that the rights invoked, as guaranteed by national constitutions, were subject to limitations in the public interest, and that such limitations were also legitimate within the Community legal order.

In 1977, the Commission, the Council, and the Parliament adopted a Joint Declaration of Fundamental Rights. In the preamble to the declaration, the three institutions noted that the Court of Justice had recognized that the law applicable to the activities of the European Community included the general principles of law and, in particular, the fundamental rights on which the constitutional law of the member states was based. The institutions accordingly stressed the prime importance they attached to the protection of fundamental rights, as derived in particular from the constitutions of the member states and the ECHR.[108]

In *AM & S v Commission*, the applicants argued, in the context of a challenge to a Commission decision regarding a competition investigation, that the principle of legal privilege applied and that a provision of the decision requiring full disclosure of confidential documents should be annulled. The court heard extensive evidence as to the practice of the member states in this field. It concluded that Community law had to take into account the principles and concepts common to the laws of the member states concerning the observance of lawyer–client confidentiality.

The Court of Justice's approach to human rights was finally enshrined in the Maastricht Treaty in 1992, which established the European Union and provided that the Union would respect fundamental rights, as guaranteed by the ECHR and as they resulted from the constitutional traditions common to the member states, as general principles of Community law.[109] Thus was the court's approach to protection of fundamental rights via general principles derived from the constitutional traditions of the member states confirmed and firmly entrenched in the legal order of the European Union. The court's continued application of this approach over the subsequent years has seen the confirmation of a number of human rights as applicable in the Community legal order.

The continued efforts of the court in the course of the 1990s went hand in hand with moves at a political level to place human rights protection in the European Community and the European Union on a more
p. 219 secure legal footing. These ↳ developments culminated in the December 2000 proclamation of a Charter of Fundamental Rights, which although without binding legal effect, was nonetheless of significant political importance. The Charter did not create new rights; instead, it drew together for the first time in a single document, existing rights which were to be protected within the EU legal order. It states in its preamble that it reaffirms the rights contained in the Charter as they result, in particular, from the constitutional traditions and international obligations common to the member states, the ECHR, the Social Charters that the Union and the Council of Europe adopted, and the case law of the Court of Justice and of the European Court of Human Rights. Article 52 § 4 of the Charter provides that, in so far as the Charter recognizes fundamental rights as they result from the constitutional traditions common to the member states, such rights are to be interpreted in harmony with those traditions.

The significance of the Charter was that it essentially codified the various fundamental rights which the Court of Justice had developed in its extensive case law. In the context of the institutional changes which occurred with the conclusion of the Treaty of Lisbon in December 2007, the Charter acquired legally binding force. At the time, the Bureau of the Convention prepared informal explanations to provide information on the source of each of the rights contained in the Charter,[110] and these were updated and published following

the conclusion of the Lisbon Treaty.[111] These explanations illustrate clearly the pivotal role of the Court of Justice in developing a number of the Charter rights, as well as the importance of general principles deriving from the member states' constitutional traditions. Thus, they reveal, freedom to choose an occupation enshrined in Article 15(1) of the Charter was a right originally developed by the Court of Justice in the early cases of *Nold* and *Hauer v Land Rheinland-Pfalz*, both mentioned earlier. Article 20 of the Charter, which guarantees equality before the law, 'corresponds to a general principle of law which is included in all European constitutions'.[112] It was also recognized as a basic principle of Community law in the court's judgments in *Racke* and *Karlsson*. Article 47 of the Charter guarantees the right to an effective remedy before a tribunal, a right the Court of Justice originally elaborated as a general principle of Union law in *Johnston*.[113] The origin of the *ne bis in idem* rule in Article 50 also lies in the extensive case law of the Court of Justice and the Court of First Instance.[114] The Charter is now regularly invoked before and by the Court of Justice in
p. 220 cases which raise ↳ human rights issues.[115] In a process of cross fertilization, the ECJ today interprets the Charter with regard to case law developed by the Strasbourg court—indeed it is mandated to do so by Article 52 § 3 of the Charter—and the broader wording of provisions of the Charter and their interpretation by the Court of Justice in turn influence that court.

Thus it can be seen that general principles and constitutional traditions common to the member states lay at the very heart of the development of a system for human rights protection in the European Union. Through its judgments, the Court of Justice essentially read an 'unwritten bill of rights' into Community law, in a remarkable development.[116] In due course, the case law of the court formed the basis of a written charter of human rights which now has legally binding force in the field of the activities of the European Union and the implementation of EU legislation.[117]

6. Conclusion

There can be no doubt as to the central role that general principles and constitutions played as sources of human rights law. The eighteenth-century human rights declarations, which formed part of the constitutions of France and the United States, were influential in the general approach taken to the underlying philosophy of the UDHR. The nature and content of the rights guaranteed was heavily inspired by the constitutional traditions of the fifty-five member states of the United Nations. It is arguable that given their relative novelty at the time of the UDHR negotiations, the economic and social rights the UDHR guaranteed may never have seen the light of day without reference to the constitutions of the Latin American and Communist states. The vast majority of human rights instruments and provisions subsequently adopted at the national and international levels have built upon the guarantees elaborated in that timeless instrument.

Clearly, the role of constitutions and general principles as sources of human rights guarantees did not cease with the conclusion of the UDHR. An examination of the approach international courts have taken to questions of interpretation of human rights standards demonstrates the central role that the concept of
p. 221 general principles ↳ and the content of national constitutions retain. The ICJ has indicated that the provisions of the UDHR are relevant principles to be taken into account in its judgments, although there is potential for greater use of general principles by the ICJ judges. General principles and constitutions are solely responsible for the importation of human rights standards into the activities of the European Community and the later European Union, now enshrined in a legally binding Charter of Fundamental Rights, applicable in the EU's legal space and radiating an influence on how the Court in Strasbourg interprets provisions of the ECHR. Finally, general principles and constitutions regularly influence the approach of regional tribunals, such as the European Court of Human Rights and the Inter-American Court of Human Rights, to the interpretation of the respective Conventions, ensuring that the guarantees they

contain remain relevant to the threats posed today. The Inter-American Court stands out, in particular, through its development of *jus cogens.*[118]

In 1955, Green wrote:

> There is not sufficient in common among the nations of the world, nor in their historical development, to allow human rights, even though they may be generally recognised in the various systems of law, to be considered as general principles of law recognised by civilised nations and, as such, rules of international law.[119]

The practice of the International Court of Justice, the European and Inter-American Courts of Human Rights, and the Court of Justice of the European Union, suggests the contrary is true today.

Further Reading

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Lammers JG, 'General Principles of Law Recognized by Civilised Nations' in Frits Kalshoven, Pieter J Kuyper, and Johann G Lammers (eds), *Essays on the Development of the International Legal Order: In Memory of Haro F van Panhuys* (Martinus Nijhoff 1980) 53
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Simma B and Alston P, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1988–89) 12 *Aust YBIL* 82

Notes

2 The provision replicates Art 38(c) of the Statute of the Permanent Court of International Justice. More recently, the term 'general principles' has also appeared in Art 21 § 1(c) of the 1998 Rome Statute of the International Criminal Court, which instructs the court to apply 'general principles of law derived by the Court from national laws of legal systems of the world'.

3 JG Lammers, 'General Principles of Law Recognized by Civilised Nations' in Frits Kalshoven, Pieter J Kuyper, and Johann G Lammers (eds), *Essays on the Development of the International Legal Order: In Memory of Haro F van Panhuys* (Martinus Nijhoff 1980) 53.

4 A vast amount of literature exists on the interpretation of 'general principles of law', and it is outside the scope of this chapter to explore in any detail the different views that literature expresses. See, among many other scholarly works, LC Green, 'General Principles of Law and Human Rights' (1955–56) 8 CLP 162; Sir Arnold McNair, 'The General Principles of Law Recognised by Civilised Nations' (1957) British YBIL 1; Lammers (n 3); Maria Panezi, 'Sources of Law in Transition: Re-visiting General Principles of International Law' (2007) 2 Ancilla Iuris 66; Giorgio Gaja, 'General Principles of Law' in *The Max Planck Encyclopedia of Public International Law* (OUP 2008) online edition: <http://www.mpepil.com> accessed 22 April 2012.

5 For a comprehensive list, see Patrick Dallier, Mathias Forteau, and Alain Pellet, *Droit International Public* (8th edn, LGDJ 2009) 380–86. International human rights courts have recognized many of these principles in their adjudication of disputes—see, in this context, the judgments of the European Court of Human Rights, referred to below in the section examining the Court's case law, and the judgments of the Inter-American Court of Human Rights, which Judge Cançado Trindade referred to in his concurring opinion in the Advisory Opinion of 17 September 2003 on the *Juridical Condition and Rights of the Undocumented Migrants* para 55.

6 See Green (n 4) 176–218; Lammers (n 3) 56–59; Gaja (n 4).
7 *The Mavrommatis Palestine Concessions Case* para 21.
8 *Corfu Channel Case* para 22.
9 *Golder v UK*, para 35.
10 *John Murray v UK*, para 45.
11 See *Streletz, Kessler and Krenz v Germany*, discussed later.
12 Parliament has since confirmed the Magna Carta on a number of occasions, and some of its provisions are still in force today.
13 AW Bradley and KD Ewing, *Constitutional and Administrative Law* (12th edn, Longman 1998) 15.
14 The Scottish Parliament enacted a Claim of Rights, in similar terms, in 1689.
15 See, among many others works, Nehemiah Robinson, *The Universal Declaration of Human Rights: Its Origin, Significance, Application, and Interpretation* (Institute of Jewish Affairs and World Jewish Congress 1958); Asbjørn Eide, Gudmundur Alfredsson, Göran Melander, Lars Adam Rehof, Allan Rosas, and Theresa Swineheart (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian UP 1993); Johannes Morsink, *The Universal Declaration of Human Rights: Origin, Drafting & Intent* (U Pennsylvania Press 1999).
16 See UNCHR 'Memorandum on Historical Background of the Committee' (29 May 1947) UN Doc E/CN.4/AC.1/2.
17 UNCHR 'Draft Outline of International Bill of Rights' (4 June 1947) UN Doc E/CN.4/AC.1/3.
18 See Morsink (n 15) generally, and more specifically at 6, 131. The governments of Chile, Cuba, and Panama each submitted draft declarations, and the governments of India and the United States of America submitted proposals.
19 UNCHR 'International Bill of Rights Documented Outline' (11 June 1947) UN Doc E/CN.4/AC.1/3/Add.1.
20 UNCHR, 'International Bill of Rights Documented Outline' (n 20). The fifty-five member states were Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, the Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, the Philippine Republic, Poland, Saudi Arabia, Siam, Sweden, Syria, Turkey, the Ukrainian Soviet Socialist Republic, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom, the United States, Uruguay, Venezuela, Yugoslavia.
21 See Lauri Hannikainen and Kristian Myntti, 'Article 19' and Allan Rosas, 'Article 21' in Eide (n 15) 275, 300.
22 Morsink (n 15) 72.
23 Asbjørn Eide comments that Roosevelt's 'freedom from want' was the most innovative in the new international humanitarian order envisaged after the Second World War. Asbjørn Eide, 'Article 25' in Eide (n 15) 385.
24 See Morsink (n 15) 89, 130–33, 157, 191.
25 UNCHR 'Summary Record of the Sixth Meeting' (16 June 1947) UN Doc E/CN.4/AC.1/SR.6.
26 UNCHR 'Draft Report of the Drafting Committee to the Commission on Human Rights' (23 June 1947) UN Doc E/CN.4/AC.1/14.
27 UNCHR 'Report of the Drafting Committee to the Commission on Human Rights' (1 July 1947) UN Doc E/CN.4/21.
28 For a detailed discussion of the drafting of the 'work-related' rights contained in the UDHR, see Morsink (n 15) ch 5.
29 Morsink explains that the united voice of the Latin American delegations, together with the support of the Communist states, ensured that the substance of the original work-related provisions remained in Art 23 as finally adopted. Morsink (n 15) 130, ch 5 generally. However, a number of other organizations also played a role, especially in the development of the trade union rights in the Declaration, including the International Labour Organization, the World Federation of Trade Unions, and the American Federation of Labor. See Morsink (n 15) 168–81.
30 See Morsink (n 15) 281.
31 The similarities are noted by Tore Lindholm, 'Article 1: A New Beginning' in Eide (n 15) and discussed by Morsink (n 15) ch 8.
32 Morsink (n 15) 281.
33 For an overview, see generally Morsink (n 15).
34 See eg Morsink (n 15) 6.
35 See Jan Mårtenson, 'The Preamble of the Universal Declaration of Human Rights and the UN Human Rights Programme' in Eide (n 15); Morsink (n 15) 20. The 2002 issue of the United Nations' compilation of international human rights instruments covered almost 100 human rights instruments. UN High Commissioner for Human Rights, *Human Rights: A Compilation of International Instruments* (UN 2002).
36 Henry J Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (3rd edn, OUP 2008) 136.
37 See Green (n 4) 174–75; and Gunnar G Schram, 'Article 15' in Eide (n 15).
38 Simma and Alston (n 4) 84, 90–96; Steiner, Alston, and Goodman (n 36) 137.

39 See above. The European Convention on Human Rights (ECHR), the basis of the activities of the ECtHR, does refer to general principles of law in the context of Art 7 (which reflects the principle of legality). However, the ECHR does not contain any general provision indicating that principles are a source of law relevant to interpreting its provisions and are to be applied by the ECtHR. The founding treaties of the European Communities contained no reference to general principles.

40 See Gaja (n 4) para 3.

41 *Minority Schools in Albania Case*.

42 *Minority Schools in Albania Case* (n 41) 17.

43 *Corfu Channel Case* (n 8).

44 *Corfu Channel Case* (n 8) 22.

45 *Reservations to the Genocide Convention Case* 23. The ICJ subsequently held that the prohibition of genocide constitutes an e*rga omnes* obligation and is *jus cogens*. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* 616; *Armed Activities on the Territory of the Congo* 32.

46 *Application for Review of Judgment No 158* 181.

48 *US Diplomatic and Consular Staff Case* (n 47) 42.

49 Rodley takes a different view of the significance of the case. See Nigel S Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' (1989) 38 ICLQ 321, 324–27.

50 *Legality of the Threat or Use of Nuclear Weapons Case* 242.

51 Principle 24 of the 1992 Rio Declaration on Environment and Development provides that states should respect international law by providing protection for the environment in times of armed conflict.

52 Protection of the Environment in Times of Armed Conflict, UNGA Res 47/37 (25 November 1992) UN Doc A/47/49.

53 See, for example, *South-West Africa Cases*, discussed later; *US States Diplomatic and Consular Staff Case* (n 47).

54 *South-West Africa Cases (Second Phase) Judgment* [1966] ICJ Rep 6.

55 *South-West Africa Cases* (n 54) 250, dissenting Opinion of Judge Tanaka.

56 *South-West Africa Cases* (n 54) 287.

57 *South-West Africa Cases* (n 54) from 294.

58 *South-West Africa Cases* (n 54) 299–300.

59 See also Judge Cançado Trindade's concurring opinion in the same context, discussing the interrelationship between general principles and international human rights norms. The United Nations Human Rights Committee has been more cautious, but in its General Comment No 18, it finds that 'equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights'. UNHRC 'General Comment No 18: Non-Discrimination' (10 November 1989) UN Doc HRI/GEN/1/Rev.9.

60 *Pulp Mills on the River Uruguay*.

61 *Pulp Mills* (n 60) para 135 (separate opinion of Judge Cançado Trindade).

62 *Pulp Mills* (n 60) para 5.

63 *Pulp Mills* (n 60) para 37.

64 *Pulp Mills* (n 60) para 220. See also his concurring opinion in the Advisory Opinion of the Inter-American Court of Human Rights on the *Juridical Condition and Rights of Undocumented Migrants* (n 5).

65 This is likely to be the case in respect of most of the 'third generation' rights.

66 The Court alluded to the existence of such norms in *Barcelona Traction, Light and Power Company, Limited* 32 (rights giving rise to duties *erga omnes*). The ICJ cited protection from slavery and racial discrimination as examples of *erga omnes* norms. See also *East Timor* 102 (right to self-determination); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 45) 616 (prohibition of genocide). The ICJ has, on occasion, expressly referred to *jus cogens* in its judgments and advisory opinions. See eg *Legality of the Threat or Use of Nuclear Weapons* (n 50) 258 (not necessary to pronounce on whether principles and rules of humanitarian law are part of *jus cogens*); *Armed Activities on the Territory of the Congo* (n 45) 32 (prohibition of genocide is *jus cogens*). The International Criminal Tribunal for the Former Yugoslavia has also invoked the principle of *jus cogens*. See *Prosecutor v Furundžija* 55, 58–61 (prohibition of torture is *jus cogens*).

67 See Chapter 24 in this *Handbook* and, generally Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008); Jochen A Frowein, '*Ius Cogens*', *The Max Planck Encyclopaedia of Public International Law* (OUP 2008) online edition: <http://www.mpepil.com> accessed 22 April 2012.

68 See UNHRC, 'General Comment No 29: States of Emergency (article 4)' (31 August 2001), UN Doc No CCPR/C/21/Rev.1/Add.11 paras 11–13. While this would appear to be, at least in part, a reference to *jus cogens* norms, the Committee took care not to characterize them as such. The list includes the following (a) all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person; (b) prohibitions against the taking of hostages, abductions, or unacknowledged detention; (c) the international protection of the rights of

persons belonging to minorities includes elements that must be respected in all circumstances (as reflected in the prohibition against genocide, the inclusion of a non-discrimination clause in Art 4 § 1, as well as the non-derogable nature of Art 18); (d) deportation or forcible transfers of populations that amount to a crime against humanity as set out in the Rome Statute of the International Criminal Court.

69 Article 7 § 2 of the Convention. See Art 15 § 2 of the ICCPR. There are two other references in the ECHR. Article 35 § 1 requires that all domestic remedies be exhausted 'according to the generally recognised rules of international law'. Article 1 of Protocol No 1 protecting the right to property provides that: 'No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' In the field of expropriation these principles have been held not to apply to the taking of the property of nationals (*James v UK*, paras 60–66).

70 *Streletz, Kessler and Krenz v Germany* (n 11) paras 105–106. See also the concurring opinions of Judges Loucaides and Levits.

71 *Baumgarten v Germany* para 9.4.

72 For example, *Markin v Russia*, para 96.

73 Paragraph 62.

74 *Soering v UK*.

75 Consultative Assembly, 'Working Paper No 93' (1950) vol III, 982.

76 *Golder* (n 9) paras 35–36.

77 *John Murray* (n 10) para 45.

78 See, in this respect, *Scoppola (No 2) v Italy*; the partly dissenting opinions of Judges Nicolau, Bratza, Lorenzen, Jociene, Villiger, and Sajó; and Art 49 § 1 of the Charter.

79 See below for a discussion of the Charter. In the area of criminal law, see also *AP, MP and TP v Switzerland*, where the court considered that criminal liability does not survive the person who has committed the criminal act. This was considered to be a fundamental rule of criminal law linked to the presumption of innocence. Inheritance of the guilt of the dead was not considered to be compatible with the standards of criminal justice in a society governed by the rule of law.

80 *Al-Saadoon and Mufdhi v UK*, para 126. See also *Mamatkulov and Askarov v Turkey*, where the dissenters (Judges Caflisch, Turmen, and Kovler) considered that there was no general principle of law recognizing the interim measure that an international court issues as obligatory. The majority found that such a measure, under the Convention, was binding on the state, but reached this conclusion on the basis of an interpretation of the ECHR, without making a finding concerning the existence of a general principle.

81 *Al-Jedda v UK*, para 102.

82 Paragraph 61. The ICJ vindicated the Court's view on state immunity in the *Jurisdictional Immunities of the State* case, 37–39.

83 See Kanstantsin Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] *PL* 534.

84 *Demir and Baykara v Turkey*, paras 67, 71.

85 *Demir and Baykara* (n 84) para 76.

86 *Demir and Baykara* (n 84) para 79.

88 *Demir and Baykara* (n 84) para 106.

89 *Demir and Baykara* (n 84) para 151.

90 *Demir and Baykara* (n 84) para 152.

91 *Demir and Baykara* (n 84) para 155.

92 Paragraph 61.

93 Paragraphs 54–56.

94 Paragraphs 26–28, 70.

95 Paragraphs 60–61.

96 Paragraphs 285–89.

97 Paragraph 176.

98 European Coal and Steel Community Treaty, concluded in 1951, and the 1957 Treaties of Rome, which created the European Economic Community and the European Atomic Energy Community.

99 The only human rights guarantee appeared in Art 4 of the Treaty of Rome which prohibited, within the scope of application of the Treaty, discrimination on the grounds of nationality, a prohibition reflected in other more specific articles of the Treaty (see, for example, Art 40(3)).

100 See Ulrich Scheuner, 'Fundamental rights in European community law and in national constitutional law' (1975) 12 CML Rev 171; GF Mancini, 'The Making of a Constitution for Europe' (1989) 26 CML Rev 595, 608–609; Bruno De Witte, 'The Past

and Future Role of the European Court of Justice in the Protection of Human Rights' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999) 864.

101 It was renamed the Court of Justice of the European Union following the treaty changes the Treaty of Lisbon introduced in 2007.

102 See *Stork v High Authority*; *Geitling and Others v High Authority*; *Sgarlata and Others v Commission*.

103 See Mancini (n 100) 609; and Scheuner (n 100) 172–73, 177–80 for more detailed discussion.

104 *Costa v ENEL*.

105 *Internationale Handelsgesellschaft*, para 4.

107 *Nold v Commission*, para 13.

108 For consideration of the Declaration in the context of the right to property, see *Hauer v Land Rheinland-Pfalz*.

109 Article 6(2).

110 'Draft Charter of Fundamental Rights of the European Union' (11 October 2000) CHARTE 4473/00.

111 Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17.

112 Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17.

113 *Johnston v Chief Constable of the Royal Ulster Constabulary*.

114 See eg *Gutmann v Commission*; *Limburgse Vinyl Maatschappij NV and Others v Commission*; *Gözütok and Brugge*.

115 The first case in which the Court of Justice referred to the Charter in its reasoning was *European Parliament v Council*.

116 Mancini (n 100) 611.

117 See Allan Rosas and Heidi Kaila, 'L'Application de la Charte des Droits Fondamentaux de l'Union Européenne par la Cour de Justice: Un Premier Bilan' [2011] *Il Diritto dell'Unione Europa* 9.

118 See Judge Cançado Trindade, 'The Expansion of the Material Context of *Jus Cogens*: The Contribution of the Inter-American Court of Human Rights' in Dean Spielmann, Marialena Tsirli and Panayotis Voyatzis (eds), *The European Convention on Human Rights, a Living Instrument; Essays in Honour of Christos L Rozakis* (Bruylant 2011) 27–46.

119 See Green (n 4) 183.

Annex ZO

NGOs have been no less active in the drive toward equality of the sexes and the advancement of the status of women. They have taken various initiatives and have greatly affected the agendas of the Commission on the Status of Women, culminating in the adoption of both the Declaration (1967) and the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and other special conventions to protect women. From the International Women's Year (1975) to the Beijing Women's Conference (1995), groups concerned with the well being of women have accelerated their efforts toward equality, development, and peace, and pressed on in the twenty-first century. The importance of NGOs to the cause of women is such that the General Assembly, in Resolution 40/108, "Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women," adopted in December 1985, specifically acknowledged the constructive contributions made by NGOs, in general, and the Non-Governmental Organizations Forum, in particular, to the advancement of women and invited their continued participation in implementing the strategies formulated at the Nairobi Conference.[33]

Unfortunately, promotional activities are still too often carried forward from parochial and fragmented, rather than inclusive, perspectives. A frequent limitation on adequate performance of the promoting function comes from the all-too-frequent domination of public channels of communication by agents (official or unofficial) of special interests. Once having degenerated into propaganda of narrow views, promotional activities all too often have been perceived in terms of inter-bloc warfare—East against West, North against South, globalization against national interests, and so on. Problems arise, for example, when ideological polemics become a substitute for serious negotiation toward reduction and control of strategic and conventional armaments, or when measures to address climate change are opposed in the name of private interests. Nonnegotiable polemics must not overwhelm genuine expressions of common interests.

(p. xcv) The Prescribing Function

The prescribing function entails the adoption of community policies or rules by competent decision-makers. In practice, the act of prescription continues to be dominated by state actors. However, non-state actors enjoy an increasingly prominent role in the deliberation and adoption of legislation, treaties, resolutions, and other prescriptive acts. Their influence is keenly felt in the intelligence and promoting functions that invariably precede the act of prescription. Consider, for example, the adoption of the United Nations Convention on the Rights of the Child, the Mine Ban Treaty, and the Rome Statute of the International Criminal Court, whose contents were greatly enriched by the lobbying of NGOs representing broad perspectives and identifications.

In a fundamental sense, prescription results from a process of communication that proceeds on three levels: the designation of the content of a policy, creation of expectations about the authority of the policy so designated, and the creation of an expectation that the policy will be put into controlling practice through appropriate sanctioning measures. In the world community, as in its lesser component communities, processes of communication by which prescriptions are shaped range from the most deliberate forms of expression—international agreements and treaties—to the least deliberate form—the vast flow of expectations derived from and implicit in uniformities in decision and behavior. For this reason, it is important not to focus too narrowly on the formalities of the prescriptive process, but rather to probe for its effects wherever they may be found. The diversity and abundance of the processes of communication by which legal norms are made in the contemporary world are staggering. Those involved include not only the officials of states and intergovernmental organizations but also the representatives of political parties, pressure groups, and private associations, not to mention individual human beings with all their manifold identifications. The perspectives of participants are evidenced in their myriad demands, identifications, and expectations with varying degrees of compatibility or incompatibility with common interests and fundamental general community policies. The strategies participants employ to manage

their base values manifest varying degrees of explicitness and implicitness in relation to prescription and a wide continuum of persuasion and coercion. They encompass the modalities suggested in Article 38 of the Statute of the ICJ, as well as the procedures used in different arenas, and all other strategies characteristically employed within the value processes.

(p. xcvi) The crucial point for the present inquiry is the degree to which policies about human rights, however projected, become a part of the working expectations of the effective participants within the world community. Expectations are generated and reflected in a dynamic process of communication and practice. Only when the prescribing function is explicitly related to the ongoing, larger processes of communication and decision can the dynamics inherent in lawmaking be realistically and fully brought to the fore. In a public order of human dignity, the fundamental freedoms and rights of the individual would be so widely shared, intensely demanded, and highly cherished, they would be given special protection by formal prescriptions encompassing all values. The effective functioning of the prescribing function would ensure representative perspectives of the community are given expression in authoritative texts and force through controlling practice. Community policy would be inclusive in its concern, rejecting all claims of special interests. Reasonable latitude would be preserved for the recognition of emerging conceptions of rights.

The most striking contemporary developments in terms of the prescribing function relate to the growing role of international governmental organizations (IGOs). Contrary to the lingering myth that such organizations enjoy little direct prescriptive competence, they play an increasingly important role as forums for the flow of explicit communications and acts of collaboration that generate expectations about authoritative community policy. This is especially true of the United Nations and its affiliated agencies. The prescriptive power of IGOs challenges the notion that states are the sole legitimate subjects of international law. Intergovernmental bodies such as the United Nations are equipped with an international legal personality and fundamental rights that have been affirmed by the ICJ. While IGOs are formed by states in order to pursue common interests, these organizations, owing to their legal personhood, function independently of the host states in which they operate. Their efforts have contributed to an ever-growing body of rules and norms, including most significantly international treaties as well as mechanisms for resolving international disputes, between both nations and private parties.

The evolution of the Universal Declaration of Human Rights as quasi-legislation and custom offers an instructive example. When the Universal Declaration was adopted unanimously in December 1948 by the General Assembly, the original shared expectation was that it represented only “a common standard of achievement” without direct legal authority and enforceability. (p. xcvii) But the authoritative nature of the Universal Declaration has grown in the seven decades since. It has been affirmed and reaffirmed by numerous resolutions of UN entities and related agencies, invoked and reinvoked by various participants, and incorporated into international agreements and national constitutions, finding increasing expression in judicial decisions, both transnational and national. Today, the Universal Declaration, along with the two International Covenants, is widely acclaimed as the “Magna Carta of humankind,” to be observed by all the participants in the world arena. The authoritative effect of the Universal Declaration is recognized in a number of ways: as the authoritative identification and clarification of human rights guaranteed under the UN Charter, as part of customary international law, as a vital component of *jus cogens*, and as an indispensable component of the developing global bill of human rights. Likewise, in the arena of international humanitarian law, officials and nonofficials look to the Geneva Conventions as representing customary expectations of conduct during times of war. The treaties’ authoritative effect is evidenced by the degree to which they have been invoked by states as legitimate expressions of basic rights by both signatory and nonsignatory nations.

Provisions outlawing practices, most notably torture, have attained status as *jus cogens* as the result of their widespread adoption over the decades since the conventions' ratification.

The world arena lacks a well-organized, centralized lawmaking institution. Under the deliberate mode of prescription, states are not bound by a particular international agreement unless they give express consent. Nevertheless, the global prescribing process increasingly exhibits features of inclusivity, rationality, and effectiveness. An appropriate inclusivity is greatly fostered by the informal components in the transnational prescribing process that permit expectations about policies, authority, and control to be created by cooperative behavior of both official and unofficial participants. Such processes represent a preferred policy of democracy and representativeness because they entail a constant accommodation of the interests and behavior of all actors affected by the prescriptions thus created.

The Invoking Function

As described above, the invoking function refers to the provisional characterization of events in terms of community prescriptions. The objectives of invocation extend from obtaining the benefits of an informal appreciation of events (p. xcviii) to setting in motion a formal application by authoritative decision-makers. The participants in invocation before transnational arenas include states, international governmental organizations, nongovernmental organizations and groups, and individuals. In situations of a lesser degree of institutionalization, invocation is generally open to all effective participants; in arenas of a higher degree of institutionalization, access is available only through formal channels and may be highly restricted.

The process of invocation ordinarily proceeds through phases of initiation, exploration of facts and policies, and stimulation of the applicative arenas to take action. Like other claims to authority, an invocation involves assertions about facts, relevant policies, and appropriate remedies. The claimants who invoke a rule do so by making allegations about what has happened, what policies have been violated, and what future action is needed to remedy the wrong. They may do so through formal or informal channels. Specific and responsible allegations of violations of international legal norms, though falling short of mobilizing formal application by authoritative decision-makers, could nevertheless in the aggregate produce significant effects in ending lawless acts or in securing greater compliance with established international standards. World public opinion is the court of last resort for informal invocations, which can be undertaken day in and day out by nongovernmental groups, the media of mass communication, and concerned individuals. Publicity mobilizes support, support leads to action, and action alleviates abuses. In a basic sense, the terms of a human rights treaty may be invoked as effectively in a widely broadcast news report as in a legal brief presented before a tribunal.

Maintenance of minimum world order depends on timely invocation in response to breaches of peace and other gross violations of international law. Respect for and confidence in processes of authoritative decision depend greatly on the ability of individuals and private groups to challenge unlawful deprivations. As such, invocation within a world order of human dignity evidences the highest degree of inclusivity in terms of access to arenas of authority. Special provision is made for individual claimants to bring claims concerning putative deprivations and to secure remedies before authoritative decision-makers. Provision is also made for the invocation of rights on behalf of the community. Since the original edition of *Human Rights and World Public Order*, the ability for individual petitioners to be heard by human rights courts and other authoritative bodies has been greatly expanded. Individuals previously were dependent on state actors to take up their

Annex ZP

Part 1 Delimitation of the Problem, Four The Global Constitutive Process of Authoritative Decision

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2. Application.

   Provision is made for the applicability of intensely demanded prescriptions about individual rights to all decision makers and community members, whether official or nonofficial. Officials at all levels of government, from central to provincial, are required to observe and promote these rights, and nonofficials are required to respect the equal rights of others in all interactions in social process.

   Prescriptions designed to protect human rights are buttressed by specialized institutions for application. Allocations of competence may be balanced so as to secure disinterested judicial review of decisions and activities by officials and others who are alleged to have imposed deprivations of human rights.

3. Invocation.

   Special provision is made to enable individuals who allege that their human rights have been violated to challenge putative deprivations before authoritative decision makers.

   Provision is made for specialized invocation by representatives of the community, such as ombudsmen or attorneys general.

4. Termination.

   Special difficulties are placed in the way of amending or terminating intensely demanded prescriptions about human rights. It is commonly the case that such prescriptions can be changed only in the ways that they are created.

(p. 320) It may now be demonstrated that all these different features of constitutive process, so thoroughly tested and so highly cherished in national communities, have appeared, or are in process of appearing, in global constitutive process in relation to the protection of human rights. It is convenient, again, in recounting these developments to focus upon each of the four decision functions.

Prescription

The prescriptions about human rights range, as described above, from the most deliberate form (agreement) to the least deliberate form (customary development), with a paramount role being increasingly accorded communication emanating from the United Nations.[558]

The deliberate effort to create an international bill of human rights began even before the formal establishment of the United Nations. In recognition of the intimate relationship between human rights and peace, as vividly brought home by the atrocities of the Third Reich, a proposal to include an International Bill of Human Rights in the United Nations Charter itself was presented at the San Francisco conference.[559] While the delegates were not ready for such a proposal, the Charter, as finally adopted, did contain several significant human rights provisions;[560] and the "idea of establishing an International Bill of Rights" was, in the words of Schwelb, "treated as inherent in the Charter."[561] Appearing at the close of the San Francisco conference, President Truman stated emphatically:

> We have good reason to expect the framing of an international bill of rights, acceptable to all the nations involved. That bill of rights will be as much a part of international life as our own Bill of Rights is a part of our Constitution. The Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere

—without regard to race, language or religion—we cannot have permanent peace and security.[562]

(p. 321) Prior to the Charter's coming into force on October 24, 1945, the Preparatory Commission of the United Nations and its executive committee had recommended that the Commission on Human Rights, as provided in the Charter, accord the top priority to the "formulation of an international bill of rights" in its future work.[563] Hence, when the Commission on Human Rights was created in February 1946, "an international bill of rights" was the first item on its agenda.[564] Shortly after the Commission and a drafting committee commenced their work, it became apparent that there were differences among the members regarding the appropriate modality of the envisaged international bill of rights—whether in the form of a "declaration" or "manifesto" by the General Assembly or of an international convention.[565] While the proponents of the "declaration" route expected the proposed declaration to be reinforced by one or more conventions, the proponents of the "convention" route endorsed the adoption also of a general and comprehensive declaration. Eventually, in 1947, it was decided that the contemplated "International Bill of Human Rights" would consist of a Declaration, a Convention (Covenant), and "Measures of Implementation."[566] The first part of this international bill—the Universal Declaration of Human Rights—was adopted unanimously on December 10, 1948, by the General Assembly in the form of a resolution.[567]

Subsequent to the adoption of the Universal Declaration, the ideological controversy relating to the nature and prominence of "civil and political rights" and of "economic, social, and cultural rights" led the General Assembly to decide, in 1952, that two covenants—one on civil and political rights and the other on economic, social, and cultural rights—should be simultaneously prepared, submitted, approved, and opened for signature, (p. 322) and that "measures of implementation" should be incorporated in each of the two covenants.[568] The Human Rights Commission, entrusted with the primary task of drafting, completed its work on the two draft covenants in 1954.[569] After the lapse of more than a decade, the General Assembly, on December 16, 1966, adopted unanimously the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights,[570] and, by majority vote, the Optional Protocol to the International Covenant on Civil and Political Rights (dealing with procedures for individual petitions).[571] Despite some gloomy predictions, the Covenant on Economic, Social, and Cultural Rights has been in force since January 3, 1976, while the Covenant on Civil and Political Rights and its Optional Protocol have been in force since March 23, 1976.[572] Thus, the International Bill of Human Rights, as contemplated at the founding of the United Nations, has been projected in familiar form.

This developing International Bill of Human Rights has, further, been greatly fortified by various ancillary instruments dealing with particular categories of participants (women, refugees, stateless persons, youths, children, mentally retarded persons, and so on), or particular value categories or subject matters (genocide, apartheid, discrimination, racial discrimination, sex-based discrimination, slavery, forced labor, nationality, employment, education, marriage, and so on),[573] by the decisions and recommendations of international governmental organizations (especially by the various organs and entities of the United Nations), and by customary developments in the transnational arena.

Representing a new departure from traditional preoccupation with "interstate" relations, the United Nations has projected an unmistakably new commitment toward world order, seeking to secure not only a minimum order (in the sense of minimization of unauthorized coercion) (p. 323) but also a maximum order (in the sense of the greater production and wider distribution of all values). The United Nations Charter offers multiple provisions suggesting that the protection of human rights is a coequal, even indistinguishable, goal in relation to the maintenance of peace and security. The determination of the peoples of the

United Nations “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women,” as expressed in the preamble, is immediately followed, in Article 1(3), by the enunciation of the following as a principal purpose of the United Nations:

> To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Toward this purpose, the General Assembly is authorized, under Article 13(1)(b), to “initiate studies and make recommendations”; the Economic and Social Council is similarly authorized, under Article 62(2), to “make recommendations”; and Article 76c makes explicit that enhancement of “respect for human rights and for fundamental freedoms” is one of the “basic objectives” of the international trusteeship system. Most importantly, Articles 55 and 56 together oblige all member states to “pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of,” among other things, “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

In the light of this mass of explicit references to the protection of human rights, many scholars have, from the beginning of the United Nations, taken the position that the human rights provisions of the Charter are law in the sense of imposing definite legal obligations upon the member states and others. Dismissing the argument that the Charter provisions on human rights “are a mere declaration of principle devoid of any element of legal obligation” as “no more than a facile generalisation,”[574] Lauterpacht eloquently stated:

> For the provisions of the Charter on the subject figure prominently in the statement of the Purposes of the United Nations. Members of the United Nations are under a legal obligation to act in accordance with these Purposes. It is their legal duty to respect and observe fundamental rights and freedoms. . . .[575]

(p. 324) Drawing upon other Charter provisions, he elaborated:

> There is a mandatory obligation implied in the provision of Article 55 that the United Nations “shall promote respect for, and observance of, human rights and fundamental freedoms”; or, in the terms of Article 13, that the Assembly shall make recommendations for the purpose of assisting in the realisation of human rights and freedoms. There is a distinct element of legal duty in the undertaking expressed in Article 56 in which “All Members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.” The cumulative legal result of all these pronouncements cannot be ignored. The legal character of these obligations of the Charter would remain even if the Charter were to contain no provisions of any kind for their implementation. For the Charter fails to provide for the enforcement of its other numerous obligations the legal character of which is undoubted.[576]

The position taken by Jessup is equally emphatic: “It is already the law, at least for Members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which they are parties.”[577]

This interpretation of the human rights provisions of the Charter, as imposing definable specific obligations upon states, has recently received authoritative confirmation from the International Court of Justice. In the *Namibia* case, in 1971, the Court held that the extension of apartheid to Namibia (South West Africa) by the government of South Africa is in contravention of the Charter of the United Nations.[578] The Court declared:

> Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to (p. 325) enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.[579]

In particular application to the case before it, the Court stated emphatically that

> no factual evidence is needed for the purpose of determining whether the policy of *apartheid* as applied by South Africa in Namibia is in conformity with the international obligations assumed by South Africa under the Charter of the United Nations. In order to determine whether the laws and decrees applied by South Africa in Namibia, which are a matter of public record, constitute a violation of the purposes and principles of the Charter of the United Nations, the question of intent or governmental discretion is not relevant; nor is it necessary to investigate or determine the effects of those measures upon the welfare of the inhabitants.[580]

In his incisive analysis of the Court's opinion, Schwelb notes that "the interpretation of the human rights clauses [as imposing legal obligation upon member states] contained in the Advisory Opinion is backed by the authority of the Court as a body and of the thirteen Judges who voted for it and . . . is not challenged by one of the two dissenting Judges and not specifically objected to by the other."[581] "To sum up," Schwelb adds, "the authority of the Court is now clearly behind the interpretation of the human rights clauses of the Charter as presented almost a generation ago by Lauterpacht and others."[582]

The very general authoritative prescriptions of the Charter about human rights were shortly given somewhat more detailed specification in the Universal Declaration of Human Rights, adopted in 1948. This Declaration has acquired, as we have already described, the attributes of authority in two different ways.[583] First, it is commonly accepted as an authoritative specification of the content of the human rights provisions of the United Nations Charter. Secondly, its frequent invocation and application by officials, at all levels of government and in many different communities about the world, have conferred upon its content those crystallized expectations of future invocation and application characteristic of customary law.

(p. 326) Thus, the Montreal Statement of the Assembly for Human Rights (a world assembly attended by both officials and nonofficials in commemoration of the International Year of Human Rights) declared, in March 1968, that "The Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary international law."[584] Similarly, in his separate opinion in the *Namibia* case, Judge Ammoun, vice-president of the Court, after observing that the Court's "Advisory Opinion takes judicial notice of the Universal Declaration of Human Rights,"[585] elaborated as follows:

> Although the affirmations of the Declaration are not binding *qua* international convention within the meaning of Article 38, paragraph 1(a), of the Statute of the Court, they can bind States on the basis of custom within the meaning of paragraph 1(b) of the same Article, whether because they constituted a codification of customary law as was said in respect of Article 6 of the Vienna Convention on the Law of Treaties, or because they have acquired the force of custom through a general practice accepted as law, in the words of Article 38, paragraph 1(b), of the Statute.[586]

In documenting a thesis that "the adoption of the [Universal] Declaration may well have been one of the greatest achievements of the United Nations,"[587] Humphrey offers relevant historical context for the Declaration:

> It provides the framework for the international recognition of those human rights and fundamental freedoms that were left undefined by the Charter. In the tradition of Magna Carta, the American Declaration of Independence, the French Declaration of the Rights of Man, and other historic statements, the Universal Declaration of Human Rights enshrines on the international level a universally accepted philosophy of freedom for the 20th century moving beyond the historic declarations by recognizing that civil and political rights can have little meaning without economic, social, and cultural rights. Its moral and political authority is equal to that of the Charter itself.[588]

(p. 327) In summarizing the use to which the Universal Declaration has been put, Humphrey concludes:

> In the more than a quarter of a century since its adoption, however, the Declaration has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and therefore is binding on all states. The Declaration has become what some nations wished it to be in 1948: the universally accepted interpretation and definition of the human rights left undefined by the Charter.[589]

The same conclusion is announced by Waldock in a much quoted passage:

> This constant and widespread recognition of the principles of the Universal Declaration clothes it, in my opinion, in the character of customary law. Be that as it may, the Declaration has acquired a status inside and outside the United Nations which gives it high authority as the accepted formulation of the common standards of human rights. Furthermore, if you look at the Declaration, you will see that it unequivocally starts from the standpoint of the rule of law—the standpoint that the function of law is not merely to regulate the conduct of the governed but also to protect them from abuses of power by the governors.[590]

The two International Covenants on Human Rights and the Optional Protocol to the Covenant on Civil and Political Rights have, as indicated, been in effect since early 1976. They are of course binding for all states that have ratified or acceded to them. Like the Universal Declaration, they are, further, authoritative interpretations of the Charter provisions on human rights, as well as vital components in the flow of communication that creates the expectations comprising customary international law. They have both given further detailed specification to the content of internationally protected human rights and provided structures and procedures (albeit with some inadequacies) for remedying deprivations, thereby contributing mightily to the stabilization of authoritative expectations about the defense and fulfillment of human rights.[591] Similarly, a (p. 328) growing body of

more particular conventions dealing with certain deprivers or various deprivations has significantly contributed to the enrichment and growth of the core content of the human rights prescriptions projected in the United Nations Charter.[592]

The authoritativeness of the Charter provisions on human rights, and of the specification of these provisions in the Universal Declaration and related instruments, has been greatly fortified by the practice of international governmental organizations, especially the various organs of the United Nations. As Schwelb observes:

> In the practice of the United Nations and of its Members neither the vagueness and generality of the human rights clauses of the Charter nor the domestic jurisdiction clause have prevented the United Nations from considering, investigating, and judging concrete human rights situations, provided there was a majority strong enough and wishing strongly enough to attempt to influence the particular development.[593]

Some of the more important aspects of this United Nations practice have already been summarized by reference to each of the seven decision functions performed.[594] Here attention may be called to a recent, somewhat more comprehensive, and conventionally organized study emanating from the United Nations, which describes the depth and wide acceptance of this practice.[595] This study summarizes in terms of:

1. "General pronouncements endorsing the Universal Declaration or calling upon Governments to live up to its provisions." [596]

   The list includes:

   General Assembly Resolution on "Essentials of Peace" of December 1, 1949;

   The "Uniting for Peace" Resolution adopted by the General Assembly on November 3, 1950;

   The Resolution on "Observance of Human Rights" adopted by the General Assembly on February 4, 1952;

   The landmark Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the Assembly on December 14, 1960;

   (p. 329) The United Nations Declaration on the Elimination of All Forms of Racial Discrimination adopted on November 20, 1963;

   The General Assembly Resolution on measures to accelerate the promotion of respect for human rights and fundamental freedoms adopted on December 18, 1965;

   The General Assembly Resolution of December 19, 1968, endorsing the Proclamation of Teheran as "an important and timely reaffirmation of the principles embodied in the Universal Declaration and in other international instruments in the field of human rights";

   The Declaration on Social Progress and Development of 1969;

   The General Assembly Declaration on the Occasion of the Twenty-fifth Anniversary of the United Nations (October 24, 1970). [597]

2. "United Nations resolutions invoking the Universal Declaration in support of action on a world-wide scale for the solution of human rights problems in specific fields." [598]

   These specific fields include:

Action against discrimination in general;

Action against sex-based discrimination and for the protection of women;

The right of asylum;

Administration of justice;

Freedom of information;

The protection of refugees;

The protection of the child and of the youth;

The protection of the elderly and the aged;

The protection of mentally retarded persons;

Action against the outflow of skilled personnel from developing to developed countries. [599]

3. "United Nations resolutions invoking the Universal Declaration in regard to concrete human rights situations." [600] (p. 330)

The concrete human rights situations involved include:

Respect for human rights in non-self-governing territories;

The racial situation in southern Africa;

The Namibia controversy;

Matters relating to forced labor;

The exploitation of labor through illicit and clandestine trafficking;

The policy of apartheid in South Africa;

The Russian wives case;

The question of Tibet. [601]

The summary in the United Nations study includes also a specification of "the influence of the Universal Declaration on international treaties"[602] and of "the influence of the Universal Declaration on national constitutions, municipal laws and court decisions."[603] The first influence, that on the proliferation of human rights conventions, has already been noted.[604]

The second influence of the Universal Declaration, that on the making of national constitutions, statutes, and decisions, is of particular importance in augmenting the great historic communication—that the protection of human rights is of the highest priority—inherent in the practice of national constitutionalism during the past two hundred years. This flow of communication on the national level confirms community-wide expectations that the basic content of human rights, as specified in many relevant documents, is rapidly becoming the most fundamental law of the global community. The United Nations study offers this summation:

> Evidence of the impact of the Universal Declaration may be found in texts of various national constitutions which were enacted after the adoption of the Universal Declaration. Several of these constitutions expressly refer, either in their preambles or in their operative provisions, to the Universal Declaration. In addition, many other constitutions contain detailed provisions on a number of human rights, most of which are inspired by, or often modelled on, the text of the articles of the Declaration.[605]

(p. 331) Another important body of practice contributing to the establishment and maintenance of a global bill of rights is the customary international law of the responsibility of states about the treatment of aliens. This still vital inheritance, which afforded transnational protection to a particular category of human beings (nationals abroad) in an era when human rights matters were commonly accepted as within the domain of domestic jurisdiction, continues to serve the common interest today. In fact, as we have developed elsewhere, the customary international law of state responsibility, in constant interaction with the contemporary human rights movement and as an integral part of this movement, has greatly contributed to the sum total of the human rights protection, helping to raise the level of transnational protection of nationals as well as of aliens.[606] The conjunction of the customary protection through state responsibility and the new human rights prescriptions generated by, and radiated from, the United Nations Charter has eliminated "out-groups" in the regime of transnational protection of human rights and accorded protection to all human beings, irrespective of their nationality or their place of sojourn.

The end result of all this comprehensive and continuing prescription, ranging in modality from the most deliberate to the least deliberate, would appear to be that the core content of the various communications has, in the immemorial manner of constitutive process, been prescribed as a global bill of human rights. This global bill of rights is in form and policy content very much like those bills of rights created and maintained in the more mature national communities. The English constitution, for example, supposedly "unwritten," is in fact composed both of a series of instruments, traceable back to Magna Carta, and of customary practice.[607] Similarly, when the United States Constitution is properly understood, it is not merely a single written document, but the whole flow of communication and decision, preceding 1787 and coming down to date;[608] the Bill of Rights in this Constitution goes well beyond the (p. 332) confines of the first eight or ten articles of the amendments to the Constitution.[609] In any constitutive process, it is not merely a simple isolated act of communication, but a whole flow of communication and decision through time, that establishes and maintains authoritative expectations.[610]

Application

The contemporary transnational prescriptions for the protection of human rights would appear to project the same broad compass in applicability characteristic of the bills of rights of mature national communities. These prescriptions are clearly made applicable to the United Nations and its organs and other international governmental organizations, to nation-states and all their officials, and to all the non-governmental groups and individuals active in the whole of world social process.

The United Nations and Its Organs

The United Nations Charter is commonly expected, as indicated in a vast flow of communication before and since 1945, to be the most fundamental law of the global community, binding all participants. For member states this is made explicit in Article 103, the Charter's supremacy clause. This article stipulates: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." It is not to be thought that the member states and their global audience could have understood by these words that the members were creating an organization or agencies with a competence to transgress the obligations, with respect to security and human rights, that they themselves were assuming. The struggle to bring kings and presidents and other agencies within the confines of the fundamental laws of national communities has left too indelible an impression upon too many peoples to make plausible

(1970); THE SUPREME COURT AND THE JUDICIAL FUNCTION (P. Kurland ed. 1975); JUDICIAL REVIEW AND THE SUPREME COURT (L. Levy ed. 1967); E. Rostow, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW (1962); H. Wechsler, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW (1961); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 768 (1971).

Constitutional law case books typically begin with judicial review. *See* P. Brest, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 46–87 (1975); E. Barrett, CONSTITUTIONAL LAW: CASES AND MATERIALS 17–153 (5th ed. 1977); J. Barron & C. Dienes, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY: CASES AND MATERIALS 1–139 (1975); P. Freund, A. Sutherland, M. Howe, & E. Brown, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1–146 (4th ed. 1977); G. Gunther, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1–80 (9th ed. 1975); P. Kauper, CONSTITUTIONAL LAW: CASES AND MATERIALS 1–314 (4th ed. 1972); W. Lockhart, Y. Kamisar, & J. Choper, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1–159 (4th ed. 1975).

557 *See* notes 635–99 and 748–67 *infra* and accompanying text.

558 *See* notes 315–67 *supra* and accompanying text.

559 *See* R. Russell, A HISTORY OF THE UNITED NATIONS CHARTER 323–27 (1958); E. Schwelb, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 31 (1964) [hereinafter cited as E. SCHWELB]; U.S. Department of State, POSTWAR FOREIGN POLICY PREPARATION, 1939–1945, at 115–16, 472, 483–85 (1949); Sohn, *A Short History of United Nations Documents on Human Rights*, in COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 39, 46–56 (1968) [hereinafter cited as Sohn, *A Short History*].

560 *See* U.N. Charter, Preamble and Arts. 1(3), 13, 55, 56, 62(2), and 76(c).

561 E. SCHWELB, *supra* note 559, at 31.

562 1 United Nations Information Organization, DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 717 (1945).

563 REPORT OF THE PREPARATORY COMMISSION OF THE UNITED NATIONS 28, 36 (1946).

564 G.A. Res. 7, U.N. Doc. A/64 at 12 (1946); E.S.C. Res. 5, 1 U.N. ESCOR 163 (1946).

565 See Commission on Human Rights, *Report of the Drafting Committee on an International Bill of Human Rights: First Session*, U.N. Doc. E/CN.4/21 (1 July 1947).

566 *See* Report of the Commission on Human Rights, 2d Session, 6 U.N. ESCOR, Supp. (No. 1) 5, U.N. Doc. E/600 (1947). *See also* G.A. Res. 543, 6 U.N. GAOR, Supp. (No. 20) 36, U.N. Doc. A/2119 (1952); G.A. Res. 421, 5 U.N. GAOR, Supp. (No. 20) 42, U.N. Doc. A/1775 (1950); G.A. Res. 217 F, U.N. Doc. A/810, at 79 (1948).

For accounts of this development, *see* Y.B.U.N. 1947–48, at 572–73. *See also* Schwelb, *Notes on the Early Legislative History of the Measures of Implementation of the Human Rights Covenants*, in MELANGES OFFERTS À POLYS MODINOS 270–89 (1968); Sohn, *A Short History*, *supra* note 559, at 60–67 (1968).

567 Universal Declaration, *supra* note 45.

For its history and growth, *see N. Robinson, supra* note 363; E. SCHWELB, *supra* note 559; UNITED NATIONS ACTION, *supra* note 73, at 8–19; Cassin, *From the Ten Commandments to the Rights of Man*, in OF LAW AND MAN: ESSAYS IN HONOR OF HAIM H. COHN 13–25 (S. Shoham ed. 1971); Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, in E. LUARD, INTERNATIONAL PROTECTION, *supra* note 57, at 39–58.

568 G.A. Res. 543, 6 U.N. GAOR, Supp. (No. 20) 36, U.N. Doc. A/2119 (1952).

For a detailed account of this decision, *see Annotations on the Draft Covenants, supra* note 411, at 7–10. *See also* Schwelb, *Some Aspects, supra* note 301, at 105–07; Sohn, *A Short History, supra* note 599, at 101–07.

569 The completed work of Human Rights Commission on the draft covenants is fully incorporated in *Annotations on the Draft Covenants, supra* note 411.

570 Covenant on Economic, Social, and Cultural Rights, *supra* note 47; Covenant on Civil and Political Rights, *supra* note 48.

571 Optional Protocol, *supra* note 49. The Optional Protocol was adopted by a vote of sixty-six for, two against, and thirty-eight abstentions.

572 *See After 30 Years, an International Bill of Human Rights*, 13 UN MONTHLY CHRONICLE 50 (Apr. 1976); Schwelb, *Entry into Force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights*, 70 AM. J. INT'L L. 511 (1976).

573 These instruments are conveniently collected in U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 51. *See also* BASIC DOCUMENTS ON HUMAN RIGHTS (I. Brownlie ed. 1971).

574 H. LAUTERPACHT, *supra* note 39, at 147.

575 *Id.*

576 *Id.* at 148.

577 P. JESSUP, *supra* note 16, at 91. *See also* G. TUNKIN, *supra* note 315, at 80–82; Carey, *The International Legal Order on Human Rights*, in 4 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 268, 269–70 (C. Black & R. Falk eds. 1972); Newman, *Interpreting the Human Rights Clauses of the UN Charter*, 5 HUMAN RIGHTS J. 283 (1972). For other views endorsing this position, *see* Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337, 339–41 (1972) [hereinafter cited as Schwelb, *ICJ and Human Rights*]. Dissenting views are summarized in Schwelb, *supra*, at 338–39.

578 Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16 [hereinafter cited as Advisory Opinion on Namibia].

579 *Id.* at 57.

580 *Id.*

581 Schwelb, *ICJ and Human Rights, supra* note 577, at 350.

582 *Id.*

583 *See* notes 358–67 *supra* and accompanying text.

584 MONTREAL STATEMENT OF THE ASSEMBLY FOR HUMAN RIGHTS (1968).

See also Sohn, *The Human Rights Law of the Charter*, 12 TEXAS INT'L L.J. 129, 132–34 (1977).

585 [1971] I.C.J. 67, 76.

586 *Id.* at 76.

587 Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 529 (1976) [hereinafter cited as Humphrey, *The International Bill of Rights*].

588 *Id.*

589 *Id.*

590 Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1, 15 (1965) (Brit. Institute of Int'l & Comp. L., Int'l L. Series No. 5).

591 *See* notes 96, 376–83, 434–64 *supra* and accompanying text. *See also* A. ROBERTSON, *supra* note 551; Humphrey, *The International Bill of Rights, supra* note 587; Schwelb, *Civil and Political Rights, supra* note 382; Schwelb, *The Nature of the Obligations, supra* note 460; Schwelb, *Some Aspects, supra* note 301.

592 *See* notes 326–46 *supra* and accompanying text.

593 Schwelb, *ICJ and Human Rights, supra* note 577, at 341.

594 *See* notes 154–68 *supra* and accompanying text.

595 UNITED NATIONS ACTION, *supra* note 73.

596 *Id.* at 9.

597 See *id.* at 9–11.

598 *Id.* at 11.

599 *See id.* at 11–14.

600 *Id.* at 14.

601 *See id.* at 14–15.

602 *Id.* at 16.

603 *Id.* at 17.

604 *See* notes 326–46 *supra* and accompanying text.

605 UNITED NATIONS ACTION, *supra* note 73, at 17.

606 *See* chapter 14 *infra*.

607 *Cf.* A. DICEY, *supra* note 544; F. Maitland, THE CONSTITUTIONAL HISTORY OF ENGLAND (1908).

For more recent developments, *see* Daintith, *The Protection of Human Rights in the United Kingdom*, 1 HUMAN RIGHTS J. 275 and 407 (1968).

608 *See* H. McBain, THE LIVING CONSTITUTION (1927); C. Merriam, THE WRITTEN CONSTITUTION AND THE UNWRITTEN ATTITUDE (1931); *Comprehensiveness in Conceptions of Constitutive Process, supra* note 3; Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703 (1975); Miller, *Notes on the Concept of the "Living" Constitution*, 31 GEO. WASH. L. REV. 881 (1963); Reich, *The Living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT 133–62 (S. Strickland ed. 1967).

Contrast Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693 (1976).

609 For a comparable view, *see* W. Cohen & J. Kaplan, BILL OF RIGHTS: CONSTITUTIONAL LAW FOR UNDERGRADUATES 1–3 (1976).

610 *See* Miller, *supra* note 608. For a comprehensive development of this theme, *see* P. BREST, *supra* note 556.

611 I. BROWNLIE, *supra* note 172, at 677.

612 Goodrich, Hambro, and Simons point out:

> Article 2 is of fundamental importance in the total economy of the Charter. It lays down basic principles which the Organization, functioning through its various organs, and its members, must respect. Since the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council are composed of member states, it might be thought that—at least with respect to the

Annex ZQ

HUMAN RIGHTS AND HUMANITARIAN INTERVENTION: THE CASE LAW OF THE WORLD COURT

NIGEL S. RODLEY*

THIS article briefly canvasses a small number of International Court of Justice cases in which the Court has addressed human rights issues. From this it emerges that the Court has unambiguously accepted that the obligation to respect fundamental human rights is an obligation found in general international law. Questions may, however, remain as to:

(1) whether all the human rights enumerated in the Universal Declaration of Human Rights are equally binding;
(2) whether the content of all the rights may be equally discoverable; and
(3) how far the rights may be protected or implemented apart from such measures as particular human rights treaties may themselves provide. One measure of implementation that is clearly not allowed is unilateral resort to armed force by one State to adjust the human rights situation in another State (the doctrine of humanitarian intervention).

The cases in question are the advisory opinions on *Reservations to the Genocide Convention*[1] and on *Namibia*[2] and the decisions in the contentious cases in *South-West Africa*,[3] *Barcelona Traction*,[4] *US Diplomatic and Consular Staff in Tehran*,[5] and *Military Activities in Nicaragua*.[6] I shall treat the earlier cases, much pored over already, in less detail than the last one.

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1. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] I.C.J. Rep. 15.
2. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] I.C.J. Rep. 6.
3. *South-West Africa Cases (Ethiopia* v. *South Africa*; *Liberia* v. *South Africa) (Second Phase)* [1966] I.C.J. Rep. 6.
4. *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium* v. *Spain), Second Phase* [1970] I.C.J. Rep. 3.
5. *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* [1980] I.C.J. Rep. 3.
6. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits* [1986] I.C.J. Rep. 14.

I. THE EARLIER CASES

A. The Reservations *Case*

In the *Reservations* case the main point for the purposes of this article is the Court's observation that "the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, *even without any conventional obligation*".[7] In other words, regardless of participation in the Genocide Convention, the obligation not to commit genocide existed independently under general international law. The observation was important to the thrust of the Court's reasoning. The Court had been asked by the General Assembly whether, *inter alia*, the existence of reservations by one or more States, objected to by other States, could prevent the reserving States from becoming parties to the Convention. The Court's answer in short was: not unless the reservations are incompatible with the object and purpose of the treaty. It stated:

> The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result.[8]

The Court was, thus, seemingly at pains to avoid taking a position whereby limited participation risked undermining the notion that genocide was illegal, "even without any conventional obligation". With the passage of time it is easy to overlook the striking importance of this notion. The advisory opinion was handed down only some two and a half years after the adoption of the Convention by the General Assembly.[9] Moreover, the Convention was itself innovative: the Charter and Judgment of the International Military Tribunal at Nuremberg had recognised genocide as a crime against humanity, which was a crime under international law when committed *in connection with crimes against peace or war crimes*;[10] the Convention required no such limitation. It provided that the crime of genocide could be committed outside the context of international armed conflict, in other words, even in peacetime. The opinion represented a first brave breach by the Court of the doctrine of domestic jurisdiction. In subsequent cases the Court

7. [1951] I.C.J. Rep. 15, 23 (emphasis added).

8. *Idem*, p.24.

9. The Convention was adopted by the UN General Assembly on 9 Dec. 1948: G.A. Res.260A (III). The Court handed down its opinion on 28 May 1951.

10. Art.6, Charter of the International Military Tribunal annexed to the Agreement for the Establishment of an International Military Tribunal, concluded at London, 8 Aug. 1945: 5 U.N.T.S. 251. The judgment of the tribunal (1946) is reproduced in (1947) 41 A.J.I.L. 172.

has confirmed and elaborated on with greater precision what it said in this case about the legal prohibition of genocide.

B. The Barcelona Traction *Case*

The *Barcelona Traction* case concerned a Canadian corporation with subsidiaries operating in Spain, which was sued for bankruptcy in Spanish courts. The company was allegedly owned largely by Belgian shareholders and the issue before the Court was whether Belgium might exercise diplomatic protection of its nationals, who claimed that their interests had been harmed by action of the Spanish courts. It was fundamental to the Court's finding against Belgium's standing to bring a claim against Spain that there was a distinction between what it called bilateral obligations and obligations "towards the international community as a whole". The latter obligations were:

> By their very nature . . . the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes* [paragraph 33].
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, *as also from the principles and rules concerning the basic rights of the human person*, including protection from slavery and racial discrimination [paragraph 34, emphasis added].

Thus in this 1970 decision the Court articulated the proposition that obligations towards the international community as a whole derive from, *inter alia*, the principles and rules concerning the rights of the human person. It mentioned the prohibitions of slavery and racial discrimination as examples of such principles and rules, but only as examples. Their inclusion may be attributed to the need to give a clear retrospective reference to the earlier *South-West Africa* case (1966), wherein the Court's decision had provoked widespread criticism.[11] Further, as with the reference to genocide, these categories stood out since they are the subject of specific treaties. Indeed, an extensive list of inclusions would have risked adverse interpretation of unintentional omissions of certain principles and rules. None of the separate or dissenting opinions challenged this statement of the Court.[12]

11. [1966] I.C.J. Rep. 6. The Court had held in this case that Ethiopia and Liberia, having no direct interest at stake, had no standing to receive a decision of the court against South Africa, despite the fact that the subject matter of the case related to the human rights provisions of the League of Nations mandate under which South Africa administered South-West Africa (now Namibia).

12. [1970] I.C.J. Rep. 3, 55–357. As explained below, the Court subsequently pointed out that not all States have "the capacity to *protect* the victims of infringements of [human] . . . rights irrespective of their nationality" (para.91, emphasis added). This foreshadows *Nicaragua*.

C. The Namibia *Case*

A year later the Court handed down its advisory opinion on *Namibia*. This advisory opinion was sought by the General Assembly precisely because of the unsatisfactory nature of the 1966 decision on South-West Africa, and an expectation that the Court would wish to pronounce on the substance of the problem, something which it had avoided in 1966. The opinion confirmed the view of the UN Security Council that the continued presence of South Africa in Namibia was illegal. The Court stated in its opinion:

> To establish . . . and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter [paragraph 131].

A distinguished commentator has already pointed out the importance of not claiming too much from this statement.[13] For the Court opinion deals only with the sort of discrimination explicitly covered by the relevant UN Charter articles.[14] It is authority, however, for the proposition that there is under the UN Charter a clear legal obligation on governments not to commit such discrimination. As a former President of the Court has put it, this wording "leaves no room for doubt that, in its view, the Charter does impose on the Members of the United Nations legal obligations in the human rights field".[15] The Charter provisions are therefore not just hortatory and programmatic.[16]

D. The Tehran Hostages *Case*

The clearest statement on the juridical nature of human rights is to be found in the 1980 judgment in the *Tehran Hostages* case. The Court found that Iran had incurred responsibility towards the United States as a result of the continued detention of United States diplomatic and con-

13. J. P. Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character", in B. J. Ramcharan (Ed.), *Human Rights: Thirty Years After the Universal Declaration* (1978), p.21, 36. Professor Humphrey was the first Director of the UN Division of Human Rights.

14. See e.g. Art.1(3) of the UN Charter, which places among the "purposes" of the UN: "to achieve international co-operation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion"; as well as Arts.55 and 56, by which member States pledge themselves "to take joint and separate action in co-operation with the organisation for the achievement" of certain purposes including the promotion "of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

15. Nagendra Singh, *Enforcement of Human Rights in Peace and War and the Future of Humanity* (1986), p.28.

16. See E. Schwelb, "The International Court of Justice and the Human Rights Clauses of the Charter" (1972) 66 A.J.I.L. 350–351.

sular staff in Tehran, mainly in the premises of the United States embassy. In the judgment the Court stated:

> Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights [paragraph 91].

In respect of the plight of diplomatic and consular staff held hostage, the jurisdiction of the Court had been based on the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations.[17] Its jurisdiction in respect of "two private individuals of United States nationality" was based on the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between Iran and the United States.[18] The statement quoted above goes beyond both these instruments and was presumably made pursuant to the Court's finding that Iran had committed "successive and continuing breaches of the obligations laid upon it by . . . the applicable rules of general international law" (paragraph 90). This formulation is itself interesting. The United States, in its memorial, had invoked human rights in the framework of its argument relating to the applicability of the Treaty of Amity. Claiming a violation by Iran of the Treaty's obligation to provide "the most constant protection and security" and "humane and reasonable treatment" to United States nationals, the United States argued that one measure of that standard was represented by international human rights.[19] The Court, on the other hand, referred to principles of human rights in the context of a finding of breaches of general international law.

Neither the separate opinion of Judge Lachs[20] nor the dissenting opinion of Judge Tarazi[21] contested this aspect of the Court's decision. However, Judge Morozov in his dissenting opinion complained that the statement in effect "serves . . . to level at Iran *the unfounded allegation that it has violated the Charter of the United Nations and the Universal Declaration of Human Rights*".[22] In the context in which this opinion is found, the basis of Judge Morozov's objection is not clear. It may be that he doubted the jurisdiction of the Court on a matter (human rights) not covered by the Vienna Conventions and the Treaty of Amity which

17. Vienna Convention on Diplomatic Relations (1961), 500 U.N.T.S. 85; Vienna Convention on Consular Relations (1963), 596 U.N.T.S. 261.
18. Cited at para.77 of the Court's judgment.
19. [1981] *I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, 179–183.
20. [1980] I.C.J. Rep. 3, 47–50.
21. *Idem*, pp.58–65.
22. *Idem*, p.53.

permitted the unilateral application to the Court[23] or that he felt that responsibility should not be attributed to Iran for the acts of the "militants" who seized control of the embassy and the personnel; or he may have considered that the evidence capable of demonstrating such violations was insufficient or, finally, that the behaviour in question did not amount to violations of the Charter or the Declaration. There appears to be no challenge, however, to the contention that general international law prohibits at least some acts against human beings that are incompatible with the principles of the UN Charter and those of the Universal Declaration of Human Rights.

Thus, the apparently unanimous view of the Court is that the Universal Declaration of Human Rights is a document of sufficient legal status to justify its invocation by the Court in the context of a State's obligations under general international law. This opinion would seem to imply much more than simply the respect which is accorded to a resolution (that is, a recommendation) of the General Assembly. The Court speaks of Iran's violating the "fundamental principles enunciated in the Universal Declaration of Human Rights". It is not clear whether the Court is here distinguishing between *fundamental* principles contained in the Declaration and *other* principles therein. If it is, then it seems to be singling out the prohibition against torture or cruel, inhuman or degrading treatment or punishment and right to liberty and security of the person for specific status. But this would be a strained and unduly narrow interpretation. A more natural interpretation is that the Court was simply stating that the Declaration as a whole propounds fundamental principles recognised by general international law.

E. Conclusions Drawn from the Earlier Cases

So far, the following seems to emerge from the case law (jurisprudence) of the Court:

(a) the human rights clauses of the UN Charter contain binding legal obligations (*Namibia*);
(b) the principles and rules of international law concerning the basic rights of the human person engender obligations *erga omnes* (*Barcelona Traction*);
(c) such obligations may be found in the UN Charter and the Universal Declaration of Human Rights (*Tehran Hostages*);

23. The Court's jurisdiction was based on Art.I common to the Optional Protocol to each Convention Concerning the Compulsory Settlement of Disputes (*supra* n.17) but the jurisdiction is stipulated to concern "disputes arising out of the interpretation or application of" the conventions. It may be that, in Judge Morozov's view, human rights issues were not addressed by the conventions and therefore did not fall within the scope of this provision.

(d) wrongful deprivation of freedom involving physical constraint in conditions of hardship is an example of a breach of such obligations (*Tehran Hostages*);

(e) at least, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment and the right to liberty and security of the person seem to be covered by this latter formulation. The better interpretation would be that the Universal Declaration of Human Rights states fundamental principles, violation of which involves violation of general international law.

II. THE *NICARAGUA* CASE

THE Court's most recent judgment in which it deals with human rights is *Military Activities in Nicaragua*. Its treatment of the issue has been severely criticised from a human rights perspective:[24] either, it is argued, the Court was saying that "there are no human rights obligations apart from treaty or other formal commitments",[25] or it was saying that "regardless of the source of human rights obligations, where there is a convention, the *protection* of those rights takes the *form* of those arrangements provided for in the convention".[26]

I do not think the judgment warrants such a pessimistic reaction. Indeed, I find its approach reasonable, predictable and very much in line with what it has said earlier. The case involved Nicaragua claiming that military activities by the United States, including the mining of Nicaragua's harbour and the support given to the opposition Contras, amounted to unlawful armed intervention against Nicaragua. The thrust of the judgment is that the right of self-defence, individual or collective, does not apply in this case as a legal defence to the accusation.[27]

The central element to be borne in mind is how the question arises at all, namely, the extent to which the United States could invoke Nicaragua's human rights record to justify its military activities. The burden of the Court's message is that the United States could not; and, in the process, it has confirmed the view of those of us who argue that the doctrine

24. F. Tesón, "Le Peuple, c'est moi! The World Court and Human Rights" (1987) 81 A.J.I.L. 173.

25. *Idem*, p.174.

26. *Idem*, p.176.

27. As far as human rights violations by the Contras are concerned (they fall more into the realm of humanitarian law than human rights), the Court finds the Contras' acts not attributable or imputable to the USA (although the USA was rebuked for encouraging violations of common Art.3 of the Geneva Conventions of 12 Aug. 1949 by its production of a CIA manual advocating certain strategies of terror).

of unilateral armed humanitarian intervention has no justification at law.[28]

The point here is that if one reads what the Court says about human rights in the light of its central argument (i.e. that they cannot be invoked to justify armed intervention), one finds that the Court tends to confirm its recognition that human rights principles *are* part of general international law.

First of all, the Court deals with an alleged commitment to the Organisation of American States by Nicaragua to adopt a system of representative democracy, including holding free elections, respecting human rights and so on. The Court took the view that Nicaragua's social and political system was an internal matter (paragraph 258). Of course, it would be possible to make a binding international commitment to establish such a system (paragraph 259), but on the facts Nicaragua had not done so (paragraph 261): it had made a political pledge, not a legal one. Thus, its internal system was a matter of its own domestic jurisdiction (paragraph 263).

Despite this finding, the Court makes a crucial observation. Referring to the specific accusation that Nicaragua had violated human rights, it says:

> This particular point requires to be studied independently of the question of the existence of a "legal commitment" by Nicaragua towards the Organisation of American States to respect these rights; the absence of such a commitment would not mean that Nicaragua could with impunity violate human rights [paragraph 267].

This obviously means that human rights represent a legal obligation flowing from a source other than the specific commitment that had been under discussion. Such a source would include custom or treaty. Unfortunately, the Court makes no direct reference to custom. In the passage directly following the words denying impunity to human rights violations, the Court continues:

> However, where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves. The political pledge by Nicaragua was made in the context of the Organisation of American States, the organs of which were consequently entitled to monitor its observance . . . [T]he Nicaraguan Government has since 1979 ratified a number of international instruments on human rights, and one of these was the American Convention on Human

28. Protagonists of both sides of the argument may be found in R. B. Lillich (Ed.), *Humanitarian Intervention and the United Nations* (1973). My own views, coinciding with those of the Court, are developed in T. Franck and N. Rodley, "The Law, the United Nations and Bangladesh" (1972) 2 Is. Y.B. Human Rights 142, and T. Franck and N.

> Rights (the Pact of San José, Costa Rica). The mechanisms provided for therein have functioned. The Inter-American Commission on Human Rights in fact took action and compiled two reports (OEA/Ser. L/V/11.53 and 62) following visits by the Commission to Nicaragua at the Government's invitation. Consequently, the Organisation was in a position, if it so wished, to take a decision on the basis of these reports [paragraph 267].

This is the passage that gives rise to the apprehension of the commentator I quoted earlier. Indeed, taken out of context, it could be understood as seeming to confine human rights to the realm of treaty law or at least to confine their protection to that realm where States are parties to human rights treaties.

But, read in context, it may be understood as addressing something else. The Court may be paraphrased as saying:

> Nicaragua allegedly pledged itself to the Organisation of American States legally to respect human rights together with other values. In fact the pledge should be seen as political rather than legal, but this is no obstacle to the Organisation acting: this is because Nicaragua is party to a number of human rights treaties including the Pact of San José. As such it is subject to implementation measures that do not constrain other States. These measures had yielded results (in the form of two reports) that would have permitted the Organisation to act, if they had found serious human rights violations and wished to act on the basis of them. So the United States has nothing to complain about in terms of the opportunities for the Organisation to deal with the human rights situation in Nicaragua.

While it might have been helpful—if only to avoid any misunderstanding—for the Court to reaffirm *expressis verbis* the obligation under general international law to respect fundamental human rights, it seems to me that it implicitly has reaffirmed the obligation. The issue before the Court was not the obligation but its *implementation*. The Court could pronounce on the allegations of violations of the obligation only if they were properly before the Court: they were not. The limited questioned was whether they justified the United States military activities: they did not. Perhaps, if the United States had participated in the proceedings and itself brought a counterclaim against Nicaragua in respect of Nicaragua's human rights performance (if that could have survived the "Connally amendment"), the Court would have had squarely to

Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force" (1973) 67 A.J.I.L. 275. A recent study of the issue adopts the same approach: N. Ronzitti, *Rescuing Nationals Abroad and Intervention on Grounds of Humanity* (1985), Chap.4.

confront the issue.[29] It would indeed be unfortunate if in the future the Court were to say that it would not exercise jurisdiction on a human rights dispute under Article 36 of its Statute in respect of a State that happened to be party to an international human rights treaty with its own implementation mechanism. The effect of that would be for the treaties then to be a shield against authoritative scrutiny that other States could not invoke. I do not believe that this is the Court's line. Rather the Court seems merely to be pointing out the obvious: that international treaties do have implementation machinery of various sorts; this machinery provides, at least, the primary means of securing State compliance with the treaties' provisions; moreover, some international organisations also have available procedures for dealing with human rights disputes whether or not the States in question are parties to the treaties.[30] All these are noted as a means of asserting that the international community is not without some tools to seek to induce compliance with international legal obligations to respect human rights. This is the context which is invoked to mitigate the rigour of the clear prohibition of humanitarian intervention.

It must be acknowledged, however, that this is not the first time the Court has used notably cautious language when dealing with the *protection* of agreed human rights. In *Barcelona Traction*, the Court had referred to regional mechanisms, such as those of the European Convention on Human Rights, for a solution to the problem of enforceability of human rights standards regardless of nationality, noting the

29. The USA boycotted the proceedings (as Iran had done in *Tehran Hostages*), taking the view that the Court had erred in declaring that it had jurisdiction at all. While the Court was at pains to raise *arguendo* defences that the USA might have raised, the analysis may be thought to suffer from the element of artificiality of the exercise.

The "Connally amendment" is the term used to describe the "self-judging" clause of the US acceptance of the compulsory jurisdiction of the Court under Art.36 of its Statute. According to this clause, the declaration does not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the [USA] as determined by the [USA]". Since such restrictions may be invoked on a reciprocal basis, Nicaragua could, had it been the target of a US complaint as to its human rights performance, have argued that this touched on matters essentially within the domestic jurisdiction of Nicaragua as determined by it and was thus removable from the Court's scrutiny. In reaction to the Court's handling of the case, the USA withdrew its acceptance of the Court's compulsory jurisdiction.

30. For example, the jurisdiction of the Inter-American Commission on Human Rights itself, a body which existed before the coming into force of the American Convention on Human Rights (Pact of San José), continues to extend to Organisation of American States members not parties to the Convention. In respect of these countries, it applies the American Declaration of the Rights and Duties of Man rather than the Convention. Examples of UN procedures applicable to all UN members, regardless of treaty participation, are those recently established by the Commission on Human Rights, that is, the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on summary or arbitrary executions and the Special Rapporteur on torture: see N. Rodley, "United Nations Action Procedures Against 'Disappearances', Summary or Arbitrary Executions, and Torture' (1986) 8 Human Rights Q. 700.

inter-State complaint procedure under that convention. For, "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights, irrespective of their nationality" (paragraph 91). It should be remembered that the Court was speaking before the coming into force of the International Covenant on Civil and Political Rights, which does have an (optional) system of reviewing inter-State and even individual complaints of violations of the Covenant.[31] Accordingly, it was describing the then conventional reality. The Court in *Barcelona Traction* did consider that "human rights . . . include protection against denial of justice" (paragraph 91). If this means that denial of justice is an infringement of human rights as recognised by general international law, and in so far as a denial of justice was central to Belgium's claim, it is difficult to follow the logic of the Court's holding that the claim raised only an issue of bilateral obligations and not one of obligations *erga omnes*. For it had said in paragraph 35, quoted earlier, that "the principles and rules concerning the basic rights of the human person" give rise to obligations *erga omnes*. Probably the Court should be understood as intending to distinguish between the notion of denial of justice—at least in so far as it may cover economic rights—and that of the basic rights of the human person.[32] If so, doubt is left as to whether the socio-economic rights found in the Universal Declaration have the same legal status as (some of) the civil and political rights.

It is also true that the Court in *Nicaragua* elided the sensitive area of enquiry as to the point at which systems of government may inherently violate internationally agreed human rights standards. Some would argue, for example, that a Marxist–Leninist system of government (in so far as the Sandinista government of Nicaragua can be so described) cannot fully respect the free exercise of political rights. In fact there is not yet an authoritative enunciation of the concept of political rights. That the Court avoided an analysis of this issue evidences, I suggest, normal judicial prudence, especially in view of the fact that the central point would remain that the outcome of the enquiry would still have been that the United States was not entitled unilaterally to use armed force to change the situation.

31. According to Art.41 of the Covenant, States parties may make declarations whereby they accept that the Human Rights Committee, established by the Covenant, has the competence to receive complaints of their infringement of the provisions of the Covenant submitted by other States parties having accepted the same burden. Under the Optional Protocol to the Covenant, States parties to it accept the competence of the Committee to receive complaints of such infringements by individuals claiming to be victims of such infringements.

32. The point is developed in my "The Nationalization by Peru of the Holdings of the International Petroleum Company", in N. Rodley and C. N. Ronning (Eds.), *International Law in the Western Hemisphere* (1974), p.112, 121–123.

On this issue, the Court could not have been clearer:

> In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equiping of the Contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States [paragraph 268].

This language unmistakably places the Court in the camp of those who claim that the doctrine of humanitarian intervention is without validity. Under that doctrine a State could rely on an alleged exception to the principle prohibiting unilateral resort to armed force by one State against another, where the purpose of its intervention was to protect persons (other than its own citizens) from serious and widespread violations of their human rights. It has been a doctrine defended in recent years by commentators, rather than by States. The States that might have been expected to invoke it (India, in respect of Bangladesh; Vietnam, in respect of Kampuchea; Tanzania, in respect of Uganda; and the United States itself, in respect of Grenada) have been notably hesitant to do so, at least in their formal legal justifications for their actions.[33]

The Court's confirmation of the inapplicability of the doctrine should not be seen as a setback for human rights. There is nothing in its history to suggest that it was ever more than a rare and arbitrary alleviation of the hapless plight of those who happened to be suffering in a small country where the political interests of a militarily more powerful country conduced to the intervention. The ruling is more a clarification aimed at preventing breaches of international peace and security.

III. CONCLUSION

THE need for increasingly effective measures, within the framework of competent inter-governmental organisations, to protect against grave and systematic human rights violations remains and is indeed underlined by the *Nicaragua* judgment. In recent years there has been an impressive development in the array of inter-governmental machinery available to investigate alleged human rights violations and even intercede on behalf of victims. However, criminal violations of human rights, such

33. Ronzitti, *op. cit. supra* n.28, at pp.92–93 and 108, develops the point in respect of Bangladesh, Uganda and Kampuchea. For the US legal justification of its action in Grenada, see (1984) 78 A.J.I.L. 203–204. Three grounds are cited: 1. a request from the Governor-General of Grenada; 2. regional collective self-defence; and 3. protection of US citizens in Grenada.

as torture, murder and prolonged or permanent abduction (the so-called "disappearance"), continue to be widely reported.[34] If the ban on unilateral humanitarian intervention is to be politically credible, it should be accompanied by more determined inter-governmental action, not necessarily excluding coercive measures, to eliminate such practices.

Under the Court's jurisprudence, accordingly, it appears, first, that fundamental human rights must under general international law be respected; second, that it remains to be confirmed whether *all* the guaranteed rights under the Universal Declaration of Human Rights fall under that law (I suggest that they do, but that the content of some—socio-economic rights, political rights—is not ripe for judicial determination at the universal level); third, that implementation mechanisms established by treaty are a useful means of promoting respect for human rights; fourth, that while they are probably not the only means, the Court's language has left room for some doubt which could be helpfully dispelled at the earliest opportunity; and, finally, that individual States may not use armed force to intervene against other States on the ground of the latter's human rights record or socio-political system.

While human rights lawyers can be well satisfied with this record there is still substantial room for improvement in the field of inter-governmental action to constrain the more grievous practices of human rights violation.

34. See e.g. the annual *Amnesty International Report* and those of the UN Commission on Human Rights procedures referred to *supra* n.30.

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Annex ZR

Part I Introductory Chapters, 5 Legal Form of the Paris Agreement and Nature of Its Obligations

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(p. 91) 5 Legal Form of the Paris Agreement and Nature of Its Obligations

The question of the ‘legal form’ and ‘legal nature’ of the Paris Outcome and its particular obligations was one of the core issues in the negotiations leading up to the Paris Agreement.[1] The terms ‘legal form’, ‘legal nature’, and ‘bindingness’ tend to obscure what is not a single issue but several. While these issues are inter-related, it is useful to distinguish the following main aspects: (1) whether and to what extent the Paris Outcome includes a binding instrument of international law, ie an international treaty; (2) the placement, or ‘housing’, of any actions and targets, especially those regarding the mitigation of greenhouse gas (GHG) emissions; (3) how the Agreement’s sections and individual provisions are legally linked; (4) the prescriptiveness and precision of the wording of specific commitments and provisions;[2] (5) the nature of the obligation or commitment,[3] eg whether a given obligation is one of result or conduct; and (6) the provisions and mechanisms to ensure accountability and promote effective implementation.[4] These aspects will be addressed in the sections below.

In this chapter we first analyse the legal structure of the overall Paris Outcome in terms of the legal status of the different texts, how they are linked, and how they together form the new climate regime (section 5.A). We also look at the structure of the Paris Agreement’s content, ie how its individual provisions work together (section 5.B). This is followed by a bird’s eye view of the legal nature of individual sections and provisions (section 5.C) and conclusions (section 5.D).

A. Legal Structure of the Overall Paris Outcome: Several Documents and Elements

The legal regime created in Paris comprises and anticipates several elements with different legal status: (a) the Paris Agreement, (b) UNFCCC COP Decision 1/CP.21 (the (p. 92) Paris Decision), (c) some existing elements of the climate regime, (d) future ‘relevant’ decisions of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA), (e) intended nationally determined contributions (INDCs) and future nationally determined contributions (NDCs) (see Figure 5.1).

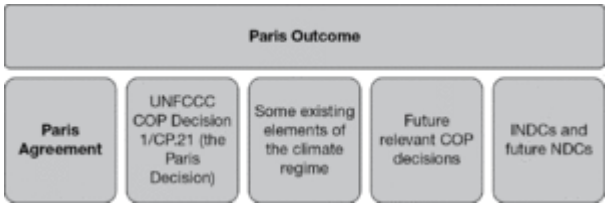

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Figure 5.1 Structure of the Paris Outcome

The *Paris Agreement* is a treaty under international law.[5] This is not a merely academic issue. Besides the political implications, in many countries it determines the internal procedures for ratification, eg whether the Agreement has to be approved by Parliament. In addition, at least in theory, parties could incur legal consequences for breaches of legal obligations. That it is a treaty is clear from several formal indicators, notably that the Paris Agreement provides for its ‘entry into force’ and that it is subject to ratification, acceptance, accession, or approval under the usual procedure for treaties.[6] While the Paris Decision that adopts the Paris Agreement leaves open the question of whether the Paris Agreement is a ‘protocol’ under Article 17 of the UNFCCC, the potential legal consequences either way are negligible. According to Article 21.1 of the Paris Agreement, it enters into force once at least fifty-five Parties to the Convention accounting for at least an estimated

55% of global emissions ratify. It is noteworthy that Article 27 excludes any reservations. States are not allowed to exclude certain provisions and the Paris Agreement has to be ratified as a whole and ‘as is’. Therefore, formally speaking, the whole Paris Agreement is binding for its parties under international law after its entry into force on 4 November 2016.[7]

The Paris Agreement was adopted ‘under’ the UNFCCC by Decision 1/CP.21 as contained in an annex to that decision. The Paris Decision specifies further details, a work programme with mandates for elaborating modalities, procedures, and guidelines, as well as political processes. Decision 1/CP.21 also establishes institutions such as the Paris Committee on Capacity-building[8] and a new interim body, the Ad Hoc (p. 93) Working Group on the Paris Agreement (APA), to carry out many of these tasks for approval by the CMA.[9]

The Paris Agreement also makes the content of certain *existing and future decisions* binding in international law. By default, COP decisions are not binding as such[10] but can be if the treaty so provides or implies (the latter is a matter of interpretation). For example, in paragraphs 8 and 9, Article 4 establishes a legal obligation for parties to ‘communicate’ NDCs and provide certain information ‘in accordance with Decision 1/CP.21 and any relevant decisions’ of the CMA. Similarly, parties are to follow guidance on reporting and review contained in Decision 1/CP.21 and future relevant decisions of the CMA.[11] The Paris Agreement also provides that the rules of procedure of the COP ‘shall be applied *mutatis mutandis*’ to the CMA unless the CMA decides otherwise.[12]

The so-called *nationally determined contributions* (NDCs) are basically individual parties’ climate action plans. In the negotiations leading to COP 21, the issue of whether the mitigation targets and actions to be pursued by the parties would be formally part of the treaty had a strong political and symbolic dimension. Although legally the treaty could make elements that are not formally part of it binding, for some parties politically it was preferable to keep them outside.[13]

In the Paris Agreement, NDCs are not formally part of the treaty, although it refers to them. NDCs are recorded in a ‘public registry maintained by the Secretariat’.[14] Their legal nature is analysed below.[15] The INDCs that were submitted by more than 180 countries prior to the Paris conference will constitute the first NDCs, unless the party concerned decides otherwise.[16]

Since parties’ individual climate plans and actions are at the heart of the international effort to tackle climate change, housing NDCs outside the treaty text raises questions regarding the clarity, predictability, and stability of the international climate regime and international law. First, it might be difficult to ascertain the content of NDCs. In this regard, the Paris Agreement does provide that the registry is ‘public’ and Decision 1/CP.21 mandates the elaboration of modalities and procedures, as well as of information to be submitted along with the NDCs.[17] (p. 94) Secondly, in the absence of specific rules, any external placement raises the question of how the content of what is housed ‘outside’ the treaty could be changed, given that the rules for amending the treaty and its annexes do not apply.[18] Regarding the NDCs, the Paris Agreement provides specific rules: each party is free to unilaterally adjust its NDC at any time, subject to a number of more or less strict conditions: adjustments should enhance the level of ambition; and developed countries are expected to maintain economy-wide absolute emission-reduction targets, while developing countries are expected to move towards economy-wide targets over time. The CMA has the task of developing further guidance on this matter.[19]

The Paris Agreement does not replace but instead complements the UNFCCC. It refers to and *incorporates existing elements of the climate regime* through different legal techniques.[20] For instance, it provides that the new transparency system shall ‘build on and enhance’ the existing Convention system, which has to ‘form part of the experience drawn upon’ for the modalities of the new system.[21] The Paris Decision further specifies that the

transparency rules developed under the Paris Agreement shall eventually supersede the system of biennial reporting that was established at COP 16 in Cancún.[22] Several institutions established under the UNFCCC are enshrined in the Paris Agreement text,[23] such as the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts,[24] the Financial Mechanism of the Convention including its operating entities,[25] and the Technology Mechanism.[26] Others are instructed to serve the Paris Agreement by the Paris Decision.[27] Another example is the Adaptation Fund (AF), which works under the authority of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP). The Paris Decision 'recognizes' that the AF 'may serve' the Paris Agreement in the future if both the CMA and the CMP so decide.[28] UNFCCC bodies and institutional arrangements that are not specifically referred to in the Paris Agreement can be made to serve the Paris Agreement by a CMA decision.[29]

(p. 95) B. Legal Structure of the Paris Agreement's Content: How Do the Provisions Work Together?

At its core, the Paris Agreement's content is structured around its overarching purpose. It stipulates a general obligation on parties to make efforts towards this purpose and elaborates this general obligation in specific thematic provisions (see Figure 5.2).

Article 2 defines the general purpose of the Paris Agreement, including three non-exclusive elements in its paragraph 1. The purpose includes holding temperature increase to 'well below' 2°C above pre-industrial levels, while also pursuing efforts to stay below 1.5°C, increasing the ability to adapt, and the transformation of (all) finance flows towards low GHG emissions and climate-resilient development.[30]

Article 3 imposes an obligation[31] on all parties to undertake efforts towards that purpose. It refers to the specific efforts as defined in the subsequent Articles 4, 7, 9, 10, 11, and 13, which cover the UNFCCC's traditional thematic areas of mitigation, adaptation, finance, technology, capacity-building, and reporting, review, and accounting ('transparency').[32] Each of these articles defines a thematic objective and what parties (p. 96) are to do to achieve it, although they differ in terms of precision and prescriptiveness (see section 5.C below). Whereas Article 2 defines the purpose of the Paris Agreement, Article 3 is a hinge and engine because it links that purpose with specific obligations in other articles and requires ambitious and progressive efforts of parties over time.

It should be noted that the reference in Article 3 to the purpose of the Agreement 'as set out in Article 2' is open to interpretation. It could mean that the 'purpose' only includes Article 2.1, but not Article 2.2. This could avoid potential difficulties of including the 'will' provision on implementation in Article 2.2 in the purpose and thus in the global stocktake. However, the most straightforward and politically reasonable interpretation is that the reference includes the entire Article 2, because it includes in a nutshell the central compromise on differentiation in Article 2.2.

Further, the wording of Article 3 uses the factual and ambiguous 'will' for the concept of progression, instead of an unequivocal 'shall'.[33] The provisions on sinks in Article 5, cooperative mechanisms in Article 6, loss and damage in Article 8, and education and awareness in Article 12[34] are not listed in Article 3. They are therefore not included in the general obligation regarding efforts towards the Paris Agreement's purpose and progression over time.

These efforts to be undertaken by parties are embedded in a structure that is designed to make parties raise their ambition over time: there is a procedural obligation to define and communicate individual efforts in the form of NDCs every five years. Also, every five years a global stocktake assesses the collective progress of parties towards the purpose and long-term goals of the Paris Agreement.[35] Since Article 3 defines the whole of Article 2 as the purpose, the assessment has to include progress towards all elements of Article 2.[36] The

outcome of the stocktake ‘shall inform’ the subsequent efforts of parties. Ideally, parties then define and implement more ambitious efforts until the next stocktake, and so on.[37] For virtually all of these core obligations, the Paris Agreement and the Paris Decision contain mandates for elaborating details on how to implement them. These core obligations are accompanied by institutional provisions and the establishment of an implementation and compliance mechanism.[38]

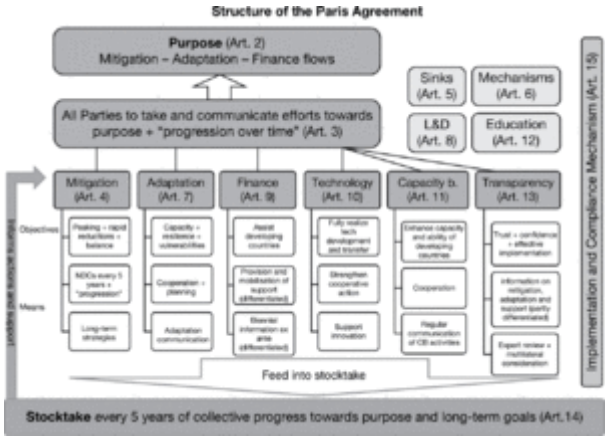

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Figure 5.2 Structure of the Paris Agreement

Source: Bodle/Donat/Duwe (2016) (modified)

Probably the most difficult political issue in the negotiations leading up to Paris was how to address differentiation between developed and developing countries. Since the adoption of the UNFCCC in 1992, the obligations under the international climate regime have been based on the principle of ‘common but differentiated responsibilities and respective capabilities’.[39] The main obligations under the UNFCCC differentiate between countries listed in Annex I to the UNFCCC, which are considered to be ‘developed countries’, and all other countries (‘non-Annex I countries’), considered to (p. 97) be ‘developing countries’.[40] The Paris Agreement breaks new ground in addressing the developed/developing country divide by:

(i) Establishing core obligations for *all* parties: the Paris Agreement explicitly states that ‘all’ parties ‘are to’ undertake actions towards its purpose, on mitigation, adaptation, means of implementation and transparency. The Paris Agreement does not refer to the annexes of the UNFCCC. However, it should be noted that many provisions in the Paris Agreement still distinguish between ‘developing countries’ and ‘developed countries’, although without defining these categories. This had increasingly become practice since COP 15 in Copenhagen. [41]

(ii) Supplementing the principle of common but differentiated responsibilities with the addition ‘in the light of different national circumstances’: this addition could increase the range of factors that may serve as a basis for determining differentiation. [42]

(iii) Addressing differentiation in a variety of ways: each individual article takes a slightly different approach to differentiation: the core obligations on mitigation, such as submission of NDCs, and on transparency apply to all parties in principle, with differentiation and flexibility to be added rather than intrinsic. [43] The Paris Agreement also recognizes the special circumstances of least developed countries (LDCs) and small island developing states (SIDS) in the context of NDCs, financial support, capacity-building and transparency. [44]

C. Legal Nature of Individual Sections and Provisions: A Bird's Eye View

It is important to distinguish between the legal form and structure of the Paris Agreement as a whole and the specific content of its individual provisions and elements. While formally speaking the whole of the Paris Agreement is binding on its parties under international law, whether and to what extent its individual provisions establish legal rights and obligations, ie determine what a party is entitled to do or must do, depends on their wording. For instance, legal provisions may be worded more or less precisely or prescriptively for reasons of legal craftsmanship or underlying politics.[45]

(p. 98) In treaty language the most prescriptive term is usually 'shall'. Throughout the Paris Agreement, many of the provisions that use 'shall' are procedural in content,[46] eg by establishing duties to communicate or report. Other uses of 'shall' mandate institutions or processes under the Paris Agreement,[47] or create entitlements, especially for developing countries.[48] In addition, the Paris Agreement also uses the ambiguous term 'will' instead of an unequivocal 'shall'.[49] Grammatically speaking, 'will' is factual language referring to the future. It is not the usual language to express an obligation, although it has been used in COP decisions before. There is also one instance of using the wording 'are to' to indicate a duty.[50]

Besides these few prescriptive elements, the Paris Agreement also employs factual, programmatic, declaratory, or legally 'soft' language that nudges but does not prescribe. The term 'should' appears several times.[51] It is less prescriptive than 'shall' as it is not absolute, but it is stronger than eg the merely permissive 'may'. A 'should' obligation creates an expectation that the provision is to be complied with, and that a party has to have reasons in case it does not. However, it would be difficult to show that a party is in breach if it does not do what it 'should', in particular if it puts forward reasons for its acts or omissions.

Additionally, in many places the language used would be expected in a preamble rather than operational treaty text, such as parties 'reaffirming', 'recognizing' or 'acknowledging' something, eg 'the importance of …'.[52] In several areas the Paris Agreement has virtually no precise and prescriptive obligations on individual parties.

The Paris Agreement's preamble, ie the text before the articles in the operative part, is by its placing and wording not binding as it does not contain specific obligations for parties to implement. But it can guide interpretation and contains some important and sometimes innovative issues.[53]

The overarching provisions in Article 2 and in Article 3 differ slightly as regards their legal nature. Article 2 is legally non-prescriptive in setting the temperature goal,[54] enshrining adaptation in its own right and for the first time addressing the general transformation of finance flows. The same applies to the modernization of differentiation in its paragraph 2 ('will'). Article 3, which links the specific efforts under the Paris Agreement to the overall purpose, appears to be prescriptive, but a close look at the wording shows softeners and ambiguities: the wording that parties 'are to' undertake and communicate ambitious efforts is rather unusual treaty language, which can either be understood as prescriptive or as expressing futurity or (p. 99) arrangement in advance.[55] Parties are required to make these efforts under the specific Articles 'with the [sic] view to achieving the purpose'[56] of the Paris Agreement, ie with the aim, or intention.[57] The requirement to make ambitious efforts could mean that Article 3 specifies the standard for *how* parties have to fulfil the specific obligations that Article 3 refers to. Alternatively, Article 3 could be a self-standing obligation *next to* the other, specific obligations. Either way, Article 3 requires conduct and not result.

Another softener on prescriptiveness is the use of 'will' to express the principle of progression in the second sentence of Article 3.

In the subsequent articles of the Paris Agreement the provisions that clearly establish prescriptive and precise obligations for individual parties relate to the preparation, communication, maintenance, and implementation of NDCs,[58] as well as transparency and accounting.[59] The formulae agreed to in these cases tend towards 'obligations of conduct', which are qualified in a number of ways.[60]

On mitigation, there is a prescriptive and generally precise obligation on each party to 'prepare, communicate and maintain' successive NDCs.[61] However, it does not specify the content or quality that an NDC should have. Furthermore, parties 'shall pursue domestic mitigation measures, with the aim of achieving' their NDCs' objectives. While this carefully drafted wording does not establish a clear 'obligation of result' to implement, let alone to achieve the NDCs, it combines domestic conduct ('prepare', 'pursue domestic mitigation measures') with international conduct ('communicate and maintain'), and it establishes a standard for assessing domestic measures to implement the NDCs: the measures must be pursued 'with the aim of achieving' the NDCs' objectives.[62] Again, the principle of progression is expressed by the factual 'will'.[63]

The provisions on finance show a similar pattern but with important differences. First, the finance provisions in Article 9 are generally more strongly bifurcated than (p. 100) the other sections,[64] in terms of prescriptiveness and transparency: although the Paris Agreement does not determine the countries with financial obligations by referring to a list as in UNFCCC Annex II (containing the member states of the Organisation for Economic Co-operation and Development (OECD) in 1992 and the European Union (EU)), the obligations on finance explicitly refer to developed country parties.[65] Other parties are merely encouraged in non-prescriptive terms, or, as in the case of mobilizing climate finance, are implicitly included in the formulation 'global effort'. The second special aspect is that there are several provisions outside of Article 9 that stipulate the recipients of support but not who has to provide it. Provisions such as 'support shall be provided to developing country parties', are clearly prescriptive but define collective entitlement instead of individual or collective obligations to provide or mobilize.[66] The third aspect is that the financial provisions in Article 9 are linked, by Article 3, to the overarching purpose in Article 2.1(c) to transform finance flows.

Apart from these particular aspects, developed countries' finance obligations are also focused on international and domestic conduct, with accompanying 'soft' indications towards a result:[67] the strict obligation to provide financial resources is not quantified and in continuation of existing obligations under the Convention;[68] the obligation to include 'projected levels of public financial resources to be provided' in the biennial *ex ante* information[69] is qualified by the addition of 'as available'; and the requirement of a 'progression beyond previous efforts' in the mobilization of climate finance is worded as a 'should'.[70]

The global stocktake in Article 14 is a mandatory collective exercise with a double legal link back to parties' subsequent individual NDCs. The link is prescriptive, but the content of the obligation leaves broad room for interpretation, as it provides that the global stocktake 'shall inform' parties.[71] The general idea is clear, but how the stocktake is going to work is left open to be negotiated by parties.[72]

In addition, the global stocktake refers to the Paris Agreement's 'long-term goals' in the plural, but the Paris Agreement is not entirely clear on what qualifies as long-term goals in this respect. One long-term goal is defined in Article 4.1, which explicitly refers to 'the long-term temperature goal set out in Article 2'. Therefore, that goal in Article 2.1(a) is both part of the Paris Agreement's 'purpose' (according to Article 3) as well as one of its 'long-term goals' (according to Article 4.1).[73] In terms of terminology this could be confusing because

Article 14.1 appears to suggest a distinction between (p. 101) the *purpose* of the Paris Agreement and its *long-term goals*. In addition, it is not quite clear which other long-term goals the plural in Article 14.1 refers to. Article 7.1 establishes the 'global goal on adaptation', but this is already included in the global stocktake by virtue of Article 7.14(d).

The provisions on transparency and accountability have a double function as obligations in their own right, as well as adding teeth to the prescriptiveness of the overall regime. They are mainly procedural and quite prescriptive in terms of general principles and reporting and communication obligations. The Paris Agreement's transparency obligations can be regarded as hybrids, formally framed as international conduct ('provision' of information) which includes a result (a report) and is based on domestic conduct (collection of information) subject to modalities, procedures, and guidelines (to be adopted by the CMA).[74]

The mechanism to facilitate implementation and to promote compliance established under Article 15 similarly has the potential to strengthen the Agreement's legal force. Article 15.2 clarifies that the mechanism consists of a committee, and the accompanying Paris Decision determines its size and composition. Further modalities and procedures are currently being developed for consideration and adoption by the CMA in 2018.[75]

On adaptation, the definition of a general adaptation goal is followed by several provisions in which parties merely 'recognize' or 'acknowledge' something.[76] Prescriptive wording is either imprecise or softened by qualifiers: Article 7.3, which provides that 'adaptation efforts shall be recognized', is highly prescriptive but also highly imprecise, as it leaves open what this recognition means or entails. The provisions on cooperation and adaptation communications use 'should',[77] while Article 7.9 on adaptation planning and actions softens the highly prescriptive 'shall' by the qualifier 'as appropriate'. The few prescriptive and precise provisions are procedural[78] or financial.[79]

The picture is similar for technology and capacity-building: apart from one prescriptive but vague provision to strengthen cooperative action on technology development and transfer,[80] there is no specific obligation on individual parties. Instead, the provisions in Article 10 are procedural,[81] institutional,[82] or financial.[83] On capacity-building, Article 11 contains general principles and 'should' obligations to cooperate, for developed countries to enhance support, and for developing countries to communicate on progress.[84] Again, the prescriptive and precise provisions are procedural and institutional.[85]

(p. 102) The provisions and thematic areas that are not linked to the overall purpose by Article 3 also follow this pattern. The provision on sinks in Article 5 is an obligation with discretion, general content, and qualified by 'as appropriate'.[86] Article 6 establishes three different types of international cooperation on mitigation and notably also on adaptation. It is peculiar because of the artfully *implied* permission given to parties, without explicitly saying so, to utilize international market mechanisms, subject to certain conditions which need to be elaborated in detail.[87] Loss and damage is included in the Paris Agreement as a distinct issue and article, but its only obligation on parties is at the low end of prescriptiveness and precision.[88] Similar to technology, the Paris Agreement anchors an existing institution in the legal text.[89] The Paris Decision avoids potential ambiguity by explicitly excluding liability and compensation from the scope of Article 8.[90] Finally, the only provision on education, public awareness, public participation, and public access to information is seemingly prescriptive, but vague in content and qualified by 'as appropriate'.[91]

The individual provisions of the Paris Agreement thus show a pattern of apparent precision and prescriptiveness, combined with ambiguity and softeners in the details. Few provisions clearly establish obligations for individual parties and score high on both prescriptiveness and precision. They relate to the preparation, communication, maintenance, and implementation of NDCs, as well as transparency and accounting. The content of these

obligations tends towards ‘obligations of conduct’, which are qualified in a number of ways. The Paris Decision contains many mandates and work programmes for elaborating details and sharing ideas and practices.

D. Conclusions and Consequences for Implementation

It is important to distinguish between the legal form and structure of the Paris Agreement as a whole and the specific content of its individual provisions and elements. The Paris Agreement is an international treaty at the core of a regime that includes other elements with different legal status. It does not replace but instead complements the UNFCCC, and it incorporates existing elements of the climate regime.

At its core, the Paris Agreement’s architecture is based on defining its overarching purpose, then stipulating a general obligation on parties to make efforts towards this purpose, and elaborating this general obligation in specific thematic provisions. Article 3 serves as a legal hinge and the engine of the Paris Agreement, because it establishes a link between the Paris Agreement’s purpose in Article 2 and specific (p. 103) obligations in other articles and because it requires increasingly ambitious action over time.

The efforts are embedded in a legal structure that is designed to include developed as well as developing country parties and make them raise individual and collective ambition over time. The Paris Agreement modernizes differentiation and establishes core obligations for *all* parties, while at the same time addressing differentiation in varying ways for different provisions.

Few provisions of the Paris Agreement are prescriptive and create precise legal obligations, and these are primarily procedural and focused on ‘nationally determined contributions’ (on mitigation) and a core transparency framework, plus collective obligations regarding finance. The Paris Agreement uses a broad range of wordings and qualifiers, which give parties more or less flexibility or discretion regarding whether and how to implement its provisions.[92] The provisions tend towards ‘obligations of conduct’, which are qualified in a number of ways. The obligations relating to finance are generally more strongly bifurcated between developed and developing countries than the other sections.

The provisions on transparency and accountability have a double function as obligations in their own right, as well as adding teeth to the prescriptiveness of the overall regime. The latter is also applicable to the mechanism to facilitate implementation and promote compliance that has the potential to clarify and ‘harden’. the obligations of the Paris Agreement.

The approach taken by the Paris Agreement is an experiment that relies on the parties to determine at national level which efforts they intend to make, combined with the persuasive impact of the transparency framework, support in terms of finance, technology, and capacity-building, and the regular taking stock of progress.[93] Through this structure the Paris Agreement establishes a political narrative that is clearer than its less prescriptive and precise legal backbone. The political narrative aims to guide the implementation and future evolution of the Agreement, including raising ambition over time. The details to be agreed and developed in further guidelines, modalities, and procedures could be crucial for safeguarding ambition and making the political narrative effective.(p. 104)

Footnotes:

1 See Sebastian Oberthür and Ralph Bodle, ‘Legal Form and Nature of the Paris Outcome’ (2016) 6 Climate Law 40, 40–46.

[2] While prescriptiveness and precision may be considered separate criteria, they are *de facto* closely related.

[3] In this text we use the terms ‘commitment’ and ‘obligation’ interchangeably as establishing a legal duty. The term ‘commitment’ is less common in international law, but is widely used in the UNFCCC to this end, along with ‘obligation’.

[4] See Oberthür and Bodle (n 1) 40–46.

[5] In accordance with art 2.1(a) of the Vienna Convention on the Law of Treaties (VCLT), ‘“treaty” means an international agreement concluded 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 its particular designation’. The name chosen for a particular instrument does not necessarily indicate whether it is binding or not, VCLT (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 2.1(a). See also Daniel Bodansky, ‘The Paris Climate Change Agreement: A New Hope?’ (2016) 110 AJIL 288.

[6] In this chapter we use ‘ratification’ as a short term encompassing all these forms. See ch 21.

[7] See https://treaties.un.org (last accessed 10 February 2017).

[8] Decision 1/CP.21 para 71. See ch 16.

[9] Decision 1/CP.21 para 7.

[10] One of the reasons is the design of national constitutional rules regarding international obligations: if COP decisions were binding, many countries would require parliamentary approval, similar to ratification, before they would agree to be bound at the international level. For details see Oberthür and Bodle (n 1) 43–44.

[11] Paris Agreement art 13.11 and 13.12 (technical expert review); arts 9.7 and 13.13 (reporting on support). Another example is art 6.2 requiring that parties who use internationally transferred mitigation outcomes comply with guidance on accounting.

[12] Paris Agreement art 16.5. This incorporates rules that have never been formally adopted under the UNFCCC and have merely been applied provisionally at each session, without the contested—and still bracketed—rule on voting.

[13] See Oberthür and Bodle (n 1) 47.

[14] Paris Agreement art 4.12. See UNFCCC Secretariat, Message to Parties (9 March 2016) http://unfccc.int/files/focus/indc_portal/application/pdf/first_ndc.pdf (last accessed 10 February 2017).

[15] See section 5.C below.

[16] Decision 1/CP.21 paras 12 and 22.

[17] The Subsidiary Body for Implementation (SBI) is tasked with the registry, while the newly established Ad Hoc Working Group on the Paris Agreement is mandated to provide further guidance on features and information to be provided in the NDCs. See Paris Agreement art 4.8 and 4.10 as well as Decision 1/CP.21 paras 26–28. The interim registry is public at http://www4.unfccc.int/ndcregistry/Pages/Home.aspx> (last accessed 10 February 2017).

[18] See Paris Agreement art 23; see also VCLT (n 5) arts 39–41.

[19] Paris Agreement art 4.4 and 4.11.

[20] See also ch 2.A.4 and Fig 5.1.

[21] See Paris Agreement art 13.3 and 13.4.

[22] Paris Agreement art 13.3; Decision 1/CP.21 para 98. See ch 18.

[23] Including the COP (which is called for this purpose the 'Conference of the Parties serving as the meeting of the Parties to the Paris Agreement', CMA), the UNFCCC Secretariat, the Subsidiary Body for Scientific and Technological Advice (SBSTA), and the SBI. See ch 2.

[24] Established in 2013 by COP Decision 2/CP.19. See Decision 2/CP.19, Warsaw international mechanism for loss and damage associated with climate change impacts, FCCC/CP/2013/10/Add.1 (31 January 2014) para 1.

[25] Paris Agreement art 9.8.

[26] Paris Agreement art 10.3.

[27] The forum on the impact of the implementation of response measures, several funds, the Standing Committee on Finance; see Decision 1/CP.21 paras 33, 58, and 63.

[28] Decision 1/CP.21 para 59.

[29] Paris Agreement art 19.1. See ch 21.C.1.

[30] See ch 7.

[31] See section 5.C on whether the unusual wording 'Parties are to …' establishes an obligation.

[32] The new umbrella term 'transparency' includes reporting and review; there are different views as to whether this also includes accounting or whether it belongs to the thematic areas. In the Paris Agreement, accounting is placed in the thematic provisions on mitigation (art 4), cooperative approaches (art 6.2), and in finance (Decision 1/CP.21 para 57). See chs 9, 11, and 14.

[33] For details on the legal meaning of these and other terms used in the Paris Agreement see section 5.C and Oberthür and Bodle (n 1) in particular 49–50.

[34] See chs 10, 11, 13, and 17.

[35] Paris Agreement arts 14.1 and 4.9; Decision 1/CP.21 paras 99–101.

[36] See chs 8 and 9.

[37] See ch 19.

[38] Paris Agreement art 15.

[39] UNFCCC art 3.1.

[40] For financial obligations, the differentiation is between a list of countries contained in Annex II of the UNFCCC, a subset of those listed in Annex I, and everyone else, non-Annex II countries.

[41] See eg the Cancún Agreements (15 March 2011); see Bodansky (n 5) 298–300 and Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 ICLQ 493, 493–514.

[42] See Meinhard Doelle, 'The Paris Agreement: Historic Breakthrough or High Stakes Experiment?' (2016) 6 Climate Law 1. See also ch 4.C and ch 8.A.

[43] For details see Ralph Bodle, Lena Donat, and Matthias Duwe, 'The Paris Agreement: Analysis, Assessment and Outlook' (2016) 10 Carbon & Climate Law Review 18; Bodansky (n 5) 300. See also chs 9 and 18.

[44] See Paris Agreement arts 4.6, 9.4, 11.1, and 13.3.

[45] Oberthür and Bodle (n 1) 49.

[46] See Paris Agreement art 4.2, 4.8, 4.9, 4.12; art 11.4; art 13.7, 13.9, 13.11, 13.12; and art 14.1.

[47] ibid eg arts 4.10, 6.4–6.6, 7.12, 7.14, 8.2, 8.5, 9.6, 9.8, 9.9, 10.3, 11.5, 13.2–13.4, 14, and 15.2–15.3; see also arts 16–26 and 28–29, including the final clauses.

[48] ibid eg 'support shall be provided' arts 4.5, 7.13, 10.6, 13.14, and 13.15.

[49] ibid art 2.2; art 3 (second sentence); art 4.1, 4.3, 4.5, and art 6.4. For details on the legal meaning of these and other terms used in the Paris Agreement see Oberthür and Bodle (n 1) 49–50.

[50] ibid art 3 and analysis below.

[51] ibid art 4.4, 4.14 and 4.19, art 5, art 7.5, 7.7 and 7.10, art 8.3, art 9.3 and 9.4.

[52] ibid eg art 5.2, art 7.4, 7.5, 7.6, art 8.1, art 10.1 and 10.2.

[53] cf art 31.2 VCLT (n 5); Bodle, Donat, and Duwe (n 43) 20. See also ch 6.

[54] See ch 7 and ch 9 on the references to 2°C and 1.5°C in art 2 as *one* temperature goal.

[55] cf the 'full definition of "be"' as a verbal auxiliary at www.merriam-webster.com/dictionary/be; www.oxforddictionaries.com/definition/english/be; and www.bbc.co.uk/worldservice/learningenglish/grammar/learnit/learnitv103.shtml (all last accessed 10 February 2017).

[56] Sic. The correct idiom would be 'with *a* view'. This appears to be a linguistic imprecision without legal implications. For more on art 3 see ch 8.

[57] As the starting point for interpretation in accordance with VCLT art 31.1, the ordinary meaning includes the mere 'hope' of achieving the purpose; cf Oxford Dictionaries online 'view' www.oxforddictionaries.com/definition/english/view (last accessed 10 February 2017). However, in a treaty text in general and in this place in particular it would seem meaningless to require the mere hope of parties.

[58] Paris Agreement art 4.2, 4.8, 4.9 and Decision 1/CP.21 para 25. Further precise prescriptive provisions relate to parties acting jointly, including in the context of a regional economic integration organization such as the EU; see art 4.16–4.18.

[59] ibid art 4.13, art 9.5, 9.7, art 11.4, art 13.7, 13.9, and 13.11; Decision 1/CP.21 paras 31, 32, and 90.

[60] Oberthür and Bodle (n 1) 53–54.

[61] Paris Agreement art 4.2.

[62] In combination with art 3, according to which parties are to undertake 'ambitious efforts' that 'will represent a progression over time', it has been argued that this is a 'due diligence' standard; see Christina Voigt, 'The Paris Agreement: What Is the Standard of Conduct for Parties?' (2016) 26 Questions of International Law 24. However, the due diligence standard does not necessarily constitute a universal standard in international law that applies by default to otherwise unspecified obligations of conduct. It could be problematic to impute a 'duty of care' into the relevant wording in the Paris Agreement, which falls short of expressions which usually indicate prescriptive and precise legal obligations: the factual 'will' and the 'are to' in arts 3 and 4.3.

[63] Paris Agreement art 4.3; on progression see ch 4.

64 See ch 14.

65 Paris Agreement art 9.1, 9.5, and 9.7.

66 ibid art 4.5, art 7.13, art 10.5–10.6, art 13.14–13.15.

67 Oberthür and Bodle (n 1) 54.

68 Paris Agreement art 9.1. The existing quantified political commitment of mobilizing US$100 billion per year by 2020 is extended until 2025 in Decision 1/CP.21 para 53, using the factual 'will'. The same goes for the provision that prior to 2025 the CMA 'will' set a 'new collective quantified goal from a floor of USD 100 billion per year'.

69 ibid art 9.5.

70 ibid art 9.3. Note the difference in the factual wording 'will' for the progression requirements in arts 3 and 4.3.

71 ibid art 14.3 and art 4.9. On the different models that were available for including a dynamic element into the Paris Agreement see Lena Donat and Ralph Bodle, 'A Dynamic Adjustment Mechanism for the 2015 Climate Agreement: Rationale and Options' (2014) 8 Carbon and Climate Law Review 13.

72 Decision 1/CP.21 para 101. On the global stocktake see ch 19.

73 See also Decision 1/CP.21 para 20.

74 See Oberthür and Bodle (n 1) 53.

75 Decision 1/CP.21 paras 102–103; Decision 1/CMA.1, Matters relating to the implementation of the Paris Agreement, FCCC/PA/CMA/2016/3/Add.1 (31 January 2017) paras 5 and 8; see also ch 20.

76 Paris Agreement art 7.2, 7.4–7.6.

77 ibid art 7.7, 7.10.

78 ibid art 7.12 on the registry and art 7.14 on adaptation-specific requirements for the global stocktake.

79 ibid art 7.13, which requires that the financial support provided for adaptation under other articles has to be 'continuous and enhanced'.

80 ibid art 10.2.

81 ibid art 10.6, second sentence.

82 ibid art 10.3 anchors the Technology Mechanism established under the Convention in the Paris Agreement; art 10.4 establishes a technology framework; art 10.5, second sentence, tasks the Technology Mechanism.

83 ibid art 10.5, second sentence; art 10.6, first sentence, includes technology-specific requirements for the global stocktake.

84 ibid art 11.2–11.4.

85 ibid art 11.4 and 11.5.

86 ibid art 5.1.

87 See ch 11; Oberthür and Bodle (n 1) 50–51.

88 Paris Agreement art 8.3 provides that parties should enhance understanding, action, and support, as appropriate, on a cooperative and facilitative basis.

89 The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, Paris Agreement art 8.2.

90 Decision 1/CP.21 para 51, which qualifies as an interpretative agreement amongst parties under VCLT (n 5) art 31.2(a) or art 31.4. The exclusion is limited to the interpretation of art 8 of the Paris Agreement. The decision text could in theory be changed or superseded in future, but this is a matter of legal durability rather than ambiguity.

91 Paris Agreement art 12 establishes a duty to 'cooperate in taking measures'.

92 See eg Paris Agreement arts 7.3, 7.9, 7.11, 11.4, and 12. We suggest that calling this 'more' or 'less' binding is confusing terminology.

93 See Bodle, Donat, and Duwe (n 43) 21.

Annex ZS

Genocide

Raphael Lemkin

The last war has focused our attention on the phenomenon of the destruction of whole populations — of national, racial and religious groups — both biologically and culturally. The German practices, especially in the course of occupation, are too well known. Their general plan was to win the peace though the war be lost, and that goal could have been achieved through successfully changing the political and demographic interrelationships in Europe in favor of Germany. The population not destroyed was to be integrated in the German cultural, political and economic pattern. In this way a mass obliteration of nationhoods had been planned throughout occupied Europe. The Nazi leaders had stated very bluntly their intent to wipe out the Poles, the Russians; to destroy demographically and culturally the French element in Alsace-Lorraine, the Slavonians in Carniola and Carinthia. They almost achieved their goal in exterminating the Jews and Gypsies in Europe. Obviously, the German experience is the most striking and the most deliberate and thorough, but history has provided us with other examples of the destruction of entire nations, and ethnic and religious groups. There are, for example, the destruction of Carthage; that of religious groups in the wars of Islam and the Crusades; the massacres of the Albigenses and the Waldenses; and more recently, the massacre of the Armenians.

While society sought protection against individual crimes, or rather crimes directed against individuals, there has been no serious endeavor hitherto to prevent and punish the murder and destruction of millions. Apparently, there was not even an adequate name for such a phenomenon. Referring to the Nazi butchery in the present war, Winston Churchill said in his broadcast of August, 1941, "We are in the presence of a crime without a name."

II

Would mass murder be an adequate name for such a phenomenon? We think not, since it does not connote the motivation of the crime, especially when the motivation is based upon racial, national or religious considerations. An attempt to destroy a nation and obliterate its cultural personality was hitherto called denationalization. This term seems to be inadequate, since it does not connote biological destruction. On the other hand, this term is mostly used for conveying or for defining an act of deprivation of citizenship. Many authors, instead of using a generic term, use terms connoting only some functional aspect of the main generic notion of the destruction of nations and races. Thus, the terms "Germanization," "Italianization," "Magyarization" are used often to connote the imposition by a stronger nation (Germany, Italy, Hungary) of its national pattern upon the national group controlled by it. These terms are also inadequate since they do not convey biological destruction, and they cannot be used as a generic term. In the case of Germany, it would be ridiculous to speak about the Germanization of the Jews or Poles in western Poland, since the Germans wanted these groups eradicated entirely.

Hitler stated many times that Germaniza-

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tion could only be carried out with the soil, never with men. These considerations led the author of this article to the necessity of coining a new term for this particular concept: *genocide.* This word is made from the ancient Greek word *genos* (race, clan) and the Latin suffix *cide* (killing). Thus, genocide in its formation would correspond to such words as tyrannicide, homicide, patricide.

III

Genocide is the crime of destroying national, racial or religious groups. The problem now arises as to whether it is a crime of only national importance, or a crime in which international society as such should be vitally interested. Many reasons speak for the second alternative. It would be impractical to treat genocide as a national crime, since by its very nature it is committed by the state or by powerful groups which have the backing of the state. A state would never prosecute a crime instigated or backed by itself.

By its very legal, moral and humanitarian nature, it must be considered an international crime. The conscience of mankind has been shocked by this type of mass barbarity. There have been many instances of states expressing their concern about another state's treatment of its citizens. The United States rebuked the government of Czarist Russia as well as that of Rumania for the ghastly pogroms they instigated or tolerated. There was also diplomatic action in behalf of the Greeks and Armenians when they were being massacred by the Turks. States have even entered into international treaties by which they assumed specific obligations in the treatment of their own nationals. We may, in this respect, refer to the treaty entered into between the United States and Spain in 1898, in which the free exercise of religion was assured by the United States to the inhabitants of the territories which were ceded to her.

Another classical example of international concern in the treatment of citizens of other states by their governments is provided by the minority treaties under the auspices of the League of Nations which were signed by a number of European countries after the first World War. Again, the declaration of the Eighth International Conference of American States provides that any persecution on account of racial or religious motives which makes it impossible for a group of human beings to live decently is contrary to the political and judicial systems of America. The Charter of the United Nations Organization also provides for the international protection of human rights, indicating that the denial of such rights by any state is a matter of concern to all mankind.

Cultural considerations speak for international protection of national, religious and racial groups. Our whole cultural heritage is a product of the contributions of all nations. We can best understand this when we realize how impoverished our culture would be if the peoples doomed by Germany, such as the Jews, had not been permitted to create the Bible, or to give birth to an Einstein, a Spinoza; if the Poles had not had the opportunity to give to the world a Copernicus, a Chopin, a Curie; the Czechs, a Huss, a Dvorak; the Greeks, a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovich.

There are also practical considerations. Expulsions of law-abiding residents from Germany before this war created frictions with the neighboring countries to which these peoples were expelled. Mass persecutions forced mass flight. Thus, the normal migration between countries assumes pathological dimensions.

Again, international trade depends upon confidence in the ability of the individuals participating in the interchange of goods to fulfill their obligations. The arbitrary and wholesale confiscations of the properties of whole groups of citizens of one state for racial or other reasons deprives them of their capacity to discharge their obligations to citizens of other states. Many American citizens were deprived of the possibility of claiming debts incurred by German importers after these importers were destroyed by the Hitler regime.

Finally, genocide in time of peace creates international tensions and leads to war. It was used by the Nazi regime to strengthen the alleged unity and totalitarian control of the German people as a preparation for war.

IV

Once we have recognized the international implications of genocidal practices, we must create the legal framework for the recognition of genocide as an international crime. The significant feature of international crime is a recognition that because of its international importance it must be punished and punishable through international cooperation. The establishment of international machinery for such punishment is essential.

Thus, it has been recognized by the law of nations and by the criminal codes of many nations that crimes which affect the common good of mankind — as, for example, piracy, unlawful production and trade in narcotics, forgery of money, trade in women and children, trade in slaves — all these are international crimes (*delicta juris gentium*). For such crimes, the principle of universal repression has been adopted: namely, the culprit can be punished not only before the courts of the country where the crime has been perpetrated, but also by courts of the country where the culprit can be apprehended if he escaped justice in his own country. For example, a currency forger who committed his crime in Paris and escaped to Prague can be punished validly in the latter city.

In 1933, at the Fifth International Conference for the Unification of Criminal Law (under the auspices of the Fifth Committee of the League of Nations) the author of the present article introduced a proposal providing for this type of jurisdiction for acts of persecution amounting to what is now called genocide. Unfortunately, at that time, his proposal was not adopted. Had this principle been adopted at that time by international treaty, we would not now have all the discussions about *ex post facto* law, in relation to crimes committed by the German government against its own citizens prior to this war.

V

A ruthless regime finds it easiest to commit genocide in time of war. It then becomes a problem of the treatment, or, rather, mistreatment, of a civilian population by an occupant. The Fourth Hague Convention establishes a rule of law in the protection of civilian populations which an occupant must respect. Within the purview of this law comes the protection of the honor, liberty, life, family rights and property rights of the population in the occupied country.

Genocide can be carried out through acts against individuals, when the ultimate intent is to annihilate the entire group composed of these individuals; every specific act of genocide as directed against individuals as members of a national or racial group is illegal under the Hague Convention. If the killing of one Jew or one Pole is a crime, the killing of all the Jews and all the Poles is not a lesser crime. Moreover, the criminal intent to kill or destroy all the members of such a group shows premeditation and deliberation and a state of systematic criminality which is only an aggravated circumstance for the punishment.

Genocide has been included in the indictment of the major war criminals for the use of the Nuremberg trials. It reads as follows:

> They (the defendants) conducted deliberate and systematic genocide — viz., the extermination of racial and national groups — against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, Gypsies and others.

By including genocide in the indictment, the enormity of the Nazi crimes has been more accurately described. Moreover, as in the case of homicide, the natural right of existence for individuals is implied: by the formulation of genocide as a crime, the principle that every national, racial and religious group has a natural right of existence is proclaimed. Attacks upon such groups are in violation of that right to exist and to develop within an international community as free members of international society. Thus, genocide is not only a crime against the rules of war, but also a crime against humanity.

Only after the cessation of hostilities could the whole gruesome picture of genocide committed in the occupied countries be reviewed. During the military occupation unconfirmed rumors about genocide leaked out from behind the iron curtains covering enslaved

Europe. The International Red Cross was precluded from visiting occupied countries and gathering information about the mistreatment of the civilian populations. It so happened because the Geneva Convention gave to the International Red Cross the right to supervise and control only the treatment of prisoners of war. A paradoxical situation was created: men who went into the battlefield with a considerable expectancy of death survived, while their families, left behind in supposed security, were annihilated. The author of the present article has proposed in his book *Axis Rule in Occupied Europe* that international law be changed so that in time of war the treatment of civilian populations will also be under supervisory control of an international body like the International Red Cross. The Swedish newspaper, *Dagens Nyheter*, of November 2, 1945, announced that the chairman of the Swedish Red Cross, Count Bernadotte, referred to the author's proposal as acceptable for consideration at a future conference of the International Red Cross, and declared that the Swedish Red Cross would support it. While the writer is gratified by this development, he hopes that other governments will support the proposal to change international law.

VI

On the basis of the foregoing considerations, the author proposes that the United Nations as they are now organized, together with other invited nations, enter into an international treaty which would formulate genocide as an international crime, providing for its prevention and punishment in time of peace and war. This treaty, basically, should include, among other things, the following principles:

1. The crime of genocide should be recognized therein as a conspiracy to exterminate national, religious or racial groups. The overt acts of such a conspiracy may consist of attacks against life, liberty or property of members of such groups merely because of their affiliation with such groups. The formulation of the crime may be as follows: "Whoever, while participating in a conspiracy to destroy a national, racial or religious group, undertakes an attack against life, liberty or property of members of such groups is guilty of the crime of genocide." The crime so formulated should be incorporated in every national criminal code of the signatories.
2. The defendants should be liable not only before the courts of the country where the crime was committed, but in case of escape shall be liable, as well, before the courts of the country where they are apprehended.
3. Persons accused of genocide should not be treated as political criminals for purposes of extradition. Extradition should not be granted except in cases where sufficient evidence exists to indicate that the requesting country will earnestly prosecute the culprits.
4. The liability for genocide should rest on those who gave and executed the orders, as well as on those who incited to the commission of the crime by whatever means, including formulation and teaching of the criminal philosophy of genocide. Members of governments and political bodies which organized or tolerated genocide will be equally responsible.
5. Independently of the responsibility of individuals for genocide, states in which such a policy obtains should be held accountable before the Security Council of the United Nations Organization. The Council may request the International Court of Justice to deliver an advisory opinion to determine whether a state of genocide exists within a given country before invoking, among other things, sanctions to be leveled against the offending country. The Security Council may act either on its own initiative or on the basis of petitions submitted by members of interested national, religious or racial groups residing either within or without the accused country.
6. The Hague Convention and other pertinent treaties should be changed to the effect that in case of war, an international body (such as the International Red Cross) should have the right to supervise the treatment of civilian populations by occupants in time of war in order to ascertain whether genocide is being practiced by such occupant.
7. A multilateral treaty for the prevention and punishment of genocide should not preclude two or more countries from entering into bilateral or regional treaties for more extensive protection against genocide. In this connection it is well to note that the Allied Governments in accordance with the Moscow agreements of December, 1945, have decided to enter into formal treaties of peace with the Axis satellite countries, Hungary, Bulgaria and Rumania, which practiced genocide in this war according to the German pattern. It is of impelling importance that anti-genocide clauses be included in these treaties.

Annex ZT

INTERNATIONAL HUMAN RIGHTS LAW

Third Edition

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While there is some criticism of the Committee taking this stance, other international human rights treaties do not tend to contain the restriction that only individuals are able to bring a complaint. For example, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) allows for complaints by groups concerning the rights protected by the ICESCR, which includes the right of self-determination.

1.3 RELEVANCE OF GROUP RIGHTS

While there are a range of group rights, such as the prohibition on genocide, the right to development, and the right to a clean environment, a specific focus of this chapter is on the right of self-determination (sometimes called the right *to* self-determination). This is because the right of self-determination is protected under the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR, it has been considered in case law and other jurisprudence, and it has wide and significant impacts across the international community, as will be shown.

The rights of minorities have similar wide and significant impacts, as there are minorities in every state. While these rights have often been seen as within the compass of individual rights, it will be shown that they are also now considered as group rights. One type of collective that has been especially affected by the development of peoples and minorities rights is indigenous peoples, and so they are also considered in this chapter.

The acknowledgment that peoples, minorities, and indigenous groups have human rights, and that their rights should be protected in international law, has taken a long time. They are still not fully understood and respected. However, they are important human rights that affect the whole of the international community. With the reality that almost every state in the world has some current or potential issue connected with group rights, it is important that these rights are understood, respected, and applied appropriately.

2 THE RIGHT OF SELF-DETERMINATION

2.1 CONCEPT

Claims have been made for centuries about matters that could now be seen in terms of self-determination, with some writers tracing it as far back as the early stages of the institution of government. However, the use of self-determination in an international legal context primarily developed during the immediate post-First World War period, with US President Wilson stating that, '[P]eoples may now be dominated and governed only by their own consent. "Self-determination" is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.'[5]

At about the same time Marxist thought on national liberation took root in the USSR. The combined effect of these ideas (and others) was that self-determination, despite its vague content and the sense to which it could be applied to a range of situations, became an accepted term of use in international relations. Then in 1945 the UN Charter proclaimed

[5] Wilson, *War Aims of Germany and Austria* (1918), reproduced in Baker, Dodd, and Leach (eds), *The Public Papers of Woodrow Wilson: War and Peace* (Harper and Brothers, 1927) 177 at 182. Wilson was supported by the British Prime Minister, Lloyd George, who declared that one reason for the UK entering the First World War had been the 'principle of self-determination' and that future territorial questions should be resolved by respecting 'the consent of the governed': address to the Trade Union Conference, 5 January 1918, reported in *The New York Times Current History* (New York) 270.

that one of the purposes of the UN was 'respect for the principle of equal rights and self-determination of peoples'.[6]

Since that time, through resolutions of the Security Council and the General Assembly, in decisions and opinions of the International Court of Justice (ICJ), in treaties, and in state practice—some of which will be referred to in this chapter—the idea of self-determination of peoples has been restated, reinforced, and reinvigorated. It has also been used in diverse contexts, not least because 'couching political goals in the language of legal entitlement has an undisputed rhetorical appeal',[7] and has become part of international law.

2.2 DEFINITIONS

Despite the general acceptance that self-determination is part of international law, it was not until the conclusion of the two international human rights Covenants that it was accepted that self-determination was a human right and that some form of legal definition was provided. Article 1 ICCPR and ICESCR provides:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The definition in Article 1(1) is largely repeated in all the subsequent international and regional human rights treaties and documents that contain a right of self-determination, although the African Charter on Human and Peoples' Rights (ACHPR) elaborates on it slightly.[8]

Yet this definition does not clarify all aspects of the right. While it is evident that it is a right that is relevant in political contexts, it is also applicable in economic, social, and cultural contexts, with, for example, Article 1(2) of the Covenants dealing with a particular economic manifestation of the right and Article 55 UN Charter referring to economic and social aspects of the right. It is also a right of peoples as distinct from individuals, although the lack of further clarification as to who are the 'peoples' who have the right, has been a major stumbling block for many diplomats and writers.

[6] UN Charter, Art 1(2).

[7] Drew, 'Self-Determination, Population Transfer and the Middle-East Peace Accords' in Bowen (ed), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories* (Martinus Nijhoff, 1997) 127.

[8] ACHPR, Art 20 provides:

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

The term 'Non-Self-Governing Territories' refers to the list of territories held by the UN that was meant to designate which were colonial territories. While this list was never comprehensive (especially as it was possible for states unilaterally to remove territories from the list), the term was a recognized UN abbreviation for colonial territories or colonies.

The ICJ has consistently held that the right of self-determination applies to all peoples in all colonial territories. In its *Namibia Opinion*, concerning the illegal presence of South Africa in Namibia, the Court's view was:

> [T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. . . . The ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.[18]

This position was confirmed by the ICJ in the *Western Sahara Case*, with Judge Dillard stating that '[t]he pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonisation of those non-self-governing territories which are under the aegis of the United Nations'.[19]

State practice confirms that the right of self-determination applies to all peoples in colonial territories. This is evident not only from the vast number of colonial territories that have exercised their right of self-determination to become new states, but also because of the acceptance by the colonial powers that they have a legal obligation to allow this exercise. Some writers have concluded from this consistent state practice, *opinio juris*, and lack of any denial by states that the right of self-determination of colonial peoples is now a matter of *jus cogens*.[20]

3.2 OUTSIDE THE COLONIAL CONTEXT

State practice shows that the right of self-determination has definitely been applied outside the colonial context. For example, when East and West Germany were united into one state in 1990, it was expressly stated in a treaty signed by four of the five permanent members of the UN that this was done as part of the exercise of the right of self-determination by the German people.[21] The right of self-determination was also referred to in the context of the dissolution of the USSR and Yugoslavia,[22] internally within states, and the ICJ confirmed that the right of self-determination applies to the Palestinian people in its *Advisory Opinion on the Wall*.[23]

The ICJ has gone further and has declared that the right of self-determination is 'one of the essential principles of contemporary international law' and has 'an *erga omnes* character'.[24] By having an *erga omnes* character it means that there is an obligation on *all states* to protect

[18] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, para 52.

[19] *Western Sahara Case* [1975] ICJ Rep 12, per Judge Dillard at 121, and see Majority Opinion, paras 54–5.

[20] eg Cassese, *Self-Determination of Peoples: A Legal Appraisal* (CUP, 1995) 140; Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002) in relation to Art 41; Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 *HRLR* 609. See Chapter 4 for an explanation of *jus cogens*.

[21] Treaty on the Final Settlement With Respect to Germany (1990) 29 *ILM* 1186.

[22] eg the terms of the European Community's Declaration on Yugoslavia and its Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union (16 December 1991), (1992) 31 *ILM* 1486.

[23] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 118 and 122.

[24] *East Timor Case (Portugal v Australia)* [1995] ICJ Rep 90, para 29. The HRC also requires all states parties to the ICCPR to report on their protection of the right of self-determination: General Comment 12, para 3.

and respect the right of self-determination. This makes clear that it is not only an obligation on colonial powers and so the right applies to peoples beyond the colonial context.

Indeed, since 1960 the right of self-determination has not been expressed in any international or regional instrument solely in the context of colonial territories but as a right of 'all peoples'. This is seen in the Declaration on Principles of International Law 1970 (which is often considered as being an internationally agreed clarification of the principles of the UN Charter) which provides:

> [All States should bear] in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of equal rights and self-determination of peoples], as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations.[25]

In fact, even the Declaration on Independence of Colonial Countries and Peoples 1960 dealt with colonialism 'in all its forms and manifestations'. The forms and manifestations of colonialism relevant to the application of the right of self-determination are about the oppressive *nature* of the administrative power over a people and not simply about the physical distance of the administering colonial power from the colonial territory. Hence, where a group or groups in a state administer power in such a way that there is 'subjugation, domination and exploitation' of another group that oppresses, demeans, and undermines the dignity of that group, then the right of self-determination may apply to the latter group. Therefore, the right of self-determination applies to any peoples in any territory (including non-colonial territories) who are subjected to 'alien subjugation, domination and exploitation'. Indeed, it would be contrary to the concept of a human right if the right of self-determination could only be exercised once (such as by a colonial territory) and then not again. All peoples in all states have the right of self-determination.

4 THE EXERCISE OF THE RIGHT OF SELF-DETERMINATION

4.1 EXTERNAL AND INTERNAL SELF-DETERMINATION

Under international human rights law, there is a concentrated focus on the *exercise* of a human right. This is usually because a particular issue has arisen due to an alleged restriction on the exercise of a right by a state. Similarly, the exercise of the right of self-determination is a crucial aspect in understanding the right.

The Declaration on Principles of International Law sets out the principal methods as to how the right of self-determination can be exercised. It provides that:

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

While the vast majority of peoples in colonial territories exercised their right of self-determination by independence, this was not the only method of exercise that was either available or used. For example, the British and the Italian Somaliland colonies joined into one state of Somalia, part of the British colony of Cameroon merged with the French

[25] GA Res 2625(XXV) (1970) Annex.

Annex ZU

CHAPTER XVI

The Principle of Self-Determination

In its Wilsonian heyday self-determination seemed to many a simple and straightforward proposition consolidating under one rubric a number of nineteenth-century liberalism's most cherished propositions as to freedom and democracy and the rights of individuals and peoples. Its subsequent history has been a checkered one, both in its practical application and in the theorizing concerning it. It has tempted the sophisticate to display his wit and learning by demonstrating its inadequacies and contradictions and forced many statesmen to shake their heads in dismay at its uncouth proportions. Neither the skeptical sophisticate nor the perturbed statesman, it should immediately be added, has had any significant bearing on the revolutionary drive of peoples to achieve their independent destiny in their own fashion.

A summary glance at the experience of the world with self-determination since World War I will indicate its curious career. Brought to explicit formulation by Woodrow Wilson and the Bolsheviks in the course of the war, it became one of the fundamental principles of international society, and yet it found no place in the League Covenant. It served as a guideline for much of the reshaping of states in the peacemaking that followed close on the heels of the war, but after that process was completed the only new states to emerge on the international stage in the interwar decades were Eire in Europe and Iraq and Saudi Arabia in Asia. (The short-lived Japanese puppet state of Manchukuo may properly be ignored in this context, as may Hitler's creations in Central Europe.)

The experience of the Second World War and its aftermath

is in many respects the reverse of the first. Although the Atlantic Charter paid appropriate homage to self-determination in a somewhat indirect fashion, the Allies, leaving aside the restoration of peoples overrun by the Axis, were not only divided as to the application of self-determination but had also largely lost their enthusiasm for it as anything approaching a panacea. For the Soviet Union the aim in relation to its Western neighbors had become one of absorption or domination, and for the colonial powers self-determination meant self-destruction of empire. Hence, although the principle of self-determination of peoples now figured among the purposes of the United Nations Charter, it played only a scanty role in such peacemaking as took place. As a sorry substitute for a peace settlement, the cold war indeed worked to produce national partitions at some of the key points on the new-style international frontier. In Germany, Korea, and Vietnam the pleas of nations for unity were subordinated to the high strategy of international politics with the result that each had a jealously guarded barricade erected across it to demarcate the spheres of the two great opposing blocs; and China underwent a division between the mainland and Formosa. In each instance there were two bitterly opposed regimes, one Communist and the other non-Communist, each claiming to represent the national will under its own symbols.

Self-determination was still very much alive but its locus had shifted from Europe to Asia, the Middle East, and Africa, with the anti-colonial powers tending to insist that it was for practical purposes an issue which had relevance only in the colonial realm. In 1919, even though the Versailles peacemakers could frequently do little more than ratify states of fact already accomplished by the peoples directly concerned, the reordering of Central and Eastern Europe was carried on under the auspices of the victorious Allies essentially at the cost of their enemies and Russia. In 1945 and thereafter self-determination was a weapon aimed primarily at the victorious imperial powers themselves, and was under their control only in the sense that they could either fight it outright, as in Indochina and Indonesia, or yield to it with greater or less grace, as in the Philippines, India, Burma, and Ceylon. In contrast to Iraq's lonely eminence in the interwar decades, a host of new Asian and

African states were added to the international family in the years following the Second World War; and more are in process of being created out of the dwindling colonial empires.

The principle of self-determination derives from a familiar set of doctrines, whose apparent simplicity conceals a multitude of complications. The prime starting point is presumably the eighteenth-century proposition that governments must rest upon the consent of the governed, to which the nineteenth and twentieth centuries added the assumption that, since man is a national animal, the government to which he will give his consent is one representing his own nation. For full-blown self-determination to emerge it was only necessary to secure recognition of a new principle of natural law which entitles nations to possess their own states and, as the other side of the coin, renders illegitimate states with a non-national base. As Woodrow Wilson put it, the Central Empires had been forced into political bankruptcy because they dominated "alien peoples over whom they had no natural right to rule." [1] With the aid of a little sleight of hand the original claim that individuals must consent to or contractually establish the governments ruling them is thus transmuted into the natural right of nations to determine their own statehood.

The difficulties of self-determination become most serious when the doctrine is brought down from abstraction to working reality and when an effort is made, as in the United Nations' covenants on human rights, to translate it from ethical and political precepts to binding legal norms. In the current temper of world opinion no one can in principle oppose what has come to be the almost self-evident right of peoples to dispose of their own destinies, but it is unfortunately equally impossible to formulate this right in such terms as to make it meaningfully applicable to reality. Who can say the nations nay, and yet who can say what nations are and when and how they may assert themselves?

A RIGHT OF REVOLUTION

If the issue is put in its most drastic terms, to accept the right of self-determination in blanket fashion is to endow social entities

Annex ZV

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The Use of International Human Rights Law in the Universal Periodic Review

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ABSTRACT

Universal Periodic Review provides a unique insight into states' perceptions of IHRL. States issue recommendations on fulfilling human rights obligations and commitments. HRC Resolution 5/1 sets out the bases of the reviews: the UN Charter, the UDHR, human rights instruments to which the state is party and voluntary pledges and commitments. Relevant IHL is 'take[n] into account'. Analysing the identification of these bases of review and how they have been used in the 57,685 recommendations from the first two cycles of UPR, we demonstrate states' understanding of the term 'human rights' and their preferences for certain sources of law. States have not limited themselves to the bases of review in Resolution 5/1. They have used additional materials and rejected distinctions between 'hard' and 'soft' law. They have interpreted the notion of 'human rights' expansively but largely ignored regional human rights instruments. A body of generalised, non-specific IHRL has been recognised.

KEYWORDS: Universal Periodic Review, Human Rights Council, United Nations, human rights, international law, international human rights law

1. INTRODUCTION

The Universal Periodic Review (UPR) provides valuable insights into states' perceptions of international human rights law. Facilitated by the Human Rights Council, it is a regular review process by which every UN member state is assessed by other member states on the fulfilment of 'human rights obligations and commitments'.

When establishing the Human Rights Council in 2006, the General Assembly (GA) mandated the Council to undertake a 'universal periodic review, based on objective and reliable information, of the fulfilment by each state of its human rights obligations

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and commitments'.[1] What was meant by 'human rights obligations and commitments' was left undefined and the Council was left to debate its meaning when developing the modalities of the UPR process.[2] A product of compromise, Human Rights Council Resolution 5/1 (2007) provides that the basis of the review is to be: (a) the UN Charter; (b) the Universal Declaration of Human Rights (UDHR); (c) 'human rights instruments to which a state is party'; and (d) 'voluntary pledges and commitments made by States', including those presented by states when standing for election to the Council. The resolution also provides that 'the review shall take into account applicable international humanitarian law' and that 'subsequent review[s] should focus, *inter alia,* on the implementation of the preceding outcome', where 'outcome' includes the 'voluntary commitments' of the state under review—namely, accepted recommendations.[3]

The 'big data'[4] generated by UPR has been mined for various empirical studies. Most notable is the work by the non-governmental organisation UPR Info.[5] This organisation has created a comprehensive and fully searchable database of all UPR recommendations made to date,[6] which has served as the basis for various influential studies of the UPR process.[7] Another non-governmental organisation, the Universal Rights Group,[8] has also produced important studies and reports on UPR and the Human Rights Council more generally.[9] These policy studies have focussed on the quality of recommendations, especially the action required by the state under review, and the implementation of accepted recommendations. There have been numerous other studies of the practice of UPR, although many of these are not empirical. Some have focussed on particular issues, such as the rights of indigenous peoples,[10]

1 GA Res 60/251, 3 April 2006, A/RES/60/251, para 5(e).

2 See Summary of the Discussion on Universal Periodic Review Prepared by the Secretariat, 13 March 2007, A/HRC/4/CRP3, para 4. Records of these negotiations are available on the OHCHR Extranet: extranet.ohchr.org/sites/hrc [last accessed 1 November 2020].

3 HRC Res 5/1, 18 June 2007, A/HRC/RES/5/1, Annex, paras 1 and 34. See also HRC Dec 17/119, 19 July 2011, A/HRC/DEC/17/119, para II.2 and HRC Res 16/21, 12 April 2011, A/HRC/RES/16/21, Annex, para I.C.1.6.

4 McMahon, 'Understanding the UN Human Rights Council Universal Periodic Review: Methods of Assessing its Functioning' (June 2017), 5, available at: www.upr-info.org/en/analyses/Studies [last accessed 1 November 2020].

5 See: www.upr-info.org/en [last accessed 1 November 2020].

6 The database is available at: www.upr-info.org/database/ [last accessed 1 November 2020].

7 See, UPR Info, *Beyond Promises. The Impact of UPR on the Ground* (2014), available at: www.upr-info.org/en/analyses/Studies [last accessed 1 November 2020]. See also the studies conducted by Edward McMahon who assisted in the development of the original database: e.g., McMahon and Ascherio, 'A Step Ahead in Promoting Human Rights: the Universal Periodic Review of the UN Human Rights Council' (2012) 18 *Global Governance* 231; McMahon, *The Universal Periodic Review: A Work in Progress* (September 2012), available at: library.fes.de/pdf-files/bueros/genf/09297.pdf [last accessed 1 November 2020]; McMahon and Johnson, *Evolution not Revolution* (September 2016), available at: library.fes.de/pdf-files/iez/global/12806.pdf [last accessed 1 November 2020].

8 See: https://www.universal-rights.org/ [last accessed 1 November 2020].

9 E.g. Gujadhur and Limon, *Towards the Third Cycle of UPR: Stick or Twist* (URG, 2016), available at: www.universal-rights.org/wp-content/uploads/2016/07/URG_UPR_stick_or_twist.pdf [last accessed: 1 November 2020]. For a comparison of the methodologies used by UPR Info and URG when analysing UPR recommendations, see McMahon, supra n 4.

10 Higgins, 'Creating a Space for Indigenous Rights: the Universal Periodic Review as a Mechanism for Promoting the Rights of Indigenous Peoples' (2019) 23 *International Journal of Human Rights* 125.

international humanitarian law,[11] women's rights[12] and the rights of LGBT persons.[13] Others have examined how particular states or regions have engaged with the UPR process.[14] However, there has been little engagement with the bases of review in the UPR.[15] This article seeks to fill this gap.

By studying UPR, we are able to provide insight into states' views of international human rights law. Given that states remain the most influential actor in international human rights law, how they perceive and use this body of law is of considerable importance. The negotiations on the bases of the UPR are revealing in this regard. However, they only provide a part of the picture. This article goes further and presents an empirical analysis of the 57,685 recommendations made during the first two UPR cycles. We demonstrate how the bases of review set out in Resolution 5/1 have *actually been used*, providing evidence on how broadly states understand the term 'human rights' and states' preferences for certain sources of human rights law.

Our analysis focuses on the text of UPR recommendations and does not go behind this text. As such, it does not address *how* states make their recommendations, *why* they do so, or the political dynamics of making recommendations. Rather, our findings are based on the premise that the text of a recommendation is the product of a reflexive

11 Zhu, 'International Humanitarian Law in the Universal Periodic Review of the UN Human Rights Council: An Empirical Survey' (2014) 5 *Journal of International Humanitarian Legal Studies* 186; Chang, 'International Humanitarian Law in the Universal Periodic Review of the UN Human Rights Council: An Empirical Survey' (2015) 8 *Journal of East Asia and International Law* 549.

12 Tufano, 'The "Holy Trinity" of the United Nations Universal Periodic Review: How to Make an Effective Recommendation Regarding Women's Rights' (2018) 21 *University of Pennsylvania Journal of Law and Social Change* 187.

13 Cowell and Milon, 'Decriminalisation of Sexual Orientation through the Universal Periodic Review' (2012) 12 *Human Rights Law Review* 341; ILGA, *Sexual Orientation, Gender Identity and Expression, and Sex Characteristics at the Universal Periodic Review* (November 2016), available at: ilga.org/downloads/SOGIESC_at_UPR_report.pdf [last accessed: 1 November 2020].

14 E.g. the various surveys in Charlesworth and Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (2015); Mao and Sheng, 'Strength of Review and Scale of Response: A Quantitative Analysis of Human Rights Council Universal Periodic Review on China' (2016–2017) 23 *Buffalo Human Rights Law Review* 1; Cofelice, 'Italy and the Universal Periodic Review of the United Nations Human Rights Council. Playing the Two-Level Game' (2017) 47 *Italian Political Science Review* 227; Cochrane and McNeilly, 'The United Kingdom, the United Nations Human Rights Council and the First Cycle of the Universal Periodic Review' (2013) 17 *International Journal of Human Rights* 152; Etone, 'The Effectiveness of South African's Engagement with the Universal Periodic Review (UPR): Potential for Ritualism' (2017) 33 *South African Journal of Human Rights* 258; Harrington, 'Canada, the United Nations Human Rights Council, and Universal Periodic Review' (2009) 18 *Constitutional Forum* 79; Smith, 'To See Themselves as Others See Them: The Five Permanent Members of the Security Council and the Human Rights Council's Universal Periodic Review' (2013) 35 *Human Rights Quarterly* 1; Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 9 *Human Rights Law Review* 1; Smith, 'A Review of African States in the First Cycle of the UN Human Rights Council's Universal Periodic Review' (2014) 14 *African Human Rights Law Journal* 346; Smith, 'The Pacific Island States: Themes Emerging from the United Nations Human Rights Council's Inaugural Universal Periodic Review' (2012) 13 *Melbourne Journal of International Law* 569.

15 Limited studies are provided by Kälin, 'Human Rights Treaties within the UPR Process: Opportunities and Limits of Inter-Governmental Monitoring of Human Rights' (2017) 60 *Japanese Yearbook of International Law* 243; Rodley, 'UN Treaty Bodies and the Human Rights Council' in Keller and Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012) 320. For an analysis of whether UPR recommendations may contribute to the formation of customary international law, see Cowell, 'Understanding the Legal Status of Universal Periodic Review Recommendations' (2018) 7 *Cambridge International Law Journal* 164.

choice made by the recommending state,[16] so that 'every time a state makes a recommendation during a UPR review, the speaker implicitly asserts the validity, legitimacy and relevance of the invoked human rights guarantee'.[17] This is carried forward to the acceptance of recommendations.[18]

Several findings emerge from our study. First, states have not limited themselves to the bases of review in Resolution 5/1. Instead, they have broadened the review by referring to a variety of other international law material in their recommendations.[19] In doing so, states eschew the traditional distinctions between 'hard' and 'soft' human rights law. Second, states have interpreted the notion of *human rights* law expansively to include international criminal law, international refugee law, international law regarding statelessness and international labour law. The boundary between human rights law and related bodies is revealed to be porous. Third, UPR tends not to engage explicitly with regional human rights law. Finally, there is frequent reference to human rights 'obligations', 'standards' and 'instruments' in recommendations. The precise content of these is not identified. States appear to have identified a body of generalised, non-specific international human rights law.

The article proceeds along the following lines. Section 2 provides an account of the concerns that directed states' choices of the bases of review. This sets the backdrop for our empirical study. Section 3 sets out the methodology used to collate and analyse the use of the bases of review in UPR recommendations made during the first two cycles of review. Section 4 presents the extent to which the bases of review have been utilised in UPR recommendations and Section 5 discusses the principal findings from our study.

2. 'OBLIGATIONS' AND 'COMMITMENTS': THE BASES OF REVIEW

When establishing the Human Rights Council in 2006, the GA instructed the Council to 'develop the modalities' for a 'universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner that ensures universality of coverage and equal treatment with respect to all States'.[20] An inter-sessional, inter-governmental working group agreed the modalities within one year, and in June 2007, the Council adopted Resolution 5/1, which sets out the objectives and mechanics of the UPR process.[21]

One of the areas for determination was what the basis of the review should be; that is, what did the GA's reference to 'human rights obligations and commitments' translate to? Some bases of review were easy to identify and attracted universal support from states, whilst others were the subject of significant debate.

16 The drafting of recommendations and decisions on their acceptance are often undertaken 'at a very high level: for instance at plenipotentiary and/or government level': see Bertotti, 'Separate or Inseparable? How Discourse Interpreting Law and Politics as Separable Categories Shaped the Formation of the UN Human Rights Council's Universal Periodic Review' (2019) 23 *International Journal of Human Rights* 1140 at 1151.

17 Kälin, 'Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal' in Charlesworth and Larking (eds), supra n 14, 33.

18 See Kälin, supra n 15 at 257–8.

19 On the range of international law material, see Baxter, 'International Law in Her Infinite Variety' (1980) 29 *International and Comparative Law Quarterly* 549.

20 GA Res 60/251, para 5(e).

21 Small changes were made following the review of the Human Rights Council in 2011.

A. The UN Charter

Using the UN Charter as a basis of review was not contentious.[22]

B. The Universal Declaration of Human Rights

Inclusion of the UDHR—a non-binding international instrument—attracted widespread support from states from all UN regional groups.[23] When discussing whether UPR would oversee compliance with treaties, states were keen to emphasise that UPR ought to focus on *accepted* treaty obligations. However, when it came to the UDHR, only one state expressed the concern that 'as the UDHR was merely a declaration containing general provisions . . . [it] would pose difficulties as a basis of review'.[24] Bernaz has suggested that the UDHR was included because its 'normative status is unquestionable', that it is an 'undeniable material source of international human rights law' and so '[i]ts absence from the list of standards would have damaged the periodic review process, even if, from a strict legal point of view, states are not bound to comply with it'.[25] During the negotiations, only one state—Liechtenstein—explained its value in the process: 'This will enable the UPR to address the whole set of internationally agreed human rights and fundamental freedoms, regardless of how many treaties the state under review is party to'.[26]

C. Human Rights Instruments to Which a State is Party

Basing UPR on human rights instruments to which a state is party was also relatively uncontentious.[27] The term 'instrument' is a broad one and may include declarations and resolutions. However, states tended to use the language of *treaties* when discussing this basis of review[28] and the use of 'party' in Resolution 5/1 confirms that it is confined

22 States that spoke in support of inclusion of the UN Charter include: Algeria (on behalf of the African Group of states), Argentina, Australia, Azerbaijan, Bangladesh, Brazil, Canada, Chile, Costa Rica, Cuba, Ecuador, Egypt, Finland (on behalf of the European Union (EU)), Indonesia, Iran, Japan, Liechtenstein, Malaysia, Mexico, Pakistan (on behalf of the Organization of the Islamic Conference (OIC)), Panama, Peru, Romania, Singapore, Sri Lanka, Switzerland, Tunisia, Uruguay, and Zambia.

23 The five UN regional groups were established in 1963: African Group, Asia-Pacific Group, Eastern European Group (EEG), Latin American and Caribbean Group (GRULAC) and Western European and others Group (WEOG). States that spoke in support of inclusion of the UDHR include: Algeria (on behalf of the African Group of states), Argentina, Australia, Azerbaijan, Bangladesh, Belgium, Bhutan, Brazil, Canada, Chile, China, Costa Rica, Cuba, Ecuador, Egypt, Finland (on behalf of the EU), Indonesia, Iran, Italy, Japan, Malaysia, Mexico, Pakistan (on behalf of the OIC), Panama, Peru, Philippines, Romania, Singapore, Sri Lanka, Switzerland, Thailand, Tunisia, the US, Uruguay, Venezuela, and Zambia.

24 See 'Summary of the discussion prepared by the Secretariat', 30 November 2006, A/HRC/3/CRP.1, para 17.

25 Bernaz, 'Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism' in Boyle (ed.), *New Institutions for Human Rights Protection* (2009) 75, at 81.

26 Statement to Human Rights Council (4 December 2006), available on OHCHR extranet.

27 States that spoke in support of basing UPR on *accepted* treaty obligations include: Algeria (on behalf of the African Group), Australia, Bhutan, Brazil, Canada, Chile, Cuba, Finland (on behalf of the EU), Guatemala, India, Indonesia, Iran, Japan, Malaysia, Mexico, Nepal, Netherlands, Pakistan, Philippines, Romania, Switzerland, and the US.

28 See 'Summary of the discussion', supra n 24 at paras 18–20.

to treaties. Indeed, the OHCHR defines human rights 'instruments' as 'treaties'[29] and this basis of review is often referred to in the literature as 'human rights *treaties*' to which the state is a party.[30]

States from all regional groups were adamant that UPR should only focus on *accepted* treaty obligations.[31] Singapore and the Russian Federation objected to basing UPR on treaty obligations because this would lead to a duplication of the work of the UN human rights treaty bodies,[32] and GA Resolution 60/251 explicitly provides that the UPR should 'complement and not duplicate the work of the treaty bodies'.[33] Other states acknowledged this duplication risk and suggested that UPR should focus on procedural obligations to cooperate with UN treaty bodies (including reporting obligations) and on follow-up to concluding observations of the treaty bodies.[34]

D. Voluntary Pledges and Commitments

The fourth basis of review set out in Resolution 5/1—'voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council'—reflects the GA requirement that UPR consider 'the fulfilment of each State of its human rights obligations *and commitments*'.[35] Precisely what is meant by pledges and commitments was left unspecified. States from all regional groups spoke in favour of including those pledges made by states when standing for election for the Human Rights Council.[36] Only Guatemala expressed a concern that using election pledges would create an unequal basis for review and undermine the basic principles of universality and equal treatment underpinning UPR because not all states would stand for election to the Council.[37] This concern was dismissed without discussion.

Including explicit reference to '[c]ommitments undertaken in relevant United Nations conferences and summits',[38] or specific conference outcomes such as the

29 See OHCHR, 'Basic facts about the UPR': 'The UPR will assess the extent to which States respect their human rights obligations set out in: . . . human rights instruments to which the State is party (human rights treaties ratified by the State concerned)' (www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx) [last accessed 18 December 2020].

30 See e.g. Bernaz, supra n 25 at 79; Smith, 'African States', supra n 14 at 350 (emphasis added). See also Etone, supra n 14 at 259.

31 Algeria (on behalf of the African Group), Australia, Bhutan, Brazil, Canada, Chile, Cuba, Finland (on behalf of the EU), Guatemala, India, Indonesia, Iran, Japan, Malaysia, Mexico, Nepal, Netherlands, Pakistan, Philippines, Romania, Switzerland, and the US spoke in favour of this view.

32 See Compilation of Proposals and comments at November 2006 Working Group meeting, available on OHCHR extranet.

33 GA Res 60/251, para 5(e).

34 See, e.g., statement by Finland on behalf of the EU, November 2006.

35 GA Res 60/251, para 5(e) [emphasis added].

36 Including: Algeria (on behalf of the African Group), Australia, Bangladesh, Canada, Chile, Ecuador, Finland (on behalf of the EU), India, Indonesia, Japan, Malaysia, Maldives, Mexico, Netherlands, Philippines, Romania, Singapore, Sri Lanka, and the US.

37 International Service for Human Rights, 'Council Monitor. Working Group to Develop the Modalities of the UPR. 12–15 February 2007', available at: olddoc.ishr.ch/hrm/council/wg/wg_reports/wg_upr_feb_07.pdf [last accessed 18 December 2020].

38 This was compromise text proposed by the Facilitator of the UPR Working Group, see A/HRC/4/117, 20 March 2007.

Vienna Declaration and Programme of Action[39] and the 2005 World Summit Outcome, was considered.[40] However, this was met with opposition on various grounds, including the 'aspirational' and non-binding nature of such documents.[41] In the end, no reference was made to commitments arising from conference outcomes in Resolution 5/1.

E. Applicable International Humanitarian Law

The most controversial basis of review was international humanitarian law (IHL).[42] From the outset of negotiations, several Latin American states suggested that UPR should consider implementation of IHL.[43] States in support of this view stressed the overlaps between the content and applicability of the other bases of review and IHL.[44] Pakistan, on behalf of the OIC, suggested that, 'international humanitarian law will be directly relevant to . . . situations of armed conflict'.[45] Malaysia also confirmed that international humanitarian law was relevant, but was keen to restrict the inclusion of IHL instruments to those ratified by the state under review.[46] With reference to the 'latest case-law of the ICJ', Azerbaijan stated that 'human rights need to be respected both in times of peace and armed conflict' and suggested that IHL may be regarded as 'protecting human rights only when it is the *lex specialis* to human rights in times of armed conflict'.[47]

Opposition came from a wide variety of states, including Australia, China, Guatemala, India, Norway, Turkey and the US.[48] Concerns were articulated on two main grounds. First, the view was put forward that the GA had called for a review of fulfilment of *human rights* obligations and commitments.[49] Second, it was suggested

39 Proposed by Germany. Algeria (on behalf of the African Group), Argentina, Brazil, Chile, Colombia, Mexico, and the Russian Federation also supported this idea.

40 Suggested by Argentina.

41 'Summary of the discussion prepared by the Secretariat' A/HRC/4/CRP.1, 13 March 2007, para 17.

42 For detailed discussion see Zhu, supra n 11.

43 Argentina, Chile, Costa Rica, Cuba, Ecuador, Panama, Paraguay, Peru, and Uruguay. See OHCHR, Updated Compilation of Proposals and Relevant Information on the Universal Periodic Review, 5 April 2007 at 12 and 26. Although Ecuador appeared to change position—see ISHR, 'Council Monitor', supra n 37, 4, n9. Belgium, Canada, Egypt and Switzerland are also reported as supporting the (qualified) inclusion of international humanitarian law at some point during the institution-building phase of the Council, see Zhu, supra n 11.

44 Finland, on behalf of the EU, suggested, 'international humanitarian law could form part of the review where specific obligations are replicated, inter alia, the UN Charter, the UDHR, human rights treaty obligations undertaken by the state or a state's voluntary commitments.' Statement by Finnish Presidency on behalf of the European Union, 4 December 2006.

45 Statement by Pakistan's Permanent Representative on behalf of the Organisation of the Islamic Conference, 4 December 2006.

46 Statement by Malaysia, 12 February 2007.

47 Azerbaijan speech to Working Group, February 2007.

48 Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) 7 *Chinese Journal of International Law* 721, 727, also suggests that the UK was 'systematically opposed' to using IHL as a basis for review.

49 India speech to Working Group, February 2007. The US maintained its traditional position on the non-applicability of human rights to armed conflict situations. US Statement to Human Rights Council, 15 November 2006.

that the Council was not competent to consider IHL for reasons of lack of expertise[50] and lack of mandate.[51]

Resolution 5/1 sets out a compromise formula in a separate paragraph to the other bases of review, which recognises 'the complementary and mutually interrelated nature of international human rights law and international humanitarian law'.[52]

F. UPR Recommendations

Finally, mention should be made of UPR recommendations as a basis of review. Whilst other methods of follow-up and oversight were disputed,[53] there was a convergence of opinion that successive cycles of UPR should focus on the implementation of accepted recommendations from preceding reviews. Once again, there was a focus on what states have consented to. Resolution 5/1 provides that 'subsequent review[s] should focus, inter alia, on the implementation of the preceding outcome', where the 'outcome' includes the 'voluntary commitments' of the state under review—namely, accepted recommendations.[54]

G. Key Themes in the Identification of the Bases of Review

Two main themes can be observed from the discussions regarding identification of the bases of review. First, the debates tended to ignore the traditional distinctions between hard and soft international human rights law.[55] In light of the instruction in GA Resolution 60/251, soft law instruments were included alongside those containing binding obligations. In fact, one source of binding obligations was explicitly excluded. A proposal to include customary international law in the bases of review[56] attracted significant opposition and was rejected due to the difficulties with its identification.[57] Only outcomes from conferences were dismissed on the basis that they were aspirational. What is apparent is that the idea of 'consent' was a key consideration for determining the bases of review. States were keen to emphasise that only accepted obligations and commitments voluntarily entered into should be used as standards for review. This explains the inclusion of human rights instruments 'to which a state is party'

50 Turkey speech to Working Group, February 2007.

51 Australia Statement to UPR Working Group, 12 February 2007. Norway made similar comments.

52 This language was inserted by the President of the Human Rights Council. See Zhu, supra n 11.

53 E.g., there was some debate on whether other human rights bodies—such as special procedure mandate holders and treaty bodies—should have a role in overseeing implementation of accepted UPR recommendations. This recommendation was not taken up. See ISHR, 'Council Monitor', supra n 37; and Summary of Discussion, supra n 24, paras 63–6.

54 HRC Res 5/1, para 34. See also HRC Dec 17/119, para 11.2: further cycles of UPR 'should focus on, inter alia, the implementation of the accepted recommendations and the development of the human rights situation in the State under review'; and HRC Res 16/21, para I.C.1.6.

55 By 'soft law', we are referring to 'any international instrument other than a treaty containing principles, norms, standards, or other statements of expected behaviour.' Shelton, 'International Law and "Relative Normativity"', in Evans (ed.), *International Law*, 1st edn (2003) 166.

56 See statement by Uruguay (on behalf of Argentina, Chile, Costa Rica, Ecuador, Panama, Paraguay, Peru) to UPR WG, 16 November 2006. Finland (on behalf of the EU) supported the inclusion of custom but only where the norm was replicated in other bases of review; whilst Switzerland expressed regret that customary international law would not be included as basis for review.

57 A view promoted by Indonesia, Iran, Japan, Pakistan (on behalf of the OIC) and Singapore.

and 'voluntary pledges and commitments', as well as accepted recommendations from previous UPR cycles as bases of review. Even the justification provided by Liechtenstein for including the non-binding UDHR suggested that it contains 'internationally agreed' rights and freedoms. Second, the debate regarding the inclusion of IHL reflects states' preoccupation with ensuring that the scope of UPR remained within the mandate of the Council, that is: 'protection and promotion of human rights'.[58] It also reveals an uncertainty as to the precise scope of 'human rights'.

3. METHODOLOGY

UPR recommendations have been the subject of various studies: some empirical, some not. Many of these studies have retrieved data from the comprehensive database of UPR recommendations created by UPR Info.[59] The web-hosted, searchable database contains records of every UPR recommendation.[60] Each record contains, *inter alia*, the text of the recommendation, the state under review (and their regional group and organisational affiliation[61]), the recommending state (and their regional group and organisational affiliation), the thematic issues raised,[62] categorisation of the action required,[63] the response (i.e. whether the recommendation was accepted or 'noted'), as well as the session and cycle of UPR in which the recommendation was made.

In the UPR Info database, a recommendation is coded as raising issues regarding 'international instruments' or 'treaty bodies' when it refers to a treaty or the outputs of a treaty body. However, a random check of the database found that these categorisations were not comprehensive and some recommendations that ought to have been captured were not. In addition, given our interest is broader and more specific than references to treaties, we reviewed *all* the recommendations in the UPR Info database[64] to identify those that refer to one or more of the bases of review and created our own database.

58 This concern regarding mandate was also reflected in a further refrain which echoed throughout the institution-building period: namely, that the UPR should 'complement and not duplicate the work of treaty bodies', GA Res 60/251, para 5(e). See also HRC Res 5/1, Annex, para 3(f).

59 E.g. Mao and Sheng, supra n 14; Higgins, supra n 10.

60 See supra n 6. There are some issues with the database: e.g., France was recorded as having 'noted' all recommendations made during its first round of UPR. However, a review of the responses provided by France suggests that some recommendations were in fact accepted. In our version of the database, identified discrepancies were rectified. Other authors have undertaken similar corrections, see Baird, 'The Universal Periodic Review: Building a Bridge between the Pacific and Geneva' in Charlesworth and Larking, supra n 14, 187 at 195.

61 E.g., Saudi Arabia is listed as a member of the OIC and the Arab League. Some states—e.g., Japan and Georgia—are not members of such organisations.

62 UPR Info has identified 56 categories of 'issues' covered in recommendations. A recommendation may relate to more than one issue; e.g., recommendations regarding the use of child soldiers are 'tagged' as 'rights of the child' and 'international humanitarian law'.

63 UPR Info has created a unique ranking scale of the action required. Recommendations are ranked on a scale from 1 (minimal action) to 5 (specific action). An explanation is available at: www.upr-info.org/database/files/Database_Action_Category.pdf [last accessed 1 November 2020].

64 A .xls file of the UPR Info database downloaded from the UPR Info website was used as the basis for our database. Since the creation of our database, UPR Info have created a new web-hosted database in partnership with HURIDOCs. See: upr-info-database.uwazi.io/en/page/bdcsi0m0n8f [last accessed 1 November 2020].

When examining the recommendations, it soon became apparent that states were not limiting themselves to the bases of review set out in Resolution 5/1. They were also referring to a range of other international law material. Accordingly, references to this other material were also recorded.

Our interest lies in *explicit* references to the bases of review or other international law material.[65] Therefore, our database contains all recommendations made during the first two cycles of UPR that explicitly refer to one or more of the bases of review identified in Resolution 5/1 or other international law material. Each record includes the data captured by UPR Info as well as information on the material(s) referred to in the recommendation and action called for in respect thereof. Many recommendations refer to more than one international instrument and each reference and associated action is logged in our database. For example, each of the three treaties referred to in the recommendation to 'Ratify CAT, ICRMW and the Optional Protocol to CAT',[66] as well as the call for ratification, were included in the record for this recommendation. The total number of references to each of the bases of review and other international law material is therefore higher than the number of recommendations in the database.

Whilst references to the UDHR, the UN Charter and other treaties can be identified with relative ease, some explanation of our process of identifying the other bases of review is required. 'Voluntary pledges and commitments' were identified where the language of 'voluntary pledge', 'pledge' or 'commitment' was used in the recommendation. For example, recommendations such as 'Fully enforce the commitment to abolishing female genital mutilation',[67] 'Honour its pledge to look into abolishing the death penalty',[68] and 'Continue its efforts to complete the implementation of the voluntary pledges'[69] were identified as referring to voluntary pledges and commitments. In addition to clear references to the implementation of UPR recommendations, phrases such as 'as previously recommended' and 'as accepted previously' (and variations thereof) were considered to reflect UPR recommendations and categorised accordingly.

As noted above, other international law material that is not listed in the bases of review in Resolution 5/1 is also explicitly referenced in UPR recommendations. Judgments from international courts, outputs from UN bodies—including the OHCHR, special procedure mandate holders, the Security Council, the GA, the United Nations High Commissioner for Refugees (UNHCR), human rights treaty bodies and various specialised agencies—, outputs from regional organisations such as the African Union and Council of Europe, and other regulatory regimes adopted at the inter-state level are all explicitly referred to in UPR recommendations. These recommendations are included in our database.

65 This is likely to undercount the use of international law as a basis for recommendations. Treaty obligations may be the basis of a recommendation even if there is no clear reference to the treaty. Rodley attempted to trace the provenance of recommendations to their treaty body source (Rodley, supra n 15 at 328–30). However, this was a very limited and, by his own admission, 'evidently unscientific' study.

66 HRC, Report of the Working Group on the Universal Periodic Review: Grenada (9 April 2015) A/HRC/29/14, Rec 72.18. Hereinafter, only the state, date and UN document reference will be provided for these reports.

67 Eritrea (4 January 2010) A/HRC/13/2, Rec 42.

68 Iraq (12 December 2014) A/HRC/28/14, Rec 127.116.

69 Sri Lanka (18 December 2012) A/HRC/22/16, Rec 127.53.

Finally, what might be termed 'general' references to international law material are frequently made in UPR recommendations. For example, Mexico recommended that Micronesia 'Adopt a law on access to information in accordance with international standards on the issue'.[70] Similarly, in a recommendation to Turkey, the UK suggested the state 'take steps to ensure she upholds her international obligations on freedom of expression and freedom of association'.[71] These recommendations also indicate engagement with international human rights law and so are taken into account in our study. Recommendations that make general, non-specific references to international 'obligations', 'law', 'standards', 'norms' or 'instruments' are therefore included in our database. Such references are labelled 'general human rights law'.[72] Similarly, if it is clear that the reference was to IHL standards then it is coded 'general IHL'. So, for example, the recommendation to Syria to '[a]bide by the laws of war, especially by immediately ending all deliberate, indiscriminate and disproportionate attacks against civilians'[73] is included in our database as a reference to 'general IHL'.

4. THE BASES OF REVIEW IN UPR RECOMMENDATIONS

Of the 57,685 recommendations in the UPR Info database, only 31% (18,129) explicitly refer to one or more of the bases of review listed in Resolution 5/1 or other international law material. The majority (69%) do not include any explicit reference to any of the bases of review. Examples of such recommendations include 'completely abolish the death penalty'[74] and 'combat violence against women and trafficking of child victims of prostitution'.[75] Our database is comprised of the 18,129 recommendations that explicitly engage with the bases of review and/or other international law material.

Figure 1 sets out the number of recommendations made by each regional group as well as observers to the Human Rights Council. Although the Western European and Others Group (WEOG) states make the most recommendations (19,554 recommendations in the first two cycles of UPR),[76] they do not make the most recommendations that explicitly refer to the bases of review or other international law material. States from the Latin American and Caribbean Group (GRULAC) are most likely to make such recommendations (37%), while recommendations from Asia-Pacific Group states

70 Federated States of Micronesia (23 December 2015) A/HRC/31/4, Rec 62.77.

71 Turkey (13 April 2015) A/HRC/29/15, Rec 148.121.

72 In some instances, whilst there was a lack of specificity in terms of which international instrument was being referred to there was a high level of certainty regarding which instruments were being referred to. In such cases, the specific instruments referred to were identified through further research: e.g., Senegal recommended to Côte D'Ivoire that it should 'Spare no effort to complete as soon as possible the ratification process for the international human rights instruments listed in pages 23 and 24 of the national report in its French version', Côte D'Ivoire (4 January 2010) A/HRC/13/9, Rec 18. The national report prepared by Côte D'Ivoire was consulted to identify that the instruments being referred to were: the Convention on the Reduction of Statelessness, CPED, ICMW, CEDAW, CRC-OP-AC, CRC-OP-SC, ICESCR-OP, ICCPR-OP2 and OPCAT.

73 Syrian Arab Republic (27 December 2016) A/HRC/34/5, Rec 109.105.

74 Tajikistan (14 July 2016) A/HRC/33/11, Rec 115.48.

75 Austria (22 December 2015) A/HRC/31/12, Rec 139.91.

76 See also, e.g., Kälin, supra n 15 at 257.

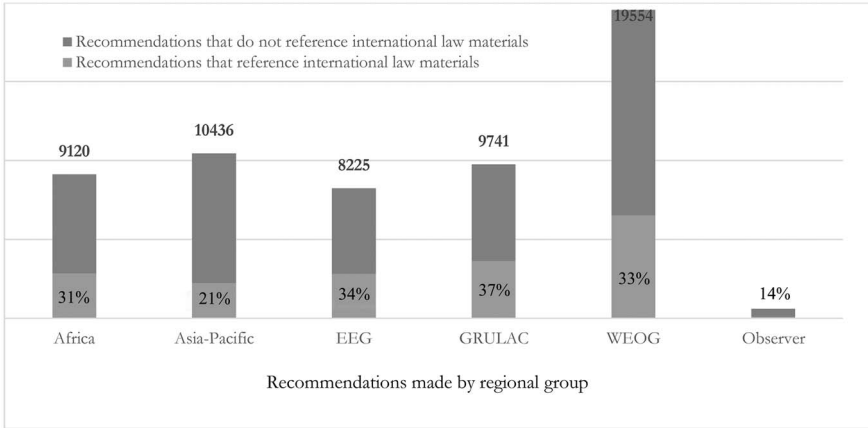

Figure 1. UPR recommendations made by regional group

are least likely to contain such references (21%). The other regional groups make explicit references to the bases of review or other international law material in 31–34% of recommendations. The much lower rate of reference to international law by Asia-Pacific states likely reflects what has been described as Asia's 'ambivalence' towards international law.[77]

The overall acceptance rate for recommendations during the first two cycles of UPR is 73%. Whilst the acceptance rate for recommendations that do not mention the bases of review or other international law material is 80%, only 59% of recommendations that do mention these were accepted. There appears to be some hesitancy on the part of states to commit to recommendations that explicitly refer to the bases of review or other international law material. Both Eastern European Group (EEG) and African Group states accepted a much higher proportion of such recommendations than states from other groups. EEG states accepted 71% of recommendations that explicitly refer to international law, whilst African states accepted 66%. By comparison, GRULAC states accepted 56% of such recommendations, whilst Asia-Pacific and WEOG states accepted 54%.

The extent to which the different bases of review are referred to varies considerably.

A. The UN Charter

Only two recommendations mention the UN Charter. Despite being an uncontroversial inclusion in the list of bases of review, it is barely used in the practice of UPR.

The rare citation of the UN Charter is understandable given that the references to human rights therein are general in nature. For example, Article 55 provides that 'the UN shall promote . . . universal respect for, and observance of, human rights and

77 Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present and Futures' (2017) 27 *European Journal of International Law* 945. Cf Quane, 'The Significance of an Evolving Relationship: ASEAN States and the Global Human Rights Mechanisms' (2015) 15 *Human Rights Law Review* 283.

fundamental freedoms for all without distinctions as to race, sex, language, or religion' and Article 56 calls for state action in support of this UN goal. Given these general references to human rights, any recommendation based on the UN Charter is unlikely to be precise enough to require deliberate action. Furthermore, as there are many more specific UN human rights treaties, it is appropriate that they are referenced far more frequently instead.[78] When the Charter has been referenced, it does not appear to have been invoked for its human rights provisions. Rather, in one recommendation, it was invoked to support the principle of state sovereignty;[79] and, in the other, the specific provision of the UN Charter to which the recommendation relates is unclear.[80]

B. The Universal Declaration of Human Rights

As with the UN Charter, there are very few references to the UDHR. Only 31 recommendations reference the Universal Declaration. Thus, two of the bases of review that were uncontroversial during the negotiations of Resolution 5/1 are rarely referred to in the practice of UPR.

Using the UN Charter and the UDHR as bases of review allows for states to be assessed against a broader range of internationally accepted human rights standards than human rights treaty obligations alone. It has been argued that this is particularly important where a state has not ratified one or more of the core UN human rights treaties. In such circumstances, a recommendation can be made calling upon the state to respect a right set out in the UDHR even though there is no treaty obligation to do so. Acceptance of such a recommendation 'confirm[s] its validity and contribute[s] to a universal consensus' on the meaning and content of human rights obligations.[81] Chauville has called this 'rhetorical entrapment'.[82]

However, this theoretical promise has not been realised in practice. Of the 31 recommendations invoking the UDHR less than a quarter (8) were accepted. Over one-third (12) of recommendations cite the UDHR alongside an explicit reference to a treaty obligation. For example, Malaysia recommended to Belgium that it should 'Rescind the decision to prohibit the peaceful expression of religious beliefs, including the wearing of religious symbols in schools, in line with the freedom of religion or belief guaranteed by the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the European Union Guidelines on the promotion and

78 See Section 4.C.

79 Cuba recommended to the US to 'Suspend the interception, holding and use of communications, including the surveillance and extraterritorial interception and the scope of surveillance operations against citizens, institutions and representatives of other countries, which violate the right to privacy, international laws and the principle of State sovereignty recognised in the Charter of the United Nations.' United States of America (20 July 2015) A/HRC/30/12, Rec 176.302.

80 China recommended that the US 'Quickly close down Guantanamo prison and follow the provision of the United Nations Charter and the Security Council Resolution by expatriating the terrorist suspect to their country of origin.' United States of America (4 January 2011) A/HRC/16/11, Rec 92.157.

81 See Kälin, supra n 17 at 33–4. See also Mao and Sheng, supra n 14 at 8; Kälin, supra n 15 at 258–59.

82 Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures' in Charlesworth and Larking, supra n 14, 87 at 89.

protection of freedom of religion or belief'.[83] In these cases, reference to the UDHR only adds emphasis to existing treaty obligations. Furthermore, 60% of recommendations invoking the UDHR in relation to civil and political rights do so when the state under review was a party to the ICCPR (12 out of 20), whilst all such recommendations relating to economic, social and cultural rights (5) were issued to states that are party to the ICESCR.

During the negotiations on the bases of review, one delegation raised a concern that the UDHR lacked specificity in terms of human rights *obligations*.[84] This view may explain the reticence to refer to the UDHR where there are no human rights treaty obligations, as well as its (limited) use to buttress calls for compliance with existing treaty obligations.

C. Human Rights Instruments to Which the State is Party

A significant number—11,054—of recommendations explicitly refer to one or more treaties.[85] That is, 61% of the recommendations in our database explicitly call for action in relation to treaties. A further 744 recommendations (4%) make general references to treaties and treaty norms and obligations without specifying which treaty. This latter group includes recommendations such as 'Accede to international human rights instruments'[86] and 'incorporate international human rights treaties into national law'.[87]

Treaties are by far the most relied upon basis of review. As Tables 1 and 2 show, various treaties are invoked.

(i) 'Core' UN human rights treaties

Table 1 refers to the 'core'[89] UN human rights treaties and their optional protocols. There is considerable variation in the number of times each of the treaties is referred to. There are significantly more references to the ICCPR than the ICESCR. Optional protocols that establish individual complaints mechanisms are referenced fewer times than their 'parent' treaty.[90] Of the 1188 references to the ICMW, 36% were made by African states, 22% by Asian states and 34% by GRULAC states. WEOG and EEG states only made 88 recommendations that referred to the ICMW, amounting to 7% of all such recommendations. Of these 88 recommendations, Turkey made 33 and Azerbaijan 24; both states are parties to the ICMW unlike most EEG and WEOG members. At the other end of the spectrum, WEOG and EEG states made 69% of the recommendations referring to the ICCPR-OP2 regarding the abolition of the death penalty. This can be explained by the fact that Europe is a death penalty free zone and most of the states

83 Belgium (11 April 2016) A/HRC/32/8, Rec 141.29.

84 See Section 2.B.

85 References to international humanitarian law treaties are not included. See Section 4.E.

86 Marshall Islands (20 July 2015) A/HRC/30/13, Rec 75.21.

87 Montenegro (6 January 2009) A/HRC/10/74, Rec 66.5.

88 Many recommendations call for action in relation to more than one treaty. Therefore, the total number of references to *treaties* is greater than the number of *recommendations*.

89 There are 9 'core' UN human rights treaties: www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx [last accessed 1 November 2020].

90 Namely, ICCPR-OP1, ICESCR-OP, OP-CEDAW, OP-CRC-IC and OP-CRPD.

Table 1. References to 'core' UN human rights treaties and their optional protocols[88]

Treaty	Number of references	Consider/become a party to the treaty (% of references)
ICERD	309	74%
ICCPR	1047	62%
ICCPR-OP1	212	98%
ICCPR-OP2	1030	97%
ICESCR	697	93%
ICESCR-OP	472	99%
CEDAW	739	33%
OP-CEDAW	413	98%
CAT	1114	77%
OP-CAT	1414	92%
CRC	503	19%
OP-CRC-AC	330	91%
OP-CRC-SC	360	90%
OP-CRC-IC	274	97%
ICMW	1188	98%
CPED	1095	99%
CRPD	879	85%
OP-CRPD	253	98%

Table 2. References to regional human rights treaties by regional group

	Number of references						
	Africa	Asia-Pacific	EEG	GRULAC	WEOG	Observer	Total
African Union treaties	15	0	2	4	19	0	40
Council of Europe treaties	4	3	54	4	96	1	162
Organisation of American States treaties	0	0	1	19	1	0	21

that retain the death penalty are members of GRULAC or the African and Asia-Pacific groups.[91]

There are three main types of recommendations made to states regarding 'human rights instruments to which a state is party': (1) those that call for a state to become a party to the treaty; (2) those that call for a state to remove its reservations to the treaty; and (3) those that call for the state to implement the treaty obligations substantively

91 See Amnesty International, 'Abolitionist and Retentionist Countries as of July 2018', available at: www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf [last accessed 1 November 2020].

or call for the incorporation of the treaty into domestic law. As Table 1 shows, a significant proportion of recommendations regarding UN human rights treaties call for the state under review to become a 'party' to the relevant treaty or to 'consider' doing so. Whilst the vast majority of recommendations in our database call for such action, there are two treaties for which this is not the case: CEDAW and the CRC. Both treaties were widely ratified prior to the commencement of the UPR process and so only 33% of recommendations referring to CEDAW call for the state under review to become a party to the treaty, and 19% of recommendations referring to the CRC call for the same action.[92] Conversely, over 90% of the recommendations referring to an optional protocol to one of the core UN human rights treaties called for the state under review to become a party to the treaty. In the case of the ICESCR-OP, the figure is as high as 99%. Similarly, 99% of recommendations referring to CPED—which was adopted in December 2006—call for the state under review to become a party.

This practice of calling for states to become a party to a treaty is notable given that UPR is concerned with assessing a state's human rights record against those 'human rights instruments to which a state is party'. The phrasing in Resolution 5/1 necessarily means that a state has already signed and ratified, or acceded to, a treaty. This interpretation accords with the views expressed when the UPR process was being developed. States were keen to emphasise that the UPR should focus on *accepted* treaty obligations.[93] Recommendations calling for the state under review to *become* a party to a treaty, however, relate to treaties to which a state is *not* already party. Such recommendations have been described as 'non-confrontational' and 'politically neutral'.[94] To call on a state to ratify a treaty does not engage in criticism of a state's action on the domestic plane and this may explain the dominance of such recommendations in the practice of UPR. Despite such recommendations going beyond the intended purview of the UPR process, states have routinely accepted them. Forty-eight percent of recommendations calling for specific action to become a party to a core UN human rights treaty or its optional protocol were accepted, whilst 53% of softer recommendations calling for the state under review to 'consider' becoming a party to the treaty were accepted.[95]

(ii) Regional human rights treaties

Although regional human rights treaties are captured under 'human rights instruments to which a state is party', there were only 6 references to the African Charter on Human and Peoples' Rights, 11 references to the European Convention on Human

92 A few of the recommendations regarding the CRC were issued erroneously to states that were already party to the treaty (e.g. Brunei Darussalam, India, Iraq, Maldives, Micronesia, the Seychelles, Singapore and Tanzania). The majority called for action from Somalia, South Sudan and the US. Both Somalia and South Sudan accepted these recommendations and became parties to the CRC in 2015. The US remains a signatory.

93 See Section 2.C.

94 Kälin, supra n 17 at 32.

95 This data includes all recommendations that call for the state under review to 'sign', 'ratify', 'accede', 'adhere', 'join' and 'become a party' to a core UN human rights treaty or for the state under review to 'consider' such action.

Rights, 1 reference to the European Social Charter and 16 references to the American Convention on Human Rights. No references were made to the Arab Charter on Human Rights. References to other regional and sub-regional treaties[96] are sporadic. This is despite the number of such treaties. Only the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) stands out as an outlier to this general trend: 88 recommendations refer to this treaty.

As Table 2 shows, references to regional treaties tend to be made by those states that are members of the relevant regional organisation. There are some exceptions. In its second UPR, Somalia received three recommendations referring to the Protocol to the African Charter on the Rights of Women (Maputo Protocol): two of which were from WEOG states (Australia and Sweden).[97] It is likely that one impetus for these recommendations was the inclusion in one of the reports on which UPR is based—the OHCHR summary of stakeholders' information[98]—of a submission from Human Rights Watch regarding ratification of the Maputo Protocol.[99] However, a general lack of knowledge about regional human rights treaties is likely to be a contributing factor to the low number of references to regional human rights treaties. Regional human rights treaties rarely feature in the three reports on which each UPR is based. Whilst states are directed to provide information on the 'scope of international obligations identified in the "basis of review" in resolution 5/1' in their national reports,[100] very few refer to regional human rights treaties. This information is not included in the OHCHR compilation of UN information that forms part of the information base for each UPR. It is only included in the OHCHR summary of stakeholders' information if raised in submissions.

(iii) Other treaties

Treaties that are not *human rights* treaties *stricto sensu* are also cited in UPR recommendations. Table 3 sets out the most frequently referenced of these 'other' treaties and the regional groups that refer to these treaties in their recommendations. There are significantly more recommendations referring to these treaties than regional human rights treaties. The numerous recommendations referring to these treaties suggest that states act as though the boundaries between human rights law and other areas of law are porous.

There are 383 recommendations that reference one or more conventions adopted by the International Labour Organisation, and these have been made by all regional groups. States that made the recommendations consider these treaties to be part of

96 E.g. the South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and the Southern African Development Community Protocol on Gender and Development.

97 Somalia (13 April 2006) A/HRC/32/12, Recs 135.9 and 136.80. Namibia made the third recommendation (Rec 135.8).

98 HRC Res 5/1, para 15(b).

99 Summary prepared by the OHCHR in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Somalia (6 November 2015) A/HRC/WG.6/24/SOM/3, para 6.

100 HRC Dec 6/102, 27 September 2007, A/HRC/DEC/6/102, para 1.

the human rights regime. Furthermore, the number of recommendations referring to the Refugee Convention and/or its Protocol (144) and those treaties relating to statelessness (145) would suggest that the states invoking these instruments are making the same assumption.

The blurring of boundaries is particularly pronounced as regards international criminal law. The number of references to the Rome Statute of the International Criminal Court, Kampala Amendments to the Rome Statute and Agreement on the Privileges and Immunities of the International Criminal Court is greater than for many of the core UN human rights treaties. There are 933 recommendations that refer to the Rome Statute alone, making it the seventh most cited treaty behind the ICCPR, ICCPR-OP2, CAT, OP-CAT, ICMW and CPED and ahead of core human rights treaties such as the ICESCR, CEDAW and CRC. States occasionally acknowledge that the Rome Statute is not a human rights treaty,[101] but the sheer number of references suggests this is not the dominant view. EEG, GRULAC and WEOG states in particular promote the view that international criminal law—and its oversight mechanisms—are considered as part of the international human rights regime through their copious invocations of the Rome Statute.

Other treaties referenced include conventions adopted by the Hague Conference on Private International Law (including the Hague Convention on Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption). There are also references to the Arms Trade Treaty, the Convention on the Suppression of Terrorism, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the Minamata Convention on Mercury, the UN Framework Convention on Climate Change, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the UN Convention against Transnational Organised Crime, the UN Convention against Corruption, the Convention on the Political Rights of Women, the WHO Framework Convention on Tobacco Control, the Marrakesh Treaty to facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled and the Vienna Convention on Consular Relations. In invoking these treaties, the recommending states accept, albeit implicitly, that these treaties are relevant to the enjoyment of human rights. However, given the paucity of references to these treaties—fewer than 20 for most of these treaties—it is premature to argue that there is a widespread view amongst states that these are part of the human rights regime, even if some states are of that view.

In fact, it is remarkable that some treaties are not referred at all. Security treaties, such as nuclear weapon free zone treaties,[102] are not raised in UPR recommendations. States do not seem to perceive these as human rights treaties, even though they are premised on ideas of freedom from fear, and the prohibition on nuclear weapons is linked to human rights.[103]

101 E.g. Hungary recommended Israel '[r]atify OP-CAT and, although not a human rights instrument per se, the Rome Statue of the International Criminal Court (ICC)': Israel (19 December 2013) A/HRC/25/15, Rec 136.8.

102 E.g. Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean 1967; South Pacific Nuclear Free Zone Treaty 1985.

103 See Human Rights Committee, General Comment No 36, 30 October 2018, para 66.

Table 3. Recommendations referring to 'other' treaties by regional group

	Number of recommendations	Recommendations by regional group (% of references)[104]				
		Africa	Asia-Pacific	EEG	GRULAC	WEOG
Rome Statute of the ICC, Kampala Amendments, and Agreement on Immunities and Privileges	991	11	5	32	20	31
ILO Conventions[105]	383	9	26	9	36	20
Refugee Convention and Protocol	144	12	4	13	34	37
Statelessness Conventions[106]	145	9	2	30	30	29
UNESCO Conventions[107]	94	39	18	18	16	7
Genocide Convention	85	20	0	60	15	5
Palermo Protocols[108]	79	11	15	16	20	37
Peace Agreements	59	25	5	7	5	56

Another set of instruments referenced in UPR recommendations are peace agreements. These include inter-state peace agreements,[109] as well as agreements concluded between a state and a non-state armed group.[110] Most recommendations referencing peace agreements are issued by African and WEOG states. Peace agreements concluded between states are accepted as treaties.[111] By contrast, there is considerable debate on the legal nature of a peace agreement that is concluded between a state and an armed

104 Three references to the treaties were made by Palestine and the Holy See as 'observer' states to the UN and are not indicated in the proportion of references made by regional groups.

105 Including references to the treaties listed infra n 208, as well as Convention Nos 2, 81, 97, 102, 117, 118, 143, 155, 169, 170, 174, 186, 188 and 189.

106 Convention Relating to the Status of Stateless Persons 1954 and Convention on the Reduction of Statelessness 1961.

107 Including: UNESCO Convention against Discrimination in Education 1960; UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003; and UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005.

108 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2000; Protocol against the Smuggling of Migrants by Land, Sea and Air 2000; and Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition 2001.

109 E.g. Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region 2013.

110 E.g. Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist) 2006.

111 Article 2(1)(a) VCLT defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single agreement or in two or more related instruments and whatever its particular designation.'

group: some see these as 'binding international instruments',[112] whilst others simply suggest that they are 'not treaties'.[113] Regardless of their characterisation as a treaty or another instrument, it is difficult always to characterise peace agreements as *human rights* treaties or instruments. Peace agreements will frequently address a variety of matters—such as regulation of power-sharing, wealth-sharing and security arrangements—of which human rights forms but one part. Some UPR recommendations highlight the human rights and humanitarian law aspects of the relevant peace agreement, mentioning free and fair elections and democracy[114] or the rights of refugees and internally displaced persons.[115] However, the majority of references simply urge compliance with the peace agreement itself. As with the 'other' treaty references discussed above, recommending states implicitly accept that such agreements are part of the human rights regime.[116]

The practice of UPR indicates that the phrase 'human rights instruments to which a state is party' has been interpreted expansively. Whilst most references to treaties are to the core UN human rights treaties (even where the treaty has not been ratified), treaties in related areas such as international criminal law and refugee law are also referred to. This may, in some part, be due to the information provided by the OHCHR prior to each review.[117] The numerous references to these other treaties suggest that they are part of the human rights regime. Given this generous interpretation of the term 'human rights instrument', it is all the more noteworthy that there are very few references to regional human rights instruments.

D. Voluntary Pledges and Commitments

Only 94 recommendations explicitly refer to a 'pledge' or 'commitment' undertaken by the state under review. This is a surprisingly low figure for two reasons. First, 100 states had been members of the Human Rights Council by the end of the second cycle of UPR,[118] with the majority making voluntary pledges regarding human rights.[119] Second, states undergoing review often make voluntary commitments in the national

112 E.g. Report of the International Commission of Inquiry on Darfur to the Secretary-General, 1 February 2005, S/2005/60, para 174.

113 *Prosecutor v Kallon and Kamara* SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, paras 45–50.

114 E.g. Niger to Guinea: 'Ensure that the upcoming elections are democratic, transparent and fair in order to allow for a definitive return by Guinea to the democratic international and regional arena, in line with the Ouagadougou Agreement of 15 January 2010': Guinea (14 June 2010) A/HRC/15/4, Rec 71.88.

115 E.g. Finland to Myanmar: 'Support the active and meaningful participation of women, "ethnic groups", internally displaced persons and refugees in the implementation of the Nationwide Ceasefire Agreement, including the national dialogue': Myanmar (23 December 2015) A/HRC/31/13, Rec 144.30.

116 E.g. Canada to Democratic Republic of Congo: 'Pursue the implementation of the peace accords with a view to stabilising and pacifying the eastern part of the Democratic Republic of the Congo and create suitable conditions to ensure and promote respect for international humanitarian law and the protection of the civilian population': Democratic Republic of Congo (4 January 2010) A/HRC/13/8, Rec 97.2.

117 See Section 5.B.

118 For a list of members of the Council, see: www.ohchr.org/EN/HRBodies/HRC/Pages/PastMembers.aspx [last accessed 1 November 2020].

119 Details of past elections (and links to voluntary pledges made) are available at: www.ohchr.org/EN/HRBodies/HRC/Pages/HRCElections.aspx [last accessed 1 November 2020].

reports they submit as part of the UPR process. Data from UPR Info suggests that 160 states had made 1100 such commitments during the first two UPR cycles.[120]

The recommendations referring to voluntary pledges and commitments relate to a variety of actions from ratification of treaties, to issuing standing invitations to the special procedures of the Human Rights Council, to 'uphold[ing] commitments to prevent impunity for human rights violations'.[121] Most of the recommendations are inward-looking; that is to say, they relate to a state committing to do certain things that will improve the human rights situation within its jurisdiction.

Occasionally, binding obligations under international human rights law have been reframed as voluntary commitments. For example, the Republic of Korea recommended to Yemen that it '[h]onour its voluntary commitment to submit national reports to the treaty bodies by the due date'.[122] But timely submission of state party reports to human rights treaty bodies is an obligation that arises from the human rights treaties to which the state is party.[123] By characterising timely reporting as a voluntary commitment, a binding treaty obligation is downgraded into a voluntary measure.

There does not appear to be any significant regional variation in terms of making or accepting recommendations that refer to voluntary pledges and commitments. Seventy four were accepted (79%) with no significant difference between regional groups in terms of acceptance rates. There appears to be no distinction in terms of accepting recommendations explicitly based on a formal treaty obligation (the acceptance rate for 'implementation' of treaty obligation recommendations was 73%) and those based on non-binding pledges or commitments.

E. International Humanitarian Law

Resolution 5/1 also provides that 'given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the [UPR] shall take into account applicable international humanitarian law'. As discussed above,[124] this formulation was a compromise solution following considerable debate during the negotiations on the modalities of the UPR. There was substantial opposition to the inclusion of IHL as a basis for the UPR. Despite the concerns expressed at that time, the practice of UPR demonstrates some limited engagement with IHL.

During the first two cycles of UPR, there were 120 recommendations that made a reference to IHL; this includes 39 recommendations that reference one or more IHL

120 Data available by searching the UPR Info database, supra n 6, for 'Voluntary Pledges only'.

121 Colombia (4 July 2013) A/HRC/24/6, Rec 116.71.

122 Yemen (5 June 2009) A/HRC/12/13, Rec 27. The voluntary commitment can be found in the National Report submitted in accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1 (20 February 2009) A/HRC/WG.6/5/YEM/1, 14.

123 E.g., Article 40(1) ICCPR provides that states parties 'undertake to submit reports on the measures they have adopted . . . (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests.'

124 See Section 2.5.

instruments[125] and a remaining 81 that make a general reference to IHL.[126] Reference was made to the 1949 Geneva Conventions collectively (2), Geneva Convention IV (19), Additional Protocol I to the 1949 Geneva Conventions (12), Additional Protocol II to the 1949 Geneva Conventions (12), Additional Protocol III to the 1949 Geneva Conventions (4), Ottawa Convention on Anti-Personnel Landmines (3), Chemical Weapons Convention (1), Hague Regulations (1), First Protocol to the 1954 Hague Convention (1) and the Second Protocol to the 1954 Hague Convention (1).[127] Of these specific references, there is a preference for 'Geneva Law'—an unofficial term that describes the body of law that protects the victims of armed conflicts in the power of a Party to the conflict[128]—over rules of 'Hague Law' that regulate the conduct of hostilities and the means and methods of warfare. This might be due to the closer connection of Geneva Law, with its obligations of humane treatment and rules on the treatment of detainees, to human rights protections.

There are fewer recommendations referring to IHL than to the Statelessness Conventions (145), the Refugee Convention and its Protocol (144), ILO Conventions (383) and the various instruments relating to the International Criminal Court (991).[129] This is despite the inclusion of IHL as a basis of review, albeit one that should be 'taken into account'. Recommendations that do reference IHL were made to only a handful of states. Of the 32 states that received recommendations referring to IHL, 50% were made to just three states: Israel (35), Syria (14) and Somalia (11). The rest received recommendations in the single digits. All recommendations that reference the Fourth Geneva Convention and the Hague Regulations are to Israel addressing the situation in the Occupied Palestinian Territories and the Golan Heights.

The low number of references to IHL in UPR recommendations may be attributed in part to the opposition to including IHL as a basis of UPR and the view that IHL does not properly fall within the province of UPR, or indeed the work of the Human Rights Council more generally.[130] However, these reasons can only be part of the explanation. Fifty of the 120 recommendations refer to IHL without further mention of human rights protections. In fact, recommendations regarding IHL were made by some states that were opposed to its inclusion in the bases of review. For example, Australia made three recommendations referring to 'obligations under international humanitarian law'[131] and Turkey made three recommendations calling for respect for

125 In this study 'IHL instruments' is understood as those instruments that seek to regulate conduct during armed conflict and belligerent occupation—what might be termed 'Hague Law' and 'Geneva Law'. International criminal law instruments and the OP-CRC-AC have been excluded. Zhu, supra n 11, takes a broader view of what constitutes IHL.

126 E.g. Kuwait's recommendation to Iraq to '[c]ommit to abide by international humanitarian law and international law': Iraq (15 March 2010) A/HRC/14/14, Rec 27.

127 The Ottawa Convention on Anti-Personnel Landmines and the Chemical Weapons Convention are treated as IHL instruments given that they contain prohibitions on the use of certain weapons during armed conflict.

128 Sassòli, *International Humanitarian Law* (2019) at 10.

129 See Section 4.C.

130 On the latter, see Alston, Morgan-Foster and Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"' (2008) 19 *European Journal of International Law* 183.

131 Iraq (15 March 2010) A/HRC/14/14, Rec 121; Angola (5 December 2014) A/HRC/28/11, Rec 134.187; Syrian Arab Republic, supra n 73, Rec 109.119.

IHL.[132] Both these states initially expressed the view that the Human Rights Council was not competent to engage with questions regarding IHL in the UPR.[133] In fact, with 59 states from all 5 regional groups referring to IHL in their recommendations,[134] and an additional 19 states from all 5 regional groups accepting recommendations that refer to IHL,[135] states from all regional groups have positively engaged with IHL in the UPR—both making and accepting such recommendations. This includes states that were involved in armed conflicts, such as Colombia, the Democratic Republic of the Congo, Iraq, Sri Lanka, Syria and the US.

Resolution 5/1 provides no guidance on what is to be considered *applicable* IHL. Whether this term refers to those IHL treaties to which the state under review is a party,[136] customary IHL, or only those norms that overlap with human rights protections was left open to interpretation. The practice of UPR does not shed much light on states' perceptions of 'applicable'. There are references to conventional IHL. Yet, 60% of the references call on the state under review to become a party to a treaty and so are referring to IHL instruments that are *not* applicable to the state under review.

The remainder of the references to IHL are general references. For example, Mexico called on Pakistan to '[s]trictly adhere to international human rights law and international humanitarian law and international refugee law in its fight against terrorism',[137] but it is not clear which rules of IHL are being referred to. Such recommendations may be referring to customary rules of IHL or treaty rules or both. In fact, despite the considerable body of customary IHL that is binding on all states,[138] there is only one reference to custom in the context of IHL. Sweden called on Syria to 'Protect civilians and civilian infrastructure, in accordance with international humanitarian law and customary international law, and stop its indiscriminate and aerial bombardments, including the use of barrel bombs'.[139] The recommendation was accepted.[140] This is the sole instance of customary international law—both in the context of IHL and generally—being invoked in the first two cycles of UPR. This may be due to uncertainties as to whether a particular rule forms part of customary international law and a reluctance on the part of the recommending state to engage in a debate on whether a rule has such status. It also reveals a clear preference for treaty law.

132 Somalia (11 July 2011) A/HRC/18/16, Recs 98.48 and 98.77; Syrian Arab Republic, supra n 73, Rec 110.6. See also the recommendations made by the UK to the Central African Republic and Colombia: Central African Republic (4 June 2009) A/HRC/12/2, Rec 14; Colombia (9 January 2009) A/HRC/10/82, Rec 17.

133 See Section 2.E.

134 The distribution of recommendations was: Africa: 9; Asia-Pacific: 25; EEG: 14; GRULAC: 28; WEOG: 41. Three recommendations were made by observer states.

135 These included: 10 African states; 6 Asia-Pacific states; 1 EEG state; 1 GRULAC state; and 1 WEOG state.

136 As suggested by Malaysia, supra n 46.

137 Pakistan (4 June 2008) A/HRC/8/42, Rec 25.

138 See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005).

139 Syrian Arab Republic, supra n 73, Rec 109.99.

140 The recommendation was accepted, although 'reservations' were expressed 'about the politicised nature of the wording and the aggressive, accusatory and provocative language in which they were expressed.' HR Council, Report of the Working Group on the Universal Periodic Review: Syrian Arab Republic, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (13 March 2017) A/HRC/34/5/Add.1, 7.

F. UPR Recommendations

UPR recommendations have been referred to in 404 recommendations; with 101 references occurring in the first cycle, and the remainder in the second cycle (303).[141] The rather low number of references in the second cycle is noteworthy given that subsequent cycles of UPR 'should focus, inter alia, on the implementation of the preceding outcome'.[142] One explanation for the low number is that there is an expectation that accepted recommendations will be implemented by the state under review before its next UPR. Where such recommendations are implemented, there is simply no need to refer back to them.[143] Another, less charitable, explanation is that most states are not interested in following up on accepted recommendations in later rounds of UPR.

References to UPR recommendations in the first cycle relate to the *process* of implementation of recommendations from that cycle. There are three broad categories of recommendation. The first calls on states to ensure an inclusive process involving civil society and relevant government departments—including translating and disseminating the outcome of the UPR—when implementing recommendations. Only one such recommendation was rejected. Venezuela noted a Canadian recommendation to 'Ensure a participatory and inclusive process with civil society, including NGOs who may be critical of the government's efforts, in the follow up of UPR Recommendations'.[144] Notably, Venezuela did accept a similar recommendation from Norway.[145] The second category of recommendation is more outward-looking. States are called on to 'seek technical and financial assistance from the international community to implement the recommendations'.[146] All these recommendations were accepted. The final category of recommendation calls for a commitment to provide mid-term or periodic reports to the Council on implementation of accepted UPR recommendations. Of the six recommendations that call for such action, two were noted (by Kazakhstan and Tanzania).

Of the 303 second cycle references to UPR recommendations, 67 relate to the process of implementation and 236 refer to UPR recommendations from the first cycle. Table 4 shows a breakdown of the second type of reference.

Not all the references to UPR recommendations from the first cycle are references to 'accepted' recommendations. Tracking each reference back to the original recommendation reveals that 38% of recommendations reference a recommendation that was noted by the state under review in the first cycle.[147] This is despite the instruction that

141 A further 132 recommendations refer to a follow-up process to the UPR but do not expressly mention UPR recommendations.

142 HRC Res 5/1, para 34; HRC Dec 17/119, para II.2.

143 Kothari has noted that 'One of the defining features of the UPR process has been the robust follow-up mechanisms that have emerged throughout the reporting cycles of the UPR.' He refers, amongst other things, to UPR mid-term reports and the '[d]evelopment of matrices and tools to track the implementation status of UPR recommendations.' Kothari, 'Research Brief: The Universal Periodic Review Mid-Term Reporting Process: Lessons for the Treaty Bodies' (Geneva Academy, 2019) 3, available at: www.geneva-academy.ch/research/publications/detail/504-the-universal-periodic-review-mid-term-reporting-process-lessons-for-the-treaty-bodies [last accessed 1 November 2020].

144 Venezuela (Bolivarian Republic of) (7 December 2011) A/HRC/19/12, Rec 96.37.

145 Venezuela, supra n 144, Rec 93.19.

146 Côte d'Ivoire, supra n 72, Rec 99.101.

147 Where, despite a reference to a previous recommendation, no such recommendation was made then this has been recorded as a 'noted' recommendation. E.g., Burkina Faso recommended that Brazil should 'Continue

Table 4. Cycle 2 recommendations referring to 'accepted' and 'noted' cycle 1 recommendations

Regional group of state under review	Reference to an 'accepted' recommendation from first cycle		Reference to a 'noted' recommendation from first cycle	
Action in second cycle	Accepted	Noted	Accepted	Noted
Africa	37	11	13	9
Asia-Pacific	40	11	4	20
Eastern Europe	11	0	0	4
Latin America and Caribbean	14	5	9	18
Western Europe and Others	12	5	0	13
Total	114	32	26	64

'the second and subsequent cycles should focus on, *inter alia*, the implementation of accepted recommendations'.[148] States do not tend to accept such recommendations. Only 29% of these previously 'noted' recommendations are accepted. Most of these 'repeat' recommendations are made by the state that made the original recommendation in the first cycle. For example, during the first cycle of UPR Slovenia had recommended that Swaziland[149] abolish the death penalty. However, Swaziland indicated that it was 'not yet ready to accept this recommendation'.[150] Slovenia returned to this recommendation in the second UPR cycle, calling for Swaziland to 'Abolish the death penalty, as previously recommended'.[151] Once again, the recommendation was 'noted'.

Twenty-two percent of the recommendations that reference a recommendation 'accepted' in the first round of UPR are 'noted' in the second cycle. One-third of these relate to a commitment to sign, ratify or accede to an international human rights treaty. For example, in its first UPR Australia accepted recommendations to ratify OP-CAT but only 'noted' recommendations that recalled these commitments in its second UPR. There are alternative possible explanations for such behaviour. One is that states do not view acceptance of a UPR recommendation as creating a commitment to act. Another is that something changed in the state under review between the first and second UPR, such as a change of government or a change of policy. A third is that states took acceptance of UPR recommendations more seriously in the second round

with the implementation of recommendations related to the ratification of human rights international instruments'; however, no recommendations were made to Brazil in the first cycle of UPR relating to ratification of human rights instruments. See Brazil (9 July 2012) A/HRC/21/11, Rec 119.1.

148 HRC Res 16/21, Annex: Outcome of the review of the work and functioning of the United Nations Human Rights Council, para I.C.1.6 [emphasis added]. See also HRC Dec 17/119, para II.2.

149 Now Eswatini. The official documents relate to when the state was called Swaziland.

150 Report of the Working Group on the Universal Periodic Review, Swaziland, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (6 March 2012) A/HRC/19/6/Add.1, para 11.

151 Swaziland (13 July 2016) A/HRC/33/14, Rec 109.37.

of UPR and so were unlikely to accept a recommendation regarding treaty ratification unless there was certainty that the recommendation could be implemented. In the case of Australia, the last explanation seems the most persuasive. Australia said that it 'is actively considering the ratification of the OPCAT' in response to the second cycle recommendations,[152] and subsequently ratified OPCAT.[153] Similarly, Somalia confirmed that in light of capacity and resource constraints it needed to 'prioritise' ratification of certain human rights instruments and therefore general recommendations regarding ratification of core human rights treaties could not be accepted.[154]

5. INTERNATIONAL 'HUMAN RIGHTS' LAW IN UPR

The negotiations on the bases of review and their use (or lack thereof) in the first two cycles of UPR provide some insights into states' perceptions of international 'human rights' law.

A. 'Other' International Law Material in UPR Recommendations

A stark finding of our analysis of UPR recommendations is that states have not limited themselves to the bases of review set out in Resolution 5/1. In the practice of UPR, states have expanded the review to include a wide range of other international law material. Remarkably, 5608 recommendations—almost 10% of all recommendations made in the first two cycles and 31% of the recommendations in our database—call for implementation of international law material not obviously captured by the bases of review. There are 3776 distinct references to *specific* materials that *prima facie* fall outside the bases of review;[155] as well as 2242 *'general* human rights' references.[156]

Of the 3776 distinct references to specific international law materials not captured by the bases of review listed in Resolution 5/1, some are to binding materials, such as international court judgments, whilst the majority are to soft law instruments, including various declarations and principles. Materials from human rights bodies are referenced, including outputs from UN treaty bodies and special procedure mandate holders, as are materials from entities that are not traditionally considered human rights bodies, such as the World Food Programme, the United Nations Development Programme and the Food and Agricultural Organization. These materials are rarely referred to in conjunction with a Resolution 5/1 basis of review. Only 213 references exist alongside a reference to a basis of review (6%). Recommendations are made to states to 'implement'

152 Australia, Addendum (19 February 2016) A/HRC/31/14/Add.1, para 5.

153 21 December 2017. See treaties.un.org/Pages/showActionDetails.aspx?objid=08000002804e0fea&clang=_en [last accessed 1 November 2020].

154 Somalia, Addendum (7 June 2016) A/HRC/32/12/Add.1.

155 Some recommendations refer to more than one international law material that is not captured by the bases of review.

156 See Section 5.D.

157 See GA Res 48/134, 20 December 1993, A/RES/48/134.

158 See GA Res 55/2, 18 September 2000, A/RES/55/2.

159 GA Res 61/295, 13 September 2007, A/RES/61/295.

160 This figure includes references to both the original (ECOSOC Res 663C (XXIV), 31 July 1957; ECOSOC Res 2076 (LXII), 13 May 1977) and updated Standard Minimum Rules (Nelson Mandela Rules) (GA Res 70/175, 8 January 2016, A/RES/70/175).

161 18 September 2008, A/HRC/RES/9/12.

Table 5. Five most cited international law instruments by regional group

Material referenced	Number of references	Africa	Asia-Pacific	EEG	GRULAC	WEOG	Observer
		% of references made					
Principles Relating to the Status of National Human Rights Institutions[157]	1279	28	22	9	15	26	0
Millennium Development Goals[158]	198	31	47	7	11	4	2
UN Declaration on the Rights of Indigenous Persons[159]	63	16	13	5	33	33	0
Standard Minimum Rules for the Treatment of Prisoners[160]	57	9	12	16	2	61	0
Human Rights Council Resolution 9/12 (Human Rights Voluntary Goals)[161]	45	0	0	0	100	0	0

these international law materials (or the actions they call for) and these have been accepted by states from all regional groups.

Table 5 shows the five most cited of these 'other' international law instruments.[162] The vast majority of the references (34%) are to the Paris Principles Relating to the Status of National Human Rights Institutions, with references to other materials being far fewer in number. However, many more materials are referenced sporadically: 50 different international instruments are referred to fewer than 10 times. So, despite their importance in their respective fields, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[163] are only referred to 5 times and the Guiding Principles on Internal Displacement[164] 8 times. Instruments adopted by experts, such as the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity[165] (21), and regulatory frameworks, such as the Extractive Industries Transparency Initiative[166] (3) are also referred to.

States from all regional groups make recommendations referring to these international law instruments. There are variations in terms of issues being pursued. For example, Asia-Pacific and African group states made most of the references to instruments and standards relating to development. These groups accounted for 92% of the references to the GA's Overseas Development Aid Target,[167] 78% of the references to the Millennium Development Goals and 74% of the references to the Sustainable Development Goals.[168] All of the references to Human Rights Council Resolution 9/12 (Human Rights Voluntary Goals) were made by Brazil and all but one of the 37 references to the UN Rules for the Treatment of Women Prisoners (the Bangkok Rules)[169] were made by Thailand.[170]

Materials from different sources are cited to varying degrees. There are 884 references to outputs from the UN treaty bodies. These references include occasional references to general comments (14) and concluding observations (19). The vast majority are general references to 'recommendations' for action made by treaty bodies. Given that the UN treaty bodies are mandated to provide guidance on performance of core human rights treaty obligations, these outputs have a close link to one of the bases of review: 'human rights instruments to which a state is party'. Most of the recommendations calling for implementation of treaty body outputs refer to outputs from the Committee on the Rights of the Child (214) and the Committee on the Elimination of Discrimination against Women (203). There are far fewer references to

162 Citations were counted as they were presented in recommendations: e.g., a recommendation referring to the title of an instrument contained in a GA resolution—such as the Declaration on Human Rights Defenders—was counted as a reference to the actual instrument rather than the parent resolution. This provides an accurate picture of the material states refer to in their recommendations.

163 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.

164 11 February 1998, E/CN/4/1998/53/Add.2.

165 'Yogyakarta Principles—Principles on the application of international human rights law in relation to sexual orientation and gender identity', March 2007.

166 See: eiti.org [last accessed 1 November 2020].

167 GA Res 2626 (XXV), 24 October 1970. There were 38 references.

168 GA Res 70/1, 25 September 2015, A/RES/70/1. There were 24 references.

169 GA Res 65/229, 21 December 2010, A/RES/65/229.

170 Switzerland made the other recommendation.

outputs from the Human Rights Committee (101) and the Committee on Economic, Social and Cultural Rights (69). The acceptance rates for recommendations calling for implementation of treaty body recommendations is 72%, which reflects the acceptance rate for recommendations calling for implementation of the core UN human rights treaties (73%).

There are 236 references to outputs from UN special procedures. Recommendations have focussed on implementation of outputs from thematic special procedures rather than country specific mandates. There are only 19 references to outputs from country specific mandates. This reflects the more contentious nature of the country mandates and their limited number.[171] Six recommendations referring to the work of the Special Rapporteur on the situation of human rights in Cambodia and the single recommendation referring to the Independent Expert on the situation of human rights in the Sudan were accepted. Both these mandates are concerned with capacity building and technical assistance and were established with the support of the state concerned. The remaining 12 recommendations were rejected.

There are far fewer references to resolutions, decisions and other 'recommendations' from the Human Rights Council (113), the GA (97) and the Security Council (88). The references to GA resolutions are predominantly references to resolutions regarding the abolition of the death penalty generally and directed towards those African, Asia-Pacific and GRULAC states that retain the death penalty. They tend to be rejected: only 17% of recommendations being accepted. Almost half of the references to Security Council resolutions are to Resolution 1325 on Women, Peace and Security.[172] The overall acceptance rate for recommendations referring to Security Council resolutions is 72%.

Outputs from a variety of other UN entities and specialised agencies, are also referred to, albeit less frequently. These references tend to be rather general, invoking unspecified 'recommendations' from the various bodies. States are called upon to implement 'recommendations' from the High Commissioner for Human Rights and their office (OHCHR) (42), the ILO and its supervisory bodies (24) and the UNHCR (21). There are sporadic references to outputs from other specialised agencies, including the World Health Organisation, UN Education, Scientific and Cultural Organization (UNESCO) and the Food and Agricultural Organisation (FAO).

Only two recommendations call for implementation of ICJ judgments and one recommendation calls for the implementation of an order for provisional measures. Nicaragua called for the implementation of the *Nicaragua* judgment.[173] This recommendation was noted by the US. Mexico's call for the US to implement the *Avena* judgment was accepted.[174] The Russian Federation noted the recommendation from Georgia to 'comply' with provisional measures ordered by the ICJ,[175] because it 'did not comply with the basis of the review stipulated in HRC Resolution 5/1'.[176] A further

171 See Freedman, 'The Human Rights Council', in Mégret and Alston (eds), *The United Nations and Human Rights* (2020) 233.

172 SC Res 1325, 31 October 2000, S/RES/1325 (2000).

173 ICJ Reports 1986, 14. See A/HRC/16/11, supra n 80, Rec 92.53.

174 ICJ Reports 2004, 12. See A/HRC/16/11, supra n 80, Rec 92.54.

175 ICJ Reports 2008, 353.

176 Russian Federation (5 October 2009) A/HRC/11/19, paras 54 and 86.

eight recommendations called upon Israel to accept and implement the Advisory Opinion in the *Wall* case.[177] Each of these was noted.

States seem to be working on the basis that limiting references to the UN Charter, the UDHR, human rights treaties and voluntary pledges and commitments overlooks numerous other materials that are relevant to improving the situation of human rights in the state under review. Failure to mention these materials would be to ignore a significant part of the picture, even though these materials do not form part of the official bases of review.

Most 'other' international law materials cited are soft law instruments. Whilst many academics and lawyers are concerned with the hard/soft law distinction—and some are critical of the very idea of soft law[178]—state delegates who make UPR recommendations are far less troubled by the distinction. The practice of UPR indicates an erosion of the hard/soft law divide. In fact, states demonstrated this willingness to overlook formal distinctions during the negotiations on the modalities of the UPR.[179] The bases of review set out in Resolution 5/1 reflect a broad range of human rights commitments undertaken by states at the international level, including a mix of both hard and soft law.

As Boyle and Chinkin have observed: 'contemporary international law is often the product of a complex and evolving interplay of instruments, both binding and non-binding, and of custom and general principles'.[180] This is reflected in the design and practice of UPR, with the notable absence of custom. Although states have broadened the bases of review in practice to include a variety of soft law instruments, customary international human rights law is almost entirely missing. States appear more comfortable with written texts, even if not binding, than with an unwritten source, even if binding.

The OHCHR compilation of UN information which feeds into each UPR is likely to account for some of the references to this 'other' material. The compilation includes, for each state under review, relevant information from the treaty bodies, special procedures, OHCHR, UN country teams, ILO committee of experts, UNESCO and UNHCR, amongst others.[181] The OHCHR compilation seems to serve as an influential document from which states draw and demonstrates the potential importance of actors who operate 'behind the scenes'.[182] At the same time, states do not limit themselves to materials included in the compilation.

177 ICJ Reports 2004, 3.

178 E.g. Klabbers, 'The Redundancy of Soft Law' (1996) 65 *Nordic Journal of International Law* 167; d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 *European Journal of International Law* 1075.

179 See Section 2.G.

180 Boyle and Chinkin, *The Making of International Law* (2007) at 210–11.

181 See e.g. Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Bolivarian Republic of Venezuela, A/HRC/WG.6/26/VEN/2 (25 August 2016).

182 There is growing attention to the work of international civil servants, such as those in the OHCHR, who 'identify and frame issues for collective debate, set the agenda, negotiate appropriate rules and policies, partake in their implementation and monitor their advancement': Mansouri, 'International Civil Servants and Their Unexplored Role in International Law' *EJIL:Talk!* (3 October 2019). See also Baetans (ed.), *Legitimacy of Unseen Actors in International Adjudication* (2019). On UPR specifically, see Billaud, 'Keepers of the Truth: Producing "Transparent" Documents for the Universal Periodic Review' in Charlesworth and Larking, supra n 14, 63; McGaughey, 'The Role and Influence of Non-governmental Organisations in the

Many of the 'other' international law materials are referenced only a few times each; but the citation of a particular material indicates that at least the recommending state 'tacitly assert[s] the validity, legitimacy and relevance of the invoked human rights norm'.[183] This in turn affects future discussion of the issue, as the recommending state cannot later argue that the particular material is invalid, illegitimate or irrelevant to human rights. This is particularly important for expert adopted materials and materials drawn up by non-human rights bodies. As Baxter has noted in a different context, 'the future course of discussion, negotiation, and even agreement will not be the same as they would have been in the absence of the [material]'.[184] Over time, if more and more states reference a particular instrument, the stature of that instrument grows and it becomes a central point of reference on an issue.

One such instrument is the Paris Principles on national human rights institutions. The Paris Principles are invoked in 1279 recommendations: 990 of those recommendations were accepted (77%). It was invoked more times than all but one of the core UN human rights treaties. The number of recommendations that invoke the Paris Principles—both in absolute terms and relative to the number of recommendations that refer to individual treaties, the diversity of states that made the recommendations and accepted them, and the language of the recommendations all point to the Paris Principles having considerable influence and being an important point of reference. A confluence of factors explains the high citation figure for the Paris Principles. The Principles already have a certain weight in UPR, with 'A-status' national human rights institutions—that is, those fully compliant with the Principles—having a privileged position.[185] States are regularly encouraged to establish or strengthen a national human rights institution in line with the Principles.[186] Furthermore, mention of the Principles is an 'easy' recommendation as it is not particularly critical of a state's human rights record.

B. Breadth of Subject Matter

UPR recommendations also reveal states' perceptions of the content of *human rights* law. States invoke instruments from a variety of related fields, suggesting that they are part of the human rights regime. Whilst Resolution 5/1 contains explicit acknowledgment of the 'complementary and interrelated nature' of IHL and human rights,[187] there have been only 120 recommendations referring to IHL norms and instruments, and there have been far more references to instruments from other fields of international law.

Universal Periodic Review—International Context and Australian Case Study' (2017) 17 *Human Rights Law Review* 421.

183 Kälin, supra n 15 at 257–8. See also Kälin, supra n 17 at 33.

184 Baxter, supra n 19 at 565.

185 The OHCHR compilation of information from stakeholders contains a separate section for information from the national human rights institution of the state under review that is in 'full compliance with the Paris Principles'. Such national human rights institutions are also 'entitled to intervene immediately after the State under review during the adoption of the outcome of the review'. HRC Res 16/21, paras 9 and 13.

186 E.g. GA Res 74/156, 23 January 2020, A/RES/74/156; HRC Res 39/17, 8 October 2018, A/HRC/RES/19/17.

187 See Section 2.E.

International criminal law instruments are referenced frequently.[188] The invocation of these instruments confirms the 'contemporary turn to criminal law in human rights'.[189] Accountability and the fight against impunity occupy a prominent place on the human rights agenda. The obligation to investigate and prosecute certain human rights violations and the rejection of amnesties are seen as part of the human rights law mainstream.[190] Through supervision of national prosecutions, regional human rights courts have been described as exercising a 'quasi-criminal jurisdiction', constituting 'international criminal law by other means'.[191] A large part of this turn to criminal law has been the development of international criminal law institutions.[192] It is this in particular that is reflected in the practice of UPR recommendations, with 933 references to the Rome Statute of the International Criminal Court. This is more than the number of references to several core UN human rights treaties. There are additional references to the Kampala Amendments to the Rome Statute (37), the Agreement on Privileges and Immunities of the ICC (140) and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (23).

States also reference numerous ILO conventions in UPR recommendations. ILO standards and recommendations are also invoked.[193] This citation practice feeds into the debate as to whether labour rights are human rights.[194] In 1996, Leary wrote of a 'regrettable paradox', whereby 'the human rights movement and the labour movement run on tracks that are sometimes parallel and rarely meet'.[195] Today, there are far more intersections between the two.[196] One such intersection is the UPR, with recommendations containing 383 references to ILO conventions. Two ILO conventions in particular are invoked frequently. The first is ILO Convention No 189 on domestic workers, which is invoked in 149 recommendations. That convention mentions a number of international human rights instruments in its preamble and has been described as taking a 'human rights approach'.[197] Second, ILO Convention No 169 on Indigenous and Tribal Peoples is also well-represented in UPR recommendations with 122 references. UPR recommendations are informative not only for the number of references to ILO conventions, but also how they are referenced. In several instances, states that invoke the ILO conventions explicitly characterise them as human rights treaties. For example,

188 See Section 4.C.

189 Engle, 'Mapping the Shift: Human Rights and Criminal Law' (2018) 112 *ASIL Proceedings* 84, at 84.

190 See Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell Law Journal* 1069; Pinto, 'Historical Trends of Human Rights Gone Criminal', LSE Law, Society and Economy Working Papers 4/2020.

191 Huneeus, 'International Criminal Law by other Means: the Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *American Journal of International Law* 1. See also O'Flaherty and Higgins, 'International Human Rights Law and Criminalization' (2015) 58 *Japanese Yearbook of International Law* 45, 68, noting that human rights bodies and courts have carved out 'a significant criminal law mandate'.

192 Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell Law Journal* 1069.

193 There are 26 references to ILO 'standards' and 'recommendations'.

194 See Kolben, 'Labour Rights as Human Rights' (2010) 50 *Virginia Journal of International Law* 450; Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151.

195 Leary, 'The Paradox of Workers' Rights as Human Rights', in Compa and Diamond (eds), *Human Rights, Labor Rights, and International Trade* (1996) 22.

196 See Kolben, supra n 194.

197 Mantouvalou, supra n 194 at 169.

Ghana recommended that Lebanon '[r]atify various international human rights statutes and conventions, including the Rome Statute . . . and the ILO Conventions Nos. 87, 169 and 189'.[198]

A body of law that is closely associated with international human rights law is international refugee law. Whereas many commentators express the view that the Convention relating to the Status of Refugees is itself a human rights treaty,[199] the occasional commentator contends that it is not.[200] There are 144 references to the Convention relating to the Status of Refugees and its Protocol in UPR recommendations, as well as additional references to UNHCR conclusions, guidelines and recommendations. The view of states is that, if not specifically a human rights issue, these instruments are relevant to the enjoyment of human rights.

A closely related subject matter is the protection of stateless persons. The Convention on the Reduction of Statelessness and the Convention relating to the Status of Stateless Persons are each referenced in over 100 UPR recommendations. The relationship between statelessness and human rights law is uncertain. For example, drawing on the work of Goodwin-Gill,[201] Foster and Lambert have argued that 'statelessness as a human rights issue is . . . a concept whose time has come'.[202] They argue that instead of being seen as a narrow technical issue, which can be resolved by harmonising domestic law, statelessness should be seen as a human rights issue.[203] The practice of UPR is informative in this regard. In addition to the 145 references to the statelessness conventions, states sometimes describe the statelessness treaties as human rights treaties. For example, Ecuador recommended that the Solomon Islands 'Sign or ratify the following international human rights instruments: . . . the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness', a recommendation which was accepted.[204]

States thus include international criminal law, international labour law, international refugee law and the international law relating to stateless persons as part of the human rights law regime. States treat the boundaries between these bodies of law as fluid. Each of them is seen as relevant to the improvement of the human rights situation on

198 Report of the Working Group on the Universal Periodic Review, Lebanon (22 December 2015) A/HRC/31/5, para 132.23.

199 Edwards, 'International Refugee Law', in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law,* 3rd edn (2017) 539, at 543 ('The Refugee Convention is a human rights instrument of a particular scope'); Hathaway, *The Rights of Refugees under International Law* (2005) at 5 ('refugee law is a remedial or palliative branch of human rights law'); McAdam, *Complementary Protection in International Refugee Law* (2007) at 14 (the Refugee Convention is 'a specialist human rights treaty').

200 Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law', in Rubio-Marín (ed.), *Human Rights and Immigration* (2014) 22 ('Contrary to conventional wisdom, the Geneva Convention is not a human rights treaty in the orthodox sense, for both historical and legal reasons').

201 Goodwin-Gill, 'The Rights of Refugees and Stateless Persons', in Saksena (ed.), *Human Rights Perspective and Challenges (in 1990 and Beyond)* (1994) 378.

202 Foster and Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 *International Journal of Refugee Law* 564, at 584.

203 Foster and Lambert, supra n 202.

204 Report of the Working Group on the Universal Periodic Review, Solomon Islands (11 July 2011) A/HRC/18/8, para 81.5; Report of the Human Rights Council on its eighteenth session (22 October 2012) A/HRC/18/2, para 372.

the ground,[205] and potentially even as part of human rights law themselves. IHL, on the other hand, is seen as 'complementary' and there is a relative reticence to make recommendations that explicitly refer to this body of law even though dozens of armed conflicts take place each year involving numerous states.[206]

As with the breadth of materials cited, states are likely taking their lead from the OHCHR compilation of UN information which feeds into the review. The compilation includes information on the status of ratification of the core UN human rights treaties, as well as 'other main relevant international instruments' for each state under review.[207] These instruments include the Genocide Convention, the Rome Statute, the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, the Refugee Convention and its Protocol, the Convention Relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness, the ILO 'fundamental Conventions',[208] as well as the UNESCO Convention on Discrimination in Education.[209] The OHCHR compilation appears to serve as an influential tool for coalescing state views on what is a 'human rights' instrument.

C. The Absence of Regional Human Rights Law Instruments

Given the broad interpretation of human rights law, it is remarkable that UPR recommendations rarely refer to regional and sub-regional human rights law instruments. As seen in Section 4.C, there are only 40 references to AU treaties, 162 to Council of Europe treaties and 21 to OAS treaties. There are also relatively few references to other regional material, such as judgments of regional human rights courts, and very few references to material from outside Europe.

There are 195 references to international law material adopted by regional intergovernmental organisations and human rights bodies. This number includes 51 references to judgments from regional human rights courts. There are 36 recommendations calling for implementation of judgments from the European Court of Human Rights, which are made primarily by parties to the ECHR.[210] A further 13 recommendations call for implementation of judgments from the Inter-American Court of Human Rights,

205 HRC Res 5/1, para 4(a).

206 According to one report, at least 48 armed conflicts took place in 28 states in 2016 alone. Bellal, *The War Report: Armed Conflicts in 2016* (Geneva Academy, 2017) at 15, available at: www.geneva-academy.ch/research/publications/detail/202-the-war-report-2016 [last accessed 1 November 2020].

207 See e.g. Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Togo (22 August 2016) A/HRC/WG.6/26/TGO/2, I.A.2.

208 These are Convention No 29 concerning Forced or Compulsory Labour; Convention No 105 concerning the Abolition of Forced Labour; Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise; Convention No 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively; Convention No 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value; Convention No 111 concerning Discrimination in Respect of Employment and Occupation; Convention No 138 concerning Minimum Age for Admission to Employment; and Convention No 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

209 The document also includes as 'relevant' the status of ratification of the 1949 Geneva Conventions and the Additional Protocols thereto.

210 There is only one exception. Mexico called for the UK to 'comply with the rulings of the European Court of Human Rights on the cases concerning the United Kingdom': United Kingdom (6 July 2012) A/HRC/21/9, Rec 110.48.

and two references to judgments from the ECOWAS Community Court of Justice. However, it is not member states of these regional communities that led the call for implementation of these regional court judgments: 10 of these recommendations are from WEOG states, whilst five recommendations regarding the Inter-American Court judgments are from members of the OAS (Canada (2), Costa Rica, Ecuador and Mexico). Despite being binding on states party to the dispute, the acceptance rate for recommendations calling for implementation of regional court judgments is 67%.

The other 144 references are to other outputs from a variety of regional organisations and bodies. The acceptance rate for recommendations containing these references is 61%. The general picture is one of limited engagement with regional bodies beyond Europe. There are 105 references to outputs from European organisations, including various Council of Europe institutions, the European Union and the Organisation for Security and Cooperation in Europe (OSCE) and 86% of these are made by members of those organisations. Beyond Europe, there are 17 references to outputs from African Union institutions, 4 references to material from SADC, 13 references to outputs from OAS institutions, 2 references to Commonwealth missions, and single references to a recommendation from CARICOM, the N'Djamena Declaration, and the ASEAN Declaration on Human Rights. Regional human rights law instruments are neglected.

Although some authors suggest that regional human rights treaties are 'beyond the scope of the UPR's mandate',[211] Resolution 5/1 refers to 'human rights instruments to which a State is party'. This basis of review is broad enough to encompass regional and sub-regional human rights treaties.[212] It might be that states are of the view that the regional human rights systems are separate from the UN human rights system and therefore regional instruments should not be invoked in the UPR process. Equally, it might be that some states deliberately decide not to reference regional instruments so as not to undermine the universality of the point they are making. However, in various contexts, states,[213] the Human Rights Council,[214] and the regional human rights systems[215] have stressed the importance of improving collaboration between the regional and UN human rights systems. Certainly those states that do refer to regional human rights instruments must be of the view that such instruments do fall within the

211 Harrington, supra n 14 at 87.

212 See also Smith, African States, supra n 14 at 350.

213 E.g., as part of the treaty body strengthening process, a number of states have called for closer collaboration between the treaty bodies and regional mechanisms. See Response of Switzerland to the OHCHR questionnaire on General Assembly resolution A/Res/68/268, Bern, 28 February 2019; Costa Rica, Cuestionario relativo a la resolución 68/268 de la Asamblea General sobre el 'Fortalecimiento y mejora del funcionamiento eficaz del sistema de órganos creados en virtud de tratados de derechos humanos', adoptada el 9 de abril de 2014.

214 HRC Res 6/20, 28 September 2007, A/HRC/RES/6/20; HRC Res 12/15, 1 October 2009, A/HRC/RES/12/15; HRC Res 18/14, 14 October 2011, A/HRC/RES/18/14; HRC Res 24/19, 27 September 2013, A/HRC/RES/24/19; HRC Res 32/127, 1 October 2015, A/HRC/RES/32/127; HRC Res 34/17, 24 March 2017, A/HRC/RES/34/17.

215 E.g., one OHCHR report provides that 'the Council of Europe Human Rights Commissioner . . . intends to assist in the implementation of recommendations made by the UPR Working Group to the member States of the Council of Europe by following up on the pledges those member States made during the Review process.' Report of the Secretary-General on the workshop on regional arrangements for the promotion and protection of human rights, 24 and 25 November 2008, 28 April 2009, A/HRC/11/3, para 49.

ambit of the UPR. If states so desire, UPR is one way in which the connections between the UN and regional human rights systems could be improved.

D. A Body of Generalised International Human Rights Law

UPR recommendations point to the growing recognition on the part of states of a body of *generalised,* non-specific international human rights law. By this, we are *not* referring to a body of customary international human rights law or a body of customary international human rights law together with general principles of international human rights law. Schabas has observed that 'In practice, States rarely refer to the legal instruments during the Universal Periodic Review. It is as if they are applying a body of general international human rights law rather than the precise provisions of treaties and the related case law'.[216] Although our empirical analysis shows that reference to legal instruments is by no means 'rare', the application of a body of generalised international human rights law is evident from the frequent invocation of general 'standards', 'instruments', and 'norms' without specifying precisely which standards, instruments and norms are to be followed.

There are 2242 'general human rights' references in our database. These are generic references to international 'standards', 'instruments', 'legal commitments', 'norms' and 'law'. These references are not routinely made alongside a specific reference to the bases of review or other international law material. Only 4% of the total number of general human rights references are in addition to one or more bases of review, and the majority of these accompany references to IHL. However, this is an exceptional phenomenon.

The vast majority of recommendations containing general human rights references call upon states to implement or comply with international human rights law without specifying the source of the obligation or commitment. Such language could be shorthand for the obligations and commitments recognised as the bases of the UPR in Resolution 5/1 or it could be intended to go further. Either way, it points to the identification of a body of generalised, non-specific international human rights law. The indeterminate legal source of obligation has not caused significant concern for states under review: the acceptance rate for recommendations only containing these vague general human rights references is 67%.

The way in which international law materials are referenced in UPR recommendations also serves to demonstrate the recognition of a body of generalised, non-specific international human rights law. References to the outputs of treaty bodies rarely specify which outputs are being referenced, whether general comments, views, or concluding observations. Instead, references are to the 'recommendations' of treaty bodies, unspecified. This is true also of references to other international law material, such as 'recommendations' of the ILO and its supervisory mechanisms.

Reference to this body of generalised international human rights law in UPR recommendations serves to complement the work of other human rights mechanisms. One of the 'principles' of the UPR process is that it should '[c]omplement and not duplicate other human rights mechanisms, thus representing an added value'.[217] Monitoring

216 Schabas, 'The Future of the United Nations Human Rights System' in Bassiouni (ed.), *Globalisation and its Impact on the Future of Human Rights and International Criminal Justice* (2015) 119 at 120.

217 HRC Res 5/1, para 3(f).

compliance with particular provisions of human rights treaties is likely to encroach on the mandate of human rights treaty bodies, which are better placed to suggest what is required to perform a specific treaty obligation. Applying a body of generalised international human rights law fits with the hybrid politico-legal nature of the UPR process and the lack of international human rights law expertise on the part of some of those who are undertaking the reviews.

6. CONCLUSION

UPR has much to tell us about how states perceive international human rights law. The negotiations establishing the bases of the review provide some insights. Examining the actual practice of UPR provides a more complete picture. That fewer than one-third of the 57,685 recommendations made during the first two cycles of UPR explicitly refer to the bases of review or other international law material is remarkable. Our empirical analysis of these recommendations demonstrates how international (human rights) law has been used and from this we can draw some conclusions on states' perceptions of this body of law. Whilst we have not explored how the recommendations were made or the politics behind certain recommendations, the text of UPR recommendations has proven revealing.

States do not feel constrained by the bases of review listed in Resolution 5/1. Ten percent of all recommendations made in the first two cycles of UPR refer to international law material not listed in Resolution 5/1. Of the recommendations that refer to one or more of these other international law materials, a significant number refer to soft law. These range from recommendations of treaty bodies to principles drawn up by private expert bodies. In the practice of UPR, states do not dwell on the distinction between hard and soft law. This was foreshadowed by the negotiations on the bases of review where the distinction between hard and soft law was not a significant consideration and Resolution 5/1 refers to treaties to which the state is a party alongside voluntary commitments and pledges. Indeed, states go out of their way to refer to numerous soft law instruments that do not formally constitute part of the bases of review. The referencing of soft law is stark when compared to the number of times customary international human rights law is mentioned. Custom is mentioned in only one recommendation. States are more comfortable referring to written documents, even when they are non-binding, than they are unwritten rules, even when binding.

The notion of *human rights* law has been interpreted broadly to include related bodies of law, notably international criminal law, but also international labour law, international refugee law and international law regarding statelessness. At the same time, regional human rights law is frequently absent. There remains a division between international human rights law, of which UPR forms part, and regional human rights law. States also refer to a generalised body of human rights law in UPR recommendations: unspecified human rights 'standards', 'obligations' and 'laws' are mentioned, and general references are made to 'recommendations' of treaty bodies and other entities.

When drawing these conclusions, we are mindful that some of this practice is likely due to the way in which states perceive UPR itself. Whilst academics and lawyers are often focussed on formal distinctions between hard and soft law and discrete bodies of law, these are not crucial considerations in UPR. States do not see UPR as a strictly legal

process by which to enforce international human rights obligations. It is not a judicial or quasi-judicial process like those conducted by courts or treaty bodies. Rather, reviews are conducted at the inter-governmental level by diplomats and the process is one that is *informed by* international human rights law. The goal is to improve the human rights situation in the state under review and recommendations are made on everything that is relevant: whether hard law or soft law and whether it is a matter of human rights law narrowly defined or a closely related body of law. The very fact that these distinctions are set aside is significant when we consider the potential of international law to secure the enjoyment of human rights.

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Annex ZW

Part III Civil and Political Rights, 7 Right of Self-determination—Article 1

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(p. 153) 7 Right of Self-determination—Article 1

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Article 1

> **1.** All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> **2.** All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefits, and international law. In no case may a people be deprived of its own means of subsistence.
>
> **3.** The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

[7.01] Article 1 is common to both the ICCPR and the International Covenant on Economic Social and Cultural Rights, highlighting the complex nature of the right of self-determination, and its importance for the achievement of all civil, political, economic, social, and cultural rights.

General Comment 12

> **¶1.** …The right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

[7.02] The Committee on the Elimination of Racial Discrimination (CERD), along with the Human Rights Committee (HRC), has issued a general comment on the topic. The CERD General Recommendation is far more detailed and useful than the HRC Comment.

(p. 154) Definition of Self-determination

[7.03] The HRC has issued very little jurisprudence on the meaning of self-determination for the purposes of the ICCPR. This is partly due to its refusal to admit article 1 complaints under the First Optional Protocol [7.24]. Furthermore, its General Comment on article 1 fails to give any clear definition beyond reiteration of the express words of article 1.

General Comment 12

[7.04]

> **¶2.** Article 1 enshrines an inalienable right of all peoples as described in its paragraphs 1 and 2. By virtue of that right they freely 'determine their political status and freely pursue their economic, social and cultural development'. The article imposes on all States parties corresponding obligations. This right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law….
>
> **¶7.** In connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the right of all peoples to self-determination, in particular the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (General Assembly Resolution 2625 (XXV)).

[7.05] The Comment obliquely refers to other 'international law' obligations, indicating the ICCPR meaning accords with the international legal meaning of self-determination.[1] The most important international law document in this respect is, as indicated in paragraph 7, General Assembly Resolution 2625, the 'Declaration on Friendly Relations'.[2] The Declaration describes the right of self-determination as 'the right of peoples to be free from alien subjugation, domination and exploitation'. However, the interpretation of 'peoples' and 'alien subjugation' remains controversial.

Peoples

[7.06] Self-determination is the collective right of 'peoples'. Various conditions or characteristics of 'peoples' have been put forward, including common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, common economic life, and consisting of a certain minimum number.[3] However, no permanent, universally (p. 155) acceptable list of criteria for a 'people' exists.[4] Neither the HRC nor the CERD Committee has postulated a definition.

Gillot et al v France (932/00)

[7.07] The authors were French residents of the French colony of New Caledonia. Their complaint related to restrictions on their rights to vote in referendums, including one plebiscite in 1998 and future plebiscites from 2014 onwards, which were ultimately to determine the status of New Caledonia for the purposes of an exercise of self-determination by its peoples. The first referendum was for the purpose of deciding whether to continue the process of self-determination. The future referendums will relate to the mode of self-determination, whether by independence or other means. The impugned voting restrictions, for the purposes of these plebiscites, were described as follows by the authors:

> **¶2.5.** For the first referendum on 8 November 1998, Decree No. 98–733 of 20 August 1998 on organization of a referendum of the people of New Caledonia, as provided for by article 76 of the Constitution, determined the electorate with reference to article 2 of Act No. 88–1028 of 9 November 1988 (also determined in article 6.3 of the Noumea Accord), namely: 'Persons registered on the electoral rolls for the territory on that date and resident in New Caledonia since 6 November 1988 shall be eligible to vote.'

¶2.6. For future referendums, the electorate was determined by the French Parliament in article 218 of the Organic Law of New Caledonia (No. 99–209) of 19 March 1999 (reflecting article 2.2 of the Noumea Accord (2)), pursuant to which:

'Persons registered on the electoral roll on the date of the referendum and fulfilling one of the following conditions shall be eligible to vote:

(a) They must have been eligible to participate in the referendum of 8 November 1998;

(b) They were not registered on the electoral roll for the referendum of 8 November 1998, but fulfilled the residence requirement for that referendum;

(c) They were not registered on the electoral roll for the 8 November 1998 referendum owing to non-fulfilment of the residence requirement, but must be able to prove that their absence was due to family, professional or medical reasons;

(d) They must enjoy customary civil status or, having been born in New Caledonia, they must have their main moral and material interests in the territory;

(e) Having one parent born in New Caledonia, they must have their main moral and material interests in the territory;

(f) They must be able to prove 20 years' continuous residence in New Caledonia on the date of the referendum or by 31 December 2014 at the latest;

(g) Having been born before 1 January 1989, they must have been resident in New Caledonia from 1988 to 1998;

(p. 156) (h) Having been born on or after 1 January 1989, they must have reached voting age on the date of the referendum and have one parent who fulfilled the conditions for participation in the referendum of 8 November 1998.

Periods spent outside New Caledonia for the performance of national service, for study or training, or for family, professional or medical reasons shall, in the case of persons previously domiciled in the territory, be included in the periods taken into consideration in order to determine domicile.'

¶2.7. The authors, who did not fulfil the above criteria, state that they were excluded from the referendum of 8 November 1998 and that they will also be excluded from referendums planned from 2014 onwards.

The case was brought under article 25, which guarantees the right to vote, as well as article 26 guaranteeing freedom from discrimination. Article 1 however was very relevant to the HRC's reasoning, even though the self-determination guarantee is not justiciable under the OP [7.24]. The HRC found that the voting restrictions in the referendums (past and future) on self-determination were not unreasonable, in light of article 1 of the ICCPR, and therefore did not breach articles 25 and 26.

¶11.2. The Committee has to determine whether the restrictions imposed on the electorate for the purposes of the local referendums of 8 November 1998 and in

2014 or thereafter constitute a violation of articles 25 and 26 of the Covenant, as the authors maintain.…

¶13.3. In the present case, the Committee has taken note of the fact that the local ballots were conducted in the context of a process of self-determination of the population of New Caledonia. In this connection, it has taken into consideration the State party's argument that these referendums—for which the procedures were fixed by the Noumea Accord and established according to the type of ballot by a vote of Congress or Parliament—must, by virtue of their purpose, provide means of determining the opinion of, not the whole of the national population, but the persons 'concerned' by the future of New Caledonia.

¶13.4. Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in article 1 of the Covenant, it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee is of the view, therefore, that, in this case, it may take article 1 into account in interpretation of article 25 of the Covenant.

¶13.5. In relation to the authors' complaints, the Committee observes, as the State party indeed confirms, that the criteria governing the right to vote in the referendums have the effect of establishing a restricted electorate and hence a differentiation between (a) persons deprived of the right to vote, including the author(s) in the ballot in question, and (b) persons permitted to exercise this right, owing to their sufficiently strong links with the territory whose institutional development is at issue. The question which the Committee must decide, therefore, is whether this differentiation is compatible with article 25 of the Covenant. The Committee recalls that not all differentiation constitutes discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant.

¶13.6. The Committee has, first of all, to consider whether the criteria used to determine the restricted electorates are objective.

(p. 157) ¶13.7. The Committee observes that, in conformity with the issue in each ballot, apart from the requirement of inclusion on the electoral rolls, the criteria used are: (a) for the 1998 referendum relating to the continuation or non-continuation of the process of self-determination, the condition of length of residence in New Caledonia; and (b) for the purpose of future referendums directly relating to the option of independence, additional conditions relating to possession of customary civil status, the presence in the territory of moral and material interests, combined with birth of the person concerned or his parents in the territory. It accordingly follows, as the date for a decision on self-determination approaches, that the criteria are more numerous and take into account the specific factors attesting to the strength of the links to the territory. To the length of residence condition (as opposed to the cut-off points for length of residence) for determining a general link with the territory are added more specific links.

¶13.8. The Committee considers that the above-mentioned criteria are based on objective elements for differentiating between residents as regards their relationship with New Caledonia, namely the different forms of ties to the territory, whether specific or general—in conformity with the purpose and nature of each ballot.…

¶13.14. The Committee also has to examine whether the differentiation resulting from the above-mentioned criteria is reasonable and whether the purpose sought is lawful vis-à-vis the Covenant.…

¶13.16. The Committee recalls that, in the present case, article 25 of the Covenant must be considered in conjunction with article 1. It therefore considers that the criteria established are reasonable to the extent that they are applied strictly and solely to ballots held in the framework of a self-determination process. Such criteria, therefore, can be justified only in relation to article 1 of the Covenant, which the State party does. Without expressing a view on the definition of the concept of 'peoples' as referred to in article 1, the Committee considers that, in the present case, it would not be unreasonable to limit participation in local referendums to persons 'concerned' by the future of New Caledonia who have proven, sufficiently strong ties to that territory. The Committee notes, in particular, the conclusions of the Senior Advocate-General of the Court of Cassation, to the effect that in every self-determination process limitations of the electorate are legitimized by the need to ensure a sufficient definition of identity. The Committee also takes into consideration the fact that the Noumea Accord and the Organic Law of 19 March 1999 recognize a New Caledonian citizenship (not excluding French citizenship but linked to it), reflecting the common destiny chosen and providing the basis for the restrictions on the electorate, in particular for the purpose of the final referendum.

¶13.17. Furthermore, in the Committee's view, the restrictions on the electorate resulting from the criteria used for the referendum of 1998 and referendums from 2014 onwards respect the criterion of proportionality to the extent that they are strictly limited *ratione loci* to local ballots on self-determination and therefore have no consequences for participation in general elections, whether legislative, presidential, European or municipal, or other referendums.

¶13.18. Consequently, the Committee considers that the criteria for the determination of the electorates for the referendums of 1998 and 2014 or thereafter are not discriminatory, but are based on objective grounds for differentiation that are reasonable and compatible with the provisions of the Covenant.

¶14.1. Lastly, the authors argue that the cut-off points set for the length of residence requirement, 10 and 20 years respectively for the referendums in question, are excessive and affect their right to vote.…

(p. 158) ¶14.7. Noting that the length of residence criterion is not discriminatory, the Committee considers that, in the present case, the cut-off points set for the referendum of 1998 and referendums from 2014 onwards are not excessive inasmuch as they are in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided. This being the case, these cut-off points do not appear to be disproportionate with respect to a decolonization process involving the participation of residents who, over and above their ethnic origin or political affiliation, have helped, and continue to help, build New Caledonia through their sufficiently strong ties to the territory.

The extent of the voting rights for the referendums in New Caledonia corresponded with the French government's definition of the appropriate peoples who had a right to determine the future political status of that French colony. The HRC apparently approved of that

definition, which restricted self-determination rights to persons with a long-standing connection to the territory.

[7.08] Much contemporary scholarship on self-determination divides the right into a right of external self-determination (ESD) and a right of internal self-determination (ISD).[5] The definition of 'peoples' in terms of the ICCPR becomes less contentious if one recognizes that all peoples are entitled to some form of self-determination, though not all peoples are entitled to the most radical manifestation of the right, ESD. In this respect, a 'people' may be broadly defined as a group with a common racial or ethnic identity, or a cultural identity (which could incorporate political, religious, or linguistic elements) built up over a long period of time.[6]

External Self-Determination

CERD General Recommendation 21

[7.09]

> **¶4.** …The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination, and exploitation.

[7.10] A claim of ESD equates with a claim by a people to a certain territory.[7] ESD is exercised by maintaining existing State boundaries or changing the boundaries of existing States. The first form of ESD arises where the relevant 'self determination unit' is the population of an existing State. The latter arises where the relevant 'self determination unit' wishes to break away from an existing State. The most controversial mode of exercising ESD is by way of secession.[8] During the 1950s and 1960s, the right of secession, and indeed the notion of (p. 159) self-determination, was intertwined with the notion of decolonization.[9] However, in the post-Cold War era, a number of non-colonial peoples have successfully seceded, including the peoples of the former USSR, the former Czechoslovakia, the former Yugoslavia, Eritrea, East Timor, and South Sudan. Furthermore, the text of article 1 does not expressly confine the right on colonial peoples. Indeed, the HRC has now confirmed that the principle of self-determination, and possibly the right of secession in some instances, 'applies to all peoples, and not merely to colonised peoples'.[10]

[7.11] The right of ESD is politically controversial, as it clearly threatens the territorial integrity of States.

CERD General Recommendation 21

> **¶1.** The Committee notes that ethnic or religious groups or minorities frequently refer to the right of self-determination as a basis for an alleged right to secession….
>
> **¶6.** The Committee emphasises that, in accordance with the Declaration of the General Assembly on Friendly Relations, none of the Committee's actions shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and possessing a government representing the whole people belonging to the territory without distinction as to race, creed or colour. In view of the Committee international law has not recognised a general right of peoples to unilaterally declare secession from a state. In this respect, the Committee follows the views expressed in the Agenda for Peace (paras. 17 et seq.), namely that a fragmentation of States may be detrimental to the protection of human rights as well as to the preservation of peace and security. This does not,

however, exclude the possibility of arrangements reached by free agreements of all parties concerned.[11]

[7.12] The HRC has largely avoided consensus comments on the territorial aspirations of secessionist groups within existing States Parties. Future potential candidates for secession include the Chechens, the Quebecois, and the Kosovars, though the existence of an international right of secession for such peoples would likely be opposed by, respectively, the Russian Federation, Canada, and the Federal Republic of Yugoslavia. The HRC has, however, criticized Morocco's policies regarding the Western Sahara:[12]

> **¶9.** The Committee remains concerned about the very slow pace of the preparations towards a referendum in Western Sahara on the question of self-determination, and at the lack of information on the implementation of human rights in that region. The State party should (p. 160) move expeditiously and cooperate fully in the completion of the necessary preparations for the referendum….

As the International Court of Justice has ruled that the peoples of the Western Sahara have a right of external self-determination,[13] it is not surprising that the HRC has singled out their secessionist aspirations for explicit endorsement.[14]

Internal Self-Determination

[7.13] ISD refers to the right of peoples to choose their political status within a State,[15] or to exercise a right of meaningful political participation. For example, the institution of democratic rule in South Africa constituted an exercise of ISD by the black majority in South Africa. The notion of ISD overlaps considerably with the rights guaranteed in articles 25 (right of political participation) and 27 (minority rights)[16] of the ICCPR. Indeed, Cassese describes ISD as a 'manifestation of the totality of rights embodied in the Covenant'.[17]

CERD General Recommendation 21

[7.14]

> **¶4.** …The right to self-determination of peoples has an internal aspect, ie. the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, governments are to represent the whole population without distinction as to race, colour, descent, national, or ethnic origins.
>
> **¶5.** In order to respect fully the rights of all peoples within a state, governments are again called upon to adhere to and implement fully the international human rights instruments and in particular the International Convention on the Elimination of All Forms of Racial Discrimination. Concern for the protection of individual rights without discrimination on racial, ethnic, tribal, religious, or other grounds must guide the policies of governments. In accordance with article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination and other relevant international documents, governments should be sensitive towards the rights of persons of ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth, and to play their part in the government of the country of which its members are citizens. Also, governments should consider, within their respective constitutional frameworks, vesting persons of ethnic or linguistic groups comprised of their

> citizens, where appropriate, with the right to engage in such activities which are particularly relevant to the preservation of the identity of such persons or groups.

(p. 161) **[7.15]** Self-determination is therefore a complex right, entailing an 'internal' and an 'external' form. The right can be conceptualized as a sliding scale of different levels of entitlement to political emancipation, constituting various forms of ISD up to the apex of the right, the right of ESD, which vests only in exceptional circumstances.[18] Different 'peoples' are entitled to different 'levels' of self-determination.

[7.16] It is contended that a people is entitled to ESD,[19] by way of secession, when it lives under colonial[20] or neo-colonial domination,[21] or when it is so severely persecuted, and its human rights so systematically abused, that ESD is necessary to remedy such abuse, and preserve its long-term viability as a people.[22] Alternatively, peoples may reach free agreements to secede from each other,[23] as occurred when Czechoslovakia peacefully split into the Czech and Slovak Republics in 1993. Finally, peoples which are not entitled to ESD are nevertheless entitled to ISD.

[7.17] The HRC has cited article 1 in raising concerns with Israel over the expansion of settlements in the Occupied Territories, and has recommended that it 'cease all construction of settlements in' those territories.[24]

[7.18] Indigenous peoples are peoples entitled to internal self-determination. For example, the HRC has said with respect to Finland:[25]

> **¶17.** The Committee regrets that it has not received a clear answer concerning the rights of the Sami as an indigenous people (Constitution, sect. 17, subsect. 3), in the light of article 1 of the Covenant. It reiterates its concern over the failure to settle the question of Sami rights to land ownership and the various public and private uses of land that affect the Sami's traditional means of subsistence—in particular reindeer breeding—thus endangering their traditional culture and way of life, and hence their identity.
>
> (p. 162) The State party should, in conjunction with the Sami people, swiftly take decisive action to arrive at an appropriate solution to the land dispute with due regard for the need to preserve the Sami identity in accordance with article 27 of the Covenant. Meanwhile it is requested to refrain from any action that might adversely prejudice settlement of the issue of Sami land rights.

This comment also highlights the strong connection between article 1 and article 27 rights.[26]

Article 1(2)

[7.19] Article 1(2) sounds like a very important right. For example, its terms suggest that a government cannot permit mining on a people's land without its approval.[27] The right is tempered by the saving of certain 'international obligations arising out of international economic cooperation'. However, this tempering may be undone by article 47 of the Covenant,[28] which provides:

> Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully their natural wealth and resources.

[7.20] Unfortunately, the HRC has shed very little light on the terms of article 1(2). Its most significant statements have come in the context of the recognition of indigenous land rights. In Concluding Observations on Canada, the HRC stated:[29]

> **¶8.** The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains 'the most pressing human rights issue facing Canadians'. In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasises that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.

Thus, the extinguishment and presumably the diminution of aboriginal native title rights breaches article 1(2).[30]

(p. 163) **[7.21]** The HRC has also stated with regard to Sweden:[31]

> **¶15.** The Committee is concerned at the limited extent to which the Sami Parliament can have a significant role in the decision-making process on issues affecting the traditional lands and economic activities of the indigenous Sami people, such as projects in the fields of hydroelectricity, mining and forestry, as well as the privatization of land….

Thus, indigenous persons should have real political influence over the use to which their traditional lands are put.

Article 1(3)

General Comment 12

[7.22]

> **¶6.** Paragraph 3, in the Committee's opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by its drafting history….The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realisation of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination….

[7.23] Article 1(3) is unusual as it imposes duties on States with regard to persons outside their jurisdiction, indeed even if those people are within the jurisdiction of another State Party.[32] This goes beyond the standard obligation in article 2(1) to respect and ensure the Covenant's rights to persons *within* the jurisdiction.[33] States Parties are expected to take positive measures to 'promote' rights of self-determination where they have been denied. Such measures may include the termination of diplomatic relations with States that deny self-determination rights.[34] States must, however, conform to the UN Charter, and not

‘interfere in the internal affairs of other States’, and are therefore prohibited from using force to assist an oppressed peoples to achieve self-determination in a foreign State.[35]

(p. 164) Non-justiciability under the First Optional Protocol

[7.24] Despite the undoubted importance of article 1, the HRC has paradoxically decided that it is not justiciable under the First Optional Protocol.

Kitok v Sweden (197/85)

This case involved a complaint about denial of reindeer husbandry rights to the author, a member of the Sami people of northern Scandinavia, in alleged breach of, *inter alia*, article 1.[36] The HRC ruled the article 1 complaint inadmissible in the following terms:

> **¶6.3.** …the Committee observed that the author, as an individual, could not claim to be the victim of a violation of the right of self-determination, enshrined in article 1 of the Covenant. Whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, article 1 … deals with rights conferred upon peoples, as such.…

The *Kitok* decision in respect of the non-justiciability of article 1 has been followed in numerous cases, including *Ominayak v Canada* (167/84),[37] *Marshall v Canada* (205/86),[38]*Mahuika v New Zealand* (547/93),[39] and *Poma Poma v Peru* (1457/06).[40]

It is regrettable that the HRC has adopted such a narrow interpretation of the ‘victim’ requirement in the Optional Protocol[41] so as to preclude article 1 complaints, thus depriving victims of article 1 violations of a valuable measure of international recourse.[42] Certain complaints could probably have been more successful if the authors had been permitted to rely on article 1 rather than the Covenant’s individual rights. For example, the authors in *Bordes and Temeharo v France* (645/95) unsuccessfully complained that French nuclear tests in the vicinity of their islands breached their rights to life and family life [3.45]. Perhaps a complaint under article 1, as the tests were conducted without the consent of the islanders and may have severely harmed the natural environment, would have been more viable.

[7.25] In *Diergaardt v Namibia* (760/97), the authors contended that the political power of their group, the Rehoboth Basters, had been reduced by the division of their ‘traditional’ self-governing territory between two regions, reducing the Basters to a minority within two areas, rather than a majority within one. The contention that the reduction of political power for the group (of ethnic Rehoboth Basters within Namibia) violated article 25 (which guarantees a right to effective (p. 165) political participation) foundered due to the individual nature of that right [22.05]. *Diergaardt* is also an example of a complaint that more clearly raised collective article 1 rights rather than individual justiciable rights. However, it was in any case unlikely that the HRC would have declared Namibia’s constitutional arrangements contrary to article 1 when those arrangements were adopted in furtherance of the article 1 rights of the Namibian peoples, who had long been denied self-determination by South Africa [22.06].

Conclusion

[7.26] Article 1 jurisprudence under the ICCPR has been brief and disappointing. It is time for the HRC to issue more significant contributions to the law surrounding this most important of rights. Its ability to do so would be enhanced if it was to drop its narrow approach regarding the non-justiciability of the right under the Optional Protocol. It is also

recommended that the Committee on Economic Social and Cultural Rights issue a General Comment on common article 1.

Footnotes:

1 However, see D McGoldrick, *The Human Rights Committee* (Clarendon Press, 1993), 248 .

2 H Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 14. The CERD General Recommendation 21 on Self-Determination also endorses the Declaration on Friendly Relations at para 3.

3 See R McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 *ICLQ* 857, 866, n 52, and R White, 'Self-Determination: Time for a Re-Assessment?' (1981) 28 *Netherlands International Law Review* 147, 163, n 52, quoting a report by the International Commission of Jurists, *The Events in East Pakistan* (ICJ, 1972), 70.

4 McCorquodale, 'Self-Determination: A Human Rights Approach', 865; M Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 *ICLQ* 241, 261.

5 See eg McCorquodale, 'Self-Determination: A Human Rights Approach', 863, and M Pomerance, *Self-Determination in Law and Practice* (Martinus Nijhoff Publishers, 1982), 37–42.

6 S Joseph, 'Resolving Conflicting Claims of Territorial Sovereignty and External Self-Determination, Part 1' (1999) 3(1) *International Journal of Human Rights* 40, 42–5.

7 L Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 *Yale Journal of International Law* 177.

8 The Declaration on Friendly Relations specifies other modes: free association or integration with another independent State.

9 *Western Sahara Advisory Opinion* [1975] ICJ Rep 12, 37. See also G Simpson, 'The Diffusion of Sovereignty: Self-determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 255, 265, and R McCorquodale, 'South Africa and the Right of Self-Determination' (1994) 10 *South African Journal on Human Rights* 4, 6. See also CERD General Recommendation 21, para 4 [7.09].

10 Concluding Comments on Azerbaijan (1994) UN doc CCPR/C/79/Add.38, para 6.

11 The 'Agenda for Peace' was issued in 1992 by Secretary General Boutros Boutros Ghali (1992) UN doc A/47/277-S/24111.

12 (1999) UN doc CCPR/C/79/Add.113.

13 *Western Sahara Advisory Opinion* [1975] ICJ Rep 12.

14 See also Concluding Observations on Morocco (2004) UN doc CCPR/CO/82/MAR, para 8; United States of America (2006) UN doc CCPR/C/USA/CO/3/Rev.1, para 37; Panama (2008) UN doc CCPR/C/PAN/CO/3, para 21.

15 McCorquodale, 'Self-Determination: A Human Rights Approach', 864.

16 See generally Ch 24.

17 A Cassese, *Self-Determination of Peoples* (Cambridge University Press, 1995).

18 F Kirgis Jr, 'The Degrees of Self-Determination in the United Nations Era' (1994) 88 *American Journal of International Law* 304, 306, and B Kingsbury, 'Claims by Non-State Groups in International Law' (1992) 25 *Cornell International Law Journal* 481, 503.

19 See generally on situations where peoples should be recognized as having a right of ESD, S Joseph, 'Resolving Conflicting Claims of Territorial Sovereignty and External Self-Determination, Part 1', and S Joseph, 'Resolving Conflicting Claims of Territorial Sovereignty and External Self-Determination, Part 2' (1999) 3(2) *International Journal of Human Rights* 49.

20 See [7.10].

21 Post-Second World War invasions can be termed 'neo-colonial situations', and have rarely been recognized as valid by the international community. See eg regarding the Indonesian invasion of East Timor, GA Res 3485 (XXX) and SC Res 384 (1975). See, regarding the Chinese invasion of Tibet, GA Res 1723/16 (20 December 1961). See eg regarding the Israeli Occupied Territories, UN doc A/RES/ES-7/2, GAOR, 7th Emergency Session, Supp 1, 3 (1980). See, regarding the Turkish invasion of northern Cyprus, SC Res 353 (1974), SC Res 440 (1978), and SC Res 541, 18 November 1983. See also S Joseph, 'Resolving Conflicting Claims of Territorial Sovereignty and External Self-Determination, Part 2', 52–3.

22 Numerous commentators have recognized a right of 'remedial ESD' such as L Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press, 1978), 220, and White, 'Self-Determination: Time for a Re-Assessment?', 160. Its existence is also implied by the Declaration on Friendly Relations, which guarantees territorial integrity only to States which are 'conducting themselves in compliance with the principles of equal rights and self-determination of people'. See also CERD General Recommendation 21, para 6 [7.11].

23 See eg CERD General Recommendation 21, para 6 [7.11].

24 See Concluding Observations on Israel (2010) UN doc CCPR/C/ISR/CO/3, para 16.

25 (2004) UN doc CCPR/CO/82/FIN; see also Concluding Observations on Chile (2007) UN doc CCPR/C/CHL/CO/5, para 19.

26 See [24.02] and [24.03].

27 See, in this respect, [24.27]ff.

28 McGoldrick, *The Human Rights Committee*, 15 and 251.

29 (1999) UN doc CCPR/C/79/Add.105.

30 The CERD Committee found the diminution of native title rights in breach of the CERD Convention, as they were racially discriminatory, in Concluding Comments on Australia (1999) UN doc CERD/C/54/Misc.40/Rev.2. As to the nature of self-determination and its relationship with economic and social aspects of subsistence, see SJ Anaya, *Indigenous People and International Law* (Oxford University Press, 1996).

31 Concluding Observations on Sweden (2002) UN doc CCPR/CO/74/SWE. See also [24.27]ff for the OP cases where indigenous peoples have made (largely unsuccessful) complaints about alleged infringement of their cultural rights arising from the use of land.

32 McGoldrick, *The Human Rights Committee*, 253. See also Ch 4, on territorial limits to a State Party's responsibility.

33 McGoldrick, *The Human Rights Committee*, 253.

34 In the 1980s, before the advent of Concluding Comments, individual HRC members questioned State Party representatives regarding relations with Israel (due to its occupation of Palestinian territories) and South Africa (due to its apartheid system); McGoldrick, *The Human Rights Committee*, 251–2.

35 See J Crawford, *The Creation of States in International Law* (Clarendon Press, 1979), 114–18. Note that no general doctrine of unilateral humanitarian intervention has yet been formally accepted in international law: see eg B Simma, 'NATO, the UN, and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1.

36 See, on the art 27 aspect of this complaint, [24.27].

37 At para 13.3. Though the Lubicon Lake Band could be termed a 'people' for the purposes of art 1, only individuals, rather than peoples, have standing under the OP: see [3.10]–[3.13].

38 At para 5.1 (also known as *Mikmaq Tribal Society v Canada*).

39 At para 9.2.

40 At para 6.3.

41 See also [3.11]ff.

42 Cassese, *Self-Determination of Peoples*, persuasively argues for a more liberal interpretation of the Optional Protocol in this regard at 141–6 and 345–6.

Annex ZX

EXTRATERRITORIALITY OF HUMAN RIGHTS TREATIES

On the eve of the planned U.S. invasion of Haiti, responding to an appeal from the International Committee of the Red Cross to apply international humanitarian law, the United States stated that

> [i]f it becomes necessary to use force and engage in hostilities, the United States will, upon any engagement of forces, apply all of the provisions of the Geneva Conventions and the customary international law dealing with armed conflict.
>
> Further, the United States will accord prisoner of war treatment to any detained member of the Haitian armed forces. Any member of the U.S. armed forces who is detained by Haitian forces must be accorded prisoner of war treatment.[1]

The agreement of September 18, 1994, negotiated in Port-au-Prince between President Jimmy Carter and General Raoul Cédras, and its acceptance by the Aristide government, led to the consent-based, nonviolent, hostilities-free entry of U.S. forces and their peaceful deployment. In such circumstances, the Geneva Conventions on the Protection of Victims of War of August 12, 1949, are not, strictly speaking, applicable.[2] Nevertheless, the U.S. forces have stated that, although persons they have detained in Haiti are detainees, not POWs, they have been accorded POW treatment in terms of the third Geneva Convention.[3] This attitude deserves to be commended because the Geneva Convention ensures humane treatment and judicial guarantees.

Of course, the readiness to apply the Geneva Conventions, formally or by analogy, should come as no surprise. It is axiomatic that the law of war or international humanitarian law obligates members of the armed forces of a state regardless of whether they operate in or outside the territory of that state. The object of this essay is to draw attention to the fact that some human rights treaties have a similar extraterritorial effect; in particular, the obligations of the United States to ensure respect for the pertinent provisions of the International Covenant on Civil and Political Rights (Political Covenant)[4] apply to the treatment of persons in Haiti under the authority and power of U.S. forces—and thus, in terms of Article 2 of the Political Covenant, under the "jurisdiction" of the United States.[5] It is

[1] U.S. Permanent Mission in Geneva, Diplomatic Note to the International Committee of the Red Cross (Sept. 19, 1994) (on file with author).

[2] Common Article 2. *See, e.g.*, Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 (Geneva Convention No. III). *See also* COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 22–23 (Jean de Preux ed., 1960). *See generally* Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of The Hague), in* UNESCO, INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 93, 93–103 (1988).

[3] Larry Rohter, *Legal Vacuum in Haiti Is Testing U.S. Policy*, N.Y. TIMES, Nov. 4, 1994, at A32.

[4] Dec. 16, 1966, 999 UNTS 171 (entered into force for the United States Sept. 8, 1992). The fact that Haiti is also a party to the Political Covenant creates a favorable political environment for its application by U.S. forces in Haiti.

[5] The U.S. declaration that the provisions of the Covenant are non-self-executing has no effect on the international obligations of the United States to respect the Covenant. For a survey of U.S. case law concerning the applicability abroad of U.S. constitutional guarantees, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §721 (1987). *But see* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). For a critique of *Verdugo*, see Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AJIL 444, 491–93 (1990).

important to point this out because Haiti is the first major exercise of authority in a foreign country by U.S. forces since the U.S. ratification of the Political Covenant.

The extraterritorial reach of the Political Covenant needs to be explained. Article 2(1) of the Covenant provides that each party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant." The legislative history of Article 2(1) does not support a narrow territorial construction.[6] The leading study by Professor Buergenthal, now a member of the United Nations Human Rights Committee, argues that Article 2(1) should be read so that each party would have assumed the obligation to respect and ensure the rights recognized in the Covenant both "to all individuals within its territory" *and* "to all individuals subject to its jurisdiction."[7] This interpretation has almost never been questioned and has long ceased to be the preserve of scholars; it has obtained the imprimatur of the Human Rights Committee and UN rapporteurs.

Aligning the Covenant with the Optional Protocol, which speaks (in Art. 1(1)) only of persons subject to the jurisdiction of the state, the Committee in its general comments on Article 2 asserted that states are obligated to ensure rights to all "individuals under their jurisdiction."[8] In its recent general comment on Article 27, the Committee referred to Article 2(1) as applying to all individuals "within the territory *or* under the jurisdiction of the state."[9] In its most recent general comment, on Article 41 of the Covenant, the Committee asserted in broad and categorical terms that "[t]he intention of the Covenant is that the rights contained therein should be ensured to all those under a State's party's jurisdiction."[10] In examining the report of Iraq under Article 40, the Committee expressed "particular concern" over the failure of the report to address the events in Kuwait under Iraqi occupation, "given Iraq's clear responsibility under international law for the observance of human rights during its occupation of that country."[11]

In some cases, the Committee took a similar position in adopting views under the Optional Protocol. In one case, for example, it stated that Article 2(1) does not imply that the state party concerned cannot be held accountable for violations of rights under the Covenant that its agents commit upon the territory of another state, whether with the acquiescence of that state or in opposition to it.[12] It

[6] During the discussion of the words "within its jurisdiction," which were proposed by the United States, the view was expressed that "a State should not be relieved of its obligations under the covenant to persons who remained within its jurisdiction merely because they were not within its territory." MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 53 (1987).

[7] Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations, in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74 (Louis Henkin ed., 1981). *Contra* Dietrich Schindler, *Human Rights and Humanitarian Law,* 31 AM. U. L. REV. 935, 939 (1982).

[8] *See* UN Doc. HRI/GEN/1/Rev.1, at 4 (1994). For a discussion of the scope *ratione loci* of the Political Covenant, see THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 106–09 (1986).

[9] UN Doc. CCPR/C/21/Rev.1/Add.5, para. 4 (1994) (emphasis added).

[10] UN Doc. CCPR/C/21/Rev.1/Add.6, at 4, para. 12 (1994) (unedited text).

[11] Report of the Human Rights Committee, UN GAOR, 46th Sess., Supp. No. 40, para. 652, UN Doc. A/46/40 (1991). *See also id.*, paras. 625, 636, 640.

[12] Saldías de López v. Uruguay, UN GAOR, 36th Sess., Supp. No. 40, at 176, 182, UN Doc. A/36/40 (1981).

emphasized that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[13] In a recent case, in discussing a party's obligations with regard to its own territory, the Committee spoke simply of "threats . . . to the personal liberty and security of non-detained individuals within the State party's jurisdiction,"[14] without mentioning territory at all.

Invoking previous practice of the Human Rights Committee, Walter Kälin, special rapporteur of the Commission on Human Rights on Kuwait under Iraqi occupation, categorically asserted that Iraq was responsible in Kuwait for complying with its obligations under the Covenant, without regard to the nationality of the victims or, because of the nonreciprocal character of those obligations, whether or not the victims' governments were parties to it.[15]

Not all the provisions of the Political Covenant are by their nature intended for extraterritorial application. Such fundamental principles as the prohibition of the arbitrary taking of life, the duty of humane treatment of persons in detention, the prohibition of inhuman or degrading treatment or punishment, and essential due process must always be respected. Some provisions, however, obviously do not lend themselves to extraterritorial application and the application of others may have to be adapted to the circumstances. Implementation in Haiti of the due process provisions in Article 14 of the Covenant, for example, must take into account the detaining state's (the U.S.) lack of a civilian judiciary in Haiti,[16] the absence of a functioning Haitian judiciary, and the need to apply Haitian criminal law to most of the offenses implicated in the detentions.[17]

The Political Covenant imposes treaty constraints not only on U.S. armed forces abroad, but also on civilian agents and officials exercising power and authority, especially in law enforcement. If U.S. agents abducted persons abroad and brought them to the United States for trial, they would violate, in addition to other applicable rules of international law, the country's treaty obligations under the Political Covenant.[18]

In view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state's obligation to respect human rights to its national territory.

[13] *Id.* at 183. The European Commission of Human Rights similarly interpreted Article 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights . . .") of the European Convention on Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 UNTS 221, with regard to the obligations of Turkey in occupied Cyprus. Cyprus v. Turkey, App. Nos. 6780/74, 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 125, 136 (1975), *summarized in* MERON, *supra* note 8, at 107 n.73. *See also* HARITINI DIPLA, LA RESPONSABILITÉ DE L'ETAT POUR VIOLATION DES DROITS DE L'HOMME 45–51 (1994).

[14] Mojica v. Dominican Republic, UN Doc. CCPR/C/51/D/449/1991, para. 5.4 (1994). *See also* Kindler v. Canada, Communication No. 470/1991, Report of the Human Rights Committee, UN GAOR, 48th Sess., Supp. No. 40 (pt. II), at 138, para. 6.2, UN Doc. A/48/40 (Part II).

[15] Walter Kälin, Report on the situation of human rights in Kuwait under Iraqi occupation, UN Doc. E/CN.4/1992/26, paras. 58–59. On this question, see Theodor Meron, *Prisoners of War, Civilians and Diplomats in the Gulf Crisis,* 85 AJIL 104, 106–07 (1991). *See generally* Theodor Meron, *Applicability of Multilateral Conventions to Occupied Territories,* 72 AJIL 542 (1978).

[16] The Covenant assumes that the same state party is responsible for the executive and the judiciary.

[17] The Security Council resolutions authorizing the U.S. intervention contain no guidance as to the applicable criminal law.

[18] For a trenchant critique of United States v. Alvarez-Machain, 112 S.Ct. 2188 (1992), see Louis Henkin, *Will the U.S. Supreme Court Fail International Law?,* ASIL NEWSLETTER, Aug.–Sept. 1992, at 1. *See also* Lowenfeld, *supra* note 5; Andreas F. Lowenfeld, *Kidnaping by Government Order: A Follow-up,* 84 AJIL at 712.

Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues.[19] That presumption could be rebutted only when the nature and the content of a particular right or treaty language suggest otherwise.[20]

Sadly, in *Sale v. Haitian Centers Council, Inc.*[21] the Supreme Court took a wholly different approach to the territorial scope of the Convention Relating to the Status of Refugees,[22] stating that

> a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.[23]

In *Sale,* pursuant to a presidential executive order, the Coast Guard intercepted vessels on the high seas that were transporting undocumented aliens to the United States and returned them to Haiti without first determining whether the aliens qualified as refugees, a determination to which they would have been entitled had the interdiction on the high seas not taken place. Most of the provisions of the Refugee Convention, in contrast to those of the Political Covenant, may be primarily territorial in character, in the sense that they apply to claimants who have reached the soil of the state of asylum. But—keeping in mind Article 33 of the Refugee Convention—when a state undertakes to exercise its jurisdiction to enforce its laws on the high seas by returning potential asylum seekers to the country they are fleeing, the Convention, and not only its spirit (as the Court suggested), is breached. As regards such an expansion of the state's jurisdiction to enforce its laws, the Court's comment on the territoriality of the Convention is, I submit, beside the point. I agree with Professor Henkin's persuasive critique of the Court's decision.[24] In the eyes of the international community, and the UN High

[19] Recent (and even the earlier European Convention on Human Rights, see *supra* note 13) human rights treaties avoid the tangled language of the Political Covenant and are indisputably addressed to the protection of all individuals that may fall under the jurisdiction of the state party. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46 (Dec. 10, 1984), UN GAOR, 39th Sess., Supp. No. 51, at 197, UN Doc. A/39/51 (1985), requires a state to take certain steps to prevent acts of torture "in any territory under its jurisdiction" (Art. 2(1)). The Convention on the Rights of the Child, GA Res. 44/25 (Nov. 20, 1989), UN GAOR, 44th Sess., Supp. No. 49, at 167, UN Doc. A/44/49 (1989), requires states to respect and ensure certain rights "to each child within their jurisdiction" (Art. 2(1)). The American Convention on Human Rights, Nov. 22, 1969, OEA/Ser.K/XVI.1.1, doc.70, rev.1, corr.1 (1970), *reprinted in* 1 THE INTER-AMERICAN SYSTEM, pt. II at 51 (F. V. García-Amador ed., 1983), addresses rights of all persons "subject to [the] jurisdiction [of states parties]" (Art. 1(1)).

See generally LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 29 (1989).

[20] Walter Kälin argued that the International Covenant on Economic, Social and Cultural Rights was binding on Iraq in Kuwait during the occupation: "[no] provision of the Covenant limits its application to the territory of States parties. . . . [A] State party remains bound by the Covenant if it occupies the territory of another State and exercises there de facto State power." Kälin, *supra* note 15, at 14.

[21] 113 S.Ct. 2549 (1993).

[22] July 28, 1951, 189 UNTS 137.

[23] 113 S.Ct. at 2565.

[24] "It is incredible," he wrote, "that states that had agreed not to force any human being back into the hands of his/her oppressors intended to leave themselves—and each other—free to reach out beyond their territory to seize a refugee and to return him/her to the country from which he sought to escape." Louis Henkin, *Notes from the President,* ASIL NEWSLETTER, Sept.–Oct. 1993, at 1.

Commissioner for Refugees, the decision of the Supreme Court leaves the nation in violation of customary international law and its treaty obligations.

Bona fide interpretation of human rights treaties by the administration and the courts is called for, in accordance with their object and purpose of promoting human rights, even where such interpretation leads to the extraterritoriality of humanitarian obligations of the United States. The established jurisprudence of the Human Rights Committee provides clear guidance and should discourage a narrow territorial construction of the Political Covenant.[25]

Narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure that a state should respect human rights of persons over whom it exercises jurisdiction. Because it holds effective power in Haiti, the United States must respect its obligations under the Covenant. Fortunately, the administration has not advanced the claim that it is not obligated to respect its obligations under the pertinent human rights treaties with regard to the land territory of Haiti.

THEODOR MERON*

HAITI AND THE VALIDITY OF INTERNATIONAL ACTION

In December 1990, after decades of dictatorship, the Haitian people overwhelmingly elected Jean-Bertrand Aristide as President. Every aspect of the election was monitored by international organizations and confirmed as "free and fair."[1] Within months, the army, an ill-trained force of some five thousand men, seized power, expelled Aristide, and brutally suppressed popular protest. The Organization of American States and the United Nations Security Council condemned the coup and its aftermath and ordered economic sanctions to dislodge the military. The sanctions failed. On July 31, 1994, the Security Council, acknowledging the gravity of the situation and recognizing that an "exceptional response" was required, passed Resolution 940, authorizing military action.[2] The legality and wisdom of Resolution 940 has been criticized on the following grounds.

• *Internal human rights violations do not constitute "threats to the peace," the UN Charter's contingency for coercive action.* In Haiti, that bridge was long since crossed. The Council's decision to apply economic sanctions—an action that is

[25] The United States will, of course, be subject to the Committee's scrutiny of its annual reports under Article 40 and in case of complaints lodged by other state parties under Article 41, which it has accepted.

* I am grateful to Professors Thomas Buergenthal, Louis Henkin and Andreas Lowenfeld for their suggestions.

[1] On international monitoring of the Haitian election of December 16, 1990, see Georges A. Fauriol, *Inventing Democracy: The Elections of 1990, in* THE HAITIAN CHALLENGE: U.S. FOREIGN POLICY CONSIDERATIONS 53, 57 (Georges A. Fauriol ed., 1993); INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT, 1990–91, at 468, OEA/Ser.L/V/II.79, rev.1 (1991). For U.S. reaction and assessment, see Howard W. French, *Haitians Overwhelmingly Elect Populist Priest to the Presidency,* N.Y. TIMES, Dec. 17, 1990, at A1; *Haiti's Choice, and Father Aristide's,* N.Y. TIMES, Dec. 18, 1990, at A24; *Haiti's First Freely Elected Leader,* WASH. POST, Dec. 20, 1991, at A23. On international election monitoring in general, see W. Michael Reisman, *International Election Observation,* 4 PACE U. Y.B. INT'L L. 1 (1992).

[2] SC Res. 940 (July 31, 1994), *reprinted in* N.Y. TIMES, July 31, 1994, at A6.

Annex ZY

Human Rights.[37] Consisting of a preamble and thirty articles, it provided succinct formulations of a catalogue of fundamental rights. The treaty and measures of implementation would wait another eighteen years. In 1966, the General Assembly approved two international covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as an Optional Protocol providing for individual petitions alleging violations of civil and political rights.[38]

In June 1947, John P. Humphrey of the United Nations Secretariat prepared an initial draft bill of rights as a basis for debate within the Commission on Human Rights. His forty-eight-article text was derived from a detailed study of national constitutional provisions. A document of several hundred pages was prepared, collating the formulations of rights in the national constitutional law of the United Nations member states.[39] It did not even look at the legal culture and traditions of countries without written constitutions, in particular the United Kingdom and some other members of the Commonwealth like Canada, Australia, and New Zealand. Thus, for example, no account was taken of the English Bill of Rights. There was no suggestion that this was an attempt to codify human rights norms under international law. The idea that such norms existed would have been hotly contested. To the extent that any source of international law was involved, the Secretariat draft of the Universal Declaration might be said to have been influenced by 'general principles of law'.[40]

Today, it would not be uncommon in negotiations of an international treaty, particularly one dealing with human rights, for delegates to refer to customary international law. But there were virtually no such references during the drafting of the Universal Declaration of Human Rights in 1946, 1947, and 1948. In the Third Committee of the General Assembly the Belgian delegate, Fernand Dehousse, made a formal statement 'on the Legal Significance of the Declaration'. He said that some of the principles in the Universal Declaration 'would only repeat rules already in the customary law of nations and were, in consequence, recognised in unwritten international law. The act of inscribing them in an international declaration could not deprive these rules of the binding character they already possessed'. Although without any specification, he explained that '[o]ther principles which would be included in the declaration did not belong to customary international

[37] Universal Declaration of Human Rights, A/RES/217 (III).

[38] International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, A/RES/2200 (XXI).

[39] Drafting Committee on an International Bill of Human Rights, International Bill of Rights Documented Outline, E/CN.4/AC.1/3/Add.1.

[40] Michael O'Boyle and Michelle Lafferty, 'General Principles and Constitutions as Sources of Human Rights Law', in Dinah Shelton, ed., *The Oxford Handbook of International Human Rights Law*, Oxford: Oxford University Press, 2013, pp. 194–221, at p. 198.

law and the fact of their inclusion in an international declaration would certainly not make them obligatory'.[41]

The only other mention of customary law during the drafting of the Universal Declaration related to the principle of legality and the non-retroactivity of criminal law. The concern was not whether some or all of the norms in the Declaration were customary in nature but rather whether such a thing as international crimes could be said to exist. Dehousse of Belgium stated: 'International law included an extremely important customary section which it was essential to take into account.'[42] Radevanovic of Yugoslavia said that 'from the penal point of view, international law had not been codified; it was based on custom.'[43] Finally, René Cassin of France 'confirmed that his delegation understood by "international law", positive law, both customary and written.'[44]

Shortly after the adoption of the Declaration, Hersch Lauterpacht was critical of Dehousse's comments on its legal significance, insisting that prior to adoption of the Charter of the United Nations, 'apart from the precarious doctrine of humanitarian intervention, international law considered these matters to be within the exclusive domestic jurisdiction of the state'.[45] Lauterpacht examined various theories of the legal status of the Declaration, notably the argument that it codified 'general principles of law' and that it was an authoritative interpretation of the Charter of the United Nations. He made only a single, and exceedingly dismissive, reference to customary international law as a possible basis for attributing legal force to the Universal Declaration: 'The student of international law may find it difficult to subscribe to the view that it is a rule of customary international law that, to mention some of the least controversial pronouncements of the Declaration, "everyone has the right to life, liberty and security of person" (Art. 3 of the Declaration); or that "no one shall be held in slavery or servitude" (Art. 4); or that "no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment" (Art. 5).'[46] Lauterpacht also rejected the thesis that the provisions of the Universal Declaration might constitute binding legal rules as 'general principles of law recognised by civilised nations', which is the formulation in Article 38(1)(c) of the Statute of the International Court of Justice. He conceded that '[t]he Declaration

[41] Summary Record of the hundred and eighth meeting [of the Third Committee of the General Assembly], 20 October 1948, *Official Records of the General Assembly*, Third Session, 1948, p. 200.

[42] Summary Record of the hundred and sixteenth meeting [of the Third Committee of the General Assembly], 29 October 1948, *Official Records of the General Assembly*, Third Session, 1948, p. 270.

[43] Ibid., p. 272.

[44] Ibid., p. 275.

[45] Hersch Lauterpacht, 'The Universal Declaration of Human Rights', (1948) 25 *British Yearbook of International Law* 354, at p. 365. Also: Hersch Lauterpacht, *International Law and Human Rights*, London: Stevens and Sons, 1950, p. 407.

[46] Hersch Lauterpacht, 'The Universal Declaration of Human Rights', (1948) 25 *British Yearbook of International Law* 354, pp. 364–365.

gives expression to what, in the fullness of time, ought to become principles of law generally recognised and acted upon by States Members of the United Nations'.[47]

Writing decades later, John Humphrey, who headed the Secretariat of the Commission on Human Rights for two decades starting in 1947, claimed that from the time of its adoption he subscribed to the view that the Universal Declaration of Human Rights constituted a codification of customary law, but he added that he could not 'remember anyone in 1948 who shared my views'.[48] Nor is there any evidence of anyone else remembering that Humphrey held the view. 'That substantial portions of the Universal Declaration of Human Rights, adopted in 1948, eventually might become customary international law, and therefore binding on all states, was beyond the comprehension and vision of all but a few of the participants',[49] wrote Richard Lillich nearly fifty years after the Declaration's adoption.

There was certainly a debate in 1948 about the legal status of the Declaration but, according to the record, apart from the isolated comment by the Belgian delegate cited above, claims about customary law did not figure in the conversations. Many delegations felt deceived that the Declaration was to proceed to adoption without an accompanying binding treaty, for which the text was far from ready. They were therefore somewhat contemptuous of the Declaration, treating it as a pale and inadequate substitute for the Covenant that they had been promised. One of the most eloquent voices for this view was Hersch Lauterpacht. He said bluntly that '[n]ot being a legal instrument, the Declaration would appear to be outside international law. Its provisions cannot properly be the subject-matter of legal interpretation.'[50] Humphrey was furious with Lauterpacht, but he wrote much later that it was 'only fair' to note that Lauterpacht's comments were made 'shortly after the adoption of the Declaration, before it began to have any real impact and before the subtle processes began to work which would make it part of the customary law of nations'.[51]

More than a decade after the Declaration's adoption, Egon Schwelb, then Deputy Director of the Division of Human Rights of the United Nations Secretariat, spoke at the annual meeting of the American Society of International Law on the influence of the Universal Declaration in national and international law. He said 'that while the substance of most, though by no means all, of the provisions of the Declaration may well be said to be identical with general principles of law recognised by civilised nations, the proposition that the Declaration is a codification of

[47] Hersch Lauterpacht, *International Law and Human Rights*, London: Stevens and Sons, 1950, p. 408.

[48] John P. Humphrey, *Human Rights and the United Nations: A Great Adventure*, Dobbs Ferry, NY: Transnational Publishers, 1984, p. 65.

[49] Richard Lillich, 'The Growing Importance of Customary International Human Rights Law', (1996) 25 *Georgia Journal of International and Comparative Law* 1, at p. 1.

[50] Hersch Lauterpacht, 'The Universal Declaration of Human Rights', (1948) 25 *British Yearbook of International Law* 354, at p. 369. Along similar lines, Josef L. Kunz, 'The United Nations Declaration of Human Rights', (1949) 43 *American Journal of International Law* 316, at p. 321: 'it is not law'.

[51] John P. Humphrey, *Human Rights and the United Nations: A Great Adventure*, Dobbs Ferry, NY: Transnational Publishers, 1984, p. 74.

these general principles is not warranted'.[52] Schwelb provided many compelling examples of the influence of the Declaration, citing its role in treaty-making and in constitutional law, but he did not mention customary international law. Schwelb appeared to discount any claim to a relationship of the Universal Declaration with customary international law.

The inescapable conclusion is that in 1948, when the Universal Declaration of Human Rights was adopted, there was little or no customary international law of human rights. It even seems audacious to contend that it was 'emerging' or 'crystallising'. Rather, the Universal Declaration launched a process that proceeded along two strands: the detailed codification of international human rights law in the many treaties and other instruments that it spawned directly or indirectly, and the gradual and less tangible appearance of state practice and *opinio juris* leading, some years later, to the establishment of a corpus worthy of being described as customary international law.

B. The debate about customary human rights law emerges

It was only in the mid-1960s that judges, academic lawyers, and activists began to speak of the customary law of human rights. When the Universal Declaration was adopted by the General Assembly, in 1948, there was some expectation that the Covenant would arrive a year or perhaps two later. But the work dragged on. In 1951, the General Assembly decided to split the draft Covenant, whose content closely tracked the Universal Declaration, into two separate instruments, based upon the nature of the rights that they contained. In 1954, the Commission on Human Rights submitted texts of the draft covenants on civil and political rights and on economic, social, and cultural rights for consideration by the General Assembly. The negotiations continued for more than a decade and the two Covenants were only adopted in 1966. It took another ten years before the thirty-five ratifications necessary for their entry into force were obtained.

There was understandable frustration about the pace of adoption and entry into force of these missing components of the international bill of rights. This provoked consideration of other pathways to the development of human rights law, stimulating interest in the potential of customary international law. In 1965, Humphrey Waldock, the British judge at the European Court of Human Rights and later at the International Court of Justice, wrote that the Universal Declaration of Human Rights was clothed 'in the character of customary international law'.[53] Nobel Peace

[52] Egon Schwelb, 'The Influence of the Universal Declaration of Human Rights on International and National Law', (1959) 53 *Proceedings of the American Society of International Law* 217, at p. 218.

[53] Humphrey Waldock, 'Human Rights in Contemporary International Law and the Significance of the European Convention', (1965) 11 *International and Comparative Law Quarterly Supplementary Publication* 1, p. 15.

Prize laureate Seán MacBride wrote in the *UNESCO Courier*, on the twentieth anniversary of the adoption of the Universal Declaration, that 'there is a growing view among international lawyers that some of its provisions, which are justiciable, now form part of customary international law … The Universal Declaration does now represent in written form the basis for the law of nations, the laws of humanity and the dictates of the public conscience as accepted in the twentieth century.'[54] The language was borrowed from the preambles of the two Hague Conventions on the laws and customs of war. The same year, a conference of non-governmental organisations adopted the 'Montreal Statement', affirming that the 'Universal Declaration of Human Rights ... has over the years become part of customary international law'.[55] In the same vein, but without an explicit claim about customary international law, the Declaration of Tehran, adopted by the 1968 International Conference on Human Rights, said that the Universal Declaration 'constitutes an obligation for members of the international community'.[56]

Recognition that human rights had entered the domain of customary international law received important judicial recognition in 1966 from Judge Kōtarō Tanaka of the International Court of Justice. Referring to Article 38(1)(b) of the Statute of the Court, Judge Tanaka said although customary law had traditionally developed as part of an historical process over a long period of time, the establishment of the League of Nations and the United Nations had brought changes. 'In the contemporary age of highly developed techniques of communication and information, the formation of a custom through the medium of international organisations is greatly facilitated and accelerated; the establishment of such a custom would require no more than one generation or even far less than that', he wrote.[57] Judge Tanaka said that '[t]he method of the generation of customary international law is in the stage of transformation from being an individualistic process to being a collectivistic process'.[58] He concluded that a norm prohibiting racial discrimination had emerged through an 'accumulation of authoritative pronouncements' in the form of resolutions, trust territory agreements, and above all the Universal Declaration of Human Rights.

In 1976, John Humphrey wrote that '[i]n the more than a quarter of a century since its adoption, however, the Declaration has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is

[54] Seán MacBride, 'The New Frontiers of International Law', *UNESCO Courier*, January 1968, p. 26.
[55] 'Montreal Statement of the Assembly for Human Rights', (1968) 9 *Journal of the International Commission of Jurists* 94, at p. 95.
[56] Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968, A/CONF.32/41, para. 2.
[57] *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, Dissenting opinion of Judge Tanaka, p. 293.
[58] Ibid., p. 294.

now part of the customary law of nations and therefore is binding on all states'.[59] Humphrey added, in a footnote: 'This claim is applicable only to those provisions that are justiciable. Philosophical assertions, such as those set forth in article 1, are not justiciable.'[60] Louis Sohn described the Declaration as 'a binding instrument in its own right'.[61] In 1980, Myres McDougal, Harold Lasswell, and Lung-chu Chen discussed 'the evolution of the Universal Declaration of Human Rights from its first status as mere common aspiration to its present wide acceptance as authoritative legal requirement',[62] concluding that it constituted 'established customary international law, having the attributes of *jus cogens* and constituting the heart of a global bill of rights'.[63] Writing in 1982, although he would later adjust his position,[64] Philip Alston said there was 'a large and growing body of evidence' favouring the claim that at least the first twenty-one articles of the Declaration were part of customary law.[65] Oscar Schachter, without invoking the Declaration as such, described the 'hard core' of human rights as being part of customary international law.[66] Frederic L. Kirgis wrote that 'the Universal Declaration of Human Rights has come to be regarded as an authoritative articulation of customary international law, at least with respect to the most fundamental human rights, no matter how widespread or persistent the nonconforming state conduct may be'.[67] In the early 1990s, several distinguished Scandinavian scholars stated that 'plentiful evidence of general and specific practice by the international community and its components has led several statesmen and scholars to conclude that the UDHR constitutes binding law as international custom in accordance with article 38 of the Statute of the International Court of Justice'. They acknowledged that other writers had suggested 'that at least many of the rights spelled out in the UDHR have emerged as rules of customary law'.[68] And a decade later,

[59] John P. Humphrey, 'The International Bill of Rights: Scope and Implementation', (1976) 17 *William and Mary Law Review* 527, at p. 529 (internal references omitted).

[60] Ibid., fn. 13.

[61] Louis B. Sohn, 'The Human Rights Law of the Charter', (1977) 12 *Texas International Law Journal* 129, at p. 133. See also: Louis B. Sohn, 'John A. Sibley Lecture: The Shaping of International Law', (1978) 8 *Georgia Journal of International and Comparative Law* 1, at pp. 18–22; Louis B. Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States', (1982) 32 *American University Law Review* 1, at p. 17.

[62] Myres S. McDougal, Harold Lasswell, and Lung-Chu Chen, *Human Rights and World Public Order*, New Haven: Yale University Press, 1980, p. 272.

[63] Ibid., p. 274.

[64] A '*volte face*' that Richard Lillich described as 'passing strange': Richard Lillich, 'The Growing Importance of Customary International Human Rights Law', (1996) 25 *Georgia Journal of International and Comparative Law* 1, at p. 11, fn. 61.

[65] Philip Alston, 'The Universal Declaration at 35: Western and Passée or Alive and Universal', (1982) 31 *ICJ Review* 60, at p. 69.

[66] Oscar Schachter, 'International Law in Theory and Practice: General Course in Public International Law', (1982) 178-V *Receuil des cours* 21, at pp. 333–342.

[67] Frederic L. Kirgis, 'Custom on a Sliding Scale', (1987) 81 *American Journal of International Law* 146, 147–148.

[68] 'Introduction', in Asbjørn Eide, Gudmunder Alfredsson, Göran Melander, Lars Adam Rejof, and Allan Rosas, eds., *The Universal Declaration of Human Rights: A Commentary*, Oslo: Scandinavian

in the early 2000s, Manfred Nowak wrote of the Universal Declaration that '[n]o doubt some of its provisions, such as the prohibition of torture and slavery, today enjoy the status of customary international law, yet despite certain legal opinions to the contrary, it is still doubtful whether the Declaration as a whole can be considered as having achieved this status'.[69]

C. American lawyers and alien torts

In the early 1980s, creative human rights lawyers in the United States invoked an ancient and essentially dormant piece of legislation, the Alien Torts Claims Act or the Alien Tort Statute, adopted in the aftermath of the Revolutionary War. The Statute authorises a civil action by an alien for a tort 'committed in violation of the law of nations'. At the time, the United States had a dismal record of ratification of human rights conventions, so there was little in the way of treaties to which to turn as a source of applicable international law. Customary international law provided an answer, to the extent that its existence could be demonstrated and its content ascertained. The United States Court of Appeals for the Second Circuit upheld the admissibility of a claim based upon the prohibition of state-sponsored torture under customary international law: 'Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists we conclude that official torture is now prohibited by the law of nations.'[70] The Court noted that '[t]his prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights'.[71] Subsequently, cases decided under the Alien Tort Claims Statute by American courts found that other human rights violations were also prohibited by the law of nations including cruel, inhuman, or degrading treatment,[72] arbitrary detention,[73] summary execution or murder,[74] enforced disappearance,[75] and genocide.[76] But United States courts also declined to make similar findings

University Press, 1992, pp. 7–8. Along the same lines: 'Introduction', in Gudmunder Alfredsson and Asbjørn Eide, eds., *The Universal Declaration of Human Rights, A Common Standard of Achievement*, The Hague/Boston/London: Martinus Nijhoff, 1999, pp. xxxi–xxxii.

[69] Manfred Nowak, *Introduction to the International Human Rights Regime*, Leiden/Boston: Martinus Nijhoff, 2003, p. 76.
[70] *Filártiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (internal references omitted).
[71] Ibid.
[72] *Xuncax v. Gramajo*, 886 F.Supp. 162, 185–189 (D. Mass. 1995).
[73] *Fernandez v. Wilkinson*, 505 F.Supp. 787, 798 (D. Kan. 1980).
[74] *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1542 (N.D. Cal. 1987).
[75] *Forti v. Suarez-Mason*, 694 F.Supp. 707, 709–711 (N.D. Cal. 1988).
[76] *Xuncax v. Gramajo*, 886 F.Supp. 162, 187, n. 35 (D. Mass. 1995).

Convention on the Rights of the Child, which declares that 'every child has the inherent right to life'.[19]

There have been three reservations to Article 6 of the International Covenant on Civil and Political Rights, of which two, by Norway[20] and Pakistan,[21] have been withdrawn. The United States reserved the right, 'subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman)'.[22] The two interpretative declarations concerning Article 6, by Ireland[23] and Thailand,[24] have been withdrawn. With respect to the Convention on the Rights of the Child, there are a few reservations and declarations concerning family planning and related issues.[25] The broad general reservations formulated by some States do not appear to be addressed to the right to life as such, but rather to aspects of its interpretation.[26] Thus, the reservations and declarations to the right to life provision in the Covenant and the Convention on the Rights of the Child do not challenge the right in such a way as to raise questions about its customary nature.

Nothing in the Universal Periodic Review materials raises any doubt that States that are not party to the Covenant or to the Arab Charter question whether they

Punishment and Eradication of Violence against Women, 'Convention of Belem do Para', OASTS 61, art. 4(a).

[19] Convention on the Rights of the Child, (1990) 1571 UNTS 3, art. 6(1).

[20] C.N.188.1972.TREATIES-7 ('with regard to the obligation to keep accused juvenile persons and juvenile offenders segregated from adults'), C.N.298.1979.TREATIES-9.

[21] C.N.405.2010.TREATIES-17, (2011) 2786 UNTS 97 ('the provisions of [article 6] shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws'), C.N.604.2011.TREATIES-41.

[22] C.N.250.1992.TREATIES-14. On the reservation by the United States, see *Domingues v. United States*, Case No. 12.285, Report No. 62/02, Merits, 22 October 2002, paras. 61–62.

[23] C.N.344.1989.TREATIES-2/17/4 ('Pending the introduction of further legislation to give full effect to the provisions of paragraph 5 of Article 6, should a case arise which is not covered by the provisions of existing law, the Government of Ireland will have regard to its obligations under the Covenant in the exercise of its power to advise commutation of the sentence of death.'), C.N.112.1994.TREATIES-2.

[24] C.N.381.1996.TREATIES-8 (' … though in theory, sentence of death may be imposed for crimes committed by persons below eighteen years, but not below seventeen years of age, the Court always exercises its discretion under Section 75 to reduce the said scale of punishment, and in practice the death penalty has not been imposed upon any person below eighteen years of age. Consequently, Thailand considers that in real terms it has already complied with the principles enshrined herein'), C.N.356.2012.TREATIES-IV.4. See the discussion of Thailand's declaration in *Domingues v. United States*, Case 12.285, Report No. 62/02, Merits, 22 October 2002, para. 59.

[25] China, C.N.92.1992.TREATIES-6 ('[T]he People's Republic of China shall fulfil its obligations provided by article 6 of the Convention under the prerequisite that the Convention accords with the provisions of article 25 concerning family planning of the Constitution of the People's Republic of China and in conformity with the provisions of article 2 of the Law of Minor Children of the People's Republic of China.'); France, Luxembourg, C.N.85.1994.TREATIES-1 (' … that this Convention, particularly article 6, cannot be interpreted as constituting any obstacle to the implementation of the provisions of … legislation relating to the voluntary interruption of pregnancy'); Tunisia, C.N.32.1992.TREATIES-2 (' … that the Preamble to and the provisions of the Convention, in particular article 6, shall not be interpreted in such a way as to impede the application of Tunisian legislation concerning voluntary termination of pregnancy.').

[26] General Comment 24, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under art. 41 of the Covenant, CCPR/C/21/Rev.1/Add.6, para. 10, fn. 3.

have an obligation to respect and protect the right to life. Confirmation can be found in many of the reports by these States to the Human Rights Council.[27]

The right to life has been described as 'the supreme right'[28] and 'the most fundamental of the rights'.[29] The Human Rights Council's Special Rapporteur on extrajudicial, summary, or arbitrary executions has spoken of 'the supremacy and non-derogability of the right to life under both treaty and customary international law'.[30] According to the Special Rapporteur, '[w]henever a State is responsible for an unlawful killing, international law requires reparations in the form of compensation and/or satisfaction. This obligation is based in general customary international law.'[31] The list of customary norms in the Third Restatement of the American Law Institute included 'the murder or causing the disappearance of individuals'. The accompanying Comment explained that 'it is a violation of international law for a state to kill an individual other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances, for example by police officials in line of duty in defence of themselves or of other innocent persons, or to prevent serious crime'.[32]

In its General Comment on reservations, the Human Rights Committee said that customary international law prohibited arbitrary deprivation of life.[33] This was reformulated, in more detail, in its third General Comment on the right to life. The Committee said reservations were not allowed 'to the prohibition against arbitrary deprivation of life of persons and to the strict limits provided in Article 6

[27] Bhutan, National report, A/HRC/WG.6/33/BTN/1, para. 7; China, National report, A/HRC/WG.6/17/CHN/1, paras. 44–47 and National report, A/HRC/WG.6/4/CHN/1, paras. 42–44; Fiji, National report, A/HRC/WG.6/20/FJI/1, para. 8; Kiribati, National report, A/HRC/WG.6/35/KIR/1, para. 75 and Views on conclusions, A/HRC/15/3/Add.1, para. 46; Micronesia, Report of the Working Group, A/HRC/16/16, paras. 8, 21; Nauru, National report, A/HRC/WG.6/10/NRU/1, paras. 16, 18–19, 28 and National report, A/HRC/WG.6/23/NRU/1, para. 27; St Kitts and Nevis, National report, A/HRC/WG.6/10/KNA/1, para. 8; Saint Lucia, National report, A/HRC/WG.6/10/LCA/1, para. 17 and Report of the Working Group, A/HRC/31/16, para. 18; Saudi Arabia, National report, A/HRC/WG.6/17/SAU/1, para. 57; Singapore, National report, A/HRC/WG.6/11/SGP/1, para. 22; Solomon Islands, National report, A/HRC/WG.6/11/SLB/1, para. 24; South Sudan, National report, A/HRC/WG.6/11/SDN/1, para. 123; Tuvalu, National report, A/HRC/WG.6/3/TUV/1, para. 33; United Arab Emirates, National report, A/HRC/WG.6/29/ARE/1, para. 13 and National report, A/HRC/WG.6/29/ARE/2, p. 3.

[28] General Comment 36, art. 6: right to life, CCPR/C/GC/36, para. 2.

[29] *Elgizouli (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2020] UKSC 10, para. 14 (per Lady Hale).

[30] Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Christof Heyns, A/HRC/23/47, para. 36. Also Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Christof Heyns, A/HRC/20/22, para. 41; Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Christof Heyns, A/HRC/17/28, para. 43.

[31] Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Philip Alston, A/HRC/14/24, para. 56.

[32] Restatement (Third) of the Foreign Relations Law of the United States, St. Paul, MN: American Law Institute, 1987, para. 702 and Comment, para. f.

[33] General Comment 24, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under art. 41 of the Covenant, CCPR/C/21/Rev.1/Add.6, para. 8.

with respect to the application of the death penalty'.[34] It wrote that the right to life has 'crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right whose effective protection is the prerequisite for the enjoyment of all other human rights and whose content can be informed by other human rights.'[35]

There is also support for viewing the right to life as a norm of *jus cogens*.[36] The Inter-American Commission on Human Rights has said that the right to life had 'attained the status of customary, and indeed peremptory, norms of international law'.[37] The African Commission on Human and Peoples' Rights has described the right to life as a norm of customary law[38] and of *jus cogens*.[39] The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia said that the 'inherent right to life' was a norm of customary international law.[40] The Human Rights Committee has explained that although not all the rights that are non-derogable under Article 4 of the International Covenant on Civil and Political Rights are *jus cogens*, the right not to be arbitrarily deprived of life was a peremptory norm. The International Law Commission did not include the right to life in the draft list of *jus cogens* norms that it adopted in 2019,[41] although some members of the Commission supported its inclusion.[42]

The right to life has both positive and negative dimensions. The negative aspect is the obligation of the State not to deprive arbitrarily persons within its jurisdiction of their lives. The positive aspect requires that States take measures to protect human life, including both the enactment of appropriate legislation and its effective enforcement. In making homicide a crime and ensuring that killings are investigated and, where appropriate, prosecuted, the State ensures the protection of the right to life. It is difficult to go beyond general principles in this respect because national legislation varies considerably, at least at the technical level. Where killings are either ignored by the authorities or, even worse, deliberately sheltered

[34] General Comment 36, art. 6: right to life, CCPR/C/GC/36, para. 68.

[35] Ibid., para. 2.

[36] General Comment 29, art. 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, para. 11.

[37] *Mario Alfredo Lares-Reyes et al. v. United States*, Case 12.379, Report No. 19/02, 27 February 2002, para. 46, fn. 23; *Victims of the Tugboat '13 de Marzo' v. Cuba*, Case 11.436, Report 47/96, 16 October 1996, para. 79.

[38] *Noah Kazingachire, John Chitsenga, Elias Chemvura, and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, No. 295/04, 12 October 2013, para. 137.

[39] General Comment 3 on the African Charter on Human and Peoples' Rights: The right to life (art. 4), para. 5.

[40] *Prosecutor v. Blaškić* (IT-94/14-A), Judgment, 29 July 2004, para. 143; *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-A), Judgment, 17 December 2004, para. 106.

[41] Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019), A/74/10, p. 274; Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, A/CN.4/727, paras. 128–130.

[42] A/CN.4/SR.3462, p. 4 (Bogdan Aurescu); A/CN.4/SR.3462, p. 11 (Carlos Argüello Gómez).

discussion in this study. For example, the 1959 Declaration highlighted the right of the child to adequate nutrition, housing, medical care, and education. The Convention on the Rights of the Child guarantees freedom of expression, of religion, and of association and peaceful assembly. To the extent that there is any special dimension to these rights required by the status of the child it may be the principle that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration', enshrined in Article 3(1) of the Convention on the Rights of the Child.[132] According to the Human Rights Committee, 'the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State'.[133] Judge Pinto de Albuquerque of the European Court of Human Rights described the principle of the best interests as one of customary international law.[134] Although not referring explicitly to customary law, the Grand Chamber of the European Court has spoken of 'a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance'.[135]

International human rights treaties are mainly directed at the obligations of the States Parties, but they may also impose obligations or duties on individuals. As the Universal Declaration makes explicit, '[e]veryone has duties to the community in which alone the free and full development of his personality is possible'.[136] The Convention on the Rights of the Child declares that 'both parents have common responsibilities for the upbringing and development of the child' and that '[p]arents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child'.[137] There have been no reservations to the provision, providing confirmation for its universal recognition as a norm of customary international law. The State has obligations to ensure that parental duties are entrenched in laws that are enforced. States are also required to 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children'.

[132] Convention on the Rights of the Child, (1990) 1571 UNTS 3, art. 3(1).

[133] *Bakhtiyari et al. v. Australia*, no. 1069/2002, Views, 6 November 2003, CCPR/C/79/D/1069/2002, para. 9.7; *D.T. et al. v. Canada*, no. 2081/2011, Views, 15 July 2016, CCPR/C/117/D/2081/2011, para. 7.10.

[134] *X. v. Latvia* [GC], no. 27853/09, 26 November 2013, Concurring opinion of Judge Pinto de Albuquerque.

[135] *Strand Lobben et al. v. Germany* [GC], no. 37283/13, § 204, 10 September 2019.

[136] Universal Declaration of Human Rights, A/RES/217 (III), art. 29(1).

[137] Convention on the Rights of the Child, (1990) 1571 UNTS 3, art. 18(1).

Six States Parties have formulated reservations or declarations respecting Article 16 of the Convention on the Rights of the Child.[191]

Taken as a whole, these materials provide very strong confirmation for recognition of the right to protection against interference with privacy, family, home, and correspondence as a norm of customary international law.

Article 17 of the International Covenant on Civil and Political Rights and several of the other treaties proscribe interference that is either 'arbitrary' or 'unlawful'. It appears that 'arbitrary' refers to interference by the State, through legislation or government action. 'Unlawful', on the other hand, expresses the horizontal obligation requiring the State to protect individuals from interference by others. The Human Rights Committee has explained that '[t]he term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.'[192] The Human Rights Committee has said that the notion of 'arbitrariness' is not to be equated with 'against the law'. Rather, it must 'be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality'.[193]

1. Protection of privacy

The right to privacy protects that particular area of individual existence and autonomy that does not touch upon the sphere of liberty and privacy of others. According to the Human Rights Committee, privacy 'refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone'.[194] Privacy protects the special, individual qualities of human existence such as a person's manner of appearance and

[191] Algeria, C.N.135.1993.TREATIES-4 (' … shall be applied while taking account of the interest of the child and the need to safeguard its physical and mental integrity'); Holy See, C.N.112.1990.TREATIES-4 ('that it interprets the Articles of the Convention in a way which safeguards the primary and inalienable rights of parents, in particular insofar as these rights concern … privacy (Article 16)'); Indonesia, C.N.245.1990.TREATIES-9, since withdrawn, C.N.147.2005.TREATIES-1 (application of art. 16 'in conformity with its constitution'); Kiribati, CN.478.1995.TREATIES-11 (' … a child's rights as defined in the Convention, in particular the rights defined in [article 16] shall be exercised with respect for parental authority, in accordance with the I-Kiribati customs and traditions regarding the place of the child within and outside the family'); Mali ('The Government of the Republic of Mali declares that, in view of the provisions of the Mali Family Code, there is no reason to apply article 16 of the Convention.'); Poland, C.N.116.1991.TREATIES-4 (similar to Kiribati reservation).

[192] General Comment 16, art. 17 (Right to privacy), A/43/40, Vol. I, p. 181, para. 2.

[193] General Comment 35, art. 9 (Liberty and security of person), CCPR/C/GC/35, para. 12, cited in the context of the right to privacy in *A.B. v. Canada*, no. 2387/2014, Views, 15 July 2016, CCPR/C/117/D/2387/2014, para. 8.7.

[194] *Coeriel et al. v. the Netherlands*, no. 453/1991, Views, 31 October 1994, CCPR/C/52/D/453/1991, para. 10.2; *G. v. Australia*, no. 2172/2012, Views, 17 March 2017, CCPR/C/119/D/2172/2012, para. 7.2.

The only State that does not have a treaty obligation recognising the right of 'individuals and bodies' to establish and direct schools is the United States of America. Its reports to the Human Rights Council have only addressed issues that concern public educational institutions.[150] Nevertheless, private education at all levels is very highly developed in the United States. The United States is a signatory to the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child and is therefore obliged to refrain from acts which would defeat their object and purpose.[151]

There is therefore much evidence, essentially based upon the universality of treaty provisions, to confirm that the right of parents to choose the education they wish for their children is recognised under customary law, subject of course to respecting the progressive objectives of education. The right of 'individuals and bodies' to establish and direct educational institutions also seems to be customary in nature although there is no suggestion that the implementation is entitled to rely upon public funds.

* * *

Conclusions. Everyone has the right to universal primary education that is compulsory and free of charge. The right must be recognised without any discrimination based on race, gender or other grounds. Education shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. Parents have the right to participate in decisions about the education that their children receive.

E. Cultural rights

Within the overall scheme of international human rights law, cultural rights are a neglected category. They are sometimes dropped altogether in the peculiarly abbreviated but not uncommon references to 'socioeconomic rights'. That they be included in the Universal Declaration of Human Rights apparently results from an American suggestion: 'Among the categories of rights which the United States suggests should be considered is the right "to enjoy minimum standards of economic, social and cultural wellbeing"'.[152] The Universal Declaration of Human Rights addresses cultural rights in a single provision, Article 27, which is composed of two paragraphs. The first concerns participation in cultural life, enjoyment of the arts,

[150] United States of America, National report, A/HRC/WG.6/9/USA/1, paras. 47–49; United States of America, National report, A/HRC/WG.6/22/USA/1, paras. 30–32, 37, 103–104.
[151] Vienna Convention on the Law of Treaties, (1980) 1155 UNTS 31, art. 18(a).
[152] United States Proposals Regarding an International Bill of Rights, E/CN.4/4, p. 2.

and benefiting from scientific advancement. The second is directed at protection of the intellectual property of a scientific, literary, or artistic nature. Cultural rights are also relevant to the right to education. Article 24 of the Universal Declaration, which provides a right to rest and leisure, serves the purpose of facilitating participation in culture and the arts. The principles in Article 27 of the Universal Declaration find a more elaborate expression in Article 15 of the International Covenant on Economic, Social and Cultural Rights. Furthermore, Article 27 of the International Covenant on Civil and Political Rights protects the right of members of minority groups to enjoy their culture. Cultural rights are also addressed in the regional human rights treaties.[153]

Although Article 27 of the Universal Declaration is obviously the template, there is great variation in the formulations of the right to culture in human rights treaties. The diversity of texts contributes in two ways to the identification of customary international law: it tends to confirm that the protection of cultural life is entrenched within custom and it provides a broad range of elements and approaches that may then be taken into consideration in the interpretation and application of the customary norm. For example, the International Convention for the Elimination of All Forms of Racial Discrimination protects the right 'to equal participation in cultural activities'.[154] Somewhat differently, the Convention for the Elimination of All Forms of Discrimination against Women enshrines a right 'to participate fully in recreational activities, sports and all aspects of cultural life'.[155] The Charter of Fundamental Rights of the European Union 'recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life'.[156] Pursuant to the International Covenant on Civil and Political Rights, members of ethnic, religious, and linguistic minorities shall not be denied the right 'to enjoy their own culture'.[157]

The Convention on the Rights of the Child provides for the right of the child 'to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts'.[158] The most detailed provision in the specialised treaties is found in the Convention on the Rights of Persons with Disabilities under the heading 'Participation in cultural life, recreation, leisure and sport'. Persons with disabilities are entitled 'to take part on an equal basis with others in cultural life'. This involves access to cultural materials, television programmes,

[153] Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, OASTS 69, art. 14; Arab Charter on Human Rights, art. 42; African Charter on Human and Peoples' Rights, (1986) 1520 UNTS 271, art. 17(1).

[154] International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, art. 5(e)(vi).

[155] Convention on the Elimination of All Forms of Discrimination against Women, (1981) 1249 UNTS 13, art. 13(c).

[156] Charter of Fundamental Rights of the European Union, OJ C 326/391, art. 25.

[157] International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, art. 27; Convention on the Rights of the Child, (1990) 1571 UNTS 3, art. 30.

[158] Convention on the Rights of the Child, (1990) 1571 UNTS 3, art. 31.

films, theatre, museums, libraries and tourism services, cultural monuments, and measures enabling them 'to have the opportunity to develop and utilise their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society'.[159]

The International Covenant on Economic, Social and Cultural Rights presents a succinct formulation: 'The States Parties to the present Covenant recognise the right of everyone: (a) To take part in cultural life . . . '.[160] In its General Comment on the subject, the Committee on Economic, Social and Cultural Rights said that the expression 'cultural life' referred to culture 'as a living process, historical, dynamic and evolving, with a past, a present and a future'.[161] The Committee explained that culture 'encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives'.[162] The Committee has insisted that 'cultures have no fixed borders. The phenomena of migration, integration, assimilation and globalisation have brought cultures, groups and individuals into closer contact than ever before, at a time when each of them is striving to keep their own identity'.[163]

There are no reservations to Article 15 of the International Covenant on Civil and Political Rights, Article 31 of the Convention on the Rights of the Child, and Article 30 of the Convention on the Rights of Persons with Disabilities.[164] Accordingly, every Member State of the United Nations is a party to one of the cultural rights provisions and most are parties to at least two of them. The one exception, the United States of America, is not a party to any of the three treaties. This is quite ironic as it was the United States that first proposed the inclusion of a cultural rights provision in the International Bill of Rights, as explained above. The Universal Periodic Review materials provide no insight into its position concerning cultural rights under international law. The United States is a signatory to

[159] Convention on the Rights of Persons with Disabilities, (2008) 2515 UNTS 3, art. 30.

[160] International Covenant on Economic, Social and Cultural Rights, (1976) 993 UNTS 3, art. 15(1)(a).

[161] General Comment 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, para. 11.

[162] Ibid., para. 13. See also the thematic reports of the Special Rapporteur on cultural rights, A/HRC/14/36, A/HRC/31/59.

[163] General Comment No. 21. Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, para. 41.

[164] Malaysia has a declaration to art. 30 of the Convention on the Rights of Persons with Disabilities that confirms its recognition of the right to culture, C.N.488.2010.TREATIES-19: 'Malaysia recognises the participation of persons with disabilities in cultural life, recreation and leisure as provided in article 30 of the said Convention and interprets that the recognition is a matter for national legislation.'

all three of the treaties and is therefore obliged to refrain from acts that would defeat their object and purpose.[165]

States that are not parties to the International Covenant on Economic, Social and Cultural Rights sometimes refer to the subject in reporting to the Human Rights Council as part of the Universal Periodic Review. For example, Tonga told the Council that although it had not ratified the Covenant, its principles were incorporated within national law and include the right to take part in cultural life.[166] Myanmar reported that '[e]very citizen shall, in accord with the law, have the rights to freely develop literature, culture, arts, customs and tradition they cherish'.[167] Some States appear to view the right to culture as being directed to the protection of their traditional culture[168] or those of ethnic minorities.[169] But this only reflects the more general pattern in the Universal Periodic Review, which is to ignore the right to participate in cultural life, although there are some exceptions.[170]

Cultural heritage receives special protection under international humanitarian law and international criminal law.[171] According to the Special Rapporteur in the field of cultural rights, the prohibition of acts of deliberate destruction of cultural heritage of major value for humanity is a norm of customary international law.[172] Article 4 of the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage declares the 'duty of ensuring the identification, protection, conservation, presentation and transmission to future generations' with respect to buildings and monuments of cultural heritage, defined as being 'outstanding universal value from the point of view of history, art or science'.[173]

Taken as a whole, these materials confirm the customary legal status of the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

The Special Rapporteur in the field of cultural rights of the Human Rights Council has identified several clusters that are protected by the right to

[165] Vienna Convention on the Law of Treaties, (1980) 1155 UNTS 31, art. 18(a).

[166] Tonga, National report, A/HRC/WG.6/29/TON/1, para. 22, National report, A/HRC/WG.6/15/TON/1, para. 139 and Report of the Working Group, A/HRC/38/5, para. 7.

[167] Myanmar, National report, A/HRC/WG.6/10/MMR/1, para. 34.

[168] Nauru, National report, A/HRC/WG.6/10/NRU/1, paras. 108–110.

[169] Malaysia, National report, A/HRC/WG.6/4/MYS/1/Rev.1, paras. 47–51.

[170] Cuba, National report, A/HRC/WG.6/4/CUB/1, paras. 45–46, National report, A/HRC/WG.6/30/CUB/1, paras. 104–109; China, National report, A/HRC/WG.6/17/CHN/1, para. 39; Tajikistan, National report, A/HRC/WG.6/12/TJK/1, paras. 172–177; Korea (DPRK), National report, A/HRC/WG.6/19/PRK/1, paras. 68–70; Mongolia, National report, A/HRC/WG.6/9/MNG/1, paras. 48–50.

[171] Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, (1956) 249 UNTS 215; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, Cambridge: Cambridge University Press, 2005, pp. 127–138; Rome Statute of the International Criminal Court (2002) 2187 UNTS 689, arts. 8(2)(b)(ix), 8(2)(e)(ix).

[172] Report of the Special Rapporteur in the field of cultural rights, A/HRC/31/59, para. 59, citing Francesco Francioni and Federico Lanzerini, 'The Destruction of the Buddhas of Bamiyan and International Law', (2003) *14 European Journal of International Law* 619, at p. 635.

[173] Convention Concerning the Protection of the World Cultural and Natural Heritage.

protection and promotion of human rights does not seem to be disputed. Article 28 of the Universal Declaration of Human Rights states that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised'. A human right to peace may prove important, for example, by facilitating a balancing of the competing interests of justice for victims and the resolution of armed conflict in circumstances where amnesty is required in order to reach a peace agreement.[19] In contrast with other 'peoples' rights' or 'third generation rights', such as the right to a healthy environment and the right to development, the right to peace has little resonance in the Universal Periodic Review materials.[20]

* * *

Conclusions. The elements that are necessary in order to affirm the recognition of a human right to peace under customary international law are probably insufficient.

B. Healthy environment

The right to enjoyment of a safe, clean, healthy, and sustainable environment does not appear in the Universal Declaration of Human Rights and the two International Covenants. The African Charter on Human and Peoples' Rights declares: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'[21] The Arab Charter on Human Rights includes 'the right to a healthy environment' under the general rubric of an adequate standard of living.[22] The Charter of Fundamental Rights of the European Union contains a provision entitled 'Environmental protection': 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'[23] The Additional Protocol to the American Convention on Human Rights affirms that '[e]veryone shall have the right to live in a healthy environment and to have access to basic public services' and that States Parties are to 'promote the protection, preservation, and improvement of the environment'.[24]

According to the Human Rights Council, more than 100 States have recognised some form of a right to a healthy environment in international agreements, their constitutions, legislation, or policies.[25] Initiatives aimed at the adoption of

[19] See, for example, *Massacres of El Mozote and nearby places v. El Salvador,* Judgment (Merits, reparations, and costs), 25 October 2012, Series C, No. 252, Concurring opinion of Judge Diego García-Sayán.
[20] Cuba, in United States of America, Report of the Working Group, A/HRC/16/11, para. 92.215.
[21] African Charter on Human and Peoples' Rights, (1986) 1520 UNTS 271, art. 24.
[22] Arab Charter of Human Rights, art. 38.
[23] Charter of Fundamental Rights of the European Union, OJ C 326/391, art. 37.
[24] Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, OASTS 69, art. 11.
[25] Human rights and the environment, A/HRC/RES/37/8, PP 17.

an additional protocol to the European Convention on Human Rights on the subject have not come to fruition, but that may be explained by the view that the Convention is already sufficient to address the issue.[26]

Aspects of environmental protection have been developed in the case law and other materials of international human rights courts and treaty bodies, relying upon the right to life[27] and the right to privacy.[28] In its third General Comment on the right to life, the Human Rights Committee explained that '[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'. It said that obligations under international environmental law should inform an understanding of the right to life: 'Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States Parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors'. This requires the adoption of measures to ensure sustainable use of natural resources and the development and implementation of substantive environmental standards. States must provide notification to other States about 'natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach'.[29]

The Inter-American Court of Human Rights has identified 'an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights'.[30] It has emphasised the special importance of the relationship between a healthy environment and human rights in cases that deal with territorial rights of indigenous and tribal peoples, where the protection of natural resources is essential.[31] For the Inter-American

[26] Recommendation 1885 (2009), Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment; Reply adopted by the Committee of Ministers on 8 July 2009 at the 1063rd meeting of the Ministers' Deputies, CM/AS(2009)Rec1862 final, para. 9; Opinion of the CDDH on Recommendation 1883 (2009), The challenges posed by climate change and Recommendation 1885 (2009) Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment, DH-DEV(2010)03, Appendix III, para. 3.

[27] *Teitiota v. New Zealand*, no. 2728/2016, Views, 24 October 2019, CCPR/C/127/D/2728/2016; Cabo Verde, Concluding observations, CCPR/C/CPV/CO/1/Add.1, paras. 17–18.

[28] *López Ostra v. Spain*, 9 December 1994, §§ 58–60, Series A no. 303-C; *Fägerskiöld v. Sweden* (dec.), no. 37664/04, 26 February 2008; *Galev et al. v. Bulgaria* (dec.), no. 18324/04, 29 December 2009; *Di Sarno et al. v. Italy*, no. 30765/08, § 113, 10 January 2012.

[29] General Comment 36, art. 6: right to life, CCPR/C/GC/36, para. 62.

[30] *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of articles 4(1) and 5(1) in relation to articles 1(1) and 2 of the American Convention on Human Rights*, Advisory Opinion OC-23/17, Series A, No. 23, 15 November 2017, para. 47. Also *Kawas Fernández v. Honduras*, Judgment (Merits, reparations, and costs), 3 April 2009, Series C, No. 196, para. 148.

[31] Ibid. Also *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, reparations, and costs), 17 June 2005. Series C, No. 125, para. 137; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment (Merits, reparations, and costs), 29 March 2006. Series C, No. 146, para. 118; *Saramaka*

Commission on Human Rights, 'several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality, and are profoundly affected by the degradation of natural resources'.[32] Similarly, the African Commission on Human and Peoples' Rights has noted the significance of economic and social rights to the extent that 'the environment affects the quality of life and the safety of the individual'.[33]

Many submissions to the Human Rights Council in the course of the Universal Periodic Review address the question of climate change and its impact upon human rights.[34] Some speak explicitly of a human right to a clean and healthy

People v. Suriname, Judgment (Preliminary objections, merits, reparations, and costs), 28 November 2007, Series C, No. 172, paras. 121 and 122; *Kaliña and Lokono Peoples v. Suriname*, Judgment (Merits, reparations, and costs), Series C, No. 309, 25 November 2015, para. 173.

[32] *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources—Norms and jurisprudence of the inter-American human rights system*, 30 December 2009, OEA/Ser.L/V/II, Doc. 56/09, para. 190.

[33] *Social and Economic Rights Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria*, No. 155/96, Decision, 27 October 2001, para. 51.

[34] Algeria, in Guyana, Report of the Working Group, A/HRC/15/14, paras. 33, 69.24; Australia, in Maldives, Report of the Working Group, A/HRC/16/7, para. 63; Azerbaijan, in Tuvalu, Report of the Working Group, A/HRC/24/8, para. 55 and in Maldives, Report on the Working Group, A/HRC/16/7, para. 45; Bahrain, in Comoros, Report of the Working Group, A/HRC/12/16, para. 23; Bangladesh, in Bhutan, Report of the Working Group, A/HRC/42/8, para. 91; Barbados, in Vanuatu, Report of the Working Group, A/HRC/41/10, para. 55; Bhutan, National report, A/HRC/WG.6/33/BTN/1, paras. 59–70, 163 and Report of the Working Group, A/HRC/42/8, paras. 9, 22, 155; Bolivia, in United States of America, Report of the Working Group, A/HRC/16/11, para. 92.222; Brazil, in Solomon Islands, Report of the Working Group, A/HRC/18/8, para. 38 and Tuvalu, Report of the Working Group, A/HRC/39/8, paras. 16, 43; Brunei Darussalam, Report of the Working Group, A/HRC/13/14, para. 16; Canada, in Micronesia, Report of the Working Group, A/HRC/16/16, para. 28 and in Nauru, Report on the Working Group, A/HRC/17/3, para. 79.84; Chad, National report, A/HRC/WG.6/31/TCD/1, paras. 34–38; China, in Guyana, Report of the Working Group, A/HRC/15/14, para. 37 and Kiribati, Report of the Working Group, A/HRC/15/3, para. 35; Chile, in Kiribati, Report of the Working Group, A/HRC/15/3, para. 53 and Solomon Islands, Report of the Working Group, A/HRC/18/8, para. 58; Comoros, National report, A/HRC/WG.6/18/COM/1, paras. 103–110, National report, A/HRC/WG.6/32/COM/1, paras. 29–37, Report of the Working Group, A/HRC/26/11, para. 29 and Report of the Working Group, A/HRC/41/12, para. 8; Costa Rica, in Nauru, Report of the Working Group, A/HRC/31/7, para. 73; Cuba, in Kiribati, Report of the Working Group, A/HRC/15/3, para. 29 and Guyana, Report of the Working Group, A/HRC/15/14, para. 36; Djibouti, in Nauru, Report of the Working Group, A/HRC/31/7, para. 85.53; Ecuador, in Solomon Islands, Report of the Working Group, A/HRC/18/8, para. 81.34; Ethiopia, National report, A/HRC/WG.6/33/ETH/1, paras. 37–38; Fiji, in Bhutan, Report of the Working Group, A/HRC/42/8, paras. 128, 158.52 and Brunei Darussalam, Report of the Working Group, A/HRC/42/11, paras. 47, 121.107; Finland, in Maldives, Report of the Working Group, A/HRC/16/7, para. 100.124; Georgia, in Micronesia, Report of the Working Group, A/HRC/31/4, para. 48; Ghana, in Tuvalu, Report of the Working Group, A/HRC/39/8, para. 101.72; Guyana, Views on conclusions, A/HRC/15/14/Add.1, para. 18 and Report of the Working Group, A/HRC/15/14, paras. 10, 31; Haiti, in Saint Lucia, Report of the Working Group, A/HRC/31/10, para. 88.121 and Tuvalu, Report of the Working Group, A/HRC/39/8, para. 101.69; Hungary, in Micronesia, Report of the Working Group, A/HRC/16/16, para. 45 and Saint Vincent and the Grenadines, Report of the Working Group, A/HRC/18/15, para. 46; Iceland, in Vanuatu, Report of the Working Group, A/HRC/41/10, para. 74; India, in Maldives, Report on the Working Group, A/HRC/16/7, para. 39; Indonesia, in Kiribati, Report of the Working Group, A/HRC/15/3, para. 59 and Nauru, Report of the Working Group, A/HRC/31/7, para. 85.54; Ireland, in Solomon Islands, Report of the Working Group, A/HRC/18/8, para. 34; Israel, in Nauru, Report on the Working Group, A/HRC/17/3, para. 69; Italy, in Solomon Islands, Report of the Working Group, A/HRC/32/14, para. 71; Jamaica, in Tuvalu, Report of the Working Group, A/HRC/39/8, para. 101.73; Kenya, National report, A/HRC/WG.6/8/KEN/1, para. 99; Kiribati, National report, A/HRC/WG.6/35/KIR/1, paras. 17–19, 47–49, 66–68, 83–84 and Report

environment.[35] Many of them do not recognise a right to a healthy environment as such but nor do they reject the idea that issues of climate change and environmental protection belong within the protection of human rights. Even the United

of the Working Group, A/HRC/15/3, paras. 19–21, 44; Korea (ROK), in Tuvalu, Report of the Working Group, A/HRC/39/8, para. 101.108 and Tonga, Report of the Working Group, A/HRC/38/5, para. 93.25; Laos, National report, A/HRC/WG.6/8/LAO/1, para. 72; Maldives, National report, A/HRC/WG.6/9/MDV/1/Rev.1, para. 137.138 and in Nauru, Report of the Working Group, A/HRC/31/7, para. 35; Malaysia, in Comoros, Report of the Working Group, A/HRC/12/16, paras. 39, 44; Mauritius, in Nauru, Report on the Working Group, A/HRC/17/3, para. 68; Mexico, in Comoros, Report of the Working Group, A/HRC/12/16, para. 29 and Tuvalu, Report of the Working Group, A/HRC/39/8, para. 74; Micronesia, National report, A/HRC/WG.6/23/FSM/1, paras. 13, 92–100, National report, A/HRC/WG.6/9/FSM/1, paras. 96–101 and Report of the Working Group, A/HRC/31/4, para. 16; Mongolia, National report, A/HRC/WG.6/9/MNG/1, paras. 21–26; Morocco, in Kiribati, Report of the Working Group, A/HRC/15/3, para. 58 and Maldives, in Nauru, Report of the Working Group, A/HRC/31/7, para. 37; Mozambique, in Comoros, Report of the Working Group, A/HRC/41/12, para. 74; Myanmar, in in Solomon Islands, Report of the Working Group, A/HRC/32/14, paras. 83, 99.55; Namibia, in Nauru, Report of the Working Group, A/HRC/31/7, para. 38 and Micronesia, Report of the Working Group, A/HRC/31/4, para. 56; Nauru, Report of the Working Group, A/HRC/31/7, para. 82, Report on the Working Group, A/HRC/17/3, para. 24, and Views on conclusions, A/HRC/17/3/Add.1, paras. 38, 46; Nepal, in Tuvalu, Report of the Working Group, A/HRC/39/8, para. 77; New Zealand, in Vanuatu, Report of the Working Group, A/HRC/12/14, para. 38; Nicaragua, in Tuvalu, Report of the Working Group, A/HRC/24/8, para. 28; Pakistan, in Samoa, Report of the Working Group, A/HRC/33/6, para. 62; Niger, National report, A/HRC/WG.6/10/NER/1, paras. 80–86; Qatar, National report, A/HRC/WG.6/19/QAT/1, para. 11; Palau, Report of the Working Group, A/HRC/18/5, para. 12; Papua New Guinea, National report, A/HRC/WG.6/11/PNG/1, paras. 82–83; Philippines, in Kiribati, Report of the Working Group, A/HRC/15/3, paras. 60, 66.82 and Nauru, Report of the Working Group, A/HRC/31/7, para. 85.56; Poland, in Palau, Report of the Working Group, A/HRC/18/5, para. 31; Portugal, in Report of the Working Group, A/HRC/41/12, para. 79; Saint Lucia, National report, A/HRC/WG.6/23/LCA/1, para. 59 and Report of the Working Group, A/HRC/31/10, para. 83; Saint Vincent and the Grenadines, Report of the Working Group, A/HRC/18/15, paras. 16, 63; Samoa, Report of the Working Group, A/HRC/18/14, para. 25.26; Seychelles, in Vanuatu, Report of the Working Group, A/HRC/41/10, para. 32; Sierra Leone, in Nauru, Report of the Working Group, A/HRC/31/7, paras. 51, 85.58; Slovenia, in Vanuatu, Report of the Working Group, A/HRC/41/10, para. 34; Solomon Islands, National report, A/HRC/WG.6/11/SLB/1, paras. 39, 57–59, Report of the Working Group, A/HRC/18/8, paras. 7, 24 and in Nauru, Report of the Working Group, A/HRC/31/7, para. 85.55; Singapore, Views on conclusions, A/HRC/32/17/Add.1, para. 36 and in Tuvalu, Report of the Working Group, A/HRC/24/8, para. 32; Slovakia, in Tuvalu, Report of the Working Group, A/HRC/24/8, para. 39; Somalia, in Comoros, Report of the Working Group, A/HRC/26/11, para. 110.98; Spain, in Kiribati, Report of the Working Group, A/HRC/15/3, para. 34 and Maldives, in Nauru, Report of the Working Group, A/HRC/31/7, para. 54; Sudan, in Report of the Working Group, A/HRC/41/12, para. 90; Tanzania, National report, A/HRC/WG.6/12/TZA/1, para. 75; Thailand, in Micronesia, Report of the Working Group, A/HRC/16/16, para. 61.73; Timor Leste, in Micronesia, Report of the Working Group, A/HRC/31/4, para. 24; Togo, in Tuvalu, Report of the Working Group, A/HRC/39/8, para. 87; Tonga, Report of the Working Group, A/HRC/38/5/Add.1, para. 2; Trinidad and Tobago, in Nauru, Report of the Working Group, A/HRC/31/7, para. 57; Turkey, in Maldives, Report of the Working Group, A/HRC/16/7, para. 65; Tuvalu, National report, A/HRC/24/8 A/HRC/WG.6/3/TUV/1, paras. 3, 42, 56–57, 75, Report of the Working Group, A/HRC/24/8, paras. 6, 9–11 and National report, A/HRC/WG.6/30/TUV/1, paras. 81–83, 88; Uganda, National report, A/HRC/WG.6/12/UGA/1, paras. 90–91 and in Eritrea, Report of the Working Group, A/HRC/26/13, para. 122.198; Ukraine, in Tonga, Report of the Working Group, A/HRC/38/5, para. 82; United Kingdom, in Micronesia, Report of the Working Group, A/HRC/31/4, para. 25; Uruguay, in Saint Vincent and the Grenadines, Report of the Working Group, A/HRC/18/15, para. 47; Vanuatu, Report of the Working Group, A/HRC/12/14, para. 9; Venezuela, in Micronesia, Report of the Working Group, A/HRC/31/4, para. 28 and in United States of America, Report of the Working Group, A/HRC/16/11, para. 92.51; United States of America, National report, A/HRC/WG.6/22/USA/1, paras. 109–112, Views on Conclusions, A/HRC/30/12/Add.1, para. 12 and in Micronesia, Report of the Working Group, A/HRC/16/16, para. 31; Viet Nam, in Bhutan, Report of the Working Group, A/HRC/42/8, para. 83.

[35] Benin, National report, A/HRC/WG.6/14/BEN/1, para. 57; Comoros, National report, A/HRC/WG.6/18/COM/1, paras. 103–110; Cuba, in Tuvalu, Report of the Working Group, A/HRC/39/8,

States addresses environmental issues in its Universal Periodic Review reports.[36] The large number of States that express concern about these issues at the Human Rights Council demonstrates not only their importance but also the strength of opinion that these are matters falling within the scope of human rights obligations. This is all the more impressive given the relative silence of international human rights treaties on the subject. Micronesia, in its National report to the Human Rights Council, explained that '[c]limate change has dramatically impacted not only the people's right to life, food, water, property, quality standard of living, and self-determination, but also the survival of a cultural heritage and patrimony of Micronesians'.[37] Tuvalu stated that '[t]he increasing frequency in which effects of climate change had been felt [had] been well documented worldwide. Those effects threatened the full and effective enjoyment by Tuvaluans of their rights to life, water and sanitation, food, health, housing, self-determination, culture and development.'[38] Ireland underscored 'the need for the international community to address the human rights dimensions of climate change'.[39] Samoa described 'the impact of climate change on the enjoyment of human rights of Samoans' as affecting food security, the right to water, access to health, the right to life, the right to an adequate standard of living, and freedom of movement, due to internal displacements.[40] Canada commended Maldives for its efforts 'to promote human rights internationally, particularly human rights and climate change'.[41] Bhutan said that although its commitments to global agreements on the environment and climate change 'would remain steadfast', it was concerned that 'global actions were inadequate to prevent further global temperature rises'.[42] It related climate change to the right to health, where the impact 'was becoming visible with the emergence of new patterns of vector-borne diseases, such as malaria, dengue, chikungunya

para. 101.71; Tanzania, National report, A/HRC/WG.6/12/TZA/1, para. 31; Morocco, National report, A/HRC/WG.6/13/MAR/1, para. 66; Andorra, National report, A/HRC/WG.6/9/AND/1, paras. 1, 87–89 and Report of the Working Group, A/HRC/16/8, para. 7; Lesotho, National report, A/HRC/WG.6/8/LSO/1, para. 9; Central African Republic, National report, A/HRC/WG.6/17/CAF/1, para. 14; Mongolia, National report, A/HRC/WG.6/9/MNG/1, para. 21; Senegal, National report, A/HRC/WG.6/31/SEN/1, para. 5; Ethiopia, National report, A/HRC/WG.6/33/ETH/1, para. 37; Uganda, National report, A/HRC/WG.6/12/UGA/1, paras. 90–91; Côte d'Ivoire, National report, A/HRC/WG.6/33/CIV/1, para. 47; Kazakhstan, National report, A/HRC/WG.6/7/KAZ/1, paras. 111–117; Lebanon, National report, A/HRC/WG.6/9/LBN/1, para. 4; Indonesia, in Kiribati, Report of the Working Group, A/HRC/15/3, para. 59; Solomon Islands, National report, A/HRC/WG.6/11/SLB/1, para. 39; Kuwait, National report, A/HRC/WG.6/8/KWT/1, p. 21; India, National report, A/HRC/WG.6/13/IND/1, para. 8.

[36] United States of America, National report, A/HRC/WG.6/36/USA/1, para. 71.
[37] Micronesia, National report, A/HRC/WG.6/9/FSM/1, para. 97.
[38] Tuvalu, Report of the Working Group, A/HRC/39/8, para. 16.
[39] Tuvalu, Report of the Working Group, A/HRC/24/8, para. 73.
[40] Samoa, Report of the Working Group, A/HRC/18/14, para. 66.
[41] Maldives, Report of the Working Group, A/HRC/16/7, para. 54.
[42] Bhutan, Report of the Working Group, A/HRC/42/8, para. 22.

and water-borne diseases'.[43] Tonga 'continues to grapple with the ever-increasing threats of climate change that have recently brought an onslaught of more severe and more frequent natural disasters'.[44] Germany said it was 'working towards a comprehensive approach to addressing climate change in collaboration with United Nations agencies and other countries'.[45]

The Human Rights Council has recognised that 'while the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by those segments of the population that are already in vulnerable situations'.[46] It has also noted 'the particular vulnerability of children to the effects of environmental harm, including to air pollution, water pollution, climate change, exposure to chemicals, toxic substances and waste, and loss of biodiversity, and that environmental harm may interfere with the full enjoyment of a vast range of the rights of the child'.[47]

Decades ago, the International Law Commission described as *jus cogens* obligations 'of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas'.[48] In 1991, the Commission identified wilful and severe damage to the environment as a crime against the peace and security of mankind.[49] But in 2019, it opted not to include this in its list of peremptory norms, following considerable debate on the subject.[50] Special Rapporteur Dire Tladi noted that despite 'the importance of the subject matter and the catastrophic consequence that could result from the destruction of the environment', he thought there was 'little evidence of the required "acceptance and recognition of the international community of States as a whole" that the environmental norms (or some of them) have acquired peremptory status, notwithstanding this empirical fact of the importance of environmental rules for the very survival of humanity and the planet'.[51]

* * *

Conclusions. There is compelling evidence for a human right to a safe, clean, healthy, and sustainable environment under customary international law.

[43] Bhutan, National report, A/HRC/WG.6/19/BTN/2, para. 43.
[44] Tonga, Views on conclusions, A/HRC/38/5/Add.1, para. 2.
[45] Germany, Report of the Working Group, A/HRC/39/9, para. 153.
[46] Human rights and the environment, A/HRC/RES/37/8, PP 11.
[47] Ibid., PP 15.
[48] *Yearbook . . . 1976*, Vol. II (Part 2), pp. 95–96.
[49] *Yearbook . . . 1991*, Vol. II (Part 2), p. 107.
[50] A/CN.4/SR.3461, p. 9 (Charles Jalloh); A/CN.4/SR.3459, p. 20 (Marja Lehto); A/CN.4/SR.3460, p. 7 (Nilüfer Oral); A/CN.4/SR.3460, p. 16 (Hussein Hassouna); A/CN.4/SR.3462, p. 12 (Carlos Arguëllo Gomez).
[51] Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, A/CN.4/727, para. 136.

Annex ZZ

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Intergenerational Equity

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A. Concept

1. General Remarks

1 The principle of intergenerational equity states that every generation holds the Earth in common with members of the present generation and with other generations, past and future. The principle articulates a concept of fairness among generations in the use and conservation of the environment and its natural resources (see also → *Conservation of Natural Resources*; → *Environment, International Protection*). The principle is the foundation of → *sustainable development*. It has also been applied to cultural resources and to economic and social problems. It could have even broader application, such as to the use of force and military operations.

2. Source of the Principle

2 The principle of intergenerational equity has deep roots in diverse cultural and religious traditions, including the Judeo-Christian, Islamic, and Asian non-theistic traditions. It has roots in Islamic law, the common law, civil law traditions, African customary law, and Native American traditional law, among others.

3 In international law, the principle builds upon the use of equity, initially formulated by Aristotle and elaborated by Grotius, who treated equity as addressing those cases not covered by the universal law (see also → *Equity in International Law*). In the twentieth century, equity was often cited as synonymous with being 'just' or with 'justice', as articulated by the → *International Court of Justice (ICJ)* in the → *North Sea Continental Shelf Cases* and in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case. Especially in the latter half of the twentieth century, equity was invoked in international law as a basis upon which to provide standards for allocating and sharing resources and for distributing the burdens of caring for the resources and the environment in which they are found. This use of equity provides a foundation for a principle of intergenerational equity.

3. Content of the Principle

(a) Definition of Future Generations

4 The term 'future generations' refers to all those generations that do not exist yet. The present generation refers to all those people who are living today. The present generation encompasses multiple generations among those living today, but they are treated collectively as the present generation.

(b) Elements of the Principle

5 The principle of intergenerational equity is a foundation for the concept of sustainable development. The World Commission on Environment and Development, which preceded the 1992 Rio Conference on Environment and Development, defined sustainable development 'as meeting the needs of the present without compromising the ability of future generations to meet their own needs' (Our Common Future at 8). This general language has been repeated in many different legal documents. It reflects concerns expressed in the earlier Stockholm Declaration on the Human Environment (→ *Stockholm Declaration [1972] and Rio Declaration [1992]*).

6 There is no binding international legal instrument that defines the elements of the principle of intergenerational equity. A review of juridical writings and legal instruments indicates that the core of the principle is that while the present generation has a right to use the Earth and its natural resources to meet its own needs, it must pass the Earth on to future generations in a condition no worse than that in which it was received so that future

generations may meet their own needs. This generally applies both to the diversity of the resources and to the quality of the environment.

7 The proposed Global Pact for the Environment, drafted by 100 international legal experts under the coordination of *Le club des juristes* provides in Art. 4, Intergenerational Equity, that '[i]ntergenerational Equity shall guide decisions that may have an impact on the environment. Present generations shall ensure that their decisions and actions do not compromise the ability of future generations to meet their own needs'.

8 In the 1980s, Brown Weiss identified a principle of intergenerational equity in which all generations hold the Earth in common as a trust. People are both beneficiaries entitled to use the environment and its resources, and at the same time trustees (or stewards or custodians) with an obligation to pass it on in no worse condition on balance than that in which it was received. This theory articulated three elements of intergenerational equity: nondiscriminatory access to the Earth and its resources; comparable options (as reflected in the diversity of resources); and comparable quality in the environment. These elements apply to both natural and cultural resources and lead to a suite of intergenerational strategies. The elements of the principle met four criteria: that they neither authorize unreasonable exploitation by the present generation nor impose unreasonable burdens on it; that they not require predicting the values of future generations and provide flexibility to future generations to achieve their own goals; that they be reasonably clear in application to foreseeable situations; and that they be generally shared by different cultural traditions and acceptable to different economic and political systems. In August 2013, the Report of the United Nations Secretary-General on Intergenerational Solidarity and the Needs of Future Generations recognized the 'fundamental principle of intergenerational equity' and noted that it included three elements: conservation of options; conservation of quality; and conservation of access (→ *United Nations, Secretary-General*).

9 The concept of comparable options rests on the assumption that future generations are more likely to survive and attain their goals if they have a variety of options for addressing their problems and opportunities. Conserving the diversity of natural and cultural resources will provide future generations with a robust and flexible heritage through which they can achieve their own well-being. The concept of comparable quality requires that on balance the quality of the natural and cultural environment be at least in no worse condition than that in which it was received. Trade-offs will be inevitable in implementing this element. Both the obligations to provide comparable options and comparable quality are part of the core obligation to pass on the environment in no worse condition than that in which it was received. The element of access gives the present generation a reasonable, non-discriminatory right of access to natural and cultural resources to use for its own benefit, and the obligation to pass on at least a minimal level or improved conditions of access.

10 Not all activities that harm the environment raise intergenerational issues. Noise pollution and surface water pollution, for example, need not raise intergenerational issues. However, disposal of wastes whose impact cannot be contained either spatially or over time, particularly toxic contamination of ground water and lakes, nuclear contamination of the oceans (→ *Nuclear Waste Disposal*), climate change from human activities (see also → *Climate, International Protection*), depletion of the ozone layer through chemical pollutants (see also → *Ozone Layer, International Protection*), rapid extinction of species (see also → *Biological Diversity, International Protection*; → *Endangered Species, International Protection*), destruction of tropical forests sufficient to affect biodiversity in the region significantly (see also → *Forests, International Protection*), loss of soils, and destruction of gene banks, do raise important intergenerational issues. The principle of

intergenerational equity applies to these and many other problems and leads to prescriptive actions.

11 It could be argued that it is not possible to know the interests of future generations and that by trying to protect those interests, the present generation is imposing its values upon them. The response is that all actions that we take today inherently affect the well-being of future generations. The elements of the principle of intergenerational equity are intended to ensure that future generations inherit a robust environment, which is resilient to dramatic changes, and that they have diverse options through which to pursue their own values.

(c) Relationship of Intergenerational Equity and Intragenerational Equity

12 There is general agreement that there are severe problems of equity among people living today. The equity problems are addressed in the concept of intragenerational equity, ie equity among peoples today. The quest for intergenerational equity requires that intragenerational equity issues be addressed. In practice, the two kinds of equity are joined, because poor communities cannot be expected to fulfil intergenerational obligations if they are not able to meet basic needs today. There is also a conceptual link between equity today and the principle of intergenerational equity. However, there is no consensus as to the nature of the linkage. One view is that they are two separate concepts, that intragenerational equity is meaningful only when it is defined, and that there is no agreement on its definition. Another view is that the broad concept of equity encompasses both intragenerational and intergenerational equity. Yet another is that the principle of intergenerational equity encompasses intragenerational equity as an integral element. Under this last view, as future generations become living generations, they assume the rights and obligations inherent in intergenerational equity. This defines intragenerational equity, for the same postulates of comparable access, options, and quality owed to future generations apply among people living today. While there may be general agreement on the basic elements of a principle of intergenerational equity, there is not yet general agreement on the definition of intragenerational equity and on its legal status, though all agree on its importance.

(d) Relationship of Rights and Obligations

13 The principle of intergenerational equity creates responsibilities on the part of the present generation towards future generations. There is controversy as to whether the principle of intergenerational equity also conveys rights. Do future generations have rights, with correlative obligations in the present generation? A right is an interest that is juridically protected and always associated with a duty. A duty is not always associated with a right. In the context of future generations, if we were to follow the philosophers Austin and Kelsen, the obligations of the present generation to future generations constitute obligations or duties for which there are no correlative rights, because determinate persons to whom the right attaches do not exist yet. The rights of future generations may be more nearly analogous to → *group rights* that protect interests held in common. They represent valued interests that attach to future generations, and that representatives of future generations can protect. The 1997 → *United Nations Educational, Scientific and Cultural Organization [UNESCO]* Declaration on the Responsibilities of the Present Generations towards Future Generations (‘UNESCO Responsibilities Declaration’) speaks only of the present generation having the responsibility to ensure that ‘the needs and interests of present and future generations are fully safeguarded’ (Art. 1 UNESCO Responsibilities Declaration). The 1988 Goa Guidelines on Intergenerational Equity, drafted under the auspices of the → *United Nations University (UNU)*, refer both to ‘rights and obligations’,

and recognize a ‘complementarity’ (see Brown Weiss [1989] 294) between recognized → *human rights* and intergenerational rights.

14 Intergenerational rights could be viewed as part of international human rights law. While international human rights agreements have not yet explicitly referenced rights of future generations, their rights could arguably be encompassed within the specific rights guaranteed in particular instruments. Economic, social, and cultural rights embodied in international covenants could be regarded as articulating the rights of both present and future generations. Rights to food, water, and similar elements might be read as implicitly recognizing the rights of future generations (see also → *Food, Right to, International Protection*; → *Water, Right to, International Protection*). In 2010, the United Nations General Assembly (‘UNGA’) and the United Nations Human Rights Council explicitly recognized a right to safe drinking water (→ *United Nations, General Assembly*; → *United Nations Commission on Human Rights/United Nations Human Rights Council*). The right carries both the obligation of the present generation to ensure that individuals have access to safe drinking water today and the obligation to ensure that future generations also have access to safe drinking water when a future generation is born and becomes a present one.

15 There is increasing recognition that a right to environment exists as part of international human rights law, although some controversy about this remains (→ *Clean and Healthy Environment, Right to, International Protection*). If a right exists, one issue is whether it should be regarded as a basic human right and individual right, or as a collective right in the nature of economic, social, and cultural rights. A right to environment implicitly includes rights of both present and future generations. The increasingly rapid loss of biological diversity and the degradation of the natural environment threaten human rights for both present and future generations. In March 2015, the → *United Nations (UN)* appointed a Special Rapporteur on human rights and the environment (→ *Special Rapporteurs of Human Rights Bodies*). The → *Human Rights Committee* affirmed in 2018 that ‘environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life’ (UN HRC ‘General Comment No 36: Article 6 of the International Covenant on Civil and Political Rights: Right to Life’ [30 October 2018] UN Doc CCPR/C/GC/36). In July 2019, the UN Special Rapporteur on human rights and the environment reported to the UNGA that ‘a safe climate is a vital element of the right to a healthy environment and is absolutely essential to human life and well-being’ (UNGA ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ [15 July 2019] UN Doc A/74/161).

16 The *Advisory Opinion OC-23/17 on the Environment and Human Rights* by the → *Inter-American Court of Human Rights (IACtHR)* in 2017 found for the first time an autonomous human right to environment in Art. 26 American Convention on Human Rights (→ *American Convention on Human Rights [1969]*; → *Advisory Opinion: Inter-American Court of Human Rights [IACtHR]*; → *Advisory Opinions*).

4. Related Principles and Concepts

17 As noted earlier, the principle of intergenerational equity provides a foundation for sustainable development. The 1992 Rio Declaration on Environment and Development (‘Rio Declaration’) developed the legal principles to carry out sustainable development. It recognized ‘the integral and interdependent nature of the Earth, our home’ (Preamble Rio Declaration). Art. 5 International Union for Conservation of Nature (‘IUCN’) Draft International Covenant on Environment and Development (‘IUCN Draft Covenant’) recognizes the principle of intergenerational equity and refers to it as ‘an essential foundation of all international law relating to environmental protection and to the concept

of sustainable development' (Commentary to Art. 5 IUCN Draft Covenant). Thus, the procedural and substantive duties that have been articulated to ensure sustainable development may be regarded as implementing the principle of intergenerational equity.

18 The doctrine of the → *common heritage of mankind* anticipates a need to address obligations related to commonly held environments. The doctrine was first mentioned in 1935 (*domaine public universel qui informe le patrimoine commun de l'Humanité*), but was not further developed and promoted until after 1950, when scholars began to stress its relevance to common environments, such as → *outer space*. In 1967, it was enunciated as applicable to the deep seabed resources in the oceans (see also → *International Seabed Area*). As the debates concerning the → *law of the sea* revealed, there is no consensus on the doctrine. While the common heritage of mankind is related to intergenerational equity in the sense that both address environments held among generations, it has generally been limited in application to areas such as outer space and oceans, and involves different content than the principle of intergenerational equity. The 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage ('World Heritage Convention') refers to 'world heritage of mankind' in its Preamble, a different formulation, which suggests its relevance to cultural and to natural heritage more broadly (→ *World Natural Heritage*).

19 A related concept of 'common concern of humankind' emerged in the 1990s. The concept has a temporal dimension in that it implicitly extends beyond today to the future. The Convention on Biological Diversity refers in its Preamble to the conservation of biological diversity as a 'common concern of humankind', though the concept is not defined. The United Nations Framework Convention on Climate Change ('UNFCC') refers to this concept in the first sentence of its Preamble, acknowledging 'that change in the Earth's climate and its adverse effects are a common concern of humankind'. The 2015 Paris Agreement further defines the concept in its Preamble, stating that climate change is a common concern of humankind and that parties 'should, when taking action to address climate change, respect … their respective obligations on human rights … and intergenerational equity'. In more recent scholarship, 'common concern of humankind' has been applied to ocean governance as a way to achieve sustainable development, and to freshwater resources. The concept may be a doctrine, with broader applications.

20 The principle of → *common but differentiated responsibilities*, articulated in the Rio Declaration, could also be regarded as related to a principle of intergenerational equity to the extent that historical actions affect the allocation and timing of responsibilities owed to present and future generations. The principle has been important in deliberations regarding such long-term issues as climate change and depletion of the ozone layer. The UN Framework Convention on Climate Change ('UNFCCC') and 2015 Paris Agreement refer to this principle. The Paris Agreement is to 'be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances' (Art. 2). Pursuant to this principle, the agreement calls for national determined contributions for controlling greenhouse gas emissions and includes provisions aimed to implement the principle.

21 Similarly, the principle of intergenerational equity is related to a principle of → *community interest*, since the community may be defined as extending over time into other generations. The principle of intergenerational equity may also be associated with an emerging principle of solidarity, since intergenerational equity implicitly rests upon

solidarity among generations (see also → *Solidarity Rights [Development, Peace, Environment, Humanitarian Assistance]*).

5. Difference from the Doctrine of Intertemporal Law

22 The principle of intergenerational equity should not be confused with the very different doctrine of → *intertemporal law* in international law. Intertemporal law primarily relates to the legal criteria for the validity of actions in the present to the legal criteria in the past in order to judge the validity of claims. As enunciated in the → *Palmas Island Arbitration* and by the → *Institut de Droit International*, the determination of whether specific acts are valid should be made in light of the law at the time of their creation. However, rights that are acquired in a valid manner may be lost if they are not maintained in a way consistent with the changes in international law. In public international law, the intertemporal doctrine has been applied to territorial claims, to certain rules of → *customary international law*, and to several aspects of → *treaties*. In → *private international law*, the intertemporal doctrine is reflected in rules governing conflict of laws.

B. Status in International Law

23 The principle of intergenerational equity has deep historical roots, but has been widely referenced and discussed only within the last few decades.

1. Treaties and Other Legal Instruments

24 Since the mid-1940s, States have frequently indicated concern for future generations in their legal documents and have often included provisions in treaties and in declarations (→ *Declaration*) that are intended to protect and enhance the welfare of both present and future generations. The 1945 → *United Nations Charter* provides: 'We the peoples of the United Nations, determined to save succeeding generations from the scourge of war' (Preamble UN Charter).

25 Concern in international law for future generations in relation to the environment and natural resources has a long history. The agreements early in the twentieth century for the conservation of certain species of → *marine mammals*, such as the 1911 Convention respecting Measures for Preservation and Protection of Fur Seals in the North Pacific Ocean, the 1931 Convention for the Regulation of Whaling, the subsequent 1946 Washington International Convention for the Regulation of Whaling, and related agreements reflect a concern with ensuring sustainable harvesting, and thus with ensuring that these animals exist for future generations (→ *Whaling*). There are also early agreements for protecting birds, such as the 1902 Convention for the Protection of Birds Useful to Agriculture, the 1900 London Convention for the Protection of Wild Animals, Birds and Fish in Africa, the 1916 Canada-United States Convention for the Protection of Migratory Birds, and the 1936 Mexico-United States Convention for the Protection of Migratory Birds and Game Mammals (see also → *Migratory Species, International Protection*).

26 Among regional agreements, the 1940 Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, the 1968 African Convention on the Conservation of Nature and Natural Resources, and the much later 1985 Association of Southeast Asian Nations Agreement on the Conservation of Nature and Natural Resources (→ *Association of Southeast Asian Nations [ASEAN]*), also reflect concern with ensuring the robustness of nature for future generations. Important multilateral environmental agreements concluded in the 1960s and 1970s are concerned with protection of endangered species, wild animals, → *wetlands*, and marine ecosystems (→ *Environment, Multilateral Agreements*; see also → *Marine Environment, International Protection*). These agreements look towards conserving the resources for present and future generations.

Agreements covering pollution of the oceans, regional seas, or fresh water are also concerned with ensuring that the resources are robust for both present and future generations.

27 At least three treaties in the 1970s explicitly include language protecting the natural and/or cultural resources for future generations: the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the 1973 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the World Heritage Convention. References to future generations appear in the 1992 UNFCCC (Preamble; Art. 3.1) and the 1992 Convention on Biological Diversity (Preamble; Art. 2). The 1992 UN Economic Commission for Europe ('UNECE') Convention on the Protection and Use of Transboundary Watercourses and International Lakes ('UNECE Convention') provides that in implementing the measures called for in the Convention, 'the Parties shall be guided by the following principles: … (c) Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs' (Art. 2 (5) UNECE Convention). The 1994 UN Convention to Combat Desertification asserts in its preamble the parties' determination 'to take appropriate action in combating desertification … for the benefit of present and future generations'. The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention; see also → *Access to Information on Environmental Matters*) notes in its Preamble that every person has the duty to protect and improve the environment for present and future generations. The 2015 Paris Agreement declares in its preamble that parties 'should, when taking action to address climate change, respect, promote and consider their respective obligations on … intergenerational equity'. The 2017 Treaty on the Prohibition of Nuclear Weapons, which entered into force on 22 January 2021, highlights in its preamble that nuclear weapons 'pose grave implications for human survival, the environment, … and the health of current and future generations'.

28 There are hundreds of other legal instruments, many of which reference the interests of future generations. The foremost early legal instrument is the 1972 Stockholm Declaration. The Preamble proclaims that '[t]o defend and improve the human environment for present and future generations has become an imperative goal for mankind' (Preamble Stockholm Declaration para. 6). Furthermore, the Declaration provides that '[m]an has the fundamental right to freedom, equality and adequate conditions for life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations' (Principle 1 Stockholm Declaration). The Stockholm Declaration explicitly addresses future generations and the environment. It provides that '[t]he natural resources of the Earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate' (Principle 2 Stockholm Declaration). The 1982 UN World Charter for Nature 'reaffirms' that 'man must … use natural resources in a manner which ensures the preservation of the species and ecosystems for the benefit of present and future generations' (Preamble UN Charter for Nature). In 1992, the Rio Declaration, the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, and → *Agenda 21* reference future generations, with Agenda 21 acknowledging the proposal to appoint a guardian for future generations (Agenda 21 para. 38.45). The 1995 IUCN Draft Covenant on Environment and Development explicitly enunciates a principle of intergenerational equity. In 1997 UNESCO adopted a Declaration on the Responsibilities of the Present Generations Towards Future Generations.

The Declaration in part grew out of the Cousteau Society initiative for a Bill of Rights for Future Generations.

29 In 2001, the Cousteau Society formally presented to the UN Secretary-General its Bill of Rights for Future Generations in the form of a draft UNGA Resolution and a petition with more than nine million signatures supporting the document. In 2012, the zero draft of the outcome document prepared by governments for the Rio + 20 Conference in Rio de Janeiro included a call for the creation of a High Commissioner for Future Generations. The UN Secretary-General's report in 2013 on Intergenerational Solidarity and the Needs of Future Generations affirmed the principle of intergenerational equity and considered a proposed High Commissioner for Future Generations and other institutional options. *Le club des juristes* Draft Global Pact for the Environment in June 2017 included an Art. 4, entitled Intergenerational Equity, which provides that '[i]ntergenerational equity shall guide decisions that may have an impact on the environment. Present generations shall ensure that their decisions and actions do not compromise the ability of future generations to meet their own needs'. UNGA Resolution 72/277 of 10 May 2018 'Towards a Global Pact for the Environment' established an Ad-Hoc Open-Ended Working Group, which in its recommendations to the UNGA listed 'reinforc[ing] the protection of the environment for present and future generations' as the first objective guiding the work (UNGA Res 73/333 [30 August 2019] UN Doc A/RES/73/333 Annex).

2. Judicial Application

(a) International Court of Justice Opinions

30 The ICJ has not explicitly referenced the principle of intergenerational equity as a legal basis for the resolution of a dispute before the Court. However, the ICJ has referred to future generations, and some concurring and dissenting opinions, particularly by the late Judge Christopher Weeramantry and current Judge Antônio Augusto Cançado Trindade, have invoked it (→ *Separate Opinion: International Court of Justice [ICJ]*).

31 On 8 July 1996, the ICJ issued its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, in which the ICJ explicitly referred to the interests of future generations (see also → *Nuclear Weapons Advisory Opinions*; → *Advisory Opinion: International Court of Justice [ICJ]*). It noted that 'it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular … their ability to cause damage to generations to come' (at 244). Judge Weeramantry, in his dissenting opinion, wrote that 'this Court … must, in its jurisprudence, pay due recognition to the rights of future generations … [T]he rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations' (at 455). The principle of intergenerational equity was raised and referenced in a concurring opinion in the 1993 → *Maritime Delimitation between Greenland and Jan Mayen Case (Denmark v Norway)*, in which Judge Weermantry noted that equity could provide a basis for considering future generations, citing In Fairness to Future Generations (at 242). The dissenting opinions of Judges Weeramantry and Palmer in the 1995 *Nuclear Tests (New Zealand v France)* (see also → *Nuclear Tests Cases*) also discussed intergenerational equity. In this case, Judge Palmer quoted that 'each generation is both a custodian or trustee of the planet for future generations and a beneficiary of its fruits' and '[t]his imposes obligations upon us to care for the planet and gives us certain rights to use it' (at 114). Judge Weeramantry wrote that the 'principle of intergenerational equity' was 'an important and rapidly developing principle of contemporary environmental law' (at 341). The principle was implicitly raised in the subsequent 1997 ICJ → *Gabčíkovo-Nagymaros Case (Hungary/Slovakia)* Judgment,

which discussed risks for present and future generations from the dam on the Danube River (at 140).

32 In the case → *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judge Cançado Trindade observed in his Separate Opinion that ‘[n]owadays, in 2010, it can hardly be doubted that the acknowledgment of inter-generational equity forms part of conventional wisdom in international environmental law’ (para. 122). In another Separate Opinion in the 2014 case → *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* he concluded that ‘inter-generational equity marks presence nowadays in a wide range of instruments of international environmental law, and indeed of contemporary public international law’ (para. 47). In both cases, Judge Cançado Trindade devoted an entire section of his opinion to the principle of intergenerational equity. Further, the term appears 81 times in the *Pulp Mills* case and 35 times in the *Whaling in the Antarctic* case. The ICJ’s Judgment in the latter cited the preamble of the International Convention for the Regulation of Whaling, concluding that it ‘recognizes “the interest of nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks”’ (para. 56).

33 In September 2019, a draft resolution was circulated to United Nations Mission Offices in New York proposing that in light of the climate crisis, the UNGA request an Advisory Opinion from the ICJ on ‘the obligations of States under international law to future generations to protect the rights of current and future generations against the adverse effects of climate change’ (Workshop on a Climate Change Advisory Opinion by the International Court of Justice, Normandy Chair for Peace [last updated 6 May 2020] <https://chairpeace.hypotheses.org/180> [accessed 7 April 2021]). While some United Nations Mission Offices considered the proposal favorably, the resolution was not introduced into the UNGA.

(b) The Inter-American Court of Human Rights

34 The IACtHR has also referenced the interests of future generations in the → *Mayagna (Sumo) Awas Tingni Community v Nicaragua Case*, involving the rights of indigenous communities (see also → *Indigenous Peoples*). While the IACtHR’s decision referred to the communities’ relations to the land as necessary to ‘preserve their cultural legacy and transmit it to future generations’ (at para. 149), the Joint Separate Opinion of three of the judges addressed the intertemporal dimension more fully and explicitly. The judges noted that ‘we relate ourselves … in time, with other generations (past and future), in respect of which we have obligations’ (Opinion of Judge Cançado Trindade, Pacheco-Gómez, and Abreu-Burelli para. 10). Footnote 6 to this part of the opinion references works on future generations and international law. In *Advisory Opinion OC-23/17*, recognizing that the right to a healthy environment is a human right, the Court stated that ‘the right to a healthy environment constitutes a universal value that is owed to both present and future generations’ (para. 59).

(c) The UN Committee on the Rights of the Child

35 A group of youth petitioned the UN → *Committee on the Rights of the Child (CRC)* under the Third Optional Protocol to the Convention on the Rights of the Child alleging violations of the Convention due to governmental failures to address the climate crisis. The petition considered the applicability of international legal principles, including the principal of intergenerational equity.

(d) National and Local Court Decisions

36 Increasingly national and lower courts in more than 20 States have looked to a principle of intergenerational equity. The number of judgments concerned with intergenerational equity started to increase significantly in 2004 and has accelerated in recent years (Brown Weiss [2018] 247–49). Courts have used intergenerational equity for two purposes. The first is for procedural matters, such as to grant standing to children as representative of future generations or to toll a statute of limitations for actions that cause significant harm to future generations. The second use is for its substantive content. The judicial decisions come within four major categories: natural resources, pollution, administrative challenges to project construction, and challenges to mineral exploitation, especially to mining permits. More recently, the principle has been raised in climate related cases.

37 For the procedural use of intergenerational equity, the seminal case is *Oposa v Secretary of the Department of Environment and Natural Resources (Factoran)*, 1993, in which the Supreme Court of the Philippines granted standing to a group of children as representative of themselves and of future generations in bringing a claim against the Environment and Natural Resources Department to seek cancellation of timber license agreements and a ban on the approval of new ones. The Philippine Supreme Court noted that 'the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for generations to come' (at para. 22). The right of the people to a balanced and healthful ecology is found in Art. II Section 16 Constitution of the Philippines.

38 The judicial decisions that have referred to intergenerational equity substantively have occurred primarily in courts in Africa, Latin America, South Asia, Asia, and recently in Hungary. In an early case in Africa *Waweru v Kenya* in March 2006, the High Court of Kenya explicitly applied the principle of intergenerational equity to a case involving water pollution from the disposal of waste water and sewage. After referring to the principle, the court noted that 'intergenerational equity obligates the present generation to ensure that health, diversity and productivity of natural resources are maintained or enhanced for the benefit of future generations' (at 13).

39 In Brazil, the High Court handed down five decisions between 2005 and 2011 that emphasized the constitutional duty to protect the environment for future generations (STJ REsp No 745.363/PR [20 September 2007]; STJ REsp No 650.728 [23 October 2007]; STJ REsp No 604.725 [21 June 2005]; STJ REsp No 1.120.117 [10 November 2009]) . In a case involving the protection of mangrove swamps in Brazil, the Superior Court of Justice noted the legal duty to preserve the threatened ecosystem and equated its destruction and deprivation of use to future generations to that of the theft of chattel (STJ REsp No 650.728 [23 October 2007] at 13–14).

40 In India, the → *Supreme Court of India* has recognized intergenerational equity in two recent mining cases. In 2014, in a mining case in the Indian state of Goa, the Indian Supreme Court, referencing intergenerational equity, required as a condition of permits to mine iron ore that a trust fund be established for the benefit of future generations (*Goa Foundation v Union of India and Others* [21 April 2014] at 39). As of February 2020, approximately $70 million had been deposited in the Goa Iron Ore Permanent Fund. In November 2013, prior to the establishment of the Permanent Fund, the Supreme Court ordered the creation of a Committee of Experts to conduct an expert analysis to find an appropriate ceiling for the annual excavation of iron ore in Goa, so as to ensure resources are exploited over an appropriate period of time. The Court directed that the committee keep 'in mind the principles of sustainable development and intergenerational equity'. On 2 August 2017, the Supreme Court of India issued an historic judgment in a large-scale mining case in Odisha, in which the Court specifically discussed the principle of

intergenerational equity and required the Government to develop an updated mineral policy. In February 2019, the Government of India issued a new National Mineral Policy, which contained for the first time a section entitled ‘Intergenerational Equity’ and established an Inter-Ministerial body to institutionalize a mechanism to ensure sustainable mining ‘keeping in mind the principles of sustainable development and intergenerational equity …’ (National Minerals Policy 2019 <https://mines.gov.in/> [accessed 7 April 2021]).

41 In Colombia, the Supreme Court of Justice held in 2018 that the Colombian government had not effectively tackled the problem of deforestation in the Amazon, despite international commitments and legislation on the subject. In its judgment, the Court ordered the Presidency of the Republic, the Ministry of Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development to formulate an Intergenerational Pact for the Life of the Colombian Amazon (*Dejusticia v Colombia* [5 April 2018] at 49). The Court discussed intergenerational equity, and noted that ‘[i]n terms of intergenerational equity, the transgression is obvious [because of] the forecast of temperature increase…; future generations, including children who brought this action, will be directly affected, unless we presently reduce the deforestation rate to zero’ (ibid 37).

42 In a landmark decision in 2020, the → *Constitutional Court of Hungary (Magyarország Alkotmánybírósága)* annulled many of the 2017 amendments of the Hungarian Act No XXXVII of 2009 on the Forest, Forest Protection and Forest Management on the grounds that they violated the Fundamental Law of Hungary (*Decision No 14/2020 (VII.6)*). The Fundamental Law in Art. P refers to the obligation to preserve the country’s natural resources and cultural artifacts for the benefit of future generations. The Court noted that the State manages this common heritage as the trustee for future generations. The Hungarian Ombudsman for Future Generations brought the case to the Constitutional Court.

43 Increasingly, claimants are bringing cases to try to force Governments to take more action to combat climate change or to try to hold fossil fuel and other companies accountable for not addressing the dangers of fossil fuels for climate change. These cases implicitly, if not explicitly, relate to future generations. A summary of several of these cases follows.

44 In the Netherlands, the Urgenda Foundation brought suit on behalf of present and future generations against the Dutch government for failing to take adequate measures to reduce emission of greenhouse gases. The District Court in The Hague held that the government was breaching its duty of care and acting unlawfully by aiming to reduce emissions of greenhouse gas by less than 25% compared with the 1990 emission levels by 2020 (at 5.1). It noted that the principle of fairness required the State to ensure that the costs of climate change be reasonably distributed between present and future generations (at 4.76). The Hague Court of Appeal upheld the District Court’s judgment in 2018 without addressing standing for future generations (at 19). In December 2019, the Supreme Court upheld the lower court decision on the basis of human rights obligations and ordered the Government to reduce GHG emissions by 25% of 1990 levels by 2020 (*Urgenda Foundation v Netherlands* [2019] at 2–3). Similar complaints were filed against the governments of France and Germany in 2018 and 2019 (*Friends of the Earth Germany, Association of Solar Supporters and Others v Germany* [2018]; *Notre Affaire à Tous and Others v France* [2018]; *Commune de Grande-Synthe v France* [2019]).

45 In the United States ('US'), 21 youth plaintiffs brought the case *Juliana v United States*, alleging that the United States Government was knowingly neglecting to mitigate against the future catastrophic effects of climate change, in violation of the plaintiffs' due process rights to life, liberty, and property and against the US public trust doctrine. From the intergenerational perspective, the plaintiffs' argument that the Government's inaction violated the public trust doctrine was significant, for it would extend the public trust doctrine from navigable waters to the atmosphere. The District Court refused to dismiss the case, recognizing the importance of climate stability for present and future generations (at 1264). In January 2020, however, the Federal Court of Appeals dismissed the case.

46 Other lawsuits have been brought in Uganda, Pakistan, and India, alleging that government failure to take sufficient action to combat climate change breaches a public trust doctrine. In *Maria Khan and Others v Federation of Pakistan and Others*, filed in 2018 by a coalition of women on their behalf and that of future generations, and *Pandey v India*, filed in 2017, the applications directly reference the principle of intergenerational equity. In *Leghari v Federation of Pakistan,* the Lahore High Court Green Bench found that the Government's failure to address climate change violated plaintiff's constitutional rights to life and dignity. The opinion invoked intergenerational equity and precautionary principles (see → *Precautionary Approach/Principle*). In April 2021, the Supreme Court of Pakistan upheld the banning of new permits and expansion of existing ones for cement plants in an ecologically sensitive area, and applied the principle of intergenerational equity in the context of climate justice (*DG Khan Cement Co Ltd v Government of Punjab through its Chief Secretary, Lahore* para. 19*)*.

47 Environmental courts and tribunals, which operate separately from a country's judicial bodies, represent another increasingly important forum for the use of intergenerational equity. Many countries have now established such courts. As of 2016, 44 countries had 1,200 environmental courts and tribunals, a sharp increase from the 350 documented in 2009 (Pring and Pring [2016]). In some countries, the environmental courts have disposed of many cases and have applied intergenerational equity. India's statute for its environmental courts encompasses implementing intergenerational equity as a basis for decisions. The experience with environmental courts illustrates the growing importance and relevance of intergenerational equity to environmental judgments at local levels.

48 One of the most striking developments is that constitutions of more and more countries now include provisions relating to future generations and the environment. Many provide only for obligations to future generations, but some also reference rights. Several refer only to protecting cultural legacy. The number of countries adopting such constitutional provisions has risen significantly in the last few decades. As of 1990, only 12 States had constitutions with specific provisions for future generations. As of 2019, the constitutions of at least 55 states do so, with 50 referring to environmental obligations to future generations. Some examples include the South African Constitution, which states that '[e]veryone has the right … to have the environment protected, for the benefit of present and future generations …' (Art. 24), and the Brazilian Constitution which holds that '[t]he Government and the community shall have the duty to defend and preserve [the environment] for present and future generations' (Art. 225). Bhutan's Constitution refers to both future generations and intergenerational equity, stating that '[e]very Bhutanese is a trustee of the Kingdom's natural resources and environment for the benefit of the present and future generations and it is the fundamental duty of every citizen to contribute to the protection of the natural environment, conservation of the rich biodiversity of Bhutan and prevention of all forms of ecological degradation …' and that the Parliament 'may enact environmental legislation to ensure sustainable use of natural resources and maintain intergenerational equity …' (Art. 5). The number of countries adopting such provisions increased after the 1992 Rio Conference on Environment and Development. The

Constitutional references implicitly recognize the importance of intergenerational equity and provide a basis for cases to be brought based upon these constitutional guarantees.

3. Parliamentary and Governmental Implementation

49 Governmental institutions that explicitly consider future generations have emerged within the last few decades. They are still relatively few in number. The Network of Institutions for Future Generations, which was established in 2014 following an international conference in Budapest, lists a variety of national institutions that have been established to protect the interests of future generations. One significant development has been the creation in several countries of an Ombudsman for Future Generations attached to the national parliament (see also → *Ombudsperson*). In 2001, the Knesset, Israel's parliamentary body, established a Commission on Future Generations with a Knesset Commissioner for Future Generations to assess bills of particular relevance for future generations, advise members of the Knesset, and present recommendations on issues of special relevance to future generations. Although the mandate was broad, the Commission in practice focused primarily on protecting children, as embodying interests of future generations. The Commission was abolished in 2007 for political and budgetary reasons. In November 2007, the Hungarian Parliament created an Ombudsman for Future Generations, who could review legislation, advising on impacts for future generations, and intervene in litigation to protect future generations. When the Parliament created the Office of the Commissioner for Fundamental Rights in 2011, the Ombudsman became a Deputy Commissioner with the authority to advise whether to institute proceedings *ex officio* or to go to the Constitutional Court on any matter that may affect future generations. The Deputy Commissioner has to 'monitor the enforcement of the interests of future generations' (Office of the Commissioner for Fundamental Rights of Hungary 'About the Office' <https://www.ajbh.hu/en/web/ajbh-en/about-the-office> [accessed 7 April 2021]).

50 Other initiatives similar to the creation of an Ombudsman for Future Generations have been implemented. In France, in 1993, at the urging of the late Jacques-Yves Cousteau, the government established a Council for the Rights of Future Generations. The Council addressed nuclear power issues before it lapsed following Cousteau's resignation as the Council's president in 1995 to protest France's decision to resume nuclear testing in the Pacific. In March 2015, the National Assembly of Wales passed a widely heralded bill with the title 'Well-being of Future Generations' (Well-being of Future Generations [Wales] Act 2015 [2015 anaw 2]). The legislation established the position of Future Generations Commissioner for Wales to 'act as a guardian of the ability of future generations to meet their needs, and encourage public bodies to take greater account of the long-term impact of the things that they do' (Art. 18). The Commissioner has the responsibility to review the extent to which public bodies are doing so. The 2014 Constitution of Tunisia created the Authority for Sustainable Development and the Rights of Future Generations, an independent constitutional institution (Art. 129). Under Art. 7 of Tunisia's Draft Organic Law on the Authority for Sustainable Development and the Rights of Future Generations of 2018 'the Authority shall be consulted on: draft laws relating to economic, social and environmental issues, [and] national and regional development plans …' (European Commission for Democracy through Law 'Tunisia: Opinion on the Draft Organic Law on the Authority for Sustainable Development and the Rights of Future Generations' [24 June 2019] CDL-AD(2019)013 para. 61).

51 Some parliaments have created special committees to consider the effects of their actions on future generations. Finland has been at the forefront of this approach by establishing in 1991 a parliamentary Committee for the Future, which is composed of members of Parliament representing different political parties. The Committee for the Future considers implications of specific developments for the future, submits reports on

them, and analyses policies of other parliamentary committees that affect the future. The United Kingdom set up an All Party Parliamentary Group for Future Generations to identify ways to include concern for future generations in policy-making. The German Bundestag established a Parliamentary Advisory Council on Sustainable Development to serve as the advocate of long-term responsibility in the political process and to structure policy for future generations. Within the European Union, countries have considered establishing a Committee for Future Generations within the Assembly, though they have not done so.

4. International Consideration of Intergenerational Equity

52 Within the last decade, international attention has increasingly focused on what impact we are having on the future and on issues of intergenerational equity. In part this is a product of the Intergovernmental Panel on Climate Change ('IPCC') reports, which indicate that we are likely facing a serious climate crisis, which could result in devastating impacts on the future. In October 2013, the high-level international Oxford Martin Commission for Future Generations issued its *Now for the Long Term,* which is a broad-ranging report identifying challenges and making recommendations. One recommendation is to build shared global norms and values. The World Economic Forum has established a Global Future Council, which looks to establishing a network of councils addressing specific issues of the future. A growing number of → *non-governmental organizations* are concerned with the future and intergenerational equity, including the long-standing World Future Council and the Mary Robinson Foundation for Climate Justice. The latter has proposed a high-level Global Guardian for Future Generations within the United Nations system. The 2018 Nelson Mandela Peace Summit Political Declaration called for the United Nations 'to explore means to systematically consider the needs of present and future generations within its decision-making processes' (Political Declaration adopted at the Nelson Mandela Peace Summit [24 September 2018] <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_5885> [accessed 7 April 2021]).

C. Concluding Observations

53 The problems facing our planet today are inherently intergenerational. Climate change may be the most visible, because it can only be addressed effectively in an intergenerational framework. But other new technologies also inherently bring challenges for the interests of future generations, including synthetic biology and artificial intelligence. Moreover we are increasingly aware that our planet is a shared space and that actions in one region or even one locality can have broad effects elsewhere and affect the well-being of future generations. As governments address the complexities of climate change and of new technological challenges, they will be making choices that have profound effects upon the robustness and integrity of the Earth. In our kaleidoscopic world, not only governments, but also the private sector, non-governmental organizations, local communities, other institutions, and individuals are important actors, whose actions can affect the well-being of future generations. This means that the norm of intergenerational equity needs to be considered in decision-making. The principle of intergenerational equity embodies this norm and provides a means to give fairness to both present and future generations. Youth today are at the forefront in pressing for ways to ensure a robust future. The principle of intergenerational equity offers a means for doing so.

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Annex ZZA

7

Due Diligence in International Environmental Law

A Fine-grained Cartography

Jorge E. Viñuales

1. Introduction

It is the fate of duties—as of other norms—deliberately formulated in a broad and open-ended manner to cause some malaise among lawyers, who expect them to have sufficient normative density to be defined not only in *concreto* but also in *abstracto*. The duty requiring states to exercise due diligence so as to avoid causing 'significant' harm to the environment, is no exception to the fate of broad duties. Circumscribing its contours in *abstracto* is a difficult exercise, not because one cannot comment on it but because such commentary—to be of some value—must try to accurately reflect the practical operation of the norm, which in turn requires the surveying of a range of contexts where the norm 'operates', both in adjudication and elsewhere. Two main inquiries can be conducted in this regard.

First, one can discuss the conceptual limits arising from the very formulation of the duty, as it appears in treaties, soft-law instruments, and judicial and quasi-judicial decisions, as well as other authorities. This first inquiry focuses on: (i) identifying the norms from which this duty arises; (ii) determining who are the duty-bearers; (iii) who are the correlative right-holders; (iv) what type of action/inaction is covered by the duty, (v) what outcome it seeks to govern; and (vi) what the outer limits of the duty are. Secondly, one can focus on the 'degree' of due diligence, namely what makes the targeted behaviour 'duly' diligent: (i) the choice of means in discharging this duty; (ii) with the level of diligence depending on the time, the type of activity and the capacity of the state in question; and (iii) the scope of the duty, which encompasses both the adoption of relevant measures and their proactive enforcement.

In this chapter I conduct both inquiries in order to clarify the normative requirements arising from this duty with respect to environmental protection. My purpose is to provide a fine-grained analysis of the materials, rather than focusing on the broad implications of due diligence for environmental protection. The chapter

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first seeks to distil from a number of old precedents several significant features relating to both inquiries (section 2). I then turn to the post-1945 law of environmental protection to clarify the due diligence duty from the two aforementioned perspectives (section 3). In conclusion, I make some observations about the wider implications of the fine-grained inquiry conducted in this chapter (section 4).

2. A Tale of Two Precedents

2.1 The Characterisation of Due Diligence in the Alabama Arbitration

The 1872 *Alabama Claims* arbitration is known for providing an authoritative statement on several rules of international law and also represents a prominent illustration of the benefits of international arbitration, even in a highly political dispute between two major powers.[1] In the specific context of due diligence, the reasoning of the arbitration court provided four important considerations that are still relevant today, including for action/inaction relating to environmental protection. The first consideration was that:

> the 'due diligence' referred to in the first and third of the said rules [Article VI of the compromis] ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part.[2]

In casu, the court noted that the circumstances were such that the UK was held to 'all possible solicitude for the observance of the rights and duties involved in the proclamation of neutrality',[3] or in other words to the highest level of due diligence. This observation is important for at least three reasons. First, it links due diligence to 'risk', which is different from actual damage. Secondly, the degree of diligence is not static; it varies with the level of risk (no sliding scale of diligence is envisaged on the basis of a state's capabilities and resources, although this was argued by counsel for the US). Thirdly, the duty of due diligence, however demanding (in this case

[1] The place of this arbitration in discussions of due diligence in international environmental law has been overshadowed by references to the *Trail Smelter* arbitration. This neglect also concerns other areas of international law. As noted in the chapter by Helmut Aust/Prisca Feihle on 'Due Diligence in the History of the Codification of the Law of State Responsibility', chapter 3 of this book, section 2.1, it is often thought that due diligence emerged from the codification work of the law on state responsibility. On the history of the concept, see Giulio Bartolini, 'The Historical Roots of the Due Diligence Standard', chapter 2 of this book, section 2.

[2] *Alabama Claims of the United States of America against Great Britain*, Decision of 14 September 1872, vol. XXIX, UNRIAA, 125-134, 129.

[3] Ibid., 130.

the court set the bar to the highest 'possible solicitude'), does not amount to strict liability. In fact, the court found that for some specific vessels manufactured in the UK, the latter had met the requirements of due diligence, despite the occurrence of undesirable results. None of these points are obvious, even today, and they are all significant for international environmental law as it presently operates.

A second consideration arising from this case is the significance of representations by the aggrieved state (the US representative had informed the UK government that vessels were being built for possible use in the Civil War), which should have triggered 'in due time' at least some 'effective' measures of prevention. Thus, action by a possibly aggrieved state (a state at risk), although not a requirement, may catalyse the duty of due diligence or, more specifically, may at the very least be instrumental in setting the time for action.

A third consideration is the fact that subsequent measures could have cured the initial negligence, although the UK failed to take such action or did so in a manner 'so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred'.[4] The latter point suggests that the duty of due diligence is a continuous rather than a discreet one: due diligence must be constantly exercised. This is important from a litigation perspective.

As a fourth and final consideration, the formulation of the due diligence rule in Article VI of the compromis makes it clear that a state's failure to effectively control the actions of 'all persons within its jurisdiction' may be a breach of the duty of due diligence. This simple point is significant because it clearly covers the actions of private persons and makes due diligence relevant for extraterritorial situations, much like in today's discussions of human rights extraterritoriality and their link to environmental principles. The duty of due diligence therefore finds a solid basis in the *Alabama Claims* arbitration. Its contribution to the clarification of the duty of due diligence thus warrants comparison with the *Trail Smelter* case, at the very least to highlight areas of convergence and divergence.

2.2 From *Alabama* to *Trail Smelter*

It must be mentioned that the *Alabama* precedent was invoked before the *Trail Smelter* tribunal and duly noted by it.[5] Significantly, the latter tribunal recognised the *Alabama* decision as the start of a relevant line of precedents—although it eventually relied on the domestic practice of Switzerland and the US, as both were federal systems and had faced disputes among 'quasi-sovereign' entities. This was

[4] Ibid., 130.

[5] *Trail Smelter Arbitration*, Decisions of 16 April 1938 and 11 March 1941, vol. III, UNRIAA, 1905-1982, 1963.

possible because Article VI of the compromis specifically required the tribunal to apply 'the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice'. In a famous and often-quoted statement, the tribunal held that it:

> finds that the *above decisions, taken as a whole*, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[6]

If, among 'the above decisions, taken as a whole', one is to include international decisions, the only explicitly identified precedent of unquestionable authority is indeed the *Alabama* decision. On this point, there is a clear convergence between the two decisions.

Further convergence can be found in that states may be responsible for allowing private parties to use their territory in harmful ways, irrespective of any attribution inquiry. The relevant conduct of the state is indeed its own inaction, not the action of the private person. Two other points of convergence are the reference to the notifications by the aggrieved state, although the *Trail Smelter* decision does not attach any significant relevance to this point, and, much more importantly, the continuous character of the duty of due diligence, which is formulated in the *Trail Smelter* decision in terms that are so advanced[7] that they could be considered progressive even for an international tribunal deciding a dispute today. The drawback is that the content of due diligence is not spelt out in general terms and remains embedded in, indeed consubstantial with, the technical specifications—akin to the modern 'standards'—provided by the tribunal and cannot be detached from them.

There is, however, some divergence between the two decisions, in that the *Trail Smelter* award provides, quite unexpectedly, a more limited statement of the duty of due diligence. First, unlike the *Alabama* decision, the *Trail Smelter* award makes no explicit reference to the possibility of curing a breach through subsequent action. The attempts of the smelter to manage the initial complaints from farmers in Washington are mentioned as part of the factual record, but the award does not derive any legal principle from them. Secondly, and more significantly, the rule stated in the *Trail Smelter* case concerns actual 'damage' and not any damage but 'material' damage.[8] Thus, the regime set out in the award, which is the embodiment of the

[6] Ibid., 1965 (emphasis added).

[7] The tribunal indeed set up a provisional regulatory regime and then a permanent one to be implemented by Canada, with the explicit possibility of adjusting the system if the circumstances (or their scientific understanding) changed. See ibid., 1966.

[8] Ibid., 1980 (emphasis added).

diligence due by Canada in this case, is aimed only at preventing 'material' damage, not any damage, let alone risk. By contrast, the *Alabama* rule is not confined to damage but encompasses 'risk' as well. That was a result of the circumstances of the case, which were so serious as to require 'all possible solicitude' from the UK. But a similar argument can be made for ultra-hazardous activities such as the generation of nuclear energy or the production of highly toxic substances, in that due diligence is not only 'required' from the state where the operations take place but also 'actionable'—namely it can be legally and specifically demanded—by potentially affected states irrespective of the occurrence of damage. Such is the rule in Article 3 of the 2001 International Law Commission's Articles on Prevention: '[the] State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimise the risk thereof'.[9] The commentary of this provision expressly relies on the *Alabama* case.

The basic conclusion to be drawn from the foregoing paragraphs is that both the *Alabama* arbitration and the *Trail Smelter* case remain relevant, even today, to a proper understanding of the broad parameters of the duty of due diligence (formulation of the duty) and the finer-grained questions of degree (degree of due diligence). Together, they 'unpack' most of the issues and set a broad perimeter within which the more recent instruments, cases, and commentary unfold. In the next section I focus on the post-1945 international law, paying particular attention to the case law of the last decade, which has made an important contribution to the clarification of due diligence.

3. The Duty of Due Diligence in Contemporary International Environmental Law

3.1 Preliminary Observations

Against the backdrop set by the *Alabama* and *Trail Smelter* precedents, subsequent developments have added further specificity (particularly regarding the operation of due diligence in an 'environmental' context), together with further elaboration of elements that were only flagged in those precedents and, last but not least, also some new elements not foreseen at the time. The two precedents nevertheless remain authoritative.

With these clarifications in mind, I now turn to the two different inquiries identified in the introduction. For each of them, the discussion relies on a combined assessment of the two aforementioned precedents and of more recent developments.

[9] United Nations, International Law Commission (ILC), Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, A/RES/56/82, 12 December 2001.

3.2 First Inquiry: Formulation of the Duty

3.2.1 Due Diligence and the Prevention Principle

In the context of environmental protection, the formulation of the duty of due diligence largely overlaps with the formulation of the principle of prevention provided in Principle 2 of the Rio Declaration on Environment and Development:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[10]

To state that due diligence 'largely' overlaps with the principle of prevention implies that there are differences. I would like to state these differences in a form that is not merely a conceptual elaboration of these two norms but one that is practically relevant.

The first difference stems from the broader scope of the duty of due diligence, which applies to several types of harm and risk other than environmental harm or risk thereof (as emphasised in the *Alabama* arbitration). The second difference is that the duty to prevent environmental harm (the prevention principle) concerns—as we recall from the *Trail Smelter* arbitration—only harm of a certain magnitude ('material' harm[11] or 'significant' harm[12] or risk of thereof.[13] By contrast, the duty of due diligence is not similarly limited and, hence, action/inaction that results in harm or risk to the environment but which is below the threshold of significance required to trigger a breach of the prevention principle remains governed by (and could potentially constitute a breach of) the duty of due diligence. That much can be learnt from the *Alabama* arbitration, where due diligence is not limited by either upper or lower bounds in the magnitude of harm or risk.[14] This is not a purely theoretical point. By way of illustration, a state may be required or entitled, under the duty of due diligence, to take precautionary measures even in

[10] United Nations, General Assembly, Rio Declaration on Environment and Development, A/CONF.151/26, 13 June 1992, Rev.1; On prevention, see Leslie-Anne Duvic-Paoli/Jorge E. Viñuales, 'Principle 2: Prevention', in Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford: OUP 2015), 107–138; Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge: CUP 2018).

[11] *Trail Smelter* (n. 5), 1980.

[12] See ILC, Prevention Articles 2001 (n. 9), art. 2(a); ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, 14, para. 101.

[13] ILC, Prevention Articles 2001 (n. 9), art. 3.

[14] *Alabama Claims* (n. 2), 129.

the absence of scientific certainty as to the existence of risk of significant harm.[15] Such a requirement/justification would not flow from the prevention principle, which only operates when there is risk. Nor would it flow, at least in the absence of an applicable treaty, from the precautionary approach/principle, whose customary grounding is still debated.[16] It would derive instead from the duty of due diligence, which is unquestionably grounded in general international law since at least the period of the *Alabama* arbitration and has a scope that is not limited to the risk of 'significant' environmental harm. The latter does not mean that any harm or risk thereof may be subject to the duty of due diligence (this sort of 'absolute integrity' theory was early on discarded by international tribunals[17]) but only that this duty is not necessarily subject to the same definition of 'significance' or of 'risk' as the prevention principle.

Aside from these two differences, however, the operation of due diligence and prevention in an environmental context overlap. They do so to a point that the duty of due diligence must be considered as defining the 'responsibility to ensure', as stated in Principle 2 of the Rio Declaration, in a form of articulation similar to that identified in other contexts.[18] Thus, as far as environmental protection is concerned, the duty of due diligence rests upon the prevention principle, which finds expression in several other norms that I have analysed elsewhere.[19]

3.2.2 Duty-bearers

With respect to the duty-bearers of these two articulated norms, one can identify three situations. First, it is well established that states are subject to both the prevention principle and the duty of due diligence, and all the authorities mentioned in this chapter analyse the situation of states as duty-bearers. Secondly, there is some authority for the proposition that at least some international organisations that have been entrusted with, and have effectively taken up, the discharge of some state activities (for example the regulation of fisheries) are likewise subject to the duty of due diligence.[20] It is unclear whether the 'degree' of due diligence expected

[15] See ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, paras 125-135, particularly paras 131 and 135.

[16] See Pierre-Marie Dupuy/Jorge E. Viñuales, *International Environmental Law* (Cambridge: CUP 2nd ed. 2018), 70–73.

[17] See *Lake Lanoux Arbitration (Spain v. France)*, Decision of 16 November 1957, vol. XII, UNRIAA, 281-317.

[18] See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 226, para. 25.

[19] See, e.g., Jorge E. Viñuales, 'The Rio Declaration on Environment and Development: Preliminary Study', in Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford: OUP 2015), 1–64; Duvic-Paoli/Viñuales, 'Principle 2' 2015 (n. 10); Jorge E. Viñuales, 'Protección Ambiental en el Derecho Consuetudinario Internacional', *Revista Española de Derecho Internacional* 69/2 (2017), 71–91.

[20] ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, 4, para. 168.

from such organisations could in all points be equated with that of states, given the fact that enforcement of such delegated powers remains, both legally and practically, fully in the hands of states. But this is something that relates to the second inquiry, namely that concerning the degree of due diligence, rather than the broad parameters of the duty of due diligence.[21] Thirdly, a range of other subjects of international law—from peoples, to indigenous, tribal, and other groups, as well as a wide variety of individuals (from multinational companies to physical persons)—could potentially be subject to the duty of due diligence and the prevention principle as they arise from international law. There is much disagreement about this point and the matter is not settled.[22] That said, the logic that should guide any consideration on this point is the same as for states and international organisations, namely that it is not merely the formal but the effective ability of such subjects to discharge the duty that is decisive. This point must not be misunderstood: with regards to the duty of due diligence, one must distinguish between matters of *formulation* and matters of *degree*. Peoples, groups, corporations, and individuals are, by their very definition, capable of discharging certain duties. Hence, it would technically (as a matter of formulation) be entirely possible to subject them to a duty of due diligence, which would be sufficient to settle matters of formulation. Matters of degree, however, present a different set of difficulties, which will be discussed later.[23]

3.2.3 Right-holders

The question of duty-bearers must be clearly distinguished from that of the correlative question of right-holders, which is far more complex. It must be noted that it is conceptually possible for a duty and, specifically, for the duty of due diligence to be owed to both an object (the environment, which is not, as such, a right-holder) and a subject, who may or may not have a correlative right (for example future generations). For the protection of these kinds of objects and subjects, the main avenue would be the active discharge by the duty-bearers of the duty of due diligence. To the extent that failure to satisfactorily discharge such a duty can be claimed, this would only be possible through the exercise of a right—whether substantive or procedural—by a right-holder. Thus, I will focus here on right-holders. Another clarification is that an obligation whose duty-bearers are mainly (albeit not only) states might entail correlative rights for both states and/or other subjects. Such is the case, for example, for the human rights obligations of states which are

[21] See below section 3.3.

[22] See the ongoing discussions on the possibility to adopt a Global Pact for the Environment: United Nations General Assembly Resolution 'Towards a Global Pact for the Environment', A/72/L.51, 10 May 2018, which would broaden the definition of 'duty-bearer'. Indeed, the Draft Project for a Global Pact for the Environment contains, in art. 2, a duty of care arising for 'every State or international institution, every person, natural or legal, public or private'.

[23] See below section 3.3.

specifically correlative to the rights of individuals. As noted earlier, the duty of due diligence has a broader scope than the prevention principle because it concerns not only the duty to prevent significant environmental harm or risk thereof but also other types of harm or risks thereof.[24]

This difference has practical importance. It means that there are two categories of rights and right-holders 'relevant' for the discharge of the duty of due diligence in the context of environmental protection: those rights arising technically from the prevention principle (category 1) and those other rights arising from either the broader due diligence duty or from other obligations that present a similar symbiosis with the prevention principle (category 2). The distinction is also important because the exercise of the rights encompassed by category 2 may expand the measure of protection afforded to other subjects (again, future generations) or to an object (the environment as such) who are not right-holders, as compared to the protection that could be claimed through the exercise of rights arising technically from the prevention principle only (category 1).

It is useful, therefore, to discuss category 2 first. This category includes a wide range of rights, none of which arise technically from the prevention principle, but whose object is 'relevant' for—that is, tends towards a similar goal as—the rights technically arising from the prevention principle. For example, the rights of access to environmental information, participation in environmental decision-making, and access to justice are certainly relevant to press state authorities to behave diligently with respect to the prevention of environmental harm, but individuals cannot rely solely on the principle of prevention to base their request for such access or participation. This point can be generalised. For example, freedom of speech and freedom of association are certainly relevant in order for civil society to press state authorities to behave diligently with respect to environmental protection, but they do not arise technically from the prevention principle itself. Such relevant rights have their own right-holders, which are not defined by the prevention principle. They are, however, relevant for the discharge of the duties arising from the prevention principle, not only because they aim for a similar or convergent goal but also, in a more technical manner (systemic integration), which will be explained by reference to category 1.

Moving now to category 1, it encompasses those rights (and right-holders) that arise specifically from the prevention principle. In order to clarify them, an additional distinction is needed between those rights that are *specifically* exigible and those which are only *generally* exigible.[25] The best way to explain the

[24] See above section 3.2.1.

[25] Unfortunately, there is no English term capable of fully translating this notion. Approximate English terms include: 'due', 'payable', or 'chargeable'. In French, 'exigible' is generally understood to mean that an existing (binding) obligation falls due and its specific discharge can thereafter be required at any time by the right-holder. An obligation may be 'binding' or 'due' without yet being 'ripe'. The terms 'payable' and 'chargeable' are closer to 'exigible' but they suggest that only sums of money (not specific performance) are concerned.

difference is with an example. The prevention principle, like the duty of due diligence, entails rights upon potentially affected states to require the state of origin of an activity to exercise due diligence to ensure that no significant harm to the environment (or risk thereof) is generated. But such rights do not entitle potentially affected states to require this or that specific measure. Thus, if a government conducts a cost-benefit analysis on a bill or a proposed regulation taking into account only the likely impact on the territory of the state of origin and not on other potentially affected states, then such other states will be entitled to demand that the state of origin exercises general due diligence but not, for example, the specific procedural measure of expanding the cost-benefit analysis. The selection of specific measures to exercise due diligence remains the purview of the state of origin.[26] In rare cases, a third party will identify the specific measures that must be adopted by the state of origin (as was the case in the *Trail Smelter* award, which is very progressive on this point). More often such measures will be defined by treaty, but neither the prevention principle nor the duty of due diligence entitles the right-holders to require the adoption of specific measures by the state of origin. These measures are only *generally* exigible, with two exceptions under which certain measures are *specifically* exigible.

There are two obligations that have been jurisprudentially considered to be technical expressions of the prevention principle[27] and that entail correlative rights to specifically demand the adoption of certain measures: namely the conduct of an environmental impact assessment and notification and consultation in certain specific cases. These rights are held by potentially affected and possibly other states and, unlike the broader right to demand the exercise of due diligence, they are *specifically* exigible, that is, they provide a legal basis to demand from the state of origin the adoption of not just a measure of its own choosing but a specific measure defined internationally. They operate in the same way as a treaty norm requiring a specific measure.

Importantly, the specification of the remaining areas (beyond the two specifically exigible measures mentioned earlier) of generally exigible due diligence is not entirely unconstrained. Whether the state of origin has exercised its discretion in the choice of relevant means can be reviewed by a tribunal (e.g., the partial cost-benefit analysis referred to above would be subject to review) and such an assessment would normally rely—pursuant to the principle of systemic integration[28]—on

[26] ILC, Prevention Articles 2001 (n. 9), comment to art. 3, paras 9, 11 and 12: referring to the *Alabama* case where the court rejected the proposition of the UK that 'due diligence' was a national standard; see also ICJ, *Pulp Mills* (n. 12), para. 205: where the ICJ suggests that the content of a component of the duty of care, namely the customary obligation to conduct an environmental impact assessment, would be left to states.

[27] ICJ, *Pulp Mills* (n. 12), paras 101–102, 144–146, 204; ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Construction of a Road in Costa Rica along the River San Juan (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015, ICJ Reports 2015, 665, para. 104.

[28] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art. 31(3)(c).

other 'relevant' norms applicable between the parties. For example, the degree of diligence could be assessed in the light of the rights of access to environmental information, participation in environmental decision-making, and access to justice, or of the human rights of the individuals in foreign states who are affected by the action/inaction of the state of origin.

At this stage, the question regarding the correlative right-holders of the prevention principle and the duty of due diligence can receive a general, albeit still incomplete, answer: technically, the correlative right-holders of the prevention principle are states; but other 'relevant' right-holders, whose rights do not technically arise from the prevention principle, include states and other subjects of international law, depending on the nature of the relevant right. A fuller examination of this question cannot be provided here as it would essentially require a survey, an inventory, and a characterisation of a range of obligations and correlative rights. I should, however, mention the specific case of the right to an environment of a certain quality.

I have examined in another context the articulation between the right to an environment of a certain quality, which is still under development, and the prevention principle.[29] In the present development of international law, the most appropriate understanding of the role of this right is as a 'relevant' right pursuing a purpose that is similar (and indeed very close) to that of the prevention principle. This right could and should in my view be relied upon to interpret the degree of due diligence *generally* exigible from a state. There are some subtleties relating to the spatial scope of operation of the two norms,[30] but their normative articulation would not be affected by them.

3.2.4 Type of Conduct Covered

The next parameter of the duty relates to the type of action/inaction. Against the background of the previous discussion, this question is less complex. Any action/inaction by the duty-bearer (states, international organisations, and possibly other subjects of international law) that may generate significant environmental harm or risk thereof in another state or an area beyond its national jurisdiction (and possibly also within the territory or the jurisdiction of the negligent state) is governed

[29] See Jorge E. Viñuales, 'A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment', in Nehal Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford: OUP 2016), 177–221.

[30] Indeed, the prevention principle concerns harm to the environment of other states and beyond national jurisdiction (with an interrogation mark for harm to the environment of the state of origin), whereas the right to an environment of a certain quality (healthy, safe, clean, and/or generally satisfactory) concerns harm that happens in the territory of the state where the person is located (with some additional developments needed for an extraterritorial application of this right, which would make it spatially convergent with the scope of the prevention principle). See the account of extraterritoriality in an environmental context provided in ibid., 218–219, which has been followed by the Inter-American Court of Human Rights in its Advisory Opinion of 15 November 2017, OC-23/18, IACtHR (Ser. A), No. 23.

by the duty of due diligence. The only two issues that may require further clarification relate to the acts of private parties and the continuous nature of the action/inaction. However, as mentioned earlier, it seems abundantly clear, since at least the *Alabama* arbitration, that it is the inaction or deficient action of the state itself, as an enabler of the private action, that is governed by the duty of due diligence.

As for the continuous nature of the action/inaction, the main distinction is between the requirements of the duty, which are continuous, and the action/inaction at stake, which does not need to be. The continuous character of the duty[31] is entirely compatible with punctual, and hence discontinuous, interventions. For example, if the authorities are informed of an imminent private initiative and, although they may have not yet taken any action, they specifically intervene to stop the initiative or keep it under control, the continuous requirements of the duty would be met even if they then discontinue the regulatory intervention, as long as they remain generally vigilant.

3.2.5 Outcomes Governed by the Duty

The outcomes that the duty seeks to govern have also been elaborated upon in the previous discussion. Four clarifications are needed for the parameters of the duty to be understood. First, the *Alabama* precedent and the 2001 ILC Articles on Prevention have made clear that the outcome to be prevented is not only a materially negative outcome ('damage' or 'harm') but also the 'risk' thereof, even if the negative outcome does not in fact materialise. The mere generation of 'risk' may be sufficient to trigger the correlative rights identified earlier.

Secondly, unlike the bare duty of due diligence, in the context of environmental protection, only damage, harm, or risk of a certain magnitude ('material' or 'significant') is governed by the prevention principle. I will not attempt to define what is deliberately not defined in the norm—and likely even beyond the possibility of being abstractly defined—but my earlier comment regarding the use of 'relevant' norms to clarify the scope of the prevention principle is also applicable here. The fact that the outcome may amount to a breach of another—distinct but related ('relevant')—norm may either render the harm 'significant' or may be an important indication that such is the case.[32] By contrast, damage, harm, or risk which is not 'material' or 'significant' is not governed by the prevention principle. This point must not be misunderstood. Indeed, such a statement may only be correct retrospectively, once the negative outcome has indeed materialised and is deemed 'immaterial' or 'non-significant', or after a diligent 'risk' assessment has led to the conclusion that any potential damage or harm would be below the threshold of

[31] On the continuous character of the duty see above section 2.1.

[32] See e.g., ECtHR, *Budayeva and others v. Russia*, Judgment of 29 September 2008, Applications No. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02, paras 128–137; PCA, *South China Sea Arbitration (Republic of the Philippines v. People's Republic of China)*, PCA Case No. 2013-19, Award of 12 July 2016, paras 962–966.

significance. In the latter case, such an assessment would remain subject to a more conclusive (retrospective) assessment of damage or harm. If instead of adopting a retrospective perspective, one adopts a prospective one, any potential outcome remains governed by the duty of due diligence and therefore triggers the correlative rights. Hence, the importance of procedural steps in this context. Even if the outcome places the action/inaction outside the scope of the prevention principle, such action/inaction may remain governed by other norms. For example, the polluter-pays principle requires states to adopt domestic measures for polluters to internalise (that is, to 'bear') the costs they have lawfully caused. In other cases, the action/inaction may not be in breach of the prevention principle and, yet, it may be in breach of another 'relevant' norm (for example obligations requiring public participation).

Thirdly, a difficult question concerns the boundary between 'risk' and outcomes that do not amount to risk. Despite the conceptual difficulties in distinguishing the two, the insurance industry has found the distinction sufficiently solid to build a business around it. Risk, in this context, requires a reliable probability ('high' or 'small', but reliable as opposed to volatile) of a negative outcome. In the absence of any of these two elements (reliable probability and negative outcome), the situation is one of 'uncertainty', which is beyond the scope of prevention and falls under that of precaution.[33]

Fourthly, as noted earlier, the most widely accepted formulation of the prevention principle refers to 'damage to the environment of other states or of areas beyond the limits of national jurisdiction'[34] without explicitly referring to an outcome that would affect only the state of origin. This apparently minor point is systemically important, and I will discuss it in the last section of this chapter. For present purposes, I should only observe that currently there is some authority for the proposition that the prevention principle applies to environmental harm in general, irrespective of where it occurs.[35]

3.2.6 Outer Boundary of the Duty

The final parameter for the formulation of the duty of due diligence in an environmental context relates to its outer boundary. Here again, the *Alabama* precedent provides normative guidance. Whether one uses conceptual categories such as

[33] See Jorge E. Viñuales, 'Legal Techniques for Dealing with Scientific Uncertainty in Environmental Law', *Vanderbilt Journal of Transnational Law* 42 (2010), 437–503; Antônio Augusto Cançado Trindade, 'Principle 15: Precaution', in Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford: OUP 2015), 403–428.

[34] See United Nations, Declaration of the United Nations Conference on the Human Environment, A/CONF 48/14/Rev.1, 16 June 1972, principle 21; United Nations, General Assembly, Rio Declaration, 13 June 1992 (n. 10), principle 2.

[35] See ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), paras 142–148; ITLOS, *Request for Advisory Opinion* (n. 20), paras 111, 120; ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire)*, Order of 25 April 2016, Case no. 23, paras 68–73; PCA, *South China Sea Arbitration* (n. 32), para. 940.

obligations of means versus obligations of result,[36] fault versus strict (or objective) liability, or some other category, the outer limit of the duty is clear: the mere occurrence of damage is not enough for a breach. This conclusion was reached in the *Alabama* decision in connection with some specific vessels[37] as well as in the 2016 *South China Sea Arbitration* with respect to some specific instances of environmental damage.[38] But more than the mere adoption of measures is required: states must proactively seek to enforce such measures.[39] Thus, this parameter could be conceptually clarified by reference to three stages: the adoption of measures; the enforcement of measures; and the occurrence of the negative outcome. The outer boundary of the duty is located between the second and the third stages.

3.3 Second Inquiry

3.3.1 Overview

The broad parameters of the duty of due diligence in the context of environmental protection thus defined, the second inquiry comes closer to the legal topography and focuses on matters of 'degree' of diligence. This inquiry is difficult because any conclusion relating to the 'degree' of due diligence should have sufficient legal grounding in the relevant authorities. Based on the materials surveyed, which are largely representative of the state of international law on this question, three main criteria have been recognised as capable of graduating the degree of diligence.

3.3.2 Gravity of the Outcome

This question arose already in the *Alabama* case. During the proceedings, counsel for the US had argued that both the gravity of the potential outcome and the 'dignity and strength of the power which is to exercise [the duty]' had to be taken into account in setting the standard of diligence. The tribunal only retained the first criterion,[40] although it did not reject the second. The gravity of the outcome resulting from negligence seems to be the main criterion graduating the level of the due diligence required.[41] But the second criterion mentioned by the US has also received some attention, although not in the manner envisioned at the time of *Alabama*.

[36] ICJ, *Pulp Mills* (n. 12), para. 187; ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), para. 110; ITLOS, *Request for Advisory Opinion* (n. 20), para. 129.

[37] *Alabama Claims* (n. 2), 132 (discussion relating to the vessel 'Retribution').

[38] PCA, *South China Sea Arbitration* (n. 32), paras 972–975. See further ICJ, *Pulp Mills* (n. 12), para. 187; ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), para. 110; ILC, Prevention Articles, 2001 (n. 9), commentary to art. 3, para. 7.

[39] ICJ, *Pulp Mills* (n. 12), para. 197; ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), paras 115 and 239; ILC, Prevention Articles, 2001 (n. 9), commentary to art. 3, para. 10.

[40] *Alabama Claims* (n. 2), 129.

[41] The 'degree of care required is proportional to the degree of risk involved in the business', ILC, Prevention Articles, 2001 (n. 9), commentary to art. 3, para. 18; ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), para. 117.

3.3.3 Capabilities

What could be referred to as the 'capabilities' criterion has featured prominently in discussions about differentiation in international environmental law.[42] It has also been expressly addressed in the advisory opinion of the International Tribunal for the Law of the Sea's Seabed Chamber on the *Responsibility of States Sponsoring Activities in the Area*.[43] In this opinion, the Chamber concluded that 'general provisions concerning the responsibilities and liability of the sponsoring state apply equally to all sponsoring states, whether developing or developed',[44] and that the rationale is to prevent 'states of convenience', that is, states where companies could register themselves to benefit from less demanding requirements. However, the opinion then noted that there may be some variations in the implementation of certain regulations that expressly rely on the precautionary approach. The formulation of the precautionary approach in Principle 15 of the Rio Declaration expressly allows for this approach to be applied by states 'according to their capabilities'. In the context of prevention, the commentary to Article 3 of the ILC Prevention Articles specifically states that:

> The economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. But a State's economic level cannot be used to dispense the State from obligation under the present articles.[45]

This somewhat elliptical comment may be understood as stating that all states are subject to the duty of due diligence (they are duty-bearers from the perspective of the duty's formulation) but the degree of due diligence that must be displayed varies. Even under this understanding, the ILC Articles on Prevention would be inconsistent with the conclusion of the Seabed Chamber, at least as a general matter, because the Seabed Chamber's conclusion concerns the specific norms at stake in that case.

The question remains unsettled in the case law, but the need to account for the capabilities of the state in question seems to me unavoidable. The real issue, in my view, is not *whether* such differences can be taken into account but *how* exactly to do so. To take an extreme example, a state whose administrative capabilities have been almost entirely neutralised as a result of civil war or a natural catastrophe could not be expected to duly and regularly follow every detail concerning activities within its territory that may result in environmental harm. But

[42] For an overview of the debate over 'common but differentiated responsibilities', see Philippe Cullet, 'Principle 7: Common but Differentiated Responsibilities', in Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford: OUP 2015), 229–244.

[43] ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), paras 158–159.

[44] Ibid., para. 158.

[45] ILC, Prevention Articles, 2001 (n. 9), commentary to art. 3, para. 13.

that may or may not mean that the level of due diligence expected from it is lower. The legal construction of the situation could be that although there is a violation of due diligence, such a violation is justified (for example through the operation of a circumstance precluding wrongfulness). Alternatively, it could be that due diligence depends on the specific circumstances in which the duty is to be discharged and not on the level of development of the state. Still another possibility would be to adjust the duty of due diligence on the grounds that the prevention principle, like the precautionary approach, admits different degrees arising from the reference—in Principle 2 of the Rio Declaration (unlike Principle 21 of the Stockholm Declaration)—to a state's 'own environmental and developmental policies'. Because these and other understandings are equally possible, the question remains unsettled.

3.3.4 Historical Circumstances

The third criterion is related to the previous one. It makes the degree of due diligence dependent on the specific moment in history in which it is assessed. As noted by the Seabed Chamber:

> The content of 'due diligence' obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that 'due diligence' is a variable concept. *It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge.*[46]

Thus stated, changes 'over time' are a proxy for a 'range of circumstances' that are normally expected to change over time, including the dominant scientific understanding of the risks associated with a given activity, the saturation of certain environmental media (even if the scientific understanding remains fundamentally similar), the public perception of a problem (for example changes in the degree of tolerance), and variations in the scale of the activity with implications for the environment.

It is not unreasonable to include in such circumstances the varying capabilities of all states and thereby (possibly) of only some states that are more (less) advanced in dealing with a given risk. All in all, this criterion, despite its solid recognition in the case law, must be handled with great care so as to prevent it from becoming a 'Trojan horse' for illegitimate (ideological) choices.

[46] ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), para. 117 (emphasis added).

4. Conclusion: Due Diligence and the Evolution of International Environmental Law

The cartography of due diligence outlined in this chapter is, above all, an effort aimed at conceptual clarification. Yet, focusing on the textured details of due diligence, however modest the exercise may initially seem, provides a solid basis to chart in actual practice the evolution of the broader international law of environmental protection. I would like to conclude this chapter with some observations emerging from practice. The evolution of due diligence in the context of environmental protection shows two fundamental transformations in the very texture of international law.

First, if the duty of due diligence was initially a legal safeguard against the possibility that a negligent exercise of sovereignty may result in harm to the interests of other states (both the *Alabama* and the *Trail Smelter* arbitrations illustrate this conception), it has since undergone a fundamental transformation requiring the protection of the environment per se, irrespective and even against the interests (if narrowly conceived) of states. This transformation can be traced, in great detail, in the incremental steps made from one case to the other, over time, particularly since the mid 1990s. I have analysed the footprints of this transformation in some detail elsewhere.[47] The key consideration is that due diligence must be exercised to prevent significant environmental damage, harm, or risk thereof, irrespective of whether it may occur. The spatial extension to areas beyond national jurisdiction was stated already in Principle 21 of the 1972 Stockholm Declaration, but it remained unrecognised by the case law until the famous paragraph 29 of the International Court of Justice's 1996 advisory opinion on the *Legality of Nuclear Weapons*.[48] That change, which has since been confirmed by the court and other international tribunals,[49] left open the question of environmental protection in the state of origin of the harmful or risky activity. If due diligence and prevention are about environmental protection per se, one would expect the duty to apply even within that state's own territory and jurisdiction.[50] Significantly, that would leave absolutely no doubt that the value protected is the environment and not the interest of a state in its territory. As noted earlier in this chapter, there is now some authority for the proposition that the environment must be protected irrespective of where it is located, even in disputed

[47] See Jorge E. Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law', *Fordham International Law Journal* 32 (2008), 232–258.

[48] ICJ, *Legality of Nuclear Weapons Opinion* (n. 18), para. 29: 'The Court also recognises that the environment is not an abstraction but represents the living space, the quality of life, and the very health of human beings, including posterity. The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment.'

[49] For an overview of the case law, see Duvic-Paoli/Viñuales, 'Principle 2' 2015 (n. 10).

[50] Ibid., 119.

areas. No case raising a direct clash between the prevention principle and the interests of the territorial state has been decided on by an international court or tribunal. Recognising that states have a due diligence duty to protect their own environment would have repercussions for other imbricated questions, including the identification of the correlative right-holders (Is it any other state, or the international community, or the environment as such, whose interests would be represented by a state or the international community, itself represented by a certain body? Or future generations, also appropriately represented? Or simply individuals, as a result of their human rights?). The inclusion of individuals in the list offers a proxy answer to this question. What I called in my discussion of right-holders 'other relevant norms', such as human rights provisions,[51] are already being used in very clear and practical terms to provide some measure of protection to the environment within a state's own territory and beyond.

Secondly, the transformation of the duty of due diligence from a norm protecting state interests to one protecting the environment per se offers a window into a broader transformation of the structure of international law from a horizontal system into an increasingly vertical one,[52] where some values receive greater objective protection, even if such protection does not reach the level of peremptory norms. The evolution of due diligence is certainly not the only instance of this transformation. Others include the questions of crimes of state, peremptory norms, obligations erga omnes and aggravated responsibility.

The overall point arising from the two foregoing observations, with the many conceptual problems they raise, is simple but important. The need for theory arises from a close, patient, and modest examination of actual practice. Such practical grounding, whether it is the practice of international courts and tribunals or some other parcel of reality, is perhaps the only guarantee that theoretical inquiry will be more than a mere self-referential game.

[51] See above section 3.2.3.

[52] From the perspective of domestic law categories, this transition would make international law less reliant on the form of private law (as once argued by Hersch Lauterpacht) and more on public law categories. See Anne Peters, 'Transnational Law Comprises Constitutional, Administrative, Criminal and Quasi-private Law', in Pieter Bekker/Rudolf Dolzer/Michael Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge: CUP 2010), 154–173.

Annex ZZB

10

Due Diligence in International Climate Change Law

Lavanya Rajamani[*]

1. Introduction

Climate change, characterised as the 'defining issue of our age',[1] is a complex, polycentric, and seemingly intractable policy challenge.[2] The international community has been grappling with this challenge since the late 1980s. During this time parties have negotiated three instruments—the 1992 Framework Convention on Climate Change (FCCC),[3] the 1997 Kyoto Protocol,[4] and the 2015 Paris Agreement[5]—countless decisions of parties, and several political agreements. They have also engaged in considerable innovation and experimentation in response to evolving geo-political imperatives, increasing scientific certainty, and gathering popular and political salience.

The 1992 FCCC lays out a broad framework, and guiding principles to regulate climate change; the 1997 Kyoto Protocol establishes binding substantive obligations of result (Greenhouse Gas (GHG) mitigation targets and timetables for developed countries); and the 2015 Paris Agreement lays down procedural obligations, and obligations of conduct, in relation to GHG mitigation and transparency for all parties. The evolution of the climate change regime from the 1997 Kyoto Protocol to the 2015 Paris Agreement charts a course from narrow coverage (of

[*] I am grateful to the editors of this book for their helpful feedback, to Jutta Brunnée for her incisive comments that have fundamentally shaped the contours of this chapter, and to Bhuvanyaa Vijay for her excellent research assistance.

[1] United Nations Secretary General Ban Ki-moon, 'Opening Remarks at 2014 Climate Summit', 23 September 2014, available at: https://www.un.org/sg/en/content/sg/speeches/2014-09-23/opening-remarks-2014-climate-summit (accessed 18 June 2019).

[2] See generally Daniel Bodansky/Jutta Brunnée/Lavanya Rajamani, *International Climate Change Law* (Oxford: OUP 2017), 1–34.

[3] United Nations Framework Convention on Climate Change (FCCC), 9 May 1992, 1771 UNTS 107.

[4] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 162.

[5] United Nations, FCCC, Decision 1/CP.21: Adoption of the Paris Agreement in the Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, 29 January 2016, FCCC/CP/2015/10/Add.1, Annex.

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a limited number of developed countries) and deep (stringent) commitments to broad (universal) coverage and shallow commitments.

As the regime has evolved, parties have embraced, with ever greater conviction, procedural obligations, and obligations of conduct, thus privileging greater flexibility and autonomy for all parties and permitting increased dynamism in the regime. The emphasis on procedural obligations, and obligations of conduct, and the expanding terrain of flexibility and autonomy for states, has created greater scope for 'due diligence' to play a role in international climate change law. Obligations of conduct and 'due diligence' are closely linked,[6] in that due diligence—characterised as an 'obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result'[7] provides the standard of conduct for such obligations. Due diligence potentially has differing normative quality and functions depending on the context.[8] In the context of international climate change law, due diligence depending on the specific treaty provision from which it emerges could be a normative expectation,[9] an obligation,[10] or a standard. In so far as these treaty provisions and the rules developed thereunder provide specific benchmarks to guide the normative expectation or obligation of due diligence from parties, they contribute to creating a standard for due diligence in the climate change regime. Thus, for instance, the 2018 Paris Rulebook[11] elaborates the Paris Agreement's procedural obligations and obligations of conduct, from which the normative expectation of due diligence emerges, and in so doing contributes towards a due diligence standard for states.

The turn towards procedural obligations (and away from substantive obligations) and towards obligations of conduct (and away from obligations of result) in the climate change regime places considerable demands on due diligence to deliver on the ambition and goals of the climate change regime. The extent to which it will do so depends, in part, on the extent to which a rigorous standard for due diligence is progressively developed, internalised, and implemented. The Paris Rulebook took a first step in this direction, but there is considerable discretion and constructive ambiguity, as we will see, in these rules, which leaves room for further concretisation of the due diligence standard in the climate change regime.

[6] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, 10, para. 111; drawing on ICJ, *Pulp Mills on the River Uruguay Case (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, 14, para. 187.

[7] Ibid., ITLOS Seabed Disputes Chamber, para. 110.

[8] Anne Peters/Heike Krieger/Leonard Kreuzer, 'Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates', chapter 1 of this book, section 4.

[9] See, e.g., Paris Agreement, 2015 (n. 5), art. 4.2.

[10] See, e.g., Kyoto Protocol, 1997 (n. 4), art. 3.2.

[11] The full set of decisions agreed to in Katowice is available at: https://unfccc.int/process-and-meetings/the-paris-agreement/paris-agreement-work-programme/katowice-climate-package (accessed 18 June 2019).

There are numerous primary rules in international climate change law. These include both substantive and procedural obligations, and obligations of conduct that engage due diligence ('best efforts') in delivering results, and obligations of result that require delivery of results. This chapter first identifies the central substantive and procedural obligations, and obligations of conduct and result, in international climate change law. These obligations provide the normative framework for the exercise of due diligence by states in addressing climate change. This chapter next addresses the nature and extent—the standard—of due diligence required of states in international climate change law. There are numerous factors influencing the nature and extent of due diligence required of states in international climate change law. These include: the objective, purpose, and goals of the climate change regime; the discretion permitted to parties in the climate change regime; differentiation in the climate change regime; the nature and degree of harm that would be suffered in the absence of due diligence; and, good faith. Each of these will be explored in turn. This chapter concludes with reflections on the promise and perils of relying on due diligence to deliver on the ambition of the climate change regime.

A few caveats. This chapter only explores key obligations of conduct, and due diligence, in relation to GHG mitigation commitments, rather than in relation to adaptation and the provision of support, to which due diligence requirements could also apply. And, finally, this chapter explores specific elements of due diligence captured in international climate change law, while assuming that elements arising in general international law and international environmental law, apply in tandem, but are covered in other chapters.

2. The Normative Framework for Due Diligence in International Climate Change Law

Due diligence acquires specific content in different areas of international regulation, including through multilateral environmental agreements in international environmental law.[12] The relevant agreements in the international climate change regime are the 1992 FCCC, 1997 Kyoto Protocol, and the 2015 Paris Agreement.

2.1 Framework Convention on Climate Change (FCCC) (1992)

The 1992 FCCC puts in place the framework for climate change regulation. It identifies principles central to addressing climate change, including the principle of common but differentiated responsibilities, and establishes both substantive and

[12] International Law Association (ILA), Study Group on Due Diligence in International Law, Second Report, 12 July 2016.

procedural obligations[13] and obligations of conduct and of result,[14] some of which apply to all parties, and others to developed countries alone.

The FCCC Article 4.1 identifies substantive obligations for 'all Parties', as for instance to formulate and 'implement' national and regional programmes to mitigate climate change and facilitate adaptation to climate change. It also identifies several procedural obligations for all states. FCCC Article 4.1 requires 'all Parties' to develop and submit national inventories of their GHGs; communicate information related to implementation of their GHG mitigation and adaptation programmes; and take climate change considerations into account, to the extent feasible, in their relevant social, economic, and environmental policies. Further, FCCC Article 4.1 requires parties to 'cooperate' in relation to adaptation to the impacts of climate change; technology development, application, and transfer; conservation and enhancement of sinks of GHGs; scientific and technological research;[15] and education, training, and public awareness.[16] These substantive and procedural obligations apply to 'all Parties' but parties are allowed to take 'into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances' in fulfilling their obligations.[17]

FCCC Article 12, a key procedural obligation, requires 'each Party' to provide information on national inventories 'to the extent its capacities permit', and efforts to implement the Convention and achieve its objective. The phrase 'to the extent its capacities permit' introduces flexibility into the performance of these obligations. Moreover, this obligation is explicitly differentiated in its application in that the frequency of submissions differs for developed, developing, and least developed countries. The Conference of Parties has since adopted decisions containing detailed guidance on national communications from developed and developing countries, including on the extent of flexibilities permitted.[18]

[13] For a full and fascinating exposition on this under-theorised area see Jutta Brunnée, 'Procedure and Substance in International Environmental Law', *Recueil des Cours de l'Académie de Droit International de la Haye* 405 (2020), 77–240.

[14] For a clarificatory discussion on obligations of conduct and result see Pierre-Marie Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', *European Journal of International Law* 10 (1999), 371–385, at 375.

[15] See also FCCC, 1992 (n. 3), art. 5.

[16] Ibid., art. 6.

[17] Ibid., art. 4.1 chapeau.

[18] See, e.g., United Nations, FCCC, Decision 4/CP.5: Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part II: UNFCCC reporting guidelines on national communications, FCCC/CP/1999/6/Add.1, 2 February 2000, 8; United Nations, FCCC, The Marrakesh Accords, Decision 22/CP.7: Guidance for the preparation of the information required under Article 7 of the Kyoto Protocol, FCCC/CP/2001/13/Add.3, 21 January 2002, 14.

The 2010 Cancun Agreements enhanced the frequency[19] as well as review of these reports.[20]

These FCCC obligations, whether substantive and procedural, whether applicable uniformly to 'all Parties' or differently to different groups of parties, are obligations of result, in that, the obligation is to submit national inventories and provide information on implementation, not merely to 'exercise best possible efforts' to do so.

In addition to these FCCC obligations applicable to 'all Parties', the FCCC contains a substantive obligation, characterised as a 'quasi-target',[21] requiring each developed country, listed in Annex I, to take policies and measures on GHG mitigation 'with the aim of returning individually or jointly' to their 1990 levels of GHGs.[22] This substantive obligation to take policies and measures on GHG mitigation is matched with an obligation of conduct in relation to these policies and measures in that developed countries are required to 'aim' to return to their 1990 levels of GHG emissions, and thus are obliged to exercise best possible efforts to reach this level rather than obliged to achieve it.[23]

2.2 Kyoto Protocol (1997)

The Kyoto Protocol establishes substantive GHG mitigation obligations, collective and individual, for developed countries set to timetables,[24] backed by procedural obligations in relation to reporting and review,[25] and a compliance system.[26] These GHG mitigation obligations are internationally negotiated rather than nationally determined, and are thus prescriptive, but the Protocol provides flexibility to parties in how they meet their targets, in particular by permitting them to use market

[19] United Nations, FCCC, Decision 1/CP.16: The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, FCCC/CP/2010/7/Add.1, 15 March 2011, paras 40 and 60 requiring biennial reports from developed countries and biennial update reports from developing countries, respectively.

[20] Ibid., para. 63 establishing international consultations and analysis of biennial reports from developing countries, and paras 44 and 46 establishing international assessment and review of GHG emissions and removals related to targets of developed countries.

[21] Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary', *Yale Journal of International Law* 18 (1993), 451–558.

[22] FCCC, 1992 (n. 3), art. 4.2(a), (b).

[23] See Christina Voigt, 'State Responsibility for Climate Change Damage', *Nordic Journal of International Law* 77 (2008), 1–22, at 6; see also, Benoit Mayer, 'Obligations of Conduct in the International Law on Climate Change: A Defence', *Review of European, Comparative and International Environmental Law* 27 (2018), 130–140, at 134.

[24] Kyoto Protocol, 1997 (n. 4), art. 3.

[25] Ibid., arts 5, 7, 8; elaborated through a series of decisions taken by the Conference of Parties, see United Nations, FCCC, The Marrakesh Accords, Decisions 2-24/CP.7, FCCC/CP/2001/13/Add.1-3, 21 January 2002.

[26] Kyoto Protocol, 1997 (n. 4), art. 18; United Nations, FCCC, The Marrakesh Accords, Decision 24/CP.7: Procedures and mechanisms relating to compliance under the Kyoto Protocol, FCCC/CP/2001/13/Add.3, 21 January 2002, 64.

mechanisms.[27] These obligations, substantive and procedural, are obligations of result in that parties are obliged to deliver, whether in relation to GHG mitigation or reporting obligations, rather than exercise best possible efforts to do so. In relation to GHG mitigation targets, this is underscored by the requirement placed on developed countries to make 'demonstrable progress' by 2005 in achieving their targets,[28] and in the consequences identified in the Marrakesh Accords for non-compliance with the established targets.[29]

2.3 Paris Agreement (2015)

The climate regime took a decisive turn towards procedural obligations in the 2015 Paris Agreement. This turn can be sourced to several political and design considerations. The Kyoto Protocol's GHG mitigation targets did not cover either developing countries that were excluded from mitigation commitments or the United States that had rejected the Kyoto Protocol in 2001. As such, the Kyoto Protocol's first commitment period targets covered just 24% of 2010 global GHG emissions,[30] and its second commitment period, which attracted even fewer countries, covers less than 12% of 2012 global GHG emissions.[31] Most developing countries, however, were reluctant to undertake substantive obligations of result, and most developed countries, in particular the US, were keen to ensure parity in the legal character of commitments across developed and developing countries. These developments were matched by a gathering momentum towards greater autonomy and flexibility for all countries. The choice before parties was to 'level up' GHG commitments for all countries to Kyoto-style substantive obligations of result or 'level down' commitments for all countries to the procedural obligations (to submit mitigation actions) and obligations of conduct (in achieving these self-selected mitigation actions) developing countries had under the Cancun Agreements. Given the momentum towards greater autonomy and flexibility for states, levelling down commitments to procedural obligations, and obligations of conduct, proved the more politically palatable option.

The central obligation relating to GHG mitigation in the Paris Agreement, contained in Article 4.2, is a procedural obligation applicable to all parties. Each party is to 'prepare, communicate and maintain' successive nationally determined contributions (NDC) that it intends to achieve. Parties are also obliged to 'pursue domestic mitigation measures, with the aim of achieving the objectives of such

[27] Kyoto Protocol, 1997 (n. 4), arts 6, 12, 17.

[28] Ibid., art. 3.2.

[29] FCCC, Marrakesh Accords, Decision 24/CP.7: Procedures/mechanisms relating to compliance under Kyoto Protocol, 2002 (n. 26), Annex, Section XV, para. 5.

[30] Igor Shishlov/Romain Morel/Valentin Bellassen, 'Compliance of the Parties to the Kyoto Protocol in the First Commitment Period', *Climate Policy* 16 (2016), 768–782.

[31] This includes the emissions share of Australia, Belarus, EU-28, Iceland, Kazakhstan, Norway, Switzerland, Ukraine in 2010, excluding LULUCF. See World Resources Institute (WRI), 'CAIT Climate Data Explorer', 2019, available at: https://cait.wri.org/ (accessed 18 June 2019).

contributions'. The obligation to communicate an NDC is a binding procedural obligation of result, in that parties are obliged ('shall') to submit such NDCs in the stipulated timeframe. The obligation to pursue domestic measures with the aim of achieving the objectives of the NDC is a binding substantive obligation in that parties are obliged ('shall') to pursue domestic measures. However parties are required only to 'aim' at achieving the objectives of their NDCs through their domestic measures, and not obliged to meet the objectives, targets, or goals identified in their NDCs. This is an obligation of conduct, an obligation to exercise best efforts,[32] and is subject to due diligence requirements.[33]

Article 4.2 is set against the backdrop of Article 3, a cross-cutting provision, that requires 'all Parties' 'to undertake and communicate ambitious efforts' and places an expectation on parties that their 'efforts' 'will represent a progression over time (…)'. These are both substantive ('undertake') and procedural ('communicate'), and obligations of conduct ('efforts'), leaving discretion to parties in relation to the nature of these 'efforts' and how these will represent a 'progression' over time. This too demands 'due diligence' from states. The expectation of 'progression' is complemented with an expectation that NDCs will reflect a party's 'highest possible ambition', their 'common but differentiated responsibilities in light of different national circumstances',[34] and 'leadership' from developed countries.[35]

These normative expectations albeit framed in predictive ('will') rather than mandatory ('shall') language, exercise considerable normative pull on parties, and perform multiple functions. In relation to the procedural obligation identified in Article 4.2 to 'prepare, communicate and maintain' NDCs, these expectations import substantive and qualitative elements into what on the face of it appears to be a purely procedural obligation. In framing and implementing their NDCs, parties must factor in these substantive expectations. In relation to the obligation of conduct identified in Article 4.2 to pursue domestic measures with the aim of meeting the objectives of the NDCs, these expectations provide regime-specific markers for due diligence.[36] The domestic measures parties undertake in order to meet the objectives of their NDCs are also expected to factor in these expectations, and the extent to which they do so will determine the extent to which they have demonstrated due diligence.

It is worth noting, however, that these terms—'progression', 'highest possible ambition', and 'leadership'—are neither defined nor explained in the Paris Agreement

[32] See Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics', *International and Comparative Law Quarterly* 65 (2016), 493–514; Daniel Bodansky, 'The Legal Character of the Paris Agreement', *Review of European, Comparative and International Environmental Law* 25 (2016), 142–150; Ralph Bodle/Sebastian Oberthür, 'The Legal Form of the Paris Agreement and Nature of its Obligations', in Daniel Klein/María Pía Carazo/Meinhard Doelle/Jane Bulmer/Andrew Higham (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford: OUP 2017), 91–103.

[33] See also Mayer, 'Obligations of Conduct in the International Law of Climate Change' 2018 (n. 23), 130–140.

[34] Paris Agreement, 2015 (n. 5), art. 4.3.

[35] Ibid., art. 4.4.

[36] I am grateful to Jutta Brunnée for pointing this out to me.

or the 2018 Paris Rulebook, and thus lend themselves to a range of possible interpretations. The Paris Rules require parties to provide information when submitting their NDCs on how they have addressed the normative expectations of progression, highest possible ambition, common but differentiated responsibilities and leadership from developed countries.[37] In the process of negotiating the Katowice rules, a direct trade-off surfaced between the level of detail in the rules, and the autonomy that states enjoy. The more detailed the rules the less discretion states have, and vice versa. For instance, to the extent that parties are able to elaborate a benchmark against which 'progression' or 'highest possible ambition' can be measured, states have less autonomy to define these for themselves. Many parties therefore resisted detailed prescriptive rules to operationalise the Paris Agreement, preferring instead to leave the constructive ambiguity in the Paris Agreement's terms untouched, or to use discretionary language, in effect leaving operational choices and details to states. As a result, the Rules privilege self-identified benchmarks for 'progression', 'highest possible ambition', and 'leadership', and self-justified and self-serving narratives around the extent to which parties have complied with these. In general, the more detailed and prescriptive the rules, the more concrete the standard for due diligence. Paradoxically, however, the more concrete the standard for due diligence in the regime, the less pivotal the normative expectation of due diligence is in guiding state behaviour. If the rules are concrete, parties have little option but to comply with them, yet it is where there is discretion or leeway, that the expectation of due diligence can be most influential in disciplining it.

The multiple functions that particular provisions play, as discussed above, hints at another interesting dimension of the Paris Agreement—there is dynamic interplay between procedural obligations and substantive obligations, between obligations of result and obligations of conduct (with corresponding due diligence requirements). Parties are required to provide information with their NDCs to facilitate the clarity, transparency, and understanding of their NDCs,[38] to account for their NDCs,[39] and to provide information necessary to track progress made in implementing and achieving their NDCs.[40] These are obligations of result, not conduct, in that parties are obliged to provide the information required, and to account for their NDCs, not merely to exercise their best efforts to do so. However, these obligations complement the obligation of conduct parties have to adopt domestic measures aimed at meeting the objectives of their NDCs. This obligation of conduct parties have is a central defining element of the Paris Agreement. The

[37] United Nations, FCCC, Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December 2018, Decision 4/CMA.1: Further guidance in relation to the mitigation section of decision 1/CP.21, Advance version, FCCC/PA/CMA/2018/3/Add.1, 19 March 2019, 11, Annex I, para. 6.

[38] Paris Agreement, 2015 (n. 5), art. 4.8.

[39] Ibid., art. 4.13.

[40] Ibid., art. 13.7.

informational requirements placed on parties in relation to their NDCs improves the quality of the knowledge base that, in turn, will help the regime determine if parties are exercising their best efforts to meet the objectives of their NDCs.

The Paris Agreement, and the Paris Rulebook, relies on procedural obligations, obligations of conduct, normative expectations, and good faith to take the place of substantive obligations of result. The normative expectation of due diligence, by giving life to the obligations of conduct, shaping expectations that parties will deliver on their NDCs, and bolstering good faith, finds its place in the interstices of the normative architecture of international climate change law.

3. Factors that Influence the Nature and Extent of Due Diligence Required of States in International Climate Change Law

The nature and extent of due diligence required of states varies across different areas of international law, and in differing contexts.[41] As the International Tribunal for the Law of the Sea (ITLOS) noted in the *Seabed Mining Advisory Opinion*, '"due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity.'[42] In the field of international climate change law, the nature and extent of due diligence required from states is influenced and shaped by several factors, including the factors outlined in the following.

3.1 Objective, Purpose, and Goals of the Climate Change Regime

The objective, purpose, and goals of the climate change regime have been progressively crystallised from FCCC Article 2 to Paris Agreement Article 2. Article 2.1 Paris Agreement, identifies the goal of '[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, …'. This long-term temperature goal builds on the FCCC objective (FCCC Article 2) of 'prevent[ing] dangerous anthropogenic interference with the climate system' by setting out, in terms of avoided temperature rise, the limits of what is 'dangerous'. It further builds on the FCCC objective by indicating, in terms of avoided

[41] ILA, Study Group on Due Diligence, Second Report 2016 (n. 12).

[42] ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 6), para. 117. For a discussion of the link between risk and due diligence in the context of the *Alabama Claims* case, see Jorge E. Viñuales, 'Due Diligence in International Environmental Law', chapter 7 of this book, section 2.1.

temperature, the level at which concentrations of GHGs in the atmosphere must be stabilised.[43] In order to achieve the long-term temperature goal, Article 4.1 requires parties to 'aim' to reach global peaking of GHG emissions as soon as possible, and to undertake 'rapid reductions' thereafter so as to achieve a balance between GHG emissions by sources and removals by sinks—popularly characterised as 'net zero'—in the second half of this century.

The purpose of the Paris Agreement, expressed in Article 2, is not limited to the long-term temperature goal. Article 2.1 lit. b) sets 'long term goals' for adaptation and resilience, and Article 2.1 lit. c) calls for financial flows to be reoriented, consistent with mitigation and adaptation objectives.

The FCCC, the Kyoto Protocol, and the Paris Agreement require parties to report on, and to varying degrees be accountable for, taking policies, measures, and actions in line with the objective, purpose, and goals of the regime. FCCC Article 12.1 lit. c), referred to earlier, requires parties to communicate information the party considers relevant to achieving the objective of the Convention. Kyoto Protocol Article 7 requires parties to incorporate in their national communications information demonstrating compliance with their GHG targets. Paris Agreement Article 14 establishes a global stock take to 'assess the collective progress towards achieving the purpose' of the Paris Agreement. These provisions seek to instil transparency and accountability for aligning national actions, policies, and commitments with the goals of the climate change regime. Such provisions, among other context-setting provisions,[44] suggest that the nature and extent of due diligence required of states must be guided by the objective, purpose, and goals of the climate change regime.

3.2 Discretion Permitted to Parties in the Climate Change Regime

The international climate change negotiations, politically divisive and deeply discordant as they are, have often reached agreement by establishing primary rules that permit parties considerable discretion in application. This is a cross-cutting feature of the climate change regime, and extends across substantive and procedural obligations, as well as obligations of conduct and result. For instance, the chapeau of FCCC Article 4.1 permits parties to 'tak[e] into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances (…)'. Other FCCC provisions qualify requirements placed on parties with terms such as 'to the extent feasible'[45]

[43] Jacob Werksman/Lavanya Rajamani, 'The Legal Character and Operational Relevance of the Paris Agreement's Temperature Goal', *Philosophical Transactions A* 376 (2018).

[44] See, e.g., Paris Agreement, 2015 (n. 5), preambular recital 3, arts 3, 4.1.

[45] FCCC, 1992 (n. 3), art. 4.1(f).

and 'to the extent its capacities permit'.[46] Paris Agreement provisions also contain such qualifications, in particular the term 'as appropriate'.[47] Discretion is also available to developed countries in the manner of performance of their commitments. For instance, in relation to their FCCC commitments on technology, a substantive obligation of conduct, developed countries are required to take 'all practicable steps', 'as appropriate'.[48] And, in relation to their Kyoto commitments to implement policies and measures, developed countries are permitted to choose these 'in accordance with its national circumstances'.[49]

More broadly, the climate change regime has evolved from a more to less prescriptive regime. The Kyoto targets were internationally negotiated and subject to obligations of result while the Paris Agreement's NDCs are self-selected, and subject to obligations of conduct in relation to their objectives. The Paris Agreement's normative expectations in relation to these self-selected contributions ('progression', 'highest possible ambition', and 'leadership') serve to provide regime-specific markers for the due diligence parties must exercise in relation to their contributions. Any assessment of the due diligence required of states thus must be guided not just by the discretion permitted to states more broadly in the climate change regime, but also the elaborate tapestry of normative expectations placed on states.[50]

3.3 Differentiation in the Climate Change Regime

The International Law Commission recognises that one of the factors in determining the standard of due diligence required of a state is its 'economic level' or capacity, but notes however that 'a State's economic level cannot be used to dispense the State from obligation under the present Articles'.[51] Differentiation in the climate change regime, however, is a many-headed beast, and is based not just on disparities in economic levels but also on differences in relation to responsibilities for causing climate harm. Arguably, the standard of due diligence in relation to specific obligations of conduct placed on a state in the international climate change regime is shaped by the distinctive content that differentiation has acquired in the climate change regime.

[46] Ibid., art. 12.1(a).
[47] See, e.g., Paris Agreement, 2015 (n. 5), arts 5.1, 7.9, 8.3.
[48] FCCC, 1992 (n. 3), art 4.5.
[49] Kyoto Protocol, 1997 (n. 4), art. 2.1(a).
[50] See Christina Voigt, 'The Paris Agreement: What Is the Standard of Conduct for Parties?', *Questions of International Law* 26 (2016), 17–28, in relation to 'highest possible ambition'.
[51] United Nations, Report of the International Law Commission (ILC) on the work of its fifty-third session, 23 April–1 June and 2 July–10 August 2001, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, UN GAOR 56th Sess., Supp. No. 10, A/56/10, 2001, art. 3, para. 13.

The standard of due diligence in the climate change regime is shaped by the resources and capacities that states have. The climate regime has, since its inception, recognised the vast disparities between developed and developing countries, and differentiated between them with respect to implementation. This takes the form of differentiation in relation to stringency or timing of implementation, such as delayed compliance schedules,[52] permission to adopt subsequent base years,[53] delayed reporting schedules,[54] flexibility in implementation,[55] and softer approaches to non-compliance;[56] and, provisions that differentiate among countries in relation to assistance, i.e., commitments to provide, and eligibility to receive, financial[57] and technological assistance.[58] Such flexibilities and support for developing countries form a fundamental part of the normative architecture of the climate change regime, and thus shape the standard of due diligence required of states in relation to obligations of conduct in the climate regime.

The standard of due diligence in the climate change regime is also, arguably, shaped by the different contributions of states to climate harm. The principle of common but differentiated responsibilities and respective capabilities, the principled basis for differentiation in the climate change regime, differentiates between states both in relation to capacities ('respective capabilities') as well as to contributions to climate harm ('responsibilities').[59] If the differentiation authorised by this principle were solely due to differences in capacities, then the use of the term 'respective capabilities' would be superfluous.[60] Thus the climate regime contains differentiation between developed and developing countries in relation to the central obligations of the regime. The FCCC's GHG stabilisation targets,[61] and the Kyoto Protocol's GHG mitigation targets,[62] apply to developed countries alone. And although the Paris Agreement, by deft sleight of hand, introduced self-differentiation in relation to mitigation, and thus side-stepped the issue of prescriptive differentiation in central obligations, it recognised the importance of the Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC) principle, and the 'leadership' role of developed countries.[63] Article 2.2, a cross-cutting provision, states that the Paris Agreement 'will be implemented to reflect equity and the

[52] See, e.g., Kyoto Protocol, 1997 (n. 4), art. 3.5.
[53] See, e.g., FCCC, 1992 (n. 3), art. 4.6.
[54] Ibid., art. 2.5.
[55] See, e.g., Paris Agreement, 2015 (n. 5), art. 13.2.
[56] See, e.g., FCCC, Marrakesh Accords, Decision 24/CP.7: Procedures/mechanisms relating to compliance under Kyoto Protocol, 21 January 2002 (n. 26).
[57] See, e.g., Paris Agreement, 2015 (n. 5), arts 9.1, 9.3; FCCC, 1992 (n. 3), art. 4.3.
[58] See, e.g., Paris Agreement, 2015 (n. 5), art. 10.6.
[59] This is disputed, however, see for a full discussion Lavanya Rajamani, 'Common but Differentiated Responsibilities', in Ludwig Krämer/Emanuela Orlando (eds), *Principles of Environmental Law: Elgar Encyclopedia of Environmental Law series* (Cheltenham: Edward Elgar, vol. VI, 2018), 291–302.
[60] This interpretation is bolstered by FCCC, 1992 (n. 3), recital 3.
[61] Ibid., arts 4.2(a), (b).
[62] Kyoto Protocol, 1997 (n. 4), art. 3.
[63] Paris Agreement, 2015 (n. 5), arts 4.4, 4.1.

principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances'. The qualification of the CBDRRC principle by a reference to 'national circumstances' introduced in the Paris Agreement, introduces a dynamic element to the interpretation of the principle—as national circumstances evolve, so too will the common but differentiated responsibilities of states.[64] However, this clause does not seek to shift the bases for differentiation in the climate change regime. Thus differentiation based on contributions to environmental harm, is also, arguably, part of the normative architecture of the climate change regime, and influences the standard of due diligence in relation to the obligations of conduct it contains.

It could be argued that while differences in contributions to climate harm may affect the responsibilities states have, it should not shape the standard of conduct that states have in fulfilling those responsibilities. Two responses may be offered to this intuitively attractive argument. First, this assumes that the conduct of a state in assuming an NDC is distinguishable from its conduct in fulfilling it. However, both the NDCs parties' take on, and the effort that parties will make to implement their NDCs will be shaped by their national circumstances, constraints, and priorities. These circumstances, include their contributions to climate harm. The extent to which states prioritise climate concerns over other pressing concerns such as poverty eradication, and the resources they will devote to implementation of NDCs, will be driven, even if not expressly, by their respective contributions to climate harm, and their perceptions of fairness. Second, the resources and capacities states have are directly linked to their GHG emissions.[65] The lines between assuming NDCs and fulfilling them, and between capacities and contributions to climate harm are drawn in the sand. Both capacities and contributions to climate harm thus shape the standard of due diligence required of states in relation to the obligations of conduct in the climate regime.

If the standard of due diligence, thus influenced, were to be applied to the obligation of conduct in Paris Agreement Article 4.2, the efforts of developing countries in meeting the objectives of their NDCs would be judged both in relation to their capacities as well as their relative contributions to climate harm. There are of course considerable operational challenges in doing so. There are many different ways of assessing contributions of parties to climate harm (cumulative, per capita etc.), and many different time frames that are plausibly argued as relevant (1850 onwards, 1990 onwards etc.). Each of these yields a different set of considerations in relation to burden sharing among states. For instance, cumulative emissions between 1850 and 2012 for Annex I countries is about 2.3 times that of non-Annex I countries,[66]

[64] See Rajamani, 'Ambition and Differentiation' 2016 (n. 32), 493–514.

[65] See Gail Cohen/João Tovar Jalles/Prakash Loungani/Ricardo Marto, 'The Long-Run Decoupling of Emissions and Output: Evidence from the Largest Emitters', *IMF Working Papers* 18/56, 13 March 2018.

[66] CO_2 emissions from Annex I countries from 1850 to 2014 are 957,536 $MtCO_2$ and from non-Annex I are 421,357 $MtCO_2$. For data for Cumulative Total CO_2 Emissions Excluding Land-Use Change and Forestry from 1850 to selected years to 2014, see WRI, 'CAIT Climate Data Explorer' 2019 (n. 31).

and per capita CO_2 emissions for most developing countries, for instance, India's at 1.8 tons, remains significantly below the US average of 15.7 tons, and even that of the EU's at 6.9 tons.[67] Yet, developing country emissions are now 60% of the total global CO_2 emissions.[68] China's economy alone has grown more than ten-fold since 1990[69] and its emissions have quadrupled. Arriving at a subjective standard of due diligence for a particular state will first require an assessment of which factors, time frames, and approaches are relevant, and next, how these translate into a tailor-made standard for that state. These operational difficulties, however, do not detract from the interpretative forces that help determine the standard of due diligence in the climate change regime.

The pervasive and cross-cutting differentiation in favour of developing countries in the climate regime is thus a critical factor in determining the nature and extent of due diligence required of parties in relation to obligations of conduct such as in Paris Agreement's crucial Article 4.2.[70] However, it is worth factoring in that there has been a gradual dilution of differentiation in favour of developing countries over time, and thus the demands of due diligence in specific contexts should be progressively interpreted as more demanding. For instance, in relation to transparency, the Katowice rules phase in uniform reporting requirements on developed and developing countries in 2024,[71] and although it allows each developing country to determine if it needs flexibility in the application of a particular provision, developing countries are required to clarify their capacity constraints, and provide time-frames for improvements.[72] These rules ensure that over time the need for differentiation is diluted, the number of countries that avail special treatment declines,[73] and there is a push over time towards higher standards for developing countries.

More broadly, given the cross-cutting and pervasive nature of differentiation in the climate change regime, it could be argued that the regime reflects a highly contextual standard for due diligence. Admittedly the general rule is that 'if the primary rule does not explicitly concede a lesser expectation of due diligence from

[67] Jos Olivier/Jeroen Peters, 'Trends in Global CO_2 and Total Greenhouse Gas Emissions: 2018 Report', The Hague: PBL Netherlands Environmental Assessment Agency, 2018, available at: https://www.pbl.nl/sites/default/files/cms/publicaties/pbl-2018-trends-in-global-co2-and-total-greenhouse-gas-emissons-2018-report_3125.pdf (accessed 18 June 2019).

[68] Total CO_2 emissions from Annex I countries for 2014 are 12,927 $MtCO_2$ and from non-Annex I are 20,288 $MtCO_2$. See WRI, 'CAIT Climate Data Explorer' 2019 (n. 31).

[69] 'GDP by Country, Statistics from the World Bank, 1960–2017: China' available at: https://knoema.com/mhrzolg/gdp-statistics-from-the-world-bank?country=China (accessed 17 June 2019).

[70] ILA, Study Group on Due Diligence, Second Report 2016 (n. 12).

[71] United Nations, FCCC, Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December 2018, Decision 18/CMA.1: Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement, FCCC/PA/CMA/2018/3/Add.2, Advance version, 19 March 2019, 18, para. 3.

[72] Ibid., para. 6.

[73] Ibid., Annex, Section I. C, para. 6.

developing states, an objective international standard is to be preferred'.[74] However, in the case of the climate change regime, even in the absence of explicit differentiation in a particular rule, the presence of cross-cutting provisions that recognise the need for differentiation in the implementation of the entire agreement render even facially neutral provisions, subject to differentiation. There are two such cross-cutting provisions in the Paris Agreement: Article 2.2 on the CBDRRC principle, discussed above; and Article 4.1 that qualifies the net-zero goal for parties with the phrase, 'on the basis of equity and in the context of sustainable development and efforts to eradicate poverty'.

3.4 The Nature and Degree of Harm that Would Be Suffered in the Absence of Due Diligence

In determining the due diligence required of states, the nature and degree of harm that would be suffered in the absence of due diligence by states or the 'risks involved in the activity'[75] are relevant factors. The International Law Commission notes that the standard for due diligence should be 'appropriate and proportional to the degree of risk of the transboundary harm'.[76] This builds on the *Alabama Claims* decision that due diligence ought to be exercised in 'exact proportion to the risks'.[77] The 'risks involved in the activity' also engage the precautionary principle, which falls within the scope of due diligence.[78] The ITLOS *Seabed Mining Advisory Opinion*, indeed, found the precautionary approach to be 'an integral part of the general obligation of due diligence'.[79] Viñuales explains that the duty of due diligence in relation to environmental harm is broader than the prevention principle in that it is not limited to harm of a certain magnitude (material harm or significant harm), rather even harm falling below this threshold of magnitude is governed by the duty of due diligence.[80] In a similar vein, Brunnée argues that, 'due diligence provides a bridge between the duty to prevent environmental harm, and the proposition that, even in the absence of "full scientific certainty", states must take precautionary measures to "prevent environmental degradation"'.[81] These elements

[74] ILA, Study Group on Due Diligence, Second Report 2016 (n. 12), 19; ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 6), para. 230.

[75] ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 6), para. 117.

[76] ILC, Draft Articles, 2001 (n. 51), commentary to art. 3, para. 11.

[77] *Alabama Claims of the United States of America against Great Britain*, Award of 14 September 1872, UNRIAA 29, 124–134, 129. See discussion by Viñuales, 'International Environmental Law', chapter 7 of this book, section 2.1.

[78] See discussion on scope of due diligence being broader than the prevention principle, by Viñuales, 'International Environmental Law', chapter 7 of this book, section 3.2.1.

[79] ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 6), para. 131.

[80] Ibid.

[81] Jutta Brunnée, 'ESIL Reflection Procedure and Substance in International Environmental Law Confused at a Higher Level?', *European Society of International Law Reflections*, vol. 5, issue 6 (June 2016), available at: https://esil-sedi.eu/?p=1344 (accessed 18 June 2019).

of due diligence in general international law apply to the climate change regime's obligations of conduct. The risks of climate change far exceed the threshold of significant harm, and there is ever-increasing scientific certainty as to the existence of risk of significant harm.

The Intergovernmental Panel on Climate Change finds in its Fifth Assessment Report that 'the warming of the climate system is "unequivocal" ',[82] and in its Special Report on 1.5°C that 'human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels.'[83] The Intergovernmental Panel on Climate Change notes that 'many of the observed changes are unprecedented over decades to millennia'.[84] These changes 'have caused impacts on natural and human systems on all continents and across all oceans',[85] and, '[c]ontinued emission of [GHGs] will cause further warming and (…) increase[e] the likelihood of severe, pervasive and irreversible impacts'.[86] The Special Report on 1.5°C stresses that there are 'robust differences' in impacts between global warming of 1.5°C and 2°C.[87] The risks of 'irreversible' impacts is higher at higher levels of temperature increase.[88]

The enormous risk of potentially irreversible climate impacts at temperatures above 1.5°C suggests a correspondingly high standard of due diligence. But what role can a high standard of due diligence play in the context of the current wholly inadequate NDCs from parties?[89] The United Nations Environment Programme 2018 Emissions Gap Report finds that 'pathways reflecting current NDCs imply global warming of about 3°C by 2100, with warming continuing afterwards'.[90] And, that '[i]f the emissions gap is not closed by 2030, it is very plausible that the goal of a well-below 2°C temperature increase is also out of reach'.[91]

Admittedly, the duty of diligence, however demanding, does not amount to 'strict liability', and notwithstanding full exercise of due diligence, undesirable

[82] Intergovernmental Panel on Climate Change (IPCC), Synthesis Report of the IPCC Fifth Assessment Report (AR5), 'Climate Change 2014', 2014, available at: https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf, 2, SPM 1.1 (accessed 18 June 2019).

[83] Intergovernmental Panel on Climate Change, 'Global Warming of 1.5ºC', Summary for Policy Makers, 2018, available at: https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf, 6 (accessed 18 June 2019).

[84] Intergovernmental Panel on Climate Change, Working Group I, 'Climate Change 2013: The Physical Science Basis', 2013, available at: http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf, 4 (accessed 18 June 2019).

[85] IPCC, 2014 (n. 82), 6, para. SPM 1.3.

[86] Ibid., 8, para. SPM 2.

[87] IPCC, 2018 (n. 83), 9, para. B.1.

[88] Ibid., paras B.2.2, B.4.2.

[89] United Nations, FCCC, Synthesis report on the aggregate effect of INDCs, FCCC/CP/2016/2, 2 May 2016; United Nations, United Nations Environment Programme, Emissions Gap Report, 27 November 2018, available at: https://www.unenvironment.org/resources/emissions-gap-report-2018 (accessed 18 June 2019).

[90] UNEP, Emissions Gap Report 2018, 27 November 2018 (n. 89), Executive Summary, available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/26879/EGR2018_ESEN.pdf?sequence=10, 4 (accessed 18 June 2019).

[91] Ibid.

consequences may ensue.[92] However, the risk of calamitous climate impacts implies a high standard of due diligence for parties in arriving at their NDCs and implementing them, further bolstering the normative expectation of progression and highest possible ambition placed on parties in relation to their NDCs. It is only this that will reflect fealty to the letter and the spirit of the Paris Agreement.

3.5 The Expectation of Good Faith

A final factor influencing the standard of due diligence required of states in the international climate change regime is the expectation of good faith. The International Law Association notes that '[a] State cannot be considered to have acted diligently when the State has acted in bad faith or has knowingly refused to take any measures whatsoever'.[93]

Good faith, implicit in all treaties, generates expectations in relation to performance of treaty obligations that permeate through the entire climate change regime.[94] So for instance, although NDCs under the Paris Agreement are not subject to obligations of result, there is a good faith expectation that parties, will, nevertheless, take all appropriate steps—given the objective of the Paris Agreement and the risks involved in runaway climate change—to the extent their resources and capacities permit, to achieve their self-selected contributions. This expectation is bolstered by the Katowice rules identifying the information necessary to track the progress made by parties in implementing and achieving their NDCs.[95]

4. Conclusion

Due diligence assumes particular significance in the context of the emerging climate regime that is built on procedural obligations, obligations of conduct, normative expectations, and good faith. This regime places considerable demands on the norms of due diligence to deliver on the ambition and goals of the climate change regime. While due diligence offers some promise in this regard, obligations of conduct, and the requirements of due diligence that these place on states, cannot be asked to perform a task that only stringent substantive obligations of result can.

The exercise of due diligence in relation to the obligations of conduct in the climate change regime, in conjunction with rigorous implementation of the full gamut

[92] See discussion by Viñuales, 'International Environmental Law', chapter 7 of this book, section 2.1.
[93] ILA, Study Group on Due Diligence, Second Report 2016 (n. 12).
[94] ILA, Committee on Legal Principles Relating to Climate Change, Declaration of Legal Principles relating to Climate Change, Resolution 2/2014, arts 8, 9.
[95] FCCC, Decision 18/CMA.1: Modalities/procedures/guidelines for transparency framework under Article 13 of the Paris Agreement, 19 March 2019 (n. 71), Annex, Section I. C.

of provisions of the climate change regime, does offer promise. The ambitious objective, purpose and goals of the climate regime, and the calamitous harm that will be suffered in the absence of due diligence demands a high standard of due diligence from states. Admittedly, the climate regime builds on self-determination—a central, defining and unifying feature of the Paris Agreement—and to varying degrees permits parties discretion, differentiation, and flexibility in their application. These could create a pull towards a standard of due diligence in relation to the fulfilment of their NDCs that is subjective, self-selected, and self-justified. However, there is progressive dilution of differentiation in the climate regime, and some forms of differentiation have the potential to assist parties in meeting their commitments. Much will depend on state practice that will emerge in the coming years, and the extent to which states engage in good faith interpretation and application of the standard for due diligence in international climate change law. To the extent that parties can be held (and/or hold themselves) to a high standard of due diligence in the discharge of their obligations of conduct under the climate regime, it may trigger an ever-increasing cycle of ambitious action, which could eventually meet the goals of the climate regime.

Annex ZZC

No cover image available

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CHAPTER

45 Human Rights

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Abstract

This chapter examines the relationship between human rights and the environment, which has developed through the adoption and interpretation of many different national constitutions and laws, human rights treaties, and multilateral environmental agreements (MEAs). The development of what might be called 'environmental human rights law' has occurred in three main channels. First, efforts to achieve recognition of a human right to a healthy environment, while ineffective at the UN, have achieved widespread success at the national and regional levels. Second, some multilateral environmental instruments have incorporated human rights norms, especially rights of access to information, public participation, and remedy. Third, human rights tribunals and other monitoring bodies have 'greened' human rights law by applying a wide range of human rights to environmental harm. The chapter explains each of these paths of development before sketching potential lines of further development through recognition of the rights of nature and of future generations.

Keywords: international environmental law, human rights, right to life, right to health, access to information, access to justice

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I. Introduction

Linkages between environmental protection and human rights depend on two premises: (a) the full enjoyment of many human rights, including the rights to life, health, and an adequate standard of living, depends on an environment that is healthy for human beings; and (b) the exercise of human rights, including the rights to information, participation in governance, and access to justice, helps to ensure that individuals and communities can advocate for and achieve satisfactory levels of environmental protection.

In principle, this interdependent relationship between human rights and the environment could be recognized through inclusion of a right to a healthy environment in a global declaration or treaty. However, the 1948 Universal Declaration of Human Rights and the two International Covenants on human rights[1] preceded the modern environmental movement, and later efforts to persuade the United Nations (UN) to recognize the right have not been successful. Although Principle 1 of the 1972 Stockholm Declaration comes close to stating the right explicitly, the UN has declined to extend or even repeat its language.

The absence of a globally recognized human right to a healthy environment has not prevented the evolution of rights-based approaches to environmental protection, but it has meant that the evolution has occurred without the benefit of an overarching international legal framework or agreed normative touchstone. Instead, the relationship of human rights and the environment has developed through the adoption and
p. 785 interpretation of many different national constitutions and laws, human rights treaties, and ↳ multilateral environmental agreements. Remarkably, this disparate set of sources has produced a relatively consistent set of norms.

The development of what might be called 'environmental human rights law' has occurred in three main channels. First, efforts to achieve recognition of a human right to a healthy environment, while ineffective at the UN, have achieved widespread success at the national and regional levels. Second, some multilateral environmental instruments have incorporated human rights norms, especially rights of access to information, public participation, and remedy. Third, human rights tribunals and other monitoring bodies have 'greened' human rights law by applying a wide range of human rights to environmental harm.

The following sections explain each of these paths of development. A concluding section describes recent signs that the approaches are converging, and sketches potential lines of further development through recognition of the rights of nature and of future generations.[2]

II. Recognition of the Human Right to a Healthy Environment

That environmental degradation interferes with the full enjoyment of human rights is not a new insight. In 1968, when the UN General Assembly decided to convene the first international environmental conference, it expressed concern about the effects of 'the continuing and accelerating impairment of the quality of the human environment … on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights'.[3] Four years later, the nations participating in the conference stated, in the Stockholm Declaration, that the natural as well as the human-made environment is essential to human well-being 'and to the enjoyment of basic human rights—even the right to life itself'.[4]

The recognition that a healthy environment is necessary to human well-being leads naturally to the idea that humans have a human right to a healthy environment, as they have human rights to other interests of fundamental importance to human dignity, freedom, and equality. So it is unsurprising that the first principle of the Stockholm Declaration refers to the 'right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'.[5]

p. 786 What may be more surprising is that the UN has never elaborated, or even repeated, this recognition, despite several opportunities to do so. The 1987 report of the World Commission on Environment and Development (the Brundtland Commission), which urged the international community to adopt sustainable development as a goal, presented legal principles drafted by an experts group, the first of which declared that 'all human beings have the fundamental right to an environment adequate for their health and well-being'.[6] However, the 1992 UN Conference on Environment and Development did not include this language in the Rio Declaration.[7] Neither did later conferences on sustainable development in Johannesburg in 2002 and Rio de Janeiro in 2012. Similarly, in 1994 an independent expert on the Sub-Commission on Prevention

of Discrimination and Protection of Minorities, a subsidiary body to the UN Human Rights Commission, presented draft principles on human rights and the environment that included 'the right to a secure, healthy and ecologically sound environment', but the Commission did not adopt the draft declaration.[8]

In contrast, the right has been widely recognized at the regional and national levels. In 1981, the African Charter on Human and Peoples' Rights became the first human rights treaty to include an environmental right, stating that 'all peoples' have the right to 'a general satisfactory environment favourable to their development'.[9] The 1988 San Salvador Protocol to the 1969 American Convention on Human Rights includes the right of everyone 'to live in a healthy environment' in its list of economic, social, and cultural rights.[10] The Aarhus Convention, concluded ten years later under the auspices of the UN Economic Commission for Europe, states in its first article that parties shall guarantee rights of information, participation, and remedy in environmental matters '[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being'.[11]

Recognition of the right has progressed even more rapidly and extensively at the national level. Beginning
p. 787 in the 1970s and continuing steadily to the present, at least 100 ↳ states have adopted explicit constitutional rights to a healthy environment.[12] Other countries have included the right in national legislation. In all, more than 150 countries have recognized the right in their constitutions or other national legislation, through judicial interpretation of other constitutional rights, or through ratification of regional agreements. Although some states have done little or nothing to implement it, courts in many countries apply the right as a basis for, among other things, reviewing government actions with environmental effects, protecting rights of information and participation, imposing substantive standards, and ordering legal remedies for environmental harm.[13]

III. Incorporation of Human Rights Norms in Multilateral Environmental Agreements

Multilateral environmental agreements almost never refer to human rights explicitly. The principal exception is the Paris Agreement of 2015, whose preamble states that 'Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of Indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity'. Although the preambular language does not have operational effect, it may help to spur governments to pay greater attention to human rights in their responses to climate change.[14]

More often, environmental instruments include language that implicitly reflects and supports human rights norms, especially rights of access to information, public participation, and effective remedies.[15] The most important global instrument in this respect is the 1992 Rio Declaration, Principle 10 of which states:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning
> p. 788 the environment that is held by public authorities, ↳ including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Two regional agreements codify the Principle 10 access rights and define the obligations of states in more detail. The Aarhus Convention, which has forty-seven parties in Europe and central Asia, sets out detailed requirements that its parties: provide environmental information (defined broadly) on request; update and disseminate environmental information; provide for public participation in environmental decision-making; and ensure that members of the public have access to legal remedies for failures to provide environmental information and facilitate public participation.[16] Its compliance committee, composed of independent experts, receives communications from members of the public, issues findings, and makes recommendations.[17]

In 2018, Latin American and Caribbean countries adopted the Escazú Agreement, which also includes detailed provisions requiring that its parties: ensure the public's right of access to environmental information; collect and disseminate environmental information; provide for public participation in environmental decision-making, and ensure access to remedies in relation not only to information and public participation, but also to 'any other decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment'.[18]

The Escazú Agreement also requires each party to guarantee a 'safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters'.[19] The Conference of the Parties, at its first meeting, will determine the rules of a committee to support implementation and compliance.[20]

Although there is no global equivalent to the regional agreements implementing Principle 10, many multilateral environmental agreements encourage or require their parties to provide access to information and/or promote public participation on specified topics within the scope of the agreements.[21] In addition, in
p. 789 2010, the UN ↳ Environment Programme (UNEP) Governing Council adopted guidelines for national legislation implementing access to information, public participation, and access to justice in environmental matters.[22]

The 1992 Convention on Biological Diversity (CBD) provides linkages to a different set of human rights norms, concerning the Indigenous and tribal rights described in the following section.[23] The CBD encourages its parties to respect, preserve, and maintain Indigenous and traditional knowledge, innovations, and practices relevant for the conservation and sustainable use of biological diversity, to promote their wider application with the approval and involvement of the holders, and to encourage the equitable sharing of the benefits arising from their utilization.[24] It also urges the parties to protect and encourage the customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.[25] In 2010, the parties to the CBD adopted the Nagoya Protocol, which provides for 'the prior informed consent or approval and involvement of indigenous and local communities' in relation to access to traditional knowledge associated with genetic resources, and requires that its parties take steps to ensure that the benefits arising from utilization of genetic resources and traditional knowledge are shared in a fair and equitable way with the communities concerned.[26]

IV. Application of Human Rights Law to Environmental Issues

Much of the development of environmental human rights law has occurred through the application by human rights bodies of existing rights, such as rights to life and health, to environmental issues. Although the development has occurred in many different forums, construing different human rights sources, it has resulted in a coherent set of norms. In addition, international instruments set out Indigenous and tribal rights, many of which directly relate to the environment.

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A. Indigenous and Tribal Rights Relating To the Environment

The two most important sources of Indigenous and tribal rights relating to the environment are International Labour Organisation Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries, and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[27] The ILO Convention has twenty-three parties, most of which are in Latin America. While not legally binding in itself, UNDRIP has been generally accepted by states as setting benchmark standards in relation to Indigenous rights,[28] and has influenced human rights bodies in their application of other treaties to Indigenous and tribal peoples.[29]

Both ILO Convention No 169 and UNDRIP provide that states must recognize and protect the rights of Indigenous peoples to the lands, territories, and resources that they have traditionally owned, occupied, or used, including those to which they have had access for their subsistence and traditional activities.[30] The ILO Convention provides that states have obligations to consult with Indigenous and tribal peoples when considering measures that may affect them directly, before undertaking or permitting any programmes for the exploration or exploitation of resources pertaining to their lands or territories, and when considering their capacity to alienate their lands or territories or otherwise transfer their rights outside their own community.[31] UNDRIP takes an important further step, stating that the free, prior, and informed consent of Indigenous peoples is necessary before the adoption or implementation of any laws, policies, or measures that may affect them, and in particular before the approval of any project affecting their lands, territories, or resources, including the extraction or exploitation of mineral, water, or other resources, or the storage or disposal of hazardous materials.[32]

UNDRIP also states that Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands, territories, and resources, and to receive assistance
p. 791 from states for such conservation and protection.[33] ↳ ILO Convention No 169 requires states to safeguard the rights of the peoples concerned to the natural resources pertaining to their lands, including their right to participate in the use, management, and conservation of these resources.[34]

The ILO Convention provides that states must ensure that the peoples concerned shall, wherever possible, participate in the benefits of exploration or exploitation of mineral or sub-surface resources pertaining to their lands and shall receive fair compensation for any damages which they may sustain as a result of such activities.[35] More generally, UNDRIP indicates that states must provide for just and fair redress for harm resulting from any activities affecting their lands, territories, or resources, particularly in connection with the development, utilization, or exploitation of mineral, water, or other resources, and 'appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact'.[36] They have the right to restitution or, if this is not possible, compensation for their lands, territories, and resources that have been taken, used, or damaged without their consent.[37]

B. 'Greening' Human Rights

1. Regional human rights tribunals

Several regional instruments recognize the human right to a healthy (or satisfactory) environment, as noted above, but only the African Charter makes the right reviewable by a tribunal or other monitoring body.[38] Instead, regional bodies in Africa, the Americas, and Europe have applied other human rights, including the rights to life, health, private and family life, and property, to environmental issues. The regional human rights systems include courts with the authority to issue decisions that legally bind the state parties, as well as commissions and other expert bodies able to review complaints but not issue binding decisions.

a) African Commission and African Court on Human and Peoples' Rights

The most important environmental decision in the African system is *Social and Economic Rights Action Centre v Nigeria*, a case involving massive oil pollution in the Niger delta region by a consortium of the Nigerian government and Royal Dutch Shell.[39] The African Commission on Human and Peoples' Rights (AComHPR)
p. 792 found that the ↳ exploitation violated the human rights of the Ogoni people living in the delta, including their rights to health and to a satisfactory environment, which are protected by Articles 16 and 24 of the African Charter. The Commission stated that Nigeria had duties to take 'reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources', and that compliance with the 'spirit' of Articles 16 and 24 'must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.[40]

Other important environmental decisions from the African system include *Centre for Minority Rights Development et al v Kenya*[41] and *African Commission on Human and Peoples' Rights v Kenya*,[42] in which the commission and the court (ACtHPR), respectively, held that the actions of a government concerning protected areas must respect and protect the rights of Indigenous peoples living there.[43]

b) European Court of Human Rights

The European Court of Human Rights (ECtHR) has developed an extensive environmental jurisprudence since 1994.[44] The pathbreaking decision was *López Ostra v Spain*, in which the court held that severe environmental pollution could violate the right to respect for private and family life protected by Article 8 of the 1950 European Convention on Human Rights. The court stated that even when pollution does not seriously endanger the health of a claimant, it may give rise to a positive duty on the state to take reasonable and appropriate measures to secure her rights.[45]

In subsequent cases under Article 8, the court has distinguished between substantive and procedural obligations. With respect to the former, it has emphasized that states have wide discretion (or 'margin of appreciation') and has given near-dispositive weight to whether they followed their own domestic standards.[46] However, the court has adopted more specific procedural requirements, which require states to
p. 793 assess the effects of proposed activities that cause environmental harm and infringe human rights, ↳ to make environmental information public, and to allow the individuals concerned to have access to judicial remedies, especially if 'they consider that their interests or their comments have not been given sufficient weight in the decision-making process'.[47]

The court has also applied Article 2 of the European Convention, which protects the right to life, to environmental threats. The court has long held that Article 2 imposes positive as well as negative duties—that is, obligations on states to protect against threats to the right to life, not just to refrain from infringing the right directly. In the environmental context, the court has held that states must establish legislative and administrative frameworks that effectively deter threats to the right to life, including by regulating the licensing and supervision of hazardous and industrial activities and by providing the public information about such activities and natural disasters such as floods and mudslides.[48] If loss of life nevertheless results, states must conduct independent and impartial investigations and punish breaches as appropriate.[49]

The court may issue judgements for damages, but it may not invalidate laws. However, its decisions influence domestic courts that are able to apply the protections of the Convention more directly. A notable recent example is the 2019 decision of the Supreme Court of the Netherlands that Articles 2 and 8 impose a

duty on the Dutch government to protect against the serious risk of loss of life and disruption of family life threatened by climate change, and that the government violated this duty by not striving to reduce greenhouse gas emissions at least 25% from 1990 levels by the end of 2020.[50]

c) European Committee for Social Rights

The European Committee for Social Rights oversees the 1961 European Social Charter, which sets out economic, social, and cultural rights. The committee has interpreted the right to health in the Charter to include the right to a healthy environment.[51] Among other things, the committee has held that states must take specific measures to prevent air pollution, including by informing and educating the public about environmental problems, introducing threshold values for emissions, measuring air quality, monitoring health risks, and enforcing standards once adopted.[52] In setting standards, states should take into account the norms and guidelines set by national and international bodies.[53]

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d) Inter-American Commission and Court of Human Rights

Many of the important decisions in the Inter-American human rights system have involved Indigenous and tribal peoples. The Inter-American Court has stated that their right to property under the American Declaration and American Convention[54] includes the lands that they have traditionally occupied and the natural resources that they have traditionally used, because the lands and resources are necessary for their physical and cultural survival.[55] Drawing on ILO Convention No 169 and UNDRIP, the court has held that states have obligations to delimit and title the ownership of the lands traditionally occupied by Indigenous and tribal peoples, consult with them regarding any proposed concessions or other activities that may affect their lands and natural resources, ensure that no concession will be issued without a prior environmental and social impact assessment, and guarantee that they receive a 'reasonable benefit' from any such plan if approved.[56] Regarding large-scale development or investment projects that would have a major impact within the territory of Indigenous or tribal peoples, the state may only proceed if it obtains 'their free, prior, and informed consent, according to their customs and traditions'.[57]

More recently, in response to a request by Columbia seeking clarification of the application of the American Convention to environmental harm, the Inter-American Court issued a far-reaching Advisory Opinion on human rights and the environment.[58] Among other things, the opinion indicates that the responsibility of states under the American Convention extends to actions within their territory or control that cause transboundary environmental harm, and that the rights to information, public participation, and access to justice are integral to the rights of life and personal integrity in the environmental context.[59]

2. UN human rights bodies

UN treaty bodies have applied human rights to environmental issues in the course of their oversight of states' compliance with the major human rights treaties, including the 1966 International Covenant on
p. 795 Economic, Social and Cultural Rights (ICESCR) ↳ and the International Covenant on Civil and Political Rights (ICCPR).[60] Treaty bodies do not have the authority to issue binding decisions, but through their general comments, assessments of country reports, and decisions in response to individual communications, they have indicated that environmental harm interferes with the enjoyment of human rights and that states have obligations to protect against such harm.[61]

The Human Rights Council (HRC), the main UN intergovernmental human rights body, has also examined environmental issues, including through its Universal Periodic Review programme, in which it reviews the human rights records of every UN member state, and in a series of resolutions calling attention to the effects of climate change on human rights.[62] In addition, the Council has appointed independent experts,

often called special rapporteurs, with mandates to examine human rights in particular areas. Many of these experts, including the special rapporteurs on Indigenous peoples, human rights defenders, toxic substances, and the right to food, have issued reports applying human rights norms to specific environmental issues.[63]

In 2012, the Human Rights Council appointed an independent expert with a mandate to study the human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment.[64] The present author received the mandate and prepared a series of reports mapping how human rights bodies have applied human rights norms to environmental issues.[65] In 2015, the Council renewed the mandate for another three years, changed the title of the mandate-holder to special rapporteur, and requested that he
p. 796 promote the realization of the obligations.[66] To that end, he prepared 'Framework ↳ Principles on Human Rights and the Environment' that summarize the human rights obligations relating to the environment.[67] In 2018, the Council took note with appreciation of the report presenting the Framework Principles and renewed the mandate for another three years.[68]

C. The Framework Principles on Human Rights and the Environment

The Framework Principles and their accompanying commentary do not purport to create new obligations under human rights law; rather, they reflect the application of existing obligations in the environmental context, as stated in international instruments and by the tribunals and other human rights bodies described above. The report presenting the Principles states that while not all governments have formally accepted all of these norms, their coherence is 'strong evidence of the converging trends towards greater uniformity and certainty in the understanding of human rights obligations relating to the environment'.[69]

The Framework Principles describe procedural obligations of states, including: to respect and protect the rights to freedom of expression, association, and peaceful assembly in relation to environmental matters; to provide for environmental education and public awareness; to provide public access to environmental information; to require the prior assessment of the possible environmental and human rights impacts of proposed projects and policies; to provide for and facilitate public participation in decision-making related to the environment; and to provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.[70]

The Framework Principles also outline human rights obligations relating to substantive standards. As noted above, human rights bodies have held that states have discretion in determining the appropriate levels of environmental protection, taking into account the need to balance the goal of preventing all environmental harm with other social goals. However, the establishment and implementation of appropriate levels of environmental protection must always comply with obligations of non-discrimination, and there is a strong presumption against retrogressive measures in relation to the progressive realization of economic, social, and cultural rights. Other factors that human rights bodies have taken into account in assessing substantive environmental standards include whether the government has taken into account relevant international
p. 797 standards, such as those promulgated by the World Health Organization.[71] Once adopted, states ↳ must monitor and effectively enforce compliance with the standards by private actors as well as governmental authorities.[72] With respect to global or transboundary environmental harm that adversely affects human rights, states have obligations of international cooperation.[73]

The obligations of states under human rights law to prohibit discrimination and to ensure equal and effective protection against discrimination apply to the equal enjoyment of human rights relating to the environment. States therefore have obligations, among others, to protect against environmental harm that results from or contributes to discrimination, to provide for equal access to environmental benefits and to ensure that their actions relating to the environment do not themselves discriminate.[74] In addition, states

must take additional steps to protect the rights of those who are particularly vulnerable to or at risk from environmental harm, including environmental human rights defenders and Indigenous peoples.[75]

V. Conclusion

As the three strands of the law of human rights and the environment mature, they increasingly take note of and converge with one another. As noted above, in 2015, the Paris Agreement became the first global environmental agreement to refer explicitly to human rights. The Conference of the Parties to the CBD has adopted guidelines on environmental and social assessment and on consultation with Indigenous peoples and local communities.[76] The Escazú Agreement on procedural access rights, adopted in 2018, provides that 'each Party shall guarantee the right of every person to live in a healthy environment and any other universally-recognized human right related to the present Agreement'.[77] And in 2018, UNEP announced a new 'environmental rights initiative' to support realization of human rights related to the environment.[78]

Conversely, human rights bodies are increasingly referring to international environmental norms. In its 2017 Advisory Opinion, the Inter-American Court of Human Rights indicated that the duties of states in relation to the rights of life and personal integrity must take into account international environmental principles, including the duty to prevent significant environmental harm, the precautionary principle, and
p. 798 the duty of international cooperation.[79] Similarly, the Human Rights Committee, the ↳ treaty body overseeing the ICCPR, stated in 2018 that 'Obligations of States parties under international environmental law should ... inform the contents of article 6 of the Covenant [on the right to life], and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law'.[80]

Efforts are again underway to convince the UN to recognize the human right to a healthy environment. In 2017, France proposed a Global Pact for the Environment whose first article would recognize the right of every person 'to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment'.[81] The UNGA responded to the proposal by creating an ad hoc open-ended working group to discuss possible gaps in international environmental law.[82] In 2018, the outgoing and incoming UN special rapporteurs on human rights and the environment urged the UNGA to recognize the right through a resolution or a treaty such as the Global Pact.[83]

Finally, two potential further lines of development of rights-based approaches to environmental protection should be noted: rights of nature, and rights of future generations.

Legal recognition of rights of nature has long been proposed as a way to protect the intrinsic value of the environment and its components,[84] which an approach focused only on *human* rights may ignore.[85] In recent years, some states have incorporated natural rights in national constitutions, laws, and judicial decisions.[86] At the international level, no treaty explicitly protects rights of nature, and the ECtHR has refused to derive such rights from the European Convention.[87] However, the Inter-American Court recently stated that the American Convention includes an implicit right to a healthy environment that protects environmental components such as forests and rivers, even in the absence of evidence of harm to human
p. 799 life and health.[88] It seems likely that as more ↳ facets of the human dependence on healthy ecosystems become clearer, advocates will increase their efforts to employ human rights norms to protect biodiversity.[89]

International environmental agreements and declarations on sustainable development often emphasize the importance of protecting future generations,[90] in accordance with the Brundtland Commission's famous definition of sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[91] However, international law has

done little to define the rights of future generations or the obligations of states to them. One potential avenue for further development in this respect may be to clarify the current human rights of children and youth in relation to the long-term but foreseeable future effects of climate change.[92]

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Notes

1 1966 International Covenant on Civil and Political Rights (ICCPR); 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).

2 See Chapters 14 and 20, 'Earth Jurisprudence' and 'Equity', in this volume.

3 UNGA Res 2398(XXIII), 'Problems of the human environment' (3 December 1968) UN Doc A/RES/2398(XXIII).

4 UN, 'Report of the United Nations Conference on the Human Environment' (5-16 June 1972) UN Doc A/CONF.48/14/Rev.1, 3, ch 1—'Declaration of the United Nations Conference on the Human Environment'.

5 Ibid, principle 1.

6 World Commission on Environment and Development, *Our Common Future* (OUP 1987).

7 *Report of the United Nations Conference on Environment and Development* (UN 1993) vol I, annex I—'Rio Declaration on Environment and Development'.

8 'Human Rights and the Environment—Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur' (6 July 1994) UN Doc E/CN.4/Sub.2/1994/9, 74, annex I—'Draft principles on human rights and the environment', principle 2. See Neil Popović, 'In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment' *Columbia Human Rights Law Review*, 27/2 (1996): 487.

9 art 24.

10 art 11.1.

11 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art 1. Two other regional instruments, the 2004 Arab Charter on Human Rights and the 2012 Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (adopted 18 November 2012) <https://asean.org/asean-human-rights-declaration/> accessed 22 January 2020, each include the right to a 'healthy' (Arab Charter, art 38) or 'safe, clean and sustainable' (ASEAN Declaration, para 28(f)) environment as an element of the right to an adequate standard of living.

12 See David Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in John Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018) 17. About two-thirds of the constitutional provisions refer to health; alternative formulations include rights to a clean, safe, favourable, or wholesome environment.

13 See generally David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012); James May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2015).

14 See Lavanya Rajamani, 'Human Rights in the Climate Regime: From Rio to Paris and Beyond' in Knox and Pejan (n 12) 236.

15 See Chapter 21, 'Public Participation', in this volume.

16 arts 4–9.

17 The committee may make recommendations to the Meeting of the Parties and, with the permission of the party concerned, directly to the party; see Decision I/7, 'Review of Compliance' (2 April 2004) UN Doc ECE/MP.PP/2/Add.8, annex.
18 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, arts 5–8. The agreement was opened for signature in September 2018, and it entered into force in April 2021.
19 art 9.
20 art 18.
21 See eg 1992 UN Framework Convention on Climate Change (UNFCCC), art 6(a); Paris Agreement, art 12; 1994 Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, arts 3(a), 16; 1998 Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, art 15.2; 2001 Stockholm Convention on Persistent Organic Pollutants, arts 7.2, 10.1; 2013 Minamata Convention on Mercury, art 18.1.
22 UNEP, 'Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters' (26 February 2010); see UNEP, *Putting Rio Principle 10 into Action: An Implementation Guide* (2015).
23 See Chapters 32 and 42, 'Wildlife' and 'Indigenous Peoples', in this volume.
24 art 8(j).
25 art 10(c).
26 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, arts 5, 7.
27 UNGA Res 61/295, 'United Nations Declaration on the Rights of Indigenous Peoples' (2 October 2007) UN Doc A/RES/61/295.
28 The UNGA resolution adopting UNDRIP received only four negative votes, from Australia, Canada, New Zealand, and the United States, each of which later reversed its position and indicated support for the declaration.
29 See eg *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement of 27 June 2012 on Merits, Reparations, Costs) IACtHR Ser C No 245 [187], [215] (Kichwa case); 'Report of the Committee on the Elimination of Racial Discrimination' (28 November 2010) UN Doc A/64/18 (country report on Guatemala) para 40(11); 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people' (4 September 2009) UN Doc A/64/338, para 48.
30 ILO 169, arts 14–15; UNDRIP, arts 26–27.
31 arts 6, 15, 17.
32 arts 19, 29.2, 32.2.
33 art 29.1.
34 art 15.1.
35 art 15.2.
36 art 32.3.
37 art 28.
38 Neither the Arab Charter nor the ASEAN Declaration creates an oversight body for any of its rights; the reference to most right in art 1 of the Aarhus Convention is not reviewable by its compliance committee; and the rights in the San Salvador Protocol are not subject to review by the Inter-American Commission or Court of Human Rights.
39 *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*, AComHPR (2001) Communication No 155/96.
40 Ibid [52], [53].
41 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, AComHPR (2009) Communication No 276/03.
42 ACtHPR (26 May 2017) No 006/2012.
43 See Lilian Chenwi, 'The Right to a Satisfactory, Healthy, and Sustainable Environment in the African Regional Human Rights System' in Knox and Pejan (n 12) 59.
44 See Council of Europe, *Manual on Human Rights and the Environment* (2nd edn, 2012).
45 (1994) 16798/90 [51].
46 See eg *Hatton v UK* (Judgement) Grand Chamber ECtHR (8 July 2003) Application no 36022/97 [99]–[104].
47 *Taskin and Ors v Turkey* (2004) ECtHR, 46117/99 [119].
48 See *Öneryildiz v Turkey* (2004) ECtHR, 48939/99 (improper maintenance of municipal rubbish tip); *Brincat and others v Malta* (2014) ECtHR, 60908/11 (workplace exposure to asbestos); *Kolyadenko v Russia* (2012) ECtHR, 17423/05 (flash flood); *Budayeva v Russia* (2008) ECtHR, 15339/02 (mudslide).
49 See Manual on Human Rights and the Environment (n 44) 38–39 (summarizing jurisprudence).
50 *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* (Judgement of 20

December 2019) No 19/00135, ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands) (Urgenda Foundation case).

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52 Marangopoulos case (n 51) [203].

53 FIDH case (n 51) [148].

54 American Declaration of the Rights and Duties of Man (adopted 2 May 1948), art XXIII; 1969 American Convention on Human Rights, art 21.

55 See eg Kichwa case (n 29); *Case of the Saramaka People v Suriname* (Judgement of 28 November 2007 on Merits, Reparations and Costs) IACtHR Ser C No 172 [121]–[122] (Saramaka People case); *Indigenous Community Yakye Axa v Paraguay* (Judgement of 17 June 2005 on Merits, Reparations and Costs) IACtHR Ser C No 142 [143]; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement of 31 August 2001 on Merits, Reparations and Costs) IACtHR Ser C No 79 [148]-[149].

56 Saramaka People case (n 55) [129].

57 Ibid [134].

58 *State Obligations in Relation to the Environment* (Advisory Opinion) IACtHR (2017) OC-23/17 (State Obligations in Relation to the Environment case); see Maria Banda, 'Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights' *American Society of International Law Insights*, 22/6 (2018).

59 State Obligations in Relation to the Environment case (n 58) [101], [211]–[241]; see also Chapter 27, 'Judicial Development', in this volume.

60 Unusually among UN human rights treaties, the 1989 Convention on the Rights of the Child includes an explicit reference to the environment: it requires its parties to pursue full implementation of children's right to health by taking measures, among others, to combat disease and malnutrition through 'the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution' (art 24.2(c)).

61 See eg Human Rights Committee, 'General Comment No 36 [on the right to life]' (30 October 2018) UN Doc CCPR/C/GC/36, paras 26, 62; Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 15: The right to water' (20 January 2003) UN Doc E/C.12/2002/11, paras 10, 21, 23; CESCR, 'General Comment No. 14: The right to the highest attainable standard of health' (11 August 2000) UN Doc E/C.12/2000/4, paras 4, 11, 15, 34.

62 See eg HRC Res on 'Human rights and climate change': 10/4 (25 March 2009); 18/22 (30 September 2011); 29/15 (2 July 2015); 38/4 (5 July 2018).

63 See eg James Anaya, 'Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries operating within or near indigenous territories' (11 July 2011) UN Doc A/HRC/18/35; Michel Forst, 'Report of the Special Rapporteur on the situation of human rights defenders' (3 August 2016) UN Doc A/71/281 (environmental human rights defenders); Baskut Tuncak, 'Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes' (2 August 2016) UN Doc A/HRC/33/41 (effect of pollution and toxics on children); Hilal Elver, 'Report of the Special Rapporteur on the right to food' (24 January 2017) UN Doc A/HRC/34/48 (pesticides).

64 HRC Res 19/10, 'Human Rights and the Environment' (12 March 2012).

65 See John Knox, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Mapping Report' (30 December 2013) UN Doc A/HRC/25/53.

66 HRC Res 28/11, 'Human Rights and the Environment' (26 March 2015).

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68 David Boyd succeeded to the mandate on 1 August 2018.

69 Framework Principles (n 67) para 9.

70 Ibid, principles 5–10, paras 10–30.

71 Ibid, principle 11, paras 31–32.

72 Ibid, principle 12, paras 34–35.

73 Ibid, principle 13, paras 36–39.

74 Ibid, principle 3, paras 7–9.

75 Ibid, principles 4, 14–15, paras 10–11, 40–53.

76 See Elisa Morgera, 'Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law' *Wake Forest Law Review*, 53/1 (2018): 101.

77 Escazú Agreement, art 4.1.

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79 State Obligations in Relation to the Environment case (n 58) [127]–[210].

80 General Comment No 36 (n 61) para 62.

81 Le Club des Juristes, 'Toward a Global Pact for the Environment' (White Paper, September 2017) 45.

82 UNGA Res 72/277 'Towards a Global Pact for the Environment' (14 May 2018) UN Doc A/RES/72/277.

83 UNGA, 'Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (19 July 2018) UN Doc A/73/188, paras 46–48.

84 Christopher Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' *Southern California Law Review*, 45/2 (1972): 450.

85 Günther Handl, 'Human Rights and Protection of the Environment: A Mildly 'Revisionist' View' in Antônio Trindade (ed), *Derechos Humanos, Desarrollo Sustentable y Medio Ambiente* (Instituto Interamericano de derechos 1995) 117, 138.

86 See eg *Constitución de la República del Ecuador* (2008), art 71; *Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien* (Framework Law of Mother Earth and Integral Development for Living Well), Law No 300 (2012) (Bolivia); Te Urewera Act 51 of 2014 (New Zealand); *Mohd. Salim v State of Uttarakhand & Others* (20 March 2017) Uttarakhand High Court (India) PIL 126/2014.

87 *Kyrtatos v Greece* (22 May 2003) ECtHR, 41666/98, para 52.

88 State Obligations in Relation to the Environment case (n 58) [62].

89 See John Knox, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (19 January 2017) UN Doc A/HRC/34/49.

90 See eg Rio Declaration (n 7) principle 3; UNFCCC, art 3.1; CBD, preamble.

91 *Our Common Future* (n 6) ch 2, para 1.

92 See Urgenda Foundation case (n 50) [37]; *Future Generations v Ministry of the Environment* (2018) Colombia Supreme Court; *Juliana v United States* (2016) District Court of Oregon, 217 F.Supp.3d 1224, reversed and remanded (2020) 9th Circuit Court of Appeals, 947 F.3d 1159.

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particular, L. Henkin, *The Age of Rights* (New York: Columbia University Press, 1990), p. 19; N. S. Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court', *International and Comparative Law Quarterly*, 38 (1989), at 321, esp. 333; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989); L. B. Sohn, 'The Human Rights Law of the Charter', *Texas International Law Journal*, 12 (1977), 129 at 132–4; H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, 25 (1995–6), 287). To be established, custom in principle requires both consistent identifiable State practice and evidence of a belief of States that compliance is required under international law (*opinio juris sive necessitatis*). The classic definition is that adopted by the International Court of Justice in the *North Sea Continental Shelf Cases* (*Federal Republic of Germany* v. *Denmark* and *Federal Republic of Germany* v. *Netherlands)* (I.C.J. Reports 1969, 44, para. 77):

> Not only must the acts concerned amount to settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to their legal obligation. The frequency or even habitual character of the acts is not in itself enough.

It has been argued, however, that, in the field of human rights, evidence of custom could be based on the resolutions of the UN General Assembly and statements made within other international organizations, demonstrating a clear commitment of the international community towards certain values, while inconsistent State practice on the other hand would not be an obstacle to the identification of such custom. For instance, the fact that the universal periodic review performed by the UN Human Rights Council takes as a reference, in the review of each State, not only the Charter of the United Nations but also the Universal Declaration of Human Rights, as well as the human rights instruments to which a State is party (appendix to the Human Rights Council Resolution 5/1 'Institution-building of the United Nations Human Rights Council' (18 June 2007): see, further, Chapter 10), provides at least an indication of the expectation of the international community that all States should comply with a basic corpus of human rights as contained in the UDHR, whichever treaties they have ratified. Some authors have gone so far as to suggest that State 'practice', for the purposes of custom determination in the field of human rights, is composed of official declarations and participation in the negotiation of human rights instruments, as well as of incorporation of human rights within the national legal orders. Consider, for instance, the attitude adopted by the 1987 *Restatement (Third) of the Foreign Relations Law of the United States* (for an exposé of the background assumptions underlying this position, see the Hague Academy course of Oscar Schachter: O. Schachter, 'International Law in Theory and Practice: General Course in Public International Law', *Recueil des cours*, 178 (1982-V), 2 at 333–42), or the position expressed by Theodor Meron:

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

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

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

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

[T]he initial inquiry must aim at the determination whether, at a minimum, the definition of the core norm claiming customary law status and preferably the contours of the norm have been widely accepted. In this context my own preferred indicators evincing customary human rights are, first, the degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments, and second, the confirmation of the right in national practice, primarily through the incorporation of the right in national laws . . . It is, of course, to be expected that those rights which are most crucial to the protection of human dignity and of the universally accepted values of humanity, and whose violation triggers broad condemnation by the international community, will require a lesser amount of confirmatory evidence.

Essentially, two arguments have been put forward in favour of this position. First, it can be said that the 'practice' of a State towards its own population (the rights of which it is the purpose of the international human rights regime to protect) would be difficult if not impossible to ascertain for practical reasons (violations committed by a State within its

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

Thus, a 'modern' view of custom has gained some acceptance in the field of human rights (for a discussion, see M. Akehurst, 'Custom as a Source of International Law', *British Yearbook of International Law* (1974–5), 1 *et seq.*; L. Henkin, 'Human Rights and State "Sovereignty"', 25 *Georgia Journal of International Law* 37 (1995–6)). This view presents itself as a substitute to the classical view as reflected in Article 38(1) of the Statute of the International Court of Justice. In the 'modern' approach, State 'practice' in the usual sense of 'behaviour' is less determinative than authoritative statements made by governments or intergovernmental bodies. This turn is favoured in part by a general identity crisis of custom as a source of international law. It has been encouraged by well-intentioned authors, eager to provide human rights law with a standing in customary law which would compensate for what was perceived in the 1970s and 1980s as the lack of enthusiasm of States in the ratification of human rights treaties. However, this 'modern' view results in distorting the classical notion of custom in such a way that the notion is barely even recognizable under its new disguise. Philip Alston and Bruno Simma have also argued that it may be ideologically biased towards the recognition of certain particular human rights as forming part of customary international law. The result of the 'new' approach, it turns out, which emphasizes deduction from statements instead of induction from State behaviour, is that those civil and political rights which are recognized in US constitutional law and which the United States invokes against other States are included, while other rights, equally essential and whose status is identical within the international bill of rights, are excluded. These authors therefore suggest that a certain 'sub-conscious chauvinism' may be at work – for instance, in the list of human rights recognized as customary international law in the *Restatement*. They ask whether 'any theory of human rights law which singles out race but not gender discrimination, which condemns arbitrary imprisonment but not capital punishment for crimes committed by juveniles or death by starvation and which finds no place for a right of access to primary health care, is not flawed in terms both of the theory of human rights and of United Nations doctrine' (B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles', 12 *Australian Yearbook of International Law* 82 (1988–9), at 94–5).

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

(c) Human rights as general principles of law

This means of recognizing the Universal Declaration of Human Rights as a source of legal obligations is encouraged by the approach adopted by the International Court of Justice itself. The Court has refrained from stating that the Declaration as such, in the totality of its articles, should be considered as customary international law. But it did refer to the Declaration on a number of occasions, albeit always with respect to a specific right and without always clarifying the source of the authority of the Declaration. For instance, alluding to the prohibition of arbitrary arrest or detention stipulated in Article 9 of the Universal Declaration of Human Rights, it stated in the *Tehran Hostages* case that 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights' (*United States Diplomatic and Consular Staff in Tehran* (*United States* v. *Iran*) (*merits*) (I.C.J. Reports 1980, at 42). The language referring to such 'fundamental principles' is not new. Already in the *Corfu Channel* case, the Court mentioned 'obligations ... based ... on certain general and well-recognized principles', among which it mentioned what it labelled 'elementary considerations of humanity' (*Corfu Channel Case* (*United Kingdom of Great Britain and Northern Ireland–Albania*) (I.C.J. Reports 1949, 4 at 22)). In the Advisory Opinion it delivered on the issue of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, it referred to 'the principles underlying the Convention' as 'principles which are recognized by civilized nations as binding on States, even without any conventional obligation' (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, 19 (28 May 1951)). Almost identical language may be found in later cases. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, referring to the *Corfu Channel* dictum, the Court stated that

> it is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'... that the Hague and Geneva Conventions have enjoyed a broad accession. Further, these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law. (I.C.J. Reports 1996, 226, at 257 (para. 79))

Similarly, in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), the Court had mentioned the 'fundamental general principles of humanitarian law' as the source of obligations for the defendant State (I.C.J. Reports 1986, 14, at 113–14). The *Case Concerning East Timor* (*Portugal* v. *Australia*) similarly referred to the 'principle' of self-determination as 'one of the essential principles of contemporary international law' (I.C.J. Reports 1995, 90, at 102 (para. 29)).

Although these statements refer, for the most part, to otherwise unspecified 'principles of international law' rather than to the 'general principles of law recognized by civilized nations' mentioned by Article 38(1)(c) of the Statute of the International Court of Justice, they nevertheless have been interpreted as implying that human rights should qualify among the latter principles, and thus as forming part of general international law (see B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles', cited above, at 102–8; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), at p. 88). Indeed, enthusiastic as they are about the grounding of international human rights law in customary international law, the reporters of the *Restatement (Third) of the Foreign Relations of the United States* note that 'there is a willingness to conclude that prohibitions [against human rights violations] common to the constitutions or laws of many states are general principles that have been absorbed into international law' (para. 701 n. 1). This conclusion also may be seen to follow from the fact that the Universal Declaration of Human Rights has been implemented, or even sometimes almost literally reproduced, in a large number of bills of rights in the world (H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, 25 (1995–6), 287, at 351–2).

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

Does it matter that international human rights have their source both in general public international law, and in specific treaties concluded at universal or regional level? The expansion of the membership of States in international human rights treaties particularly in the 1990s – the Convention on the Rights of the Child has achieved almost universal ratification and treaties such as the two 1966 Covenants or the International Convention for the Elimination of All Forms of Discrimination against Women have also been very widely ratified – may have created the impression that the controversy about how solid the foundations of human rights law are in general international law, as opposed to treaty law, is not worth the efforts of legal doctrine today, as it might have been in the 1980s. We should resist this impression, however. First, we are far from having achieved universal ratification for all human rights treaties. Second, ratifications by States may be accompanied by reservations about specific rights or about the scope of application of the treaty:

grounding the guarantees of the treaty in customary international law or in other sources of general international law may serve to overcome such restrictions. Third, it is increasingly acknowledged that States are not the only addressees of human rights law. As subjects of international law, international organizations are bound by general international law (see further on this issue, Chapter 2, section 4), and some authors believe this could be extended to transnational corporations (see Chapter 4, section 3): in order to impose human rights obligations on such private non-State actors, these obligations must have their source elsewhere than in treaties, which as a rule only States may ratify. The view that human rights treaties merely embody, in treaty form, pre-existing obligations of States – which have their source in customary international law or in the general principles of law, and which are not at the disposal of States – also has guided the approach of human rights bodies on the question of the denunciation of human rights treaties and of State succession, especially after the dismantling of the former Soviet Union or of the former Federal Republic of Yugoslavia, and the separation of Czechoslovakia into two distinct entities. Box 1.6 discusses this issue.

Box 1.6 The continuity of human rights obligations

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

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

1. The International Covenant on Civil and Political Rights does not contain any provision regarding its termination and does not provide for denunciation or withdrawal. Consequently, the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. On this basis, the Covenant is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty.

2. That the parties to the Covenant did not admit the possibility of denunciation and that it was not a mere oversight on their part to omit reference to denunciation is demonstrated by the fact that article 41(2) of the Covenant does permit a State party to withdraw its acceptance of the competence of the Committee to examine inter-State communications by filing an

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CHAPTER I

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ITS HISTORY, IMPACT AND JURIDICAL CHARACTER

PROF. JOHN P. HUMPHREY*

A. HISTORY OF THE UNIVERSAL DECLARATION

The catalyst to which we owe the Universal Declaration of Human Rights and indeed much of the new international law of human rights which has so radically changed the theory and practice of the law of nations[1] was the gross violations of human rights that were committed in and by certain countries during and immediately before the Second World War. For it was these atrocities that fostered the climate of world opinion which made it possible for the San Francisco Conference to make the promotion of respect for human rights and fundamental freedoms "for all without distinction as to race, sex, language or religion" one of the pillars on which the United Nations was erected and a stated purpose of the Organization.[2] It was on these foundations that the new international law of human rights was built.

There are seven specific references in the Charter to human rights and freedoms but nowhere does it catalogue or define them. A few delegations to the Conference, including the Chilean, Cuban and Panamian delegations sponsored provisions which would have had the Charter guarantee the protection of specified rights; and Panama even urged the incorporation of a bill of rights; but none of these proposals were accepted. Largely as a result of an energetic lobby conducted by certain American non-governmental organizations,[3] however, the Conference did include in the Charter an article 68 by which the Economic and Social Council was instructed to set up a commission for the promotion of human rights; and although there was no mention in the article of such a mandate it was

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[1] See Humphrey, "The International Law of Human Rights in the Middle Twentieth Century" in Bos (ed.) *The Present State of International Law* (Kloner, 1973) p. 75 *et seq.*

[2] Article I of the Chapter.

[3] See Humphrey, "The U.N. Charter and the Universal Declaration of Human Rights" in Luard (ed.) *The International Protection of Human Rights* (London, 1967) p. 40 *et seq.*

generally understood that this commission would draft an international bill of rights.[4]

One of the first acts of the Economic and Social Council was to set up this commission with an explicit mandate to prepare, amongst other things, a draft bill.[5] Before, however, the new Commission on Human Rights could act on this mandate, an attempt was made by Panama in the General Assembly to have the draft which it had sponsored at San Francisco adopted as a resolution of the Assembly. Had it succeeded the history of the human rights programme in the United Nations would have been different; but the attempt was defeated, largely by the efforts of Eleanor Roosevelt, a member of the United States delegation, whom everyone expected would become the first chairman of the Human Rights Commission.

The most important business of the Commission when it met under Mrs. Roosevelt's chairmanship in its first regular session on 27 January, 1947, was to make arrangements for the drafting of the bill. No decision had yet been taken as to its form. There were several possibilities which were discussed in a Secretariat working paper; it could be drafted as a resolution of the General Assembly – in effect a declaration – but this would only have the force of a recommendation and would not be binding in international law; it could be a multilateral convention binding on all states which ratified it (an option which, the Secretariat prophetically added, might involve delays) or there could be an amendment to the Charter which if adopted would make the bill part of the fundamental law of the United Nations, in effect the solution that had been rejected at San Francisco. Although the Australian and Indian delegations strongly advocated a convention, the great majority of the governments represented at this first session of the Commission favoured a declaration, and it was in that form that the first draft, the so-called Secretariat Outline,[6] was prepared. It was only at its second session that the Commission decided to draft a bill in three parts: a declaration, a multilateral convention (soon known as the Covenant and later as the Covenants after the General Assembly decided that there would

[4] In the speech with which he closed the Conference President Truman said that "under the Charter we have good reason to expect the framing of an international bill of rights acceptable to all the nations involved." United States Department of State Bulletin, vol. xiii, no. 314, p. 5.

[5] ECOSOC Resolution 1/5 of 16 February, 1946. It may be noted that the council did not adopt the recommendation of the United Nations Preparatory Commission that the work of the commission also be directed to "any matters within the field of human rights considered likely to impair the general welfare or friendly relations between nations".

[6] U.N. Document E/CN/AC.1/3. This draft is reproduced as Annex A of document E/CN.4/21 and also in the *Yearbook on Human Rights* for 1947 (United Nations, Lake Success, 1949) at p. 484.

be two conventions) and measures of implementation.

The Commission made no attempt at its first session to draft the declaration, but it did appoint a committee consisting of its chairman (Mrs. Roosevelt of the United States), its vice-chairman (P.C. Chang of China) and its rapporteur (Charles Malik of the Lebanon) to prepare a first draft. This Committee of three held only one meeting– a tea-party really in Mrs. Roosevelt's Washington Square apartment on the Sunday following the adjournment of the Commission – and soon found itself without a mandate. Nor did it draft any articles, partly because Chang and Malik – two of the most brilliant men ever to sit on the Human Rights Commission and who would later be among the principal architects of the International Bill of Rights – were poles apart philosophically and could seldom agree on anything; but the committee did ask the Director of the Human Rights Division in the Secretariat to prepare a draft declaration. He eventually did so but not until after the Commission's arrangements were upset by the Economic and Social Council when somewhat tardily the Soviet Union realized that these arrangements effectively excluded it from any role in the early drafting process. The issue was resolved when on 24 March Mrs. Roosevelt informed the president of the Council that she was appointing a new drafting committee of eight members of the Commission: Australia, Chile, China, France, the Lebanon, the United States, the United Kingdom and the Soviet Union. Strictly speaking she had no legal right to change a decision of the Commission in a matter on which it had been explicit; but her solution was realistic and politically acceptable and it was approved by the Council which also instructed the Secretariat to prepare a 'documented outline' of the Bill, a confirmation in effect of the mandate it had received from the committee of three except that whereas that committee had asked for a draft declaration the Council was now calling for a documented outline which could have been interpreted as meaning a simple list of rights. In fact the so-called Outline was a draft declaration.[7] This draft, which was based on a number of drafts that had been prepared by a number of individuals and organizations,[8] contained forty-eight short

[7] The work of the Secretariat was later described by the late Nobel laureate, René Cassin, as not being capable of use in oral debate. See his *La Pensée et l'Action*. He uses substantially the same language in an article, *Quelques souvenirs sur la Déclaration universelle de 1948, Revue de Droit contemporain* (15e année, no. 1/1968) p. 3 *et seq.* *"C'est pourquoi"*, he writes, *"je fus chargé par mes collègues de rédiger, sous ma seule responsabilité, un premier avant-projet"*. This statement is patently wrong as the record shows. See *infra*. Nowhere does Cassin mention that there existed a Secretariat draft.

[8] They included a draft by Gustavo Gutierrez (which had probably inspired the draft Declaration of the Duties and Rights of the Individual which Cuba sponsored at San Francisco) and others by H.G. Wells, Professor (as he then was) Hersch Lauterpacht, the Reverend Wilfrid Parsons, S.J., Rollin McNitt and by a committee presided over by Lord Sankey after a

articles in which both civil and political and economic and social rights were catalogued and defined. With two exceptions all the texts on which the Director worked came from English-speaking sources and all of them from the democratic West; but the documentation which the Secretariat later brought together in support of his draft included texts extracted from the constitutions of many countries.

The new drafting committee of eight met at Lake Success from 9 to 25 June. After a long debate during which the Secretariat draft declaration was discussed and compared with a draft convention sponsored by the United Kingdom,[9] the representative of the Soviet Union, Professor Koretsky – a future judge of the International Court of Justice – suggested that a working group consisting of the representatives of France, the Lebanon and the United Kingdom be asked to collate the opinions that had been expressed. He wanted this working group to report back to the Drafting Committee a few days before the next session of the full Commission. Koretsky's motion was interpreted as a delaying tactic, but the working group was nevertheless appointed with a mandate to report back forthwith 'a logical rearrangement' of the articles of the Secretariat draft and how they should be redrafted in the light of the committee's discussions and divided between a manifesto and a convention. The working group met immediately and asked the representative of France, René Cassin, to prepare a new draft based on those articles of the Secretariat draft which he considered appropriate for a declaration. He did this over the week-end with the help of Emile Giraud, an officer in the Division of Human Rights.

Cassin's draft[10] reproduced the Secretariat draft in most of its essentials and style. Some of his articles were no more than a new French version of the official United Nations translation of the English original. He also changed the order of some of the articles, combined in one article principles the Secretariat draft had expressed in two and divided some of them

public debate conducted in Britain by the *Daily Herald.* Still others came from the American Law Institute (the text sponsored by Panama at San Francisco and in the General Assembly), the American Association for the United Nations, the American Jewish Congress, the World Government Association, the *Institut de droit international* and the editors of *Free World;* and the American Bar Association provided an enumeration of subjects.

[9] See U.N. Document E/CN.4/21 Annex B/R.25. The United Kingdom draft convention had little if any influence on the final outcome. It had, however, been prepared with skill and imagination and had it been pushed more energetically might have become a solid basis for the Covenant on Civil and Political Rights. It did not contain any mention of economic, social and cultural rights.

[10] This draft in Cassin's handwriting was displayed, at the request of the French government, at United Nations Headquarters on the occasion of the tenth anniversary of the adoption of the Universal Declaration; and a photographic reproduction of the same manuscript is reproduced in his book, *La Pensée et l'Action,* already cited.

into two or more articles; and he left out some of the articles because, in his opinion, they could be more appropriately included in a convention. Many of his changes and in particular his changed order did not survive the test of time.

One of the very few new ideas in Cassin's draft was in his article twenty-eight which said that "the protection of human rights requires a public force" a truism which the Drafting Committee did not retain. Other articles enunciated principles which were more philosophical than legal, principles not included in the Secretariat draft which had avoided assertions that did not enunciate justiciable rights. His first article which read: "All men are brothers. Being endowed wtith reason, members of one family, they are free and possess equal dignity and rights" created so much difficulty at the Commission's second session that Ambassador Bogomolov was prompted to ask why the Declaration should be filled with solemn affirmations lacking in sense. It also led to difficulties with the Commission on the Status of Women which objected to its language. But the greatest harm that resulted from the introduction of unnecessary philosophical concepts was the needless controversy and useless debate which they invited, particularly in the General Assembly.

With the help of the Commission on the Status of Women, the Commission's two sub-commissions on freedom of information and the prevention of discrimination, the 1948 Geneva Conference on Freedom of Information, the Specialized Agencies and non-governmental organizations, the Human Rights Commission and its Drafting Committee continued to work on the Declaration until the late Spring of 1948. Its work on the two covenants, as they later became, would not be completed until 1954; but on 18 June, 1948, at the end of its third session the Commission adopted its draft of the Declaration with twelve of its members voting in favour. Byelorussia, the Soviet Union, the Ukraine and Yugoslavia – anticipating the stand they would later take in the General Assembly – all abstained from voting. The draft declaration was therefore ready for consideration by the Assembly at its third session.

Although the Economic and Social Council through which the Commission's text was transmitted to the General Assembly had so many human rights items on the agenda of its seventh session, including the draft convention on genocide and the Final Act of the Information Conference, that exceptionally it set up a special committee to deal with them, the Council made no changes in the text of the Declaration which when it reached the Assembly was sent to the Third Committee. In the light of the many difficulties which then arose, it was fortunate that the chairman of

this committee was Charles Malik who as rapporteur of the Commission was familiar with all the details of the legislative history of the draft. It was a tribute to the work of the Commission that many of the governments represented in the Assembly would have accepted the text as it stood; but in the event the Third Committee devoted eighty-one long meetings to it and dealt with one hundred and sixty-eight resolutions containing amendments. In the circumstances it is remarkable that the text finally adopted was so much like the Commission's text.

Several delegations, including those of New Zealand and the Soviet Union, tried for different reasons to postpone the adoption of the Declaration. The New Zealanders were opposed to adopting any declaration until the Covenant was ready: "If the Declaration were adopted first", its representative argued, "there was less likelihood that the Covenant would be adopted at all".[11] Had this advice been followed the adoption of the Declaration could have been postponed indefinitely; for it was only in 1966, eighteen years later, that the Assembly approved the Covenants and opened them for signature. Since in the meantime the United Nations human rights programme became a vehicle for political controversy, it is quite unlikely that at any time after, say 1949, the Declaration could have been adopted with its present content. It is inconceivable, for example, that at any later date there would have been no mention in it of the controversial principle of the self-determination of peoples which soon became a hot issue in the United Nations.[12]

Another unsuccessful challenge to the Commission's text was the well organized attempt, under the leadership of Cuba, to replace it in most of its essentials by the text of the American Declaration of the Rights and Duties of Man which the Organization of American States had adopted at Bogota earlier in the year – no small threat when it is remembered that twenty of the then fifty-nine member states of the United Nations were Latin American.

Although the Third Committee was ostensibly a non-political forum, the atmosphere in which it worked was charged by the Cold War and by irrelevant recriminations coming from both sides; but the Committee worked hard and by United Nations standards efficiently. Some of the most controversial issues came up in connection with matters that should never have been discussed. One pregnant source of controversy was the article, already mentioned, that Cassin had fathered in the Commission's

[11] A/C3/S.R. 89 at p. 4.

[12] The Soviet Union did try to have a reference to the principle inserted in the document even in 1948.

Drafting Committee which now read: "All human beings are born free and equal in dignity and rights. They are endowed by nature with reason and conscience and should act towards one another in a spirit of brotherhood". A motion to transfer the article to the preamble was defeated after an emotional debate, probably because the South Africans had tried to amend it in a way which in the charged atmosphere was interpreted as an attempt to weaken it. But the most controversial issue to which the article gave rise was whether it should contain some reference to the Deity. In the event the words "by nature" were deleted.

Attempts to postpone the adoption of the Declaration were, as already indicated, defeated. It was, however only in the night of 6 December that the Third Committee finished its task and forwarded its report to the plenary session of the Assembly, just in time for that body to adopt the Declaration in the night of 10 December,[13] only two days before the end of the session. There were no dissenting votes but the six communist countries which were then members of the United Nations, Saudi Arabia and South Africa all abstained.

This is not the place to review the legislative history of the Declaration[14] or even to analyse its thirty articles. Some of the articles could have been better formulated and the document suffers from the inclusion in it of certain assertions which do not enunciate justiciable rights; but having regard to the very great number of people who in one way or another contributed to the text it is a remarkably well drafted document. There were some important omissions including the failure to include any article on the protection of minorities[15] and to recognize any right of petition even at the national level – a right so fundamental that it is recognized even by some authoritarian countries – let alone by the United Nations.[16]

Remembering that the final arbiters of the text were governments it is perhaps just as well that no serious attempt was made to catalogue or define those duties which are correlative to human rights; but the principle that everyone owes duties to the community is recognized in article 29. This important article also stipulates the conditions under which limitations may be legitimately placed on the exercise of human rights and freedoms, the only permitted limitations being such "as are determined by law solely

[13] G.A. A/811.

[14] On the legislative history, see Albert Verdoodt, *La Naissance et Signification de la Déclaration universelle des droits de l'homme* (Louvain, 1964).

[15] See Humphrey, "The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities", *American Journal of International Law,* vol. 62 (1968) p. 869 *et seq.*

[16] Humphrey, "The Right of Petition in the United Nations", *Human Rights Journal,* vol. iv, p. 463 *et seq.*

for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".[17] The reference here to public order can be compared with advantage to the use in the Covenant on Civil and Political Rights of the expression "public order *(ordre public)*" which insofar as that instrument is concerned in any event introduces the nebulous and dangerous concept of public order in civil law jurisdictions.

The Declaration gives pride of place to the traditional civil and political rights which are catalogued and defined in its first twenty-one articles. There then follows, after an "umbrella article", a list and definitions of economic, social and cultural rights which, in 1948, were still controversial in many countries; witness the principal reason that motivated the division of the Covenant into two parts. It was indeed the inclusion of these rights in the Declaration which was one of the reasons for its great historical importance.

B. IMPACT AND JURIDICAL CHARACTER OF THE UNIVERSAL DECLARATION

The adoption of the Declaration was recognized as a great achievement and it immediately took on a moral and political authority not possessed by any other contemporary international instrument with the exception of the Charter itself. One of the very few dissenting voices was that of Sir Hersch Lauterpacht who in a book published shortly after the adoption of the Declaration went so far as to question even its moral authority.[18] Had this great lawyer, who was also a dedicated if impatient partisan of human rights, lived longer, he would have recognized not only the great moral authority of the Declaration but, it is submitted, its now binding character as part of the law of nations. There can now in any event, thirty years after its adoption, be no doubt, that the Declaration does possess both moral and political authority. Not only has it become an international standard by which the conduct of governments is judged both within and outside the

[17] The author of the present essay has attempted in an essay in a book to be published sometime in 1978 to discover the meaning of this article.

[18] "The moral authority and influence of an international instrument of this nature must be in direct proportion to the degree of sacrifice of the sovereignty of states which it involves . . . The Declaration does not import to imply any sacrifice of the sovereignty of the state on the altar of the inalienable rights of man and, through them, of the peace of the world." International Law and Human Rights (London, 1950) p. 419.

United Nations (it has been invoked so many times that it would require a major effort of research simply to list them); it has inspired a whole cluster of treaties – including the very important European Convention for the Protection of Human Rights and Fundamental Freedoms[19] – it is reflected in many national constitutions, some of which reproduce its provisions *verbatim* as well as in international legislation and in the decisions of both national and international courts.[20] The thesis to which the remainder of this essay will be devoted is that, in addition to their admitted moral and political authority, the justiciable provisions of the Declaration, including certainly, those enunciated in articles two to twenty-one inclusive,[21] have now acquired the force of law as part of the customary law of nations.

Law as that term is understood by lawyers acquires its normative binding force from the source or authority from which it emanates. In the case of international law this is ultimately the will of the international community, which has been traditionally expressed either directly by customary rules or indirectly by treaties which are themselves binding by virtue of the customary rule, *pacta sunt servanda.* To these two traditional sources the Statute of the International Court of Justice has added a third, "the general principles of law recognized by civilized nations". The fact therefore that the Declaration is not a treaty is not a reason for denying that it has the quality of law. A very good case can be made for the proposition that, as suggested by the French delegation at the 1948 session of the General Assembly many if not all principles set forth in the Declaration are "general principles of law"[22] a proposition ample evidence for which can be found in the documentation prepared by the United Nations Secretariat for the Drafting Committee of the Human Rights Commission in 1947. But if that is so (and it most probably is) those principles would be part of international law by virtue of their recognition by the legal systems of "civilized nations" and not because they are proclaimed by the Universal Declaration. The question, important as it may be, is not therefore an appropriate one for further examination in an inquiry into the juridical

[19] See the preamble to this Convention.

[20] See Egon Schwelb, "The Influence of the Universal Declaration of Human Rights on International and National Law", Proceedings of the American Society of International Law (1959) p. 217 *et seq.*; and "United Nations Action in the Field of Human Rights", U.N. Publication ST/HR/2 Sales number E 74 V. The latter very useful Secretariat document is now being brought up to date.

[21] Some of the articles set forth, as already indicated, philosophical assertions. Most of the rights proclaimed in articles 22 to 28, but not all of them, are programme rights the implementation of which can only be progressive.

[22] See Sir Humphrey Waldock, 106 *Recueil des Cours* (1962) p. 198: "certain fundamental rights are general principles of law recognized by civilized nations and have been frequently applied by international tribunals in cases concerning the treatment of foreigners."

character of the Declaration itself. If the Declaration as such now has the force of law it must be because it has acquired the force of customary law.

There is no agreement as to the meaning or character of custom in international law.[23] Professor A. d'Amato has gone so far indeed as to argue that the concept as traditionally understood must now be replaced by the concept of consensus.[24] The terms "custom" and "customary law" are no more than convenient terms for describing a particular juridical phenomenon; what is important is the phenomenon and not the tag. But tempting as it is to try to discover the real meaning of the phenomenon in the light of some of the theories that are now being put forward as to its real nature and to apply the findings to the Declaration, the case for its binding character will be stronger if these tags are given their traditional (one is tempted to say customary) meaning.

Traditionally and in the still dominant theory "custom", as the tag implies, is usage or practice which is accepted as law, a definition that has behind it the authority of both the Statute of the International Court of Justice[25] and of the Court itself.[26] Usage implies an element of time; but, whereas it was once thought that usage had to be of long standing, it would now seem that although time is still an element the necessary duration need not be long.[27] As Tanaka J. wrote in his dissenting opinion in the Continental Shelf cases, "the speedy tempo of present international life promoted by highly developed communication . . . has diminished the importance of the time factor and made possible the acceleration of the formation of customary international law. What required a hundred years in former days may now require less than ten years".[28] The point need not be laboured here because the Universal Declaration is already thirty years old and the practice that will presently be referred to stretches over the whole of that period.

[23] The much quoted observation made by Professor Jules Basdevant in 1936 is still true: *les idées des juristes sur le caractère de la coutume n'ont atteint ni à l'unité ni à la clarté".* Règles générales de la paix, *Recueil des Cours* 1936 - IV p. 508.

[24] The Concept of Custom in International Law (Cornell University Press, 1971). For a criticism of this theory see H.W.A. Thirlway, *International Law and Codification* (Leiden, 1972) p. 49 *et seq.*

[25] Article 38 1 (b).

[26] See in particular the Continental Shelf cases, I.C.J. Reports, 1969, p. 3 at p. 44.

[27] Josef L. Kunz, "The Nature of Customary Law", *American Journal of International Law,* vol. 47 (1947) p. 666: "international law contains no rules as to how many times or for how long a time this practice must be repeated".
G. Schwarzenberger, *Manual of International Law* (London, 1967) p. 32: "It is not, however, necessary to prove that the practice has been followed for any particular period of time."
Even Thirlway, *op. cit.,* who otherwise takes a very conservative view of the nature of custom, admits that "in the circumstances of today" customary law can "change and develop very much more rapidly than was the case in the smaller and in a sense less active international community of the last century".

[28] Continental Shelf cases, *op. cit.,* 1977. Quoted by Thirlway.

What is the nature of the practice required? According to the author of a recent prize-winning monograph,[29] "the substance of the practice required is that states have done, or abstained from doing, certain things in the international field". "The occasion of an act of state contributing to the formation of custom must always", he says, "be some specific dispute or potential dispute . . . The mere assertion *in abstracto* of the existence of a legal right or legal rule is not an act of state practice". However, the author gives no authority for his statement, and it is submitted that he is merely describing the kind of state practice that contributed to the formation of customary law when there were few if any alternative means.[30] In the world of the late twentieth century states have more ways, particularly as a result of their participation in many international organizations including the United Nations, through which to express their juridical opinion as to the existence of this or that customary rule.[31] The practice of states in international organizations such as the United Nations and its specialized agencies is just as much evidence of "general practice accepted as law" as the positions they take in disputes or potential disputes. What more authoritative way can there be for a state to express its opinion as to the existence of a customary rule than by the officially recorded votes of their authorized representatives, authorized it may be noted by the state organ, i.e. the Ministry of Foreign Affairs, most competent to bind the state internationally? There is growing support for the proposition that the collective acts of international organizations are evidence in themselves of the development of customary rules[32] and there seems to be no good reason in prin-

[29] Thirlway, *op. cit.,* at p. 58.

[30] The statement isn't even true of primitive national law. See Sir Paul Vinogradoff, *Common Sense in Law* (second edition, London, 1946) at p. 117: "the first thing to be noticed is that legal customs often arise independently of any litigation by the growth of definite views as to rights and duties."

[31] Cf. Richard A. Falk, *The Status of Law in International Society* (Princeton, 1970) at p. 154: "So long as international society was highly decentralized it was necessary to rest all law-making procedures on state practice, but with the growth of the organized international community it certainly seems increasingly plausible to allow the collective acts of the competent international institutions to serve as evidence of 'general practice accepted as law'." Falk, it will be noted, goes further than the thesis defended in this essay which is that the conduct of states as evidenced by their votes in international organizations is proof of state practice, not that the collective acts of such institutions is evidence of the formation of customary law.
And see Kunz, *op. cit.,* at p. 667, who includes international decisions and the practice of international organizations as evidence of the development of customary rules. And Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (London, 1963) at p. 2 where after pointing out that the practice of states includes "their international dealings as manifested by their diplomatic actions and public pronouncements", goes on to say that "with the development of international organizations, the votes and views of states have come to have legal significance as evidence of customary law". See finally G.I. Tunkin, *Droit international public, problèmes théoriques* (Paris, 1965) p. 101 *et seq.*

[32] Cf. the opinion of Professor Falk referred to in the previous footnote.

ciple why this should not be so. As Professor Virally suggests, "since international institutions are themselves subjects of international law, it is clear that their practice can contribute to the creation of custom".[33] The thesis being defended in this essay however is the less radical one that resolutions adopted by international conferences are evidence of *state* practice, not that the collective acts of such conferences are in themselves evidence of the development of customary rules.

What does the practice of states as proved by their votes officially recorded at international conferences show? Nothing could be clearer than that the Declaration was never meant to be binding as part of international law nor could it be simply by virtue of its having been adopted as a resolution of the General Assembly, the decisions of which have the force of recommendations only, except of course, resolutions relating to internal or house-keeping matters. It must be remembered that when it was adopted the Declaration was intended to be only one part of a tri-partite Bill one part of which was to be a multilateral treaty or Covenant. If the Declaration were to be binding why would it be necessary also to have a multilateral convention covering substantially the same ground? It was hardly necessary, therefore, for a number of delegations to stress, when explaining their votes, that the document was not binding. There were some delegations, it is true, which saw some sparks of juridical validity in the Declaration. These included the South Africans who presciently warned the Assembly that although not a treaty the Declaration would nevertheless impose certain obligations on states since it would undoubtedly be regarded as an authoritative interpretation of the rights and freedoms mentioned but not defined by the Charter. Although unlike the South Africans they nevertheless voted for the Declaration, the Chinese and French took a similar position. Referring to the Charter commitment to observe human rights, the Chinese said that the Declaration "stated these rights explicitly"; and the French after saying that the document could be considered an authoritative interpretation of the Charter went on to suggest that the norms set forth in it could also be considered "general principles of law" and therefore a source of law under the Statute of the International Court of Justice. Another delegation that detected elements of juridical obligation in the Declaration was the Chilean which said that "violation by any

[33] Max Sørensen (ed.) *Manual of International Law* (London, 1969) p. 139. In its Advisory Opinion relating to the Treaty of Lausanne and the frontier between Turkey and Iraq, the Permanent Court of International Justice invoked the unanimity rule as being "in accordance with the unvarying tradition of all diplomatic meetings or conferences". Publications of the Court, Series B., no. 12 at p. 30.

state of the rights enumerated in the Declaration would mean violation of the principles of the United Nations",[34] a statement which was undoubtedly motivated by the dispute mentioned below between Chile and the Soviet Union regarding the refusal of the Government of the latter country to allow the wife of a Chilean diplomat to leave the Soviet Union with her husband. These first official *dicta* were the beginning of a now developed practice of regarding the Declaration as an authoritative and therefore binding interpretation of the Charter.

To say that the Declaration is now part of the customary law of nations is, as already indicated, not to say that it is binding by virtue of the fact that it was adopted as a resolution of the General Assembly. As Sir Hersch Lauterpacht put it in the book already mentioned it was (and still is) "idle to attempt to kindle sparks of legal vitality in the Universal Declaration of Human Rights by regarding it as a recommendation of the General Assembly and by inquiry into its legal effects as such".[35] If the Declaration is now part of the law of nations and therefore binding on all states whether they voted for it or not, this is not because it was adopted by the Assembly, important as that may have been, but for other reasons including subsequent events and the emergence of a juridical consensus evidenced by the practice of states that the Declaration is now, whatever the intention of its authors may have been in 1948, binding as part of the law of nations.[36]

No scholar has yet attempted to review all the cases where the Declaration has been invoked either within or outside the United Nations with a view to determining whether they provide evidence of practice accepted as law and hence juridical consensus. That attempt will not be made here; but mention will be made of a few cases – all of them except one from United Nations practice – which, it is submitted, show that the Declaration has in fact been accepted as law.

The Declaration was less than five months old when, on 25 April, 1949, the General Assembly invoked two of its articles – article 13 on the right of everyone to leave any country including his own and article 16 on the right to marry without any limitation due to race, nationality or religion – in a resolution stating that "measures which prevent or coerce the wives of citizens of other nationalities from leaving their country of origin with their husbands or to join them abroad are not in conformity with the Charter"

[34] A/C.3/S.R.91 at p. 97.
[35] *Op. cit.*, p. 412.
[36] Reference may be made here to the dissenting opinion of Tanaka J. in the South West Africa cases, Second Phase, where he said that although not binding in itself, the Universal Declaration constituted evidence of the interpretation and application of the relevant Charter provisions. I.C.J. Reports 1966, pp. 288 and 293.

and recommended that the Soviet Union withdraw measures of that nature.[37] The resolution does not say in so many words that the Declaration is binding; but it does say after invoking the two articles in question that the measures adopted by the Soviet Union were not in conformity with the Charter. Since the Charter neither catalogues nor defines human rights, the logical and inescapable conclusion is that the states which voted for the resolution were using the Declaration to interpret the Charter. This was the first of many times that the General Assembly used the Declaration – as certain delegations said in 1948 it should be used – as an authentic interpretation of the Charter.[38]

Further evidence of the growth of the practice is to be found in the Declaration on the Granting of Independence to Colonial Countries and Peoples which the General Assembly adopted in 1960.[39] This Declaration, which was adopted by eighty-nine votes (including the votes of all the states except South Africa which abstained in the voting on the Universal Declaration in 1948) to none with nine abstentions, provides in its seventh and final paragraph that "all states shall observe faithfully and strictly the provisions of . . . the Universal Declaration of Human Rights". Like that Declaration, the Declaration on the Granting of Independence is not binding by virtue of its having been adopted by the General Assembly; its peremptory terms are however evidence of the practice and juridical consensus of states. The fact that the powers responsible for the administration of the colonial territories in question all abstained from voting undoubtedly affects the quality of the evidence. It may be noted, however, that Professor Tunkin, the distinguished Soviet international lawyer (who was at the time the legal counsel of the Soviet Foreign Office) has nevertheless said that the 1960 declaration is itself part of customary law.[40] His arguments can be applied with much greater force to the Universal Declaration of Human Rights.

The objection that the most interested states abstained from voting cannot be raised against the probative value of the Declaration on the Elimination of All Forms of Racial Discrimination which the General Assembly

[37] G.A. Resolution 285 (III).

[38] See Sir Humphrey Waldock, 106 *Recueil des Cours* (1962) p. 199 where he says that the Declaration may be referred to "for indications of the content of the human rights envisaged in the Charter". He went further in a lecture to the British Institute of International and Comparative Law where he mentioned the "constant and widespread recognition of the principles of the Universal Declaration" which "clothes it, in my opinion, in the character of customary law". International and Comparative Law Quarterly, Supplementary Publication no. II, 1965, p. 15. And see Goodrich and Hambro, *The Charter of the United Nations* (Revised second edition, Boston, 1949) p. 547.

[39] G.A. Resolution 1514 (XV) of 14 December 1960.

[40] *Op. cit.*, and see my discussion of the question in Luard (ed.) *op. cit.* pp. 51-52.

unanimously adopted on 20 November, 1963. In terms only slightly different from those used in the 1960 Declaration, article 11 of this Declaration says that "every state shall promote respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and shall fully and faithfully observe the provisions of . . . the Universal Declaration of Human Rights".[41] In voting for such a provision states must be taken as meaning what they say. They cannot on one occasion say that the Declaration is to be fully and faithfully observed and on another that it is not binding. The provision is also pertinent for another reason; for it is obviously another example of the use of the Universal Declaration to interpret the Charter.

In the same year, on 4 December, 1963, the Security Council adopted a resolution which speaks of *apartheid* as being "in violation" of South Africa's "obligations as a member of the United Nations and of the Provisions of the Universal Declaration of Human Rights".[42] Here again the Security Council was obviously using the Declaration to interpret the Charter. Because of its limited membership resolutions of the Security Council, however authoritative in other respects, are not as good evidence of state practice as are those of an Assembly the membership of which is now practically universal. Reference may therefore be made to the resolution of 27 October 1966 by which the General Assembly terminated the mandate of South Africa over South West Africa (Namibia) on the ground that the mandate had "been conducted in a manner contrary to the mandate, the Charter of the United Nations and the Universal Declaration of Human Rights".[43] That the General Assembly was again using the Declaration to interpret the Charter is clear enough. When, however, the International Court of Justice upheld in 1971 the right of the United Nations to terminate the mandate over South West Africa, it did not have to base its opinion on the Declaration although Judge Fuad Ammoun very nearly did so in his separate opinion.[44] For although the Charter does not catalogue or define human rights it does stipulate that they shall be enjoyed "by all without distinction as to race, sex, language or religion".[45] Therefore, in the words of the Court, "to establish instead, and to enforce, distinctions, exclusions, restrictions and limitations based on grounds of race, colour, descent or national or ethnic origin which constitute a

[41] G.A. Resolution 1904 (XVIII) of 20 November, 1963.

[42] Resolution S/5471.

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

[44] I.C.J. Reports, 1971, p. 16 *et seq.* For Judge Ammoun's separate opinion see p. 76 *et seq.*

[45] E.g. Articles 1 and 55.

denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter''.[46]

The Advisory Opinion of the Court in the Namibia case is, therefore, of little help in proving the proposition that the Universal Declaration is now part of the law of nations. This cannot be said of the Proclamation of Teheran which was unanimously approved on 13 May, 1968, by the International Conference on Human Rights, an inter-governmental conference convened by the United Nations at which 84 states were represented. Article 2 of this proclamation which was later endorsed by the General Assembly in its resolution of 19 December 1968, says that the Universal Declaration of Human Rights ''constitutes an obligation for the members of the international community''.[47] Still more recent evidence of the now binding character of the Declaration can be found in the Final Act of the Helsinki Conference on Security and Cooperation in Europe of 1975, section VII of which says, *inter alia,* that ''in the field of human rights and fundamental freedoms, the participating states will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights''. Again the same consistent association of the Declaration with the Charter and the same underlying assumption that the latter must be interpreted by reference to the former. That the participating states were treating the Declaration as giving rise to legally binding obligations appears most clearly from the ensuing sentence where they say that ''they will *also fulfil their obligations* as set forth in the international declarations and agreements in this field, including *inter alia* the International Covenants on Human Rights, by which they may be bound''.[48] The fact that the Final Act may itself not be binding is for present purposes irrelevant; for what we are looking for is evidence of state practice and *opinio juris.*

This review of state practice relating to the Universal Declaration does not pretend to be exhaustive. Enough has been said, however, to conclude that if governments mean what they say – and it must be assumed that they do mean what their officially authorized representatives say on their behalf – then the Declaration is to be ''faithfully and strictly'' observed (words of the Declaration on the Granting of Independence to Colonial Countries and Peoples), that it is to be ''fully and faithfully'' observed (words of the Declaration on the Elimination of all Forms of Racial Discrimination) that

[46] See p. 57, para. 131 of the Advisory Opinion.

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

[48] Italics added.

states shall ''act in conformity'' with it (words of the Helsinki Agreement) and that it therefore ''constitutes an obligation for the members of the international community'' (words of the Teheran Conference) – which is to say that it is binding on states as part of the law of nations. There is indeed a kind of inescapable logic in this conclusion. For it is the only instrument universally applicable to all states which catalogues and defines the human rights and fundamental freedoms which, it is now generally recognized, the Charter binds states to respect although it does not define or list them. By the development of a new customary rule the Universal Declaration of Human Rights has become an authentic interpretation of the Charter.

The importance of the Conclusion can hardly be exaggerated. The conventional wisdom of certain jurists is to say that, while the Declaration may have great moral and political authority, it is merely, as its preamble says, ''a common standard of achievement'' and has no binding legal force; the Covenants on the other hand are binding on all states that ratify them. It is unlikely, however, that the Covenants will ever be universally ratified; but if, by the development of a new rule of customary international law, the Declaration has become an authentic interpretation of the human rights provisions of the Charter, then its provisions, like those of the Charter itself, bind all member states. If, in addition to becoming an authentic interpretation of the Charter the Declaration has become part of the customary law irrespective of the Charter, it is also binding on all states whether they are members of the United Nations or not. This would mean, amongst other things, that if, for example, a country were expelled from the Organization under article six of the Charter, that country would nevertheless continue to be bound by the Declaration. In countries, moreover, in which the customary law of nations is part of the law of the land, the Declaration could be invoked before and applied by national courts.

The question of the juridical character of the Universal Declaration is not, therefore, an idle academic exercise. If the thesis set forth in this essay that it has become part of the customary law of nations is correct then its adoption by the United Nations on 10 December, 1948, was a far greater achievement than its authors could ever have imagined.