giving judgment, the court had cause to consider whether the torture violated customary international law, and it cited with approval the view that UDHR had become, *in toto*, a part of binding, international customary law. The Third Restatement of US Foreign Relations Law (1987), which commands considerable respect as a statement of general international law, indicates in para 702 that the following practices, where carried out by or on behalf of states, constitute a violation of customary international law:

- genocide;
- slavery;
- murder or causing the disappearance of individuals (this would not include executions imposed following a fair trial);
- torture and other cruel, inhuman or degrading treatment;
- prolonged arbitrary detention;
- systematic racial discrimination.

It is suggested that such violations should be considered to be breaches of *jus cogens* and that the customary rules protecting human rights are binding *erga omnes*. Some support for this view is found in the judgment of the ICJ in the *Barcelona Traction* case (1970) in which the court indicated that certain obligations deriving from the outlawing of acts of aggression and genocide and 'from the principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination' were owed to the international community as a whole and could be considered obligations *erga omnes*. In addition, the Restatement suggests that consistent gross violations of other generally recognised human rights would be contrary to customary international law even if isolated violations of such rights was not prohibited except by treaty. The Restatement suggests that a gross violation is one which is particularly shocking given its particular context.

16.3 Third generation human rights

It has already been indicated that international law distinguishes between civil and political rights and economic, social and cultural rights. The former are often referred to as 'first generation' rights and the latter as 'second generation' rights. According to the classical justification of human rights, which argued that such rights as existed were inherent in the existence of a human being, any rights belonging to entities other than human beings could not be considered as 'human rights' and their justification would have to be found elsewhere. However, with the development of rights such as those of assembly and association, which are possessed by individuals but which can only be asserted by collections of individuals, it has become clear that collective rights are recognised by the international community. From this, the idea of peoples' rights has followed. Such rights are seen as belonging to peoples rather than individuals, and the principal two such rights are the right to self-determination and the right to development. These rights are often referred to in the literature as 'third generation' rights. The right to development is discussed in Chapter 17 in the context of the international law governing economic relations. In this chapter, discussion is limited to the right of self-determination. In addition to

these peoples' rights, there is a growing argument about the existence and nature of a right to a decent, viable, healthy and sustainable environment, and such argument will be discussed in Chapter 17.

16.3.1 The right to self-determination

Although the principle of self-determination has long been recognised as a political concept, it has only assumed the status of a legal right since 1945. It remains controversial because it is not always easy clearly to identify who possesses the right or what implementation of the right entails. The UN Charter refers to the principle of 'equal rights and self-determination of peoples' in Article 1(2), but UDHR make no specific mention of self-determination, although Article 21 provides that:

> (1) everyone has the right to take part in the government of his country, directly or through freely chosen representatives; ...
>
> (3) the will of the people shall be the basis of the authority of government ...

Events during the 1950s in colonial territories brought the issue of self-determination to the forefront of discussion, and in 1960 a UN General Assembly including a number of newly independent states adopted the Declaration on the Granting of Independence to Colonial Territories and Peoples which states that:

> 1 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;
>
> 2 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;'

The provisions of para 2 were contained in the common Article 1 of both ICPR and ICESCR and, since 1966, recognition of the right of peoples to self-determination has been repeated in a number of resolutions and treaties. In the *Western Sahara* case (1975) the ICJ confirmed that the right was one recognised by international law.

The principle of self-determination certainly now seems to be a part of international law, but the problem remains as to who or what constitutes a people capable of possessing and asserting the right. The legal concept was developed during the period of de-colonisation, when it was easier to identify peoples who did not enjoy full rights to determine their own economic, social and cultural development because of the presence of the colonial government. From the 1970s onwards, the right has been asserted by groups wishing to establish a state in part of the territory of an existing state or states, and this has created problems which have yet to be resolved. Article 27 of the ICPR provides that:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This article certainly appears to recognise a peoples' right and echoes some of the minority protection measures that were adopted after World War One, but it does not provide a full-blown right of self-determination.

The question of the existence of such a right in a non-colonial situation was considered by the Badinter Arbitration Committee, which was established by the European Union in August 1991 to consider various questions of law arising from events in former Yugoslavia. One of the questions presented was whether the Serbs living in Bosnia and Croatia had the right to self-determination. The Arbitration Committee, after making a study of the international law regarding the issue, came to four main conclusions:

1 The right to self-determination must not involve changes to existing frontiers at the time of independence except where the states concerned agree otherwise;
2 Where there are two or more groups within a state constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law;
3 Article 1 of the two 1966 Covenants establishes that the principle of the right of self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he or she wishes;
4 The Serbian population in Croatia and Bosnia is entitled to the rights accorded minorities and such rights must be protected by the governments of Croatia and Bosnia.

The decision is important, as it is one of the few, if not the only, occasions in which an international tribunal has been called upon to consider whether a particular group has a right of self-determination and the consequence of that right. It would appear that, although all peoples have the right to self-determination, this should not be understood as a right to independent statehood. Where an identifiable group lives in an existing independent state, it is clear that they are entitled to minority rights; but it could be argued that 'the right to recognition of their identity' goes beyond this and suggests that such a group is entitled to some measure of autonomy as well. Certainly many of the peace proposals that have been made with regard to Bosnia have included recommendations that the Serbian population in Bosnia would possess powers in respect of their own government. However, such an interpretation of a limited right of self-determination in a non-colonial situation is not supported by the provisions of the Vienna Declaration 1993, adopted at the UN World Conference on Human Rights. Paragraph 2 re-affirms the right of all peoples to self-determination, but continues by stating that:

> This shall not be construed as authorising or encouraging any action which would dismember of 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 thus possessed of a government representing the whole people belonging to the territory without distinction of any kind.

THE RIGHTS OF PEOPLES

From the perspective of international law, the key feature of the phrase 'rights of peoples' is not the term 'rights', but the term 'peoples'. From a philosophical point of view, no doubt, the term 'rights' is itself problematic. But lawyers, including international lawyers, are used to talking about rights, and so long as one accepts Hohfeld's point that one person's right must mean another person's duty, the term seems unremarkable even in the context of peoples' rights. Moreover, international law is familiar with the notion of 'collective' rights. References to the state, the basic unit of international law, involve a reference to the social fact of a territorial community of persons with a certain political organisation, in other words, a reference to a collectivity. In this sense, international law rules that confer rights on states confer collective rights. However, when international law attributes rights to states as social and political collectivities, it does so *sub modo* – that is to say, it does so subject to the rule that the actor on behalf of the state, and the agency to which other states are to look for the observation of the obligations of the state and which is entitled to activate its rights, is the government of the state. This basic rule drastically affects the point that the state *qua* community of persons has rights in international law, especially where the view or position taken by the government of a state diverges from the interests or wishes of the people of the state that the government represents. And it is, so far at least, axiomatic that international law does not guarantee representative, still less democratic, governments.

The proposition that the international law rights of states as communities of persons are moderated through a government (not necessarily representative, but legally the representative, of the people of the state) still represents the general rule. And it is that proposition which makes the term 'peoples' in the phrase 'rights of people' remarkable. Has international law taken up the task of conferring rights on groups or communities of people against the state which those people constitute, and against the government of the state? If so, it would be no great step for it to confer rights on those groups or communities as against other states and their governments. But the people of a state are – to put it mildly – at least as likely to have their rights violated by their own government as by the governments of other states. If the phrase 'rights of peoples' has any independent meaning, it must confer rights on peoples against their own governments. In other words, if the only rights of peoples are rights against other states, and if there is no change to the established position that the government of the state represents 'the state' (ie the people of the state) for all international purposes irrespective of its representativeness, then what is the point of referring to the rights in question as rights of peoples? Why not refer to them as the rights of states, in the familiar, well understood, though somewhat elliptical way?

I think it is more profitable to try to answer this question in the context of specific formulations of the 'rights of peoples'. Which of these rights are really rights of states in disguise? Which of them are really individual human rights – or aspirations to them? Which can properly be treated as rights of peoples, as distinct from individuals or states?[5]

5 James Crawford, 'The Rights of Peoples: "Peoples" or "Governments"?' in Crawford (ed), *The Rights of Peoples*, 1988, Oxford: Oxford University Press at pp 55–56.

THIRD-GENERATION RIGHTS

The emergence of third-generation or solidarity rights is closely identified with the rise of Third World nationalism and the perception of developing states that the existing international order is loaded against them. It may also be seen as a claim by developing states for fairer treatment and for the construction of a world system that will facilitate distributive justice in the broadest Rawlsian sense. The basis for these claims is not, however, simply moral, but can be identified as having a legal basis in a number of existing international instruments.

The UN Charter itself places human rights in a pivotal position to assist in the creation of a peaceful international order and economic development. Article 1(2) of the Charter provides that one of the purposes of the UN is 'to develop friendly relations among nations based on the principle of equal rights and self-determination of people'. Article 1(3) further provides that another purpose of the organisation is '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 fundamental freedoms ...' These purposes are further reinforced by the substantive provisions of the Charter, particularly Articles 55 and 56, which clearly demonstrate that the creation of suitable international conditions is a prerequisite to the full social development of all individuals.

A number of other international instruments also support the view that the international community is obliged to establish a favourable global system for securing the better participation of developing states. The common Article 1 of the two International Covenants, for example, provide for both the political and economic right to self-determination. Article 1(2) provides:

> All peoples, may, for their own ends, freely dispose of their natural wealth and resources without any 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.

Article 2(1) of the ICESCR also provides that State Parties are 'to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the rights recognised in the present Covenant by all available means'. These provisions, it is argued by some jurists, provide a clear basis for a number of claims solidarity rights.

What, then, are these third-generation of solidarity rights? Burns Weston identifies at least six categories of solidarity rights:

1. the right to economic, political, social and cultural self-determination;
2. the right to economic and social development;
3. the right to participate in and benefit from the Common Heritage of Mankind and other information and progress;
4. the right to peace;
5. the right to a healthy environment;
6. the right to humanitarian relief.

It is immediately apparent that these rights have two dominant characteristics: first they are collective in nature and, second, they depend upon international co-operation for their achievement. It is also apparent that these rights build upon

and develop existing categories of rights and in that sense they are, as Weston suggests, historically cumulative.

The fact that third-generation rights are collective in nature does not automatically mean that they should be thought of as less than 'real' rights for that reason alone. While traditional liberal conceptions of rights emphasise their individualistic quality, it is none the less apparent that even within the category of rights which might be described as civil and political, certain rights are collective in nature. These include the right to exercise one's religion in community with others, the right of peaceful assembly and the right to freedom of association. The rights categorised as economic, social and cultural, which are contained in a variety of international instruments, are also largely collectivist in nature, but are nevertheless recognised by the parties to those instruments as positive rights. The fact, however, that the new generation of rights depends for its implementation on international co-operation leads some authors to assert that they are little more than aspirational claims which do not possess the binding quality which is the hallmark of rights proper. Others, such as Alston, however, argue that there is no need to resort to claiming new rights which may be categorised as third generation, since by and large the problems which they seek to address are dealt with by existing instruments. Alston has also argued that claims for novel rights, such as the 'right to tourism,' obscure the need to properly develop existing rights, and more particularly, implementation programmes. He has also argued that there should be a system of procedures for granting a kind of approved origin mark to any 'new' rights proclaimed by the General Assembly.[6]

16.4 Enforcement

A survey of the implementation of international human rights law throughout the world could easily give the impression that the law is honoured more in its breach than its observance and that international agreements on human rights law are of little practical use. Such a view, it is submitted, would be wrong, since the very existence of international human rights law can serve to acknowledge that abuses are occurring and to set standards for future behaviour. A number of the conventions contain specific provision for their enforcement and, of course, as treaties, they are subject to the usual rules of observance discussed in Chapter 4. But any discussion of the enforcement of human rights law cannot ignore the prominent role played by publicity, both of abuses which occur and of the existence of the rights themselves. A number of organisations exist to monitor human rights violations, either in specific regions or States or throughout the world. A number of states also have introduced a formal system of monitoring, relying on information provided by their embassies abroad; for example, the US Congress prepares a fairly comprehensive annual report on the state of human rights throughout the world, which can have an important role to play in foreign policy decisions which are taken by the Executive.

6 Scott Davidson, *Human Rights*, 1933, Buckingham: Open University Press at pp 43–45.

16.4.1 UN mechanisms

Both ICPR and ICESCR establish enforcement machinery, although neither has proved to be extremely effective. Under Article 40 of the ICPR, every State Party is bound to submit periodic reports to a Human Rights Committee, which is established under Part VI of the Covenant. The Committee is made up of 18 members elected by the parties. Reports should indicate measures that have been taken to implement the Covenant, and the Committee can ask further questions about the report. The Committee itself produces a report on the state of human rights, but it has proved reluctant or unable to criticise States, and the reports submitted by individual states are unlikely to admit serious human rights violations.

Article 41 of the ICPR establishes a procedure for inter-State complaints, whereby a party may declare, at its option, and on the basis of reciprocity, that it recognises the competence of the Human Rights Committee to receive complaints from other states, subject to the requirement of exhaustion of local remedies. If an inter-state complaint is referred to the Committee, it will attempt to mediate and, if necessary, will refer the matter to an *ad hoc* Conciliation Commission: but the final report of such a commission is not binding on states. A limited number of states have made optional declarations under Article 41.

In addition, the Optional Protocol to the ICPR provides for the possibility of individual complaints to the Human Rights Committee, which can then carry out an investigation. The report of the Committee is not binding, although its publication may shame a state into action.

Enforcement mechanisms are much less strong under ICESCR. Under its provisions, parties must submit periodic reports are to a Group of Experts established by ECOSOC. The Group of Experts tends to be more open to political influence than the Human Rights Committee. There is also an 18-member Committee on Economic, Social and Cultural Rights set up by ECOSOC to assist in implementation of rights.

Aside from the provisions of the two covenants, the Human Rights Commission established by ECOSOC has an important role to play. The Commission is composed of 43 members representing their states, and it has jurisdiction to investigate allegations of widespread human rights violations and can establish independent working groups if necessary; for example, such a group investigated the state of Iranian prisons in 1990.

Since 1971, the UN Human Rights Commission has debated complaints submitted to it by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which was authorised in 1970 to examine individual petitions relating to violations of human rights received by the Secretary General and reported to the Sub-Commission where they have revealed a consistent pattern of gross violation of human rights. It should be noted that the Sub-Commission has been subjected to immense political pressures and so has lacked effectiveness.

Recognising the problems of enforcement and realisation of human rights, the UN Conference on Human Rights at Vienna recommended a number of new measures, in particular the creation of the office of UN High Commissioner

for Human Rights. The recommendation was acted upon by the UN General Assembly in December 1993 when it voted in favour of creating such a post. In February 1994, Jose Ayala Lasso from Ecuador was appointed the first UN High Commissioner for Human Rights, and he is to serve for an initial term of four years. The High Commissioner has responsibility for co-ordinating UN human rights activities and for promoting and protecting human rights. It remains to be seen what effect the appointment will have on international human rights.

16.4.2 European mechanisms

As has already been stated, ECHR was the first human rights treaty to provide mechanisms for enforcement, and to some extent it has served as a model for other regional agreements. In recent years, the system established under ECHR has been subject to considerable criticism, much of it related to the cost and time involved in bringing cases to conclusion. The Council of Europe has been debating changes, and in May 1994 the 32 members of the Council of Europe signed Draft Protocol 11. The Protocol replaces the present Articles 19–56 of the ECHR and establishes a new permanent European Court of Human Rights to replace the present Court and Commission. Under the Protocol, the court will have jurisdiction, and the right of individual petition will be mandatory. The Protocol requires ratification by all parties to ECHR before it will enter into force, although at the Vienna summit of the Council of Europe, the heads of government of the Member States pledged themselves to secure early ratification.

The present system contained in Articles 19-56 of the ECHR involves a two-stage process. Any State Party may refer a complaint involving allegations of breach of the convention to the European Commission of Human Rights. The Commission checks that the complaint is admissible. Claims will only be admissible if local remedies have been exhausted, if the claim is brought within six months of the date on which the final local decision was made, and providing the subject matter of the claim has not been settled by previous proceedings under the convention. If the claim is admissible, then the Commission will first attempt to bring about a friendly settlement. If this fails, a report is submitted to the Committee of Ministers of the Council of Europe, which can decide on the measures to be taken if there has been a breach, or refer the matter to the European Court of Human Rights for a full hearing. In addition to states being able to initiate proceedings under ECHR, Article 25 allows the Commission to receive petitions from any individual, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the State Parties of a right contained in the convention. This right only exists if the state against which the complaint has been made has lodged a prior declaration recognising the right to bring such petitions. The lodging of such declarations is optional, and such declarations may be made for a limited period. In spite of the recent criticisms that have been made of the enforcement machinery of ECHR, it has undoubtedly had an effect on the conduct of states. For example, the UK acted to end the use of corporal punishment in schools following the decision of the European Court of Human Rights in *Campbell and Cosans v UK*.[7] The Court has

7 (1982) 4 EHRR 293.

built up a considerable jurisprudence which is of use in defining and interpreting the nature and scope of a number of significant human rights. Among the landmark decisions are *Lawless v Ireland* (1961),[8] which raised the question of the situations in which a state would be able to depart from observance of human rights; *Ireland v UK* (1978),[9] which considered the definition of torture and inhuman and degrading treatment; and *Lingens v Austria* (1986),[10] which examined the extent of the right of freedom of expression.

8 (1961) 1 EHRR 1.

9 (1978) 58 ILR 190.

10 (1986) ECHR 407.

CHAPTER 17

ECONOMIC RELATIONS

17.1 Introduction

International economic law has tended to be marginalised in general works in English on public international law.[1] Clearly, any discussion of the law of the sea will need to consider the economic aspects of the management of the sea's resources and discussion of state responsibility will usually consider the issue of expropriation of foreign-owned property. But it is rare to find a chapter devoted solely to economic law. This is not to say it is not a valid subject of study nor should it be taken to suggest that there is no coherent body of international economic law. On the contrary, any effective legal system needs to provide some framework for the conduct of economic relations. If, as was suggested in Chapter 6, the majority of wars have had as their cause a dispute over territory, the desire to acquire territory has usually had an economic motive. With the realisation that the world's physical resources are not infinite there has developed a need for the existence of rules governing the exploitation and trade in such resources and the products of such resources. The attempts made by international law to conserve and manage the world's natural resources will be discussed in Chapter 18. This chapter will consider the rules of international law which pertain to trade and development. It will not refer to developments that have occurred within the European Union which can be studied in the textbooks of European law.

The rules regulating economic relations are of comparatively recent origin. During the 19th century most states operated a *laissez faire* policy towards their internal economies and accordingly there was little, if any, control of commercial and financial transactions involving foreigners. Such controls as existed were contained in provisions of municipal law and were largely confined to customs and import restrictions. A major impetus for change came with the emergence of the USSR in 1917 and its adoption of economic policies based on the state ownership of the means of production. Implementation of such policies involved the expropriation of foreign-owned property and at the Brussels Conference on Russia in 1921 a resolution was passed which stated that:

> The forcible expropriations and nationalisations without compensation or remuneration of property in which foreigners are interested is totally at variance with the practice of civilised states. Where such expropriation has taken place, a claim arises for compensation against the government of the country.

The current position regarding expropriation of foreign-owned property is discussed at 17.6.

An important aspect of international economic law is the emphasis placed on the need for free trade. During the 19th century many states had swung

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1 This is not true of studies carried out in states other than Britain. The difference in approach may partly be explained by the fact that there is no real tradition within English law of studying economic law as a separate and independent subject.