DECLARATIONS

RULES OF PROCEDURE 9.21

STATUTES

Table of Comments and Recommendations of Various International Committees

Introduction

PRESENTATION

This course book offers a trajectory through the regime of international human rights law – its rules, institutions, and processes. It does not confine itself to the international dimension, however. Although human rights have migrated to international law since the Second World War, they live in a permanent nostalgia for where they come from: the liberal constitutions of the late eighteenth and nineteenth centuries, when they emerged as the Enlightenment's most visible response to the tyranny of monarchs and to the weight of tradition and prejudice. And as we shall see, the colonization of international law by human rights perfectly illustrates the formation of a 'self-contained regime' – one of those regimes that international lawyers are sometimes tempted to ignore, because they know they cannot be domesticated entirely.

The choice of materials seeks to reflect this hybrid character of human rights. The book collects cases, diplomatic documents, or comments. It places these materials into perspective, and it seeks to provide the reader with a robust analytical structure, which should help improve understanding of how they fit within a broader framework. A consistent effort has been made, both in the selection of texts and in the commentary, to highlight the specificity of human rights. For although human rights may have escaped the confines of the territory of domestic constitutions, they have not dissolved fully into international law and in fact, they resist assimilation. International human rights bodies and domestic courts are in constant dialogue with each other. International human rights courts are under the permanent temptation to mutate into constitutional courts. The domestic judge in turn tends to aggrandize his or her power in the name of bringing home values that are universal and rules that are supranational – but, by invoking international law, the domestic judge also transforms it into something else, that is better suited to the regulation of the relationships between the State and the individual or between individuals, than to the relationships among States. All this combines to form a unique human rights grammar which this book seeks to bring to light. Because this grammar is best illustrated by comparing international jurisprudence with the treatment of human rights arguments before national authorities – in particular judicial authorities – I have extensively relied

on comparative material to illustrate the theoretical framework proposed. Thus, while most of the cases presented originate from the Human Rights Committee, from other UN human rights treaty bodies, and from regional courts (particularly the European Court of Human Rights and the Inter-American Court of Human Rights), a significant proportion also originates from the United Kingdom House of Lords (since 1 October 2009 transmuted into the Supreme Court of the United Kingdom), the Canadian Supreme Court, the United States Supreme Court, the South African Constitutional Court, and some other domestic jurisdictions. All these courts contribute to the development of the common law of human rights, and although its focus is on the international dimension, it is this common law that the book is really about.

The book is divided in three parts. Part I is an introduction to the sources of the international law of human rights and to some problems of interpretation that arise as a result of the 'self-contained' character of the human rights regime. Chapter 1 briefly reviews the main stages of the emergence of human rights in international law (whether at universal or at regional level), and it describes the unique characteristics of human rights treaties. Chapter 2 discusses the questions of attribution in the law of State responsibility, in relation to the concepts of 'jurisdiction', 'national territory', and 'effective control'.

Part II describes the substantive obligations of States under international human rights law. Instead of examining the content of States' obligation right by right, the five chapters of this part address, respectively: the obligation to respect human rights (chapter 3); the obligation to protect human rights, and the application of human rights in 'private' relationships (chapter 4); the obligation to fulfil human rights and the progressive realization of rights (chapter 5); derogations in times of emergency (chapter 6); and the prohibition of discrimination (chapter 7). This division is neither functional, as in certain casebooks inspired by the Realist approach; nor does it follow the traditional opposition between civil and political rights on the one hand, and social, economic and cultural rights on the other; nor finally, is it faithful to the separate treatment of each right we find in the treaties themselves. Rather, the choice of this structure was dictated by my overall aim in preparing this volume: to provide the reader with the conceptual tools that will allow him or her to study the development of the case law and the extension of treaty obligations, both of which will continue to evolve at an accelerated pace in the future. On issues such as the obligation of the State to protect human rights from private initiative, the invocation of human rights in relationships between private parties, waiver of rights, or the various meanings of non-discrimination and equality of treatment, my goal has been at once modest and ambitious: modest, in that I have no pretense of being systematic in my treatment of the subject; and yet ambitious, because I hope to provide the reader with a framework for thinking through these issues. The materials selected serve to illustrate this framework, and they are arranged accordingly.

Part III is about institutions or, as stated in the title of this part, 'mechanisms of protection'. It is composed of four chapters, dealing respectively with the protection of human rights at domestic level, through both judicial and non-judicial means (chapter 8); the UN human rights treaties system (chapter 9); the UN Charter-based mechanisms

of protection (chapter 10); and the regional systems of protection, in the Council of Europe, the Organization of American States, and the African Union (chapter 11).

Throughout the text, I have inserted a number of 'boxes'. Their length ranges from a paragraph or two to a few pages. These boxes offer a brief discussion of certain specific issues, such as ethnic profiling, the role of the European Committee on Social Rights in the protection of social rights, or the regime of positive (or affirmative) action in EU law, that were considered to be too detailed to form part of the main text. The boxes can be skipped by the reader who is not interested, since they are not essential to the main argument. At the end of most sections or, at least, in closing each chapter, I also have inserted a set of 'questions for discussion', that should serve to stimulate classroom debate. Although they presuppose that the reader is familiar with the materials presented in the section or the chapter concerned, these 'questions' are not merely rehearsing the content of the materials, and they are not meant to test whether the understanding of the materials is correct; rather, they intend to raise new issues, not explored in detail in the main text, or to provoke a critical discussion about the positions presented in the main text. It is very possible in my experience to teach a full course in international human rights based almost entirely on these questions since, taken together, they cover the full range of the subjects examined in the book.

WHAT THE BOOK IS ABOUT

By the time human rights emerged as a part of international law in 1945, they already had a long history. As legal entitlements, they had originated in the liberal constitutions of the late eighteenth, and especially nineteenth centuries. International law did not follow suit immediately. And it did so, initially, only piece by piece, and hesitatingly. But it may be useful to recall certain antecedents to human rights as understood here, in order to make clear what relationships exist between those first attempts to 'humanize' international law – to borrow the formula of Theodor Meron ('The Humanization of Humanitarian Law', *American Journal of International Law*, 94 (2000), 239) – and the human rights that are the topic of this book.

International humanitarian law

Many authors see international humanitarian law as the first important precursor to international human rights law. While international humanitarian law has its roots in customary international law, it was first codified in treaty form with the adoption of the Geneva Convention of 22 August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field (18 Martens Nouveau Recueil (ser. 1) 607, 129 Consol. T.S. 361). But this instrument, like the ones that followed, still related to situations of armed conflict, a matter pre-eminently suitable for international law as the law regulating relations between States. And it is not before 1949, through the Fourth Geneva Convention relative to the protection of civilians (Convention (IV) relative to the Protection of Civilian Persons in Time of War, signed in Geneva, 12 August 1949, 75 U.N.T.S. 287), that the regulation of armed conflict sought to move beyond the

battlefield, and to address what may be called the human rights of civilians during armed conflict.

There is, today, a renewed interest for the interactions between international humanitarian law and human rights law (see, e.g. R. Arnold and N. Quénivet (eds.), *International Humanitarian Law and Human Rights Law* (Leiden: Martinus Nijhoff, 2008); H.-J. Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law', *International Review of the Red Cross*, 856 (2004), 789; R. Q. Quentin-Baxter, 'Human Rights and Humanitarian Law-Confluence or Conflict?', *Australian Yearbook of International Law*, 9 (1985), 94; L. C. Green, 'Human Rights and the Law of Armed Conflict' in L. C. Green (ed.), *Essays on the Modern Law of War*, second edn (Ardsley, NY: Transnational Publishers, 1999), p. 435; A. Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, of Convergence?', *European Journal of International Law*, 19, No. 1 (2008), 161).

It is clear, of course, that both international humanitarian law and human rights law are based on the same ideals of preserving the dignity of the human being – they both have a 'humanitarian character', to use an expression familiar in international jurisprudence. And it is equally clear that, in situations of armed conflict, both these branches of international law can apply simultaneously. Indeed, because of this partial overlap, these two branches of international law may have to be made consistent with one another in ways which sometimes may be seen as compromising the integrity of human rights law. This was the case in the famous Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, where the Court took the view that Article 6 of the International Covenant on Civil and Political Rights (ICCPR), that guarantees the right to life, should be read in accordance with 'the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities', so that 'whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself' (I.C.J. Reports 1996, 240, para. 25).

This position has been criticized for creating the impression that, where international humanitarian law is applicable, the applicability of international human rights law would somehow be suspended, since it should be treated as *lex generalis* giving way to the *lex specialis*. That critique seems excessive. The treatment by the World Court of the relationship of the two branches of law would only seem to apply to the right to life of combatants, and it would be wrong to generalize, from that specific example, to how international humanitarian law and international human rights law should interact in general. Nevertheless, the temptation to treat both as mutually exclusive remains present, and this should come as no surprise. International humanitarian law and international human rights law emerged as answers to different sets of issues, and they were initially intended to apply to different situations. They influence each other in various ways, of course – although in fact the 'humanization of humanitarian law' (the influence exercised by human rights on international humanitarian law) is probably more significant than the subversion of international human rights by the logic of international humanitarian

law. But these two branches of international law confront us nevertheless with different paradigms, which justifies that we treat them separately for the purposes of study.

Diplomatic protection

Another, at least as important influence on the origins of international human rights law, is the exercise of diplomatic protection by States whose nationals have their rights violated in another State. But here again, there are significant differences. Diplomatic protection is clearly instituted in the interest of States, and not for the benefit of the individuals aggrieved themselves: the prejudice caused to the foreigner only may give rise to international responsibility because it is considered to constitute a damage to the State of the nationality of the person concerned. Indeed, the State remains in principle entirely free to extend diplomatic protection or refuse it. There is no obligation under international law for the State to extend diplomatic protection to its nationals: thus, diplomatic protection is not premised on the idea that individuals have rights under international law, although it does presuppose the existence of minimum standards of treatment for aliens and an obligation for each State, who owes in that respect a duty to other States, to comply with those standards.

Of course, here again, there is a tendency for human rights considerations to permeate diplomatic protection, and there exists a lively discussion as to whether, as a result of the rise of human rights, diplomatic protection has become somewhat obsolete (see C. F. Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008), chapter 16; E. Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: Re-fashioning tradition?', *Netherlands Yearbook of International Law*, 35 (2004), 85–142). But the two sets of rules still respond to distinct logics, and it is hardly an exaggeration to say that human rights defined themselves, in part, as against the logic of diplomatic protection: the object and purpose of human rights, the Inter-American Court of Human Rights famously stated, 'is the protection of the basic rights of individual human beings *irrespective of their nationality, both against the State of their nationality and all other contracting States*' (Inter-American Court of Human Rights, *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, 24 September 1982, Inter-Am. Ct. H.R. (Ser. A) No. 2 (1982), at para. 29).

The rights of minorities

Two other important developments followed the First World War. The peace treaties concluded then included a number of provisions aiming to protect the rights of minorities, and the Permanent Court of International Justice had the opportunity to identify certain common principles underlying the clauses relating to the protection of minorities in the Advisory Opinion it delivered on the *Minority Schools in Albania*: as it stated there, 'the idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the

ensuing special needs' (Permanent Court of International Justice, *Minority Schools in Albania (Greece* v. *Albania)*, Advisory Opinion, 1935, P.C.I.J., Ser. A./B., No. 64, p. 4 at p. 17). This, the Court continued, explained that the peace treaties containing clauses in favour of the protection of minorities sought to ensure both that 'nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State', and that the protected minorities would enjoy 'suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics' (*ibid*.).

Quite apart even from the question whether the peace treaties concluded after the First World War still were binding after the Second World War, the idea prevailed in 1945–6 that the protection of minorities had failed to pacify the relationships between States (particularly States where national minorities are located and their kin-States), and that it would become unnecessary in the light of the emergence of an international protection of human rights (see A. W. B. Simpson, *Human Rights and the End of Empire* (Oxford University Press, 2001), pp. 227–34). However, as we shall see in chapter 7 (section 5), there exists since the 1990s an increasing convergence between minority rights and human rights. Minority rights, it is now acknowledged, are human rights. New instruments have been adopted to protect minority rights as such – in particular, the Framework Convention on the Protection of National Minorities, of 1 February 1995 and the European Charter for European or Minority Languages, of 5 November 1992, both adopted within the Council of Europe. Remarkably, these instruments follow the model of classical human rights instruments, rather than that of the earlier treaties on minorities: the lesson has apparently been learnt that, in the absence of mechanisms of protection, the most generous clauses on the protection of minority rights will remain a dead letter. In addition, an increasingly voluminous body of jurisprudence has emerged from human rights bodies that protects minorities through human rights such as the right to respect for private life, freedom of religion, the right to education, or the right to property, either alone or in combination with the requirement of non-discrimination. It would hardly be an exaggeration to say that human rights have legitimized and made politically acceptable a revival of minority rights – that minority rights have re-entered the field of international law through the channel of human rights protection (on this revival, see in particular Y. Dinstein and M. Tabory, *The Protection of Minorities and Human Rights* (Leiden: Martinus Nijhoff, 1992); J. Rehman, *The Weaknesses in the International Protection of Minority Rights* (The Hague: Kluwer Law International, 2000); P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991)).

Indeed, it is the extension of human rights that has encouraged an increasingly generous reading of 'minorities' protected under international law. Minorities are traditionally (although still controversially) defined as a group of persons who reside on the territory of a State and are citizens thereof, display distinctive ethnic, cultural, religious or linguistic characteristics, are smaller in number than the rest of the population of that State or of a region of that State, and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language (see, e.g. Recommendation 1201(1993) adopted

by the Parliamentary Assembly of the Council of Europe, proposing the adoption of an additional protocol on the rights of national minorities to the European Convention on Human Rights; F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1991), para. 568; J. Deschênes, 'Proposal concerning the Definition of the Term "Minority"', E/CN.4/Sub.2/1985/31, 14 May 1985). But there has been a tendency, particularly within the Human Rights Committee (in its interpretation of Article 27 of the International Covenant on Civil and Political Rights) and within the Advisory Committee established under the Framework Convention for the Protection of National Minorities, to broaden the scope of the provisions protecting minority rights, so as to ensure that 'minority rights' benefit all those under the jurisdiction of the State, who present certain distinct characteristics (see further on this issue, chapter 7, section 5.2., b)). This evolution would result in defining minority rights as human rights, thus in principle to be enjoyed by all, whether or not they are found to belong to a 'minority' under the classical definition of this term. This tendency has been strongly opposed by certain States. Germany, for example, argues that 'the objective of the Framework Convention [for the protection of national minorities] is to protect national minorities; it is not a general human rights instrument for all groups of the population which differ from the majority population in one or several respects (ancestry, race, language, culture, homeland, origin, nationality, creed, religious or political beliefs, sexual preferences, etc.). Rather, the members of the latter groups are protected by the general human rights and if they are nationals by the guaranteed civil rights' (Germany, Third State Report, ACFC/SR/III(2009)003, 2009, para. 8). One is led to ask, though, why this opposition is so vehement, if indeed, those groups – the 'non-minorities' who differ through one or more characteristics from the majority – anyway are protected under human rights that, as we shall see, largely ensure the same protection of diversity within increasingly multicultural societies. The convergence is such, between minority rights and human rights, that the former have largely lost their subversive character: it is their distinctiveness that they are now in danger of losing.

International labour rights

A last antecedent to international human rights deserves a mention. In 1919, the International Labour Organization (ILO) was set up in order to promote the development of international labour standards. As expressed in the Preamble of the ILO Constitution, it was built on the basis that 'universal and lasting peace can be established only if it is based upon social justice', and that 'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries'. The text of the ILO Constitution has been amended on a number of occasions since, and it has also been complemented by the Declaration concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia), adopted on 10 May 1944. But the basic purpose of the Organization has remained the same throughout its almost one century of existence. In many ways, the instruments adopted within the ILO, although focused on the rights of workers, served as models to the elaboration of the modern international human rights treaties (on the relationship between labour rights and human rights,

see further P. Alston (ed.), *Labour Rights as Human Rights* (Oxford University Press, 2005); and L. A. Compa and S. F. Diamond (eds.), *Human Rights, Labor Rights, and International Trade* (University of Pennsylvania Press, 1996)). They differ, however, not only by their origins, but also by the economic motive behind their adoption – to avoid unfair competition through the lowering of labour standards – and by the fact that labour rights are centred on the sphere of employment.

The focus of this book

While these different bodies of law have been pursuing the same objectives, to a large extent, as international human rights law, they have been doing so through other legal techniques and institutional mechanisms. This book discusses international human rights as they have emerged as a part of international law since the Second World War. References will be made to international humanitarian law, diplomatic protection, the protection of minorities, or international labour rights, only to the extent that they intersect with the protection of general international human rights. To repeat, the structure of the book and the analytical framework it proposes are largely based on the conviction that, as a branch of international law, international human rights possesses a logic of its own, as a result of the hybridization of domestic constitutional law and of general international law. It is this logic which the book seeks to introduce and it is with this view that the materials have been selected.

ACKNOWLEDGMENTS

In closing, I would like to acknowledge a large number of debts. This casebook originated in a syllabus I prepared, then in a most primitive form, when I first taught a human rights class at New York University School of Law, as a member of the Global Law School Faculty in 2004–5, at the invitation of Philip Alston. It developed incrementally as I taught this subject in different institutions, including the University of Louvain, my home institution, and Columbia University. My first debt is towards the students who were foolish enough to sit these courses, and whose questions served greatly to enrich the presentation of the materials. Either within the EU Network of Independent Experts on Fundamental Rights or within the group of 'special procedures' of the UN Human Rights Council, which I joined in May 2008 as the Special Rapporteur on the right to food, I have also been fortunate to work closely with committed human rights defenders who are also important scholars and who were, and still are, a great source of inspiration. Among them are Catarina de Albuquerque, Philip Alston, Emmanuel Decaux, Morten Kjaerum, Rick Lawson, Manfred Nowak, Martin Scheinin, Dean Spielmann, Linos-Alexandre Sicilianos, Françoise Tulkens and Ineta Ziemele. I am also grateful to Matthias Sant'Ana for having assisted me in identifying the relevant materials from the Inter-American human rights system. As to those whose work inspired my own, it would be impossible to cite them all: I hope I will be forgiven therefore for not citing any, out of fear of forgetting one.

Brussels and New York
OLIVIER DE SCHUTTER

PART I

The Sources

1

The Emergence of International Human Rights

INTRODUCTION

Human rights have a logic of their own. This stems from the fact that they have originated in domestic constitutional documents before becoming part of the corpus of international law, and that they regulate the relationships between the State and individuals under their jurisdiction, rather than simply relationships between States. In order to present this logic, this chapter provides an overview of how human rights came to emerge in international law; it discusses the sources of international human rights law; and it locates human rights within general international law. Sections 1 and 2 offer a brief review of the main developments that have occurred at universal and regional levels, leading to the contemporary regime of international human rights. The description of the evolution of the human rights regime, while forming an indispensable background, is left deliberately superficial for the moment. The following chapters shall provide ample opportunity to explore the most controverial issues which have arisen over the course of the emergence of the human rights regime. And the interesting questions arising about the sources of international human rights – such as the role of the emergence of a *jus commune* in human rights law, the status of human rights in customary international law, or the position of human rights in general international law – are explored in further depth in sections 3 and 4 of this chapter. The readers already familiar with the basic instruments of international human rights should move directly to those sections.

Sections 3 and 4 examine the new dilemmas brought about by the rise of international human rights and the strengthening of the institutions of the human rights regime. A first source of tension results from the development of a *jus commune* in the field of international human rights, particularly since the 1990s. This refers to the fact that international and national courts increasingly refer to one another, seeking inspiration in one another's case law, and progressively building a common understanding of the values which – whatever the precise legal source in which they are embodied – they seek to uphold. This movement reinforces the tendency for human rights law to develop as a self-contained regime of international law, to the extent

that the relevance of general principles of international law in the implementation of international human rights is increasingly questioned. Section 3 analyses the emergence of this *jus commune* of human rights, by looking at its manifestations and some of its potential consequences.

Section 4 seeks to locate the place of human rights in general international law. It examines the extent to which general public international law imposes respect for human rights (section 4.1.); whether human rights have a hierarchically superior status in public international law (section 4.2.); whether they impose obligations which States owe to the international community as a whole (section 4.3.); and the place of human rights treaties in the law of treaties as part of general international law (section 4.4.). It also considers the debate on the validity of reservations to human rights treaties, which provides an illustration of the tension between the view that human rights treaties are specific, and the view that they should be subordinated to the general rules of the law of treaties (section 4.5.).

The first question – whether human rights may be derived from customary international law or the general principles of law, rather than only from the treaties which codify them in conventional form – may have far-reaching implications, even now that most of the main human rights treaties have been ratified by a large majority of States: since such treaties are only binding on their signatories – States – we need to identify the sources of international human rights law in general international law in order to hold non-State actors accountable to these rights. The second question requires an examination of the *jus cogens* nature of human rights prescriptions, the consequences of which extend beyond the law of treaties to issues of State responsibility. The third question is relevant, in particular, to the much-debated issue of the *erga omnes* character of human rights norms: while it is uncontested that a State may exercise diplomatic protection where its nationals have their rights violated by another State, it is less clear whether, beyond that specific situation, States have a legal interest in seeking to ensure compliance of other States with their human rights obligations. All these issues may be related to the more fundamental question of whether human rights treaties are specific, and should be treated apart from the rules applicable to other, classical intergovernmental agreements – a question for which the issue of reservations provides an adequate illustration.

1 THE UNIVERSAL LEVEL: THE UNITED NATIONS AND HUMAN RIGHTS

The Charter of the United Nations was adopted on 26 June 1945. It referred to human rights and fundamental freedoms as one of the aims of the Organization, mentioning specifically the right to self-determination of peoples and non-discrimination as belonging to the internationally recognized human rights (see P. G. Lauren, 'First Principles of Racial Equality: the History and Politics and Diplomacy of Human Rights Provisions in the United Nations Charter', 5 *Human Rights Quarterly* (1983), 1; A. Cassese, 'The General Assembly: Historical Perspective 1945–1989' in P. Alston (ed.), *The United Nations and Human Rights: a Critical Appraisal*, second edn (Oxford

University Press, 2004), p. 25). It was understood at the time that the protection of human rights would also enclose the protection of individual members of minorities who, therefore, would no longer need a specific system, as they enjoyed under the League of Nations. The following provisions of the UN Charter are most relevant to the protection of human rights:

Charter of the United Nations, signed in San Francisco, 26 June 1945:

[Preamble]
We the Peoples of the United Nations, determined … to reaffirm 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, …

Chapter I. Purposes and Principles

Article 1
The Purposes of the United Nations are: …
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. 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; …

Chapter IX. International Economic and Social Co-operation

Article 55
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:
1. higher standards of living, full employment, and conditions of economic and social progress and development;
2. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
3. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56
All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

Chapter X. The Economic and Social Council

Article 61
1. The Economic and Social Council shall consist of fifty-four Members of the United Nations elected by the General Assembly …

Article 62

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly to the Members of the United Nations, and to the specialized agencies concerned.
2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.
3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.
4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

Article 68

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

During the negotiations which led to the adoption of the UN Charter, the Foreign Affairs Minister of Panama, Ricardo J. Alfaro, with the support of Cuba, had proposed the inclusion of the 'Statement of Essential Human Rights' produced in 1944 within the American Law Institute, an organization of judges, practitioners, and academics dedicated to the improvement of the rule of law, in whose work Alfaro had participated. The proposal was not retained. Thus, although it includes a number of references to 'human rights and fundamental freedoms' as well as to the principles of non-discrimination and self-determination of peoples, the UN Charter does not contain a catalogue of human rights. However, in order to make progress towards this objective, the Economic and Social Council (Ecosoc), the organ of the UN tasked to promote international co-operation in the area of social and economic development, was mandated under Article 68 of the Charter to create commissions on thematic issues, including human rights.

The Ecosoc first convened in London in January and February 1946. It then established the Commission on Human Rights in a nuclear form, comprising nine members under the chairmanship of Eleanor Roosevelt. The Nuclear Commission thus constituted met first between 29 April and 20 May 1946. At the end of its first session, it made a recommendation that work should begin, as soon as possible, on the drafting of an international Bill of Rights: although, at the first session of the UN General Assembly held in January–February and May–June 1946, the Minister for Foreign Affairs of Panama again proposed to adopt by resolution the draft bill elaborated within the American Law Institute, his proposal had been opposed by Eleanor Roosevelt, on behalf of the United States, in part because the draft had in fact never been adopted by the American Law Institute and would have met opposition from the domestic constituency of the United States (A. W. B. Simpson, *Human Rights and the*

End of Empire (Oxford University Press, 2001), p. 323). So the work was left to be done by the Commission on Human Rights. The Nuclear Commission also proposed that the definitive Commission be established in the form of independent experts, rather than governmental delegates. They were also in favour of it having a strong monitoring role, and not merely a role in drafting legal texts for consideration by the Ecosoc and the General Assembly (see, for more details, P. Alston, 'The Commission on Human Rights' in P. Alston (ed.), *The United Nations and Human Rights: a Critical Appraisal*, second edn (Oxford University Press, 2004), p. 126).

The Nuclear Commission was not followed on these last two points when, in June 1946, the Ecosoc discussed its proposals. The Ecosoc established the Commission on Human Rights as one of its first two 'functional commissions' set up to assist it in its work (Ecosoc Resolution 9(II) of 21 June 1946). But instead of independent experts, the Commission on Human Rights was composed of the representatives of eighteen States, including the five permanent members of the Security Council (China, France, the Soviet Union, the United Kingdom and the United States). It later grew in successive phases, in order to remain representative of the United Nations membership, which significantly expanded and diversified following the decolonization of the 1950s and 1960s. It had fifty-three members in 2006, at the time it was replaced by the Human Rights Council. And until the adoption of Resolutions 1235 (XLII) in 1967 and 1503 (XLVIII) in 1970, the Commission primarily functioned as a drafting forum for the setting of standards, without an effective monitoring role.

Alongside the Commission on Human Rights, the Commission on the Status of Women was established by Ecosoc Resolution 11(II) of 21 June 1946, with the aim of preparing recommendations and reports to the Ecosoc on promoting women's rights in political, economic, civil, social and educational fields. Initially, only a Sub-Commission on the Status of Women had been envisaged, subordinate to the Commission on Human Rights: the enhancement of the status of this body was a victory for women's rights. In addition, Ecosoc Resolution 9(II) of 21 June 1946 created the Sub-Commission on Prevention of Discrimination and Protection of Minorities (renamed in 1999 the Sub-Commission on the Promotion and Protection of Human Rights), as a group of independent experts in charge of undertaking studies and making recommendations to the Commission on Human Rights on important issues of human rights promotion. In 2006, at the time it was replaced when the new Human Rights Council was set up, the Sub-Commission on the Promotion and Protection of Human Rights was composed of twenty-six experts, each with a single alternate.

The first task performed within the Commission on Human Rights was to agree on the text of a Declaration of Rights. It did so within a remarkably short period of time, and was able to adopt a draft at its third session of 24 May–18 June 1948. On 10 December 1948, following agreement achieved within the Ecosoc, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) (GA Res. 217, UN GAOR, 3d sess., UN Doc. A/810 (1948)). The UDHR was adopted by forty-eight votes

to none, with eight abstentions. The abstentions were cast by South Africa, which had just inaugurated its 'apartheid' policy and thus opposed the affirmation of equality without distinction as to race; Saudi Arabia, which opposed the freedom to change one's religion; as well as the USSR and its satellite States which then already formed what was referred to during the Cold War as the 'Soviet Block', who considered that the Declaration could be used as a pretext for interfering with the domestic affairs of the Member States of the United Nations (for detailed histories of the drafting process, see M. A. Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001); J. P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (Dobbs Ferry, NY: Transnational Publishers, 1984); and J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Philadelphia Press, 1999); for a study on the philosophical underpinnings of the Declaration in the views of the drafters, see J. Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press: Pennsylvania Studies in Human Rights, 2009)). The adoption of the UDHR took the form of a non-binding resolution. Nevertheless, a majority of the doctrine takes the view today that, whatever the intent of the governments which voted on the Declaration, the rights stipulated in the UDHR now have acquired the status of customary international law or should be considered as part of the 'general principles of law recognized by civilized nations' mentioned in Article 38(1)(c) of the Statute of the International Court of Justice as a source of international law. This issue is explored in greater depth in section 4.1. of this chapter.

The Universal Declaration of Human Rights was later implemented in the form of binding international treaties open to the ratification of the Member States of the United Nations. The initial idea was to have the Declaration as such transformed into a binding legal instrument, proposed to the ratification of the States. Having one single universal covenant was considered to present one major advantage: it would offer a clear recognition of the fact that all the rights of the Declaration were interconnected and interdependent. Within the Ecosoc, however, the delegates gradually came to consider that civil and political rights, on the one hand, and economic and social rights, on the other hand, called for different methods of implementation. Civil and political rights could be monitored by independent experts and were of immediate applicability since they primarily required from States that they abstain from interfering with the rights of the individual. In contrast, economic and social rights (to which cultural rights were assimilated) called for progressive measures of implementation, since they required legislative action in order to become fully justiciable. They also called for budgetary commitments, and therefore their implementation depended on the resources available to each State and on international co-operation. The General Assembly was finally convinced by these arguments. In 1952, following the position of the Ecosoc, it decided to implement the UDHR by elaborating two separate covenants, each corresponding to one category of rights (A/RES/6/543, 4 February 1952). While both sets of rights were considered of equal

importance and while all agreed on the interdependence and indivisibility of all rights, the view that prevailed was that these sets of rights were sufficiently different from one another to warrant separate treatment, and to be implemented through different legal techniques (see, in the context of this discussion, A. Eide, 'Economic, Social and Cultural Rights as Human Rights' in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights. A Textbook*, second edn (Dordrecht: Martinus Nijhoff, 2001), p. 9). The discussion on whether the distinction thus established between the two categories of rights is justified continued well through the 1990s, and it may be said that it was only – provisionally – closed with the adoption, on 10 December 2008, of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (for an exposition of the arguments against assimilating both sets of rights, see E. W. Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' in *Netherlands Yearbook of International Law*, 9 (1978), 69, and M. Bossuyt, 'La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels', *Revue des droits de l'homme*, 8 (1975), 783, and for a riposte, G. J. H. Van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views' in P. Alston and K. Tomasevski (eds.), *The Right to Food* (Dordrecht: Martinus Nijhoff, 1984), p. 97: this is further discussed in chapter 8, section 1.2., on the justiciability of economic, social and cultural rights).

Still, even once the UN General Assembly had taken the decision that work should be done towards the adoption of two separate treaties, fourteen more years of negotiations were required before the two covenants could be adopted, simultaneously, on 16 December 1966. By then, a vote had already intervened on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted on 21 December 1965 after three years of negotiations. The adoption of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR), following that of the ICERD, launched a period of intense treaty-making activity. Nine treaties are often referred to as the 'core human rights treaties', because they present certain common characteristics. They are all based on the Universal Declaration on Human Rights, the values of which they seek to protect and develop. All but one set up bodies of independent experts in order to monitor them, and progressively to clarify the obligations of States which these treaties define: the only exception is the International Covenant on Economic, Social and Cultural Rights, which only provides for a role of the Ecosoc in such monitoring – although this was largely compensated by the establishment of the Committee on Economic, Social and Cultural Rights, through a resolution (1985/17, of 28 May 1985) of the Economic and Social Council. All of these treaties are based primarily on a reporting procedure by States, which undertake to provide information on a regular basis on the measures they take in order to comply with their obligations. The mechanisms set up under these treaties is explored in greater detail in chapter 9. The treaties are the following:

Treaty	Additional protocols	Entry into force	Membership (on 26 August 2009)
International Convention on the Elimination of All Forms of Racial Discrimination (A/RES/20/2106, 21 December 1965) (660 U.N.T.S. 195)		4 January 1969	173 parties
International Covenant on Economic, Social and Cultural Rights (A/RES/21/2200A, 16 December 1966) (993 U.N.T.S. 3)	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (A/RES/63/117, 10 December 2008)	3 January 1976	160 parties
International Covenant on Civil and Political Rights (A/RES/21/2200A, 16 December 1966) (999 U.N.T.S. 171)	Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) (999 U.N.T.S. 171) Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (A/RES/44/128, 15 December 1989) (1642 U.N.T.S. 414)	23 March 1976	164 parties
Convention on the Elimination of All Forms of Discrimination against Women (A/RES/34/180, 18 December 1979) (1249 U.N.T.S. 13)	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (A/RES/54/4, 6 October 1999) (2131 U.N.T.S. 83)	3 September 1981	186 parties
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) (1465 U.N.T.S. 85)	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (A/RES/57/199, 18 December 2002)	26 June 1987	146 parties
Convention on the Rights of the Child (A/RES/44/25, 20 November 1989) (1577 UNTS 3)	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (A/RES/54/263, 25 May 2000)	2 September 1990	193 parties

Treaty	Additional protocols	Entry into force	Membership (on 26 August 2009)
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (A/RES/45/158, 18 December 1990)		1 July 2003	42 parties
Convention on the Rights of Persons with Disabilities (A/RES/61/106, 13 December 2006)	Optional Protocol to the Convention on the Rights of Persons with Disabilities (A/RES/61/106, 13 December 2006)	3 May 2008	65 parties
International Convention for the Protection of All Persons from Enforced Disappearance (A/RES/61/177, 20 December 2006)		Not yet in force	13 parties

These nine core human rights treaties are not the only ones adopted within the framework of the United Nations in the field of human rights. Mention should also be made, for instance, of the Convention on the Prevention and Punishment of the Crime of Genocide (78 U.N.T.S. 277), adopted on 9 December 1948 by the UN General Assembly, although without any part being played in its elaboration by the Commission on Human Rights. Like other, similar instruments, such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted on 26 November 1968 (754 U.N.T.S. 73)) or the International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted on 30 November 1973 (1015 U.N.T.S. 243)), the 1948 Genocide Convention differs from the core human rights treaties, however, in that it is not monitored by a body of independent experts equipped to build a jurisprudence that gives meaning to its clauses, and thus to contribute to the general development of human rights.

For this reason in particular, the emphasis in this book will be on the core human rights treaties and on the developing law of human rights emanating from their control mechanisms, rather than on these other contributions of the UN to human rights, however important they may be. In addition, even within the core human rights treaties, a certain emphasis has been placed on three instruments, probably the most important whether measured by the scope of the situations they cover or by the output of the monitoring bodies: these are the two covenants adopted in 1966, as a codification into treaty form of the Universal Declaration on Human Rights (on the International Covenant on Civil and Political Rights (ICCPR), see M. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987); S. Joseph *et al*., *The International Covenant on Civil and Political Rights*, second edn (Oxford University Press, 2004); K. A. Young, *The Law and Process of the UN*

Human Rights Committee (Ardsley, NY: Transnational Publishers, 2002); D. McGoldrick, *The Human Rights Committee. Its Role in the Development of the International Covenant on Civil and Political Rights*, second edn (Oxford: Clarendon Press, 1994); I. Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights. Practice and Procedures of the Human Rights Committee* (Antwerp-Oxford: Intersentia-Hart, 1999); M. Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary*, second edn (Kehl am Rhein: N. P. Engel Verlag, 2005); on the International Covenant on Economic, Social and Cultural Rights, see in particular, K. Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights. Theoretical and Procedural Aspects* (Antwerp-Oxford: Intersentia-Hart, 1999); M. Craven, *The International Covenant on Economic, Social and Cultural Rights: a Perspective on its Development* (Oxford: Clarendon Press, 1995); and A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights. A Textbook*, second edn (Dordrecht: Martinus Nijhoff, 2001)); and the Convention on the Rights of the Child, adopted in 1989 and soon to become the most universally ratified human rights instrument, with 193 States parties at the time of writing: only the United States and Somalia among the members of the UN are not parties to the treaty (on the Convention on the Rights of the Child, see A. Alen *et al.* (eds.), *The UN Children's Rights Convention: Theory Meets Practice* (Antwerp-Oxford: Intersentia-Hart, 2007); P. Alston, St. Parker and J. Seymour (eds.), *Children, Rights and the Law* (Oxford: Clarendon Press, 1992); A. Glenn Mower, Jr., *The Convention on the Rights of the Child. International Law Support for Children* (Westport, Conn.: Greenwood Press, 1997); L. LeBlanc, *The Convention on the Rights of the Child. United Nations Lawmaking on Human Rights* (Lincoln, Nebras.: University of Nebraska Press, 1995)).

2 THE REGIONAL LEVEL

The modesty with which human rights were addressed within the UN encouraged regional organizations to set up their own system for the protection of human rights. Both the Council of Europe and the Organization of American States moved swiftly in this direction. The Organization of African Unity (now renamed the African Union) also established its own mechanism, although later and under a less ambitious form. A brief overview follows. The description here remains deliberately general and superficial: its only purpose is to recall the framework within which human rights developed in regional settings following the Second World War. In addition, the human rights protection mechanisms set up in these respective organizations are the subject of chapter 11, where they are presented in greater detail in their procedural aspects.

2.1 The Council of Europe and human rights

The Statute of the Council of Europe was adopted on 5 May 1949, and it came into force on 3 August 1949. The initial signatories were Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. They were soon followed by Germany, Greece, Iceland, and Turkey, all of which joined the

organization in 1949 or 1950. Austria joined in 1956, Cyprus in 1961, Switzerland in 1963, Malta in 1965, Portugal in 1976, Spain in 1977, Liechtenstein in 1978, San Marino in 1988, and Finland in 1989. But it was with the accession of newly democratized Eastern and Central European States, in the 1990s, that the organization underwent its deepest transformation (see the Information Report on the Enlargement of the Council of Europe (16 June 1992), Doc. 6629 of the Parliamentary Assembly of the Council of Europe). In addition to Andorra, which joined in 1994, the Council of Europe expanded from twenty-three members in 1990 to thirty-eight members in 1995, beginning with Hungary and Poland respectively in 1990 and 1991, and with seven States joining in 1992–3 (Bulgaria, the Czech Republic, Estonia, Lithuania, Romania, Slovakia and Slovenia). In 1996, together with Croatia, the Federation of Russia became a member; seven other States, including Armenia and Azerbaidjan, were added in 1999 and later. The organization now numbers forty-seven members.

The Statute defines as a condition for membership that '[e]very member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council' (Art. 3). Indeed, even prior to the signing of the Statute, it was understood that the organization's first task should be to adopt a Charter on Human Rights, since that was one of the primary aims of the European Movement at the origin of the establishment of the Council of Europe. The negotiations were launched in August 1949, and were finalized by September 1950, allowing the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – the official name of what is usually referred to as the European Convention on Human Rights – to be signed on 4 November 1950; it entered into force on 3 September 1953. The speed at which the negotiations proceeded was truly remarkable, considering the ambitious nature of the text: for the first time, an international jurisdiction, the European Court of Human Rights, was being set up, empowered to receive files submitted by the European Commission on Human Rights for its consideration, on the basis of individual applications by victims of human rights violations. Of course, the jurisdiction of the Court was initially optional, and individuals did not have direct access to the Court: it was the European Commission on Human Rights that, after an examination of the admissibility of the application, presented the case against the State, unless it chose to direct the case for consideration to the Committee of Ministers of the Council of Europe (see further chapter 11, section 1). Still, under the standards of the time, this constituted a major revolution, as important in significance as had been, only two years earlier, the adoption of the Universal Declaration of Human Rights.

The ratification of the Convention is now considered a condition for membership of the Council of Europe. This has not always been the case: France, for instance, although it is among the founding States of the Council of Europe which it hosts, only ratified the European Convention on Human Rights in 1974. The rule linking membership of the Council of Europe to accession to the ECHR appropriately reflects the pre-eminent role played by this instrument on the European continent. This, however, should not

lead to underestimate the other instruments adopted within the organization for the promotion of human rights. Shortly after the ECHR entered into force, it was deemed necessary to pursue work on the implementation of the economic and social rights of the Universal Declaration of Human Rights which, due to their focus on civil and political rights, the drafters of the Convention had essentially neglected. After six years of negotiations, the European Social Charter was signed by thirteen Member States of the Council of Europe in Turin, on 18 October 1961 (CETS No. 35; 529 U.N.T.S. 89), and it entered into force a few years later, on 26 February 1965. Although it is an impressive catalogue of social rights laid out in great detail, the European Social Charter has been almost dormant until the early 1990s, when it was felt necessary to revive it in a context in which the European Communities (now the European Union) were increasingly active in the field of social rights, and in which the shift towards market economy in the Central and Eastern European States seemed to call for a strengthened protection of social rights as a counterweight to large-scale deregulation. These were the main arguments in favour of the 'revitalization' of the Charter, which was formally launched by the Ministerial Conference on Human Rights held in Rome in November 1990 (see further box 11.1., chapter 11).

Although the European Convention on Human Rights and the European Social Charter clearly are the most important human rights instruments adopted within the Council of Europe, other, often innovative systems have been put in place, to improve the monitoring of the conditions in which persons are being held in detention (European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (C.E.T.S., No. 126), signed on 26 November 1987), to protect the rights of minorities (European Charter for Regional or Minority Languages (C.E.T.S., No. 148), signed on 5 November 1992; and Framework Convention for the Protection of National Minorities (C.E.T.S., No. 157), signed on 1 February 1995), or to protect the dignity of the person against the misuse of biology and medicine (Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (C.E.T.S., No. 164), signed on 4 April 1997). In its standard-setting capacity, the Council of Europe has also played an important role in promoting a common approach to certain subjects, such as the protection of the environment through the criminal law, the fight against corruption, or the fight against trafficking of human beings, that present a more indirect relationship to human rights. At the same time, the leading role of the Council of Europe on the European continent is sometimes seen as being threatened by the increasingly important role played by the European Union (EU) in this area, particularly as the competences of the EU have developed over time to include, at present, a large number of domains that are directly related to civil liberties or social rights (see box 1.1.).

2.2 The Organization of American States and human rights

The role of the Organization of American States in the promotion and protection of human rights presents striking similarities with that of the Council of Europe. In 1948

Box 1.1.

The rise of fundamental rights in the European Union

The original treaties establishing the European Communities in 1951 (European Coal and Steel Community) and 1957 (European Atomic Energy Community and European Economic Community) contained no reference to human rights, apart from certain provisions on free movement of workers (including a prohibition of discrimination on grounds of nationality) and on equal pay between men and women, whose primary purpose remained linked to the needs of economic integration. In the late 1960s, however, the Court of Justice of the European Communities (European Court of Justice or ECJ) gradually sought to include fundamental rights among the general principles of European Community law which, on the basis of Article 164 EEC (later Art. 220 EC), it was competent to ensure respect for in the scope of application of the treaties. This case law was developed as a means to reassure the national courts of the EU Member States that the supremacy of European Community law would not oblige these national courts to set aside guarantees relating to human rights set out in the national constitutions. Following a first series of cases where the European Court of Justice firmly resisted the suggestion that the Community would be bound to respect the fundamental rights guaranteed by the constitutions of the Member States (Case 1/58, *Stork* v. *High Authority* [1959] E.C.R. 17 at 25–6; Joined Cases 36, 37, 38 and 40/59, *Geitling* v. *High Auth*ority [1960] E.C.R. 423 at 438–9; Case 40/64, *Sgarlata* v. *Commission* [1965] E.C.R. 215 at 227), and yet affirmed that the national jurisdictions of the Member States should accept the supremacy of EC law (Case 6/64, *Costa* v. *Enel* [1964] E.C.R. 585), the German Federal Constitutional Court (*Bundesverfassungsgericht*) and the Italian Constitutional Court (*Corte costituzionale*) reacted by stating that they would not accept this supremacy where this would oblige them to renounce upholding the provisions relating to fundamental rights in their respective national constitutions, in situations where the implementation of EC law would conflict with those guarantees (see Gerhard Bebr, 'A Critical Review of Recent Case Law of National Courts', *Common Market Law Review* (1974) 408). The resistance it faced led the European Court of Justice to accept that 'fundamental human rights' are 'enshrined in the general principles of Community law and protected by the Court' (Case 29/69, *Stauder* v. *City of Ulm* [1969] E.C.R. 419). The Court announced that it would henceforth identify those fundamental rights by referring to the common constitutional traditions of the Member States, although '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' (Case 11/70, *Internationale Handelsgesellschaft* v. *Einfuhr- und Vorratsstelle Getreide* [1970] E.C.R. 1125).

Since that founding period, the European Court of Justice has sought to ensure respect for fundamental rights, as part of the general principles of law, either as regards the acts adopted by the institutions of the European Union, or as regards any acts adopted by the national authorities of the Member States to the extent that they intervene in the scope of application of EU/EC law, for instance when they take measures to implement EU legislation or when they invoke exceptions allowed by the treaties or the case law of the European Court of Justice (see, among many others, the following cases or opinions: Case C-260/89, *ERT* [1991] E.C.R. I-2925, paragraph 41; Opinion 2/94 [1996] E.C.R. I–1759, paragraph 33; Case C-274/99 P, *Connolly* v.

Commission [2001] E.C.R. I–1611, paragraph 37; Case C-94/00, *Roquette Frères* [2002] E.C.R. I-9011, paragraph 25; Case C-112/00, *Schmidberger* [2003] E.C.R. I-5659, paragraph 71; and Case C-36/02, *Omega* [2004] E.C.R. I-9609, paragraph 33).

This case law was constitutionalized in the Treaty on the European Union, that established the EU in 1992 as a single institutional framework for the European Communities and for co-operation in areas of justice and home affairs and in foreign and security policy. Article 6(3) of the EU Treaty reads: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.' The explicit mention in this provision of the European Convention on Human Rights is of course no accident. The ECHR is recognized a 'special significance' in this case law: it is *de facto* treated by the European Court of Justice as if it were binding on the EU, and the ECJ systematically seeks to align itself on the interpretation of the European Court of Human Rights. However, other treaties, such as the International Covenant on Civil and Political Rights or the Convention on the Rights of the Child, also have been relied upon by the Court of Justice (on the selective use of international human rights law by the ECJ, see I. de J. Butler and O. De Schutter, 'Binding the EU to International Human Rights Law', *Yearbook of European Law*, 27 (2008), 277).

The dependency of the case law of the European Court of Justice in the field of fundamental rights on the protection afforded to these rights in the national constitutions of the EU Member States has remained a significant factor to this day. Indeed, in its 'Solange' ('so long as') decision of 1974, the German Federal Constitutional Court insisted that, despite the 1969–70 judgments of the European Court of Justice in the cases of *Stauder* and *Internationale Handelsgesellschaft*, it did not consider that it was bound to accept unconditionally the supremacy of EC law, as long as the European Community did not possess a catalogue of rights offering the same legal certainty as the German Constitution (*Grundgesetz*) (BVerfG, judgment of 29 May 1974, [1974] 2 C.M.L.R. 551). Later, following the confirmation of the case law of the European Court of Justice and the political support it received from the then nine EC Member States (Joint Declaration of the Council, of the European Parliament and of the Commission on human rights, O.J. 1977 C103/1), the German Federal Constitutional Court somewhat relaxed its approach, agreeing to abstain from controlling the compatibility with fundamental rights of EC law it was asked to implement, as long as the level of protection of fundamental rights within the European Community would remain satisfactory (BVerfG, judgment of 22 October 1986, 2 BvR 197/83, 73 BVerfGE 339 [1987] 3 C.M.L.R. 225 ('*Solange II*' judgment)). This position was confirmed in the 'Maastricht' judgment delivered on 12 October 1993, (2 BvR 2134/92 and 2159/92, 89 BVerfGE [1993] 1 C.M.L.R. 57). Other supreme courts in the EU Member States have adopted the same attitude (e.g. the Danish Supreme Court, see *Hanne Norup Carlsen and others* v. *Prime Minister Poul Nyrup Rasmussen* [1999] 3 C.M.L.R. 854). Finally in a judgment of 7 June 2000, the German Federal Constitutional Court again slightly amended its view, agreeing to establish a presumption of compatibility of EU law with the requirements of fundamental rights: it is therefore up to the applicant, or to the court referring a case to the Constitutional Court, to bring forward elements

justifying that this presumption will be reversed (BVerfG, 2 BvL 1/97). This background explains why the European Court of Justice has consistently sought to achieve a high level of protection of fundamental rights in the EU legal order, on the basis of a comparison between the constitutional traditions of the EU Member States and seeking inspiration from the international human rights instruments they are parties to.

The sequence briefly described above also explains why, during the first semester of 1999 (as Germany was presiding over the European Union), the idea was proposed that the European Union prepare a Charter of Fundamental Rights codifying and making visible to the citizen the *acquis* of the Union in this field. The proposal to adopt such a catalogue of fundamental rights was in part a reaction to the doubts expressed by the German Federal Constitutional Court about the solidity and irreversibility of this *acquis*. The adoption of a Charter of Rights, it was thought, would provide European integration with precisely this important building block, the absence of which the Constitutional Court had deplored in its first 'Solange' judgment of 1974, and which surfaced again in the 1986 and 1993 decisions it delivered on this issue. It would thus strengthen the legitimacy of further steps towards European integration, and justify further integration in the eyes of national constitutional or supreme courts.

Following the political decision to prepare a catalogue of rights for the EU, which was adopted at the Cologne European Council of June 1999, discussions on the content of the Charter of Fundamental Rights took place between December 1999 and September 2000. On 7 December 2000, the Charter of Fundamental Rights of the European Union was proclaimed at the Nice European Council (O.J. 2000 C364/1). It lists both civil and political rights and economic and social rights, and it also includes certain rights specifically linked to the citizenship of the Union and economic freedoms protected under the European treaties. Inspired by the fundamental rights recognized by the European Court of Justice among the general principles of law it ensures respect for, and by the international human rights instruments binding upon the EU Member States, the Charter is now the single most authoritative restatement of the *acquis* of the Union in the field of fundamental rights. Its main impact is not as a legal document, however – indeed, the Charter had no binding force when it was initially proclaimed, and only with the most recent reforms of the European treaties did it acquire formal legal authority (the Reform Treaty, signed at Lisbon on 13 December 2007 in force since 1 December 2009, contains a reference to the Charter, thus confirming its status as a legally binding instrument for the institutions of the Union and for the Member States when they implement Union law: see Article 6(1) of the Treaty on European Union as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ 2007 C306/1) (referring to the EU Charter of Fundamental Rights in the revised form it has been proclaimed on 12 December 2007 (OJ 2007 C303/1)). Rather, the influence of the Charter has primarily been felt in the transformation it brought about in the culture and the practice of the European institutions: for the European Parliament and the European Commission, in particular, it has become routine to invoke fundamental rights in drafting or discussing policies and laws, now that there exists a document, prepared under conditions which guarantee it a high degree of legitimacy, listing the said rights.

the Pan American Union was renamed the Organization of American States (OAS), a 'regional arrangement' within the new United Nations world architecture (see generally on this organization, A. V. W. Thomas and A. J. Thomas, *The Organization of American States* (Dallas: Southern Methodist University Press, 1963)). At the time, it had twenty-one members, including the United States. The membership expanded gradually. A number of small English-speaking island nations of the Caribbean joined in the 1960s, after they achieved independence; Canada acceded in 1990. The OAS today comprises thirty-six Member States: Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba (although its participation in the OAS was suspended between 1962 and 2009, because of an alleged incompatibility between its adoption of Marxism-Leninism and the principles and purposes of the OAS Charter), Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras (whose participation was suspended after the *coup d'état* of June 2009), Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, St Kitts and Nevis, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela.

In April 1948, at the same time that it established the OAS, the Ninth International Conference of American States held in Bogotá, Colombia, adopted the American Declaration on the Rights and Duties of Man. The Declaration was initially not intended to be a binding instrument. In 1959, however, in part in reaction to the Cuban revolution, the Inter-American Commission on Human Rights was established by a resolution of the Fifth Meeting of Consultation of Ministers for Foreign Affairs. The resolution was adopted on the basis of Article 5(j) (now Article 3(l)) of the OAS Charter, in which the Member States 'reaffirm' and 'proclaim' as a principle of the Organization 'the fundamental rights of the individual without distinction as to race, nationality, creed or sex'. When the Statute of the Inter-American Commission on Human Rights was adopted the following year, it defined the 'human rights' the Commission was to 'further respect' as the rights contained in the American Declaration on the Rights and Duties of Man.

Prior to the adoption of the American Convention in 1969 (see below), the Commission applied the American Declaration to all Member States of the OAS. By becoming a Member State of the OAS, a State implicitly recognized the competence of the Commission to receive individual petitions alleging human rights violations attributable to the Member States. Today the Commission continues to apply the American Declaration, as a default instrument, to those States that have not yet become parties to the American Convention. It thus considers that it is competent to examine violations of the rights set forth by the Declaration, however, once the Convention has entered into force in relation to a State, it is the Convention and not the Declaration that becomes the specific source of law to be applied, as long as the petition alleges violation of substantially identical rights enshrined in both instruments and a continuing situation is not involved (see, e.g. IACHR, Annual Report 2000, *Amílcar Ménendez et al.* v. *Argentina*, Case 11.670, Report No. 3/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 95, para. 41).

The American Convention on Human Rights (ACHR) itself was adopted in San José, Costa Rica, on 22 November 1969, although it did not enter into force until 18 July 1978. It is the most important human rights instrument in the inter-American system. Largely inspired by the European Convention on Human Rights (as it then was, in its original version of 1950) (see for comparisons J. Frowein, 'The European and the American Conventions on Human Rights: a Comparison', *Human Rights Law Journal*, 1 (1980), 44; T. Buergenthal, 'The American and European Conventions on Human Rights: Similarities and Differences', *American Universities Law Review*, 40 (1980), 155), it created the Inter-American Court of Human Rights, which has its seat in San José, Costa Rica. With the exception of Cuba, which was not participating in the OAS at the time the ACHR was adopted, every Spanish-speaking Member State of the OAS, as well as Brazil, has ratified the American Convention and accepted the compulsory jurisdiction of the Court. Of the thirty-six Member States of the OAS, twenty-four are States parties to the American Convention, as of 1 July 2009. These are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. Trinidad and Tobago was a State party but denounced the American Convention on 26 May 1998, as a result of the decision adopted by the Judicial Committee of the Privy Council in *Pratt and Morgan* v. *Attorney General for Jamaica* [1994] 2. A.C. 1 (see box 1.5.). Ten other Member States of the OAS have not ratified the Convention: Antigua and Barbuda, the Bahamas, Belize, Canada, Cuba, Dominica, Guyana, St Kitts and Nevis, St Vincent and the Grenadines, and the United States. As its membership indicates, the system of the ACHR has largely succeeded in establishing its credibility within the Latin American context. In contrast, most of the English-speaking Member States have not yet become States parties to the American Convention, including, notably, the United States and Canada (although the United States signed the ACHR in 1977). Of the English-speaking Member States of the OAS, only Barbados, Grenada and Jamaica are States parties to the American Convention, but of these three only Barbados accepted the compulsory jurisdiction of the Court, in 2000. The mechanisms of the Inter-American Commission and Court of Human Rights are described in greater detail in chapter 11 (section 2).

The 1948 American Declaration on the Rights and Duties of Man and the 1969 American Convention on Human Rights are not the only instruments adopted within the OAS that contribute to the promotion and protection of human rights, however. The Convention itself was complemented in 1988 by an Additional Protocol in the area of Economic, Social and Cultural Rights, called the San Salvador Protocol after the city in which it was signed. It had fourteen States parties on 1 July 2009. While the Additional Protocol provides that only the rights stated in Article 8 a) (trade union rights) and Article 13 (right to education) may lead to the filing of individual petitions before the Inter-American Commission or Court of Human Rights, a reporting system is established for all the economic, social and cultural rights codified in the Additional Protocol. In 1990, another Protocol to the ACHR was adopted,

this time to abolish the death penalty. Separate from the ACHR, the Inter-American Convention to Prevent and Punish Torture was adopted in 1985, entering into force two years later. On 1 July 2009 it had seventeen parties to it. It mirrors in many respects the 1984 UN Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment. A Convention on the Forced Disappearance of Persons was adopted in 1994, and entered into force in 1996. It had thirteen States parties on 1 July 2009. Under the Convention, the States parties undertake to punish those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories, and to co-operate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; the Convention lists the measures States should take in order to render this prohibition effective.

2.3 The African Union and human rights

The trajectory followed by the Organization of African Unity (OAU) – now the African Union – was slightly different. The Charter founding the OAU, signed in Addis-Abeba on 25 May 1963, stated that one of the objectives of the new organization was to 'promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights' (Art. 2(1), e)). That reference was mainly symbolic: in fact, the principle of non-interference in domestic affairs was much more highly valued, as the OAU members had only recently obtained their independence and were particularly sensitive to affirming their sovereignty. Only later would human rights be put on the agenda of the organization, when certain dictatorships fell in 1979 and democratic movements gained visibility throughout the continent. The African (Banjul) Charter on Human and Peoples' Rights was adopted on 27 June 1981, and it entered into force on 21 October 1986 (OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)). It had fifty-three States parties on 1 July 2009. Initially, the African Charter was monitored exclusively by the African Commission on Human and Peoples' Rights. The system was further strengthened by the entry in force, in 2004, of the 1998 Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, although it is too early still to evaluate the effectiveness of this reform (see further chapter 11, section 3). In addition, a Protocol to the African Charter on the Rights of Women in Africa was adopted on 11 July 2003 in Maputo and entered into force in 2005.

In the Preamble of the African Charter, the OAU members state that they are 'taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights'. Indeed, the Charter presents a number of specificities that, to a certain extent, distinguish it from the other comparable human rights instruments (see J. Matringe, *Tradition et modernité dans la Charte africaine des droits de l'homme et des peuples* (Brussels: Bruylant, 1996); F. Ouguergouz, *La Charte africaine des droits de l'homme et des peuples: une approche juridique entre tradition et modernité* (Geneva: IUHEI and Paris: P.U.F., 1993); and F. Viljoen, 'The African Regional Human

Rights System' in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: a Textbook* (Abo Akademi University Institute for Human Rights, 2009), p. 503, at pp. 518–25). Thus, the African Charter lists a number of social and economic rights, that are treated as equivalent, as regards their justiciability, to civil and political rights (see, for instance, the *Ogoniland* case, discussed in chapter 3, section 1). It also insists on duties, alongside rights, on the basis that 'the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone' (Preamble, 7th Recital). However, whether this really distinguishes the African Charter from other, equivalent instruments, is doubtful. In practice, the 'duties' component means that States parties should take measures that ensure that individuals are imposed obligations that allow the rights of others to be effectively enjoyed. While the wording may differ, the substance is not truly distinct from what follows from the obligation to protect human rights imposed on States parties to other international human rights instruments (on the obligation to protect, see chapter 4; on the specificity of the African Charter as regards the notion of 'duties', see M. wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: an Evaluation of the Language of Duties', *Virginia Journal of International Law*, 35 (1995), 339).

Perhaps the most significant characteristic of the African Charter is the importance it affords to the collective rights of peoples, in addition to the human rights of the individual. The African Charter thus recognizes the right of peoples to existence, to self-determination (including the right to dispose of their natural resources), to development, to international peace and security, and to a generally satisfactory environment. Such rights are not unique to the African Charter, of course: international human rights law recognizes the right to self-determination of peoples in the UN Charter and in Article 1 of both Covenants adopted in 1966 to implement the Universal Declaration of Human Rights (see chapter 7, section 5.1.); and the right to development has been affirmed in the 1986 Declaration on the Right to Development adopted by the UN General Assembly (see chapter 2, section 2.4.). What is remarkable, rather, is that these rights – sometimes referred to as 'third generation' rights both because they are rights of peoples and because they are, for the most part, dependent on international solidarity for their realization – are treated in the Charter on a par with other 'first' and 'second' generation rights, leading the African Commission on Human and Peoples' Rights to sometimes bold and innovative interpretations that go beyond what has been achieved at universal level.

The achievements of the OAU in the field of human and peoples' rights are not limited to the adoption and implementation of the Banjul Charter. On 11 July 1990, the African Charter on the Rights and Welfare of the Child was adopted, in order to ensure the transposition, in the African regional context, of the 1989 UN Convention on the Rights of the Child (OAU Doc. CAB/LEG/24.9/49 (1990)). The African Children's Rights Charter sets up a monitoring body, the African Children's Rights Committee, which has the power to examine state reports, as well as to receive individual communications and to launch investigations. The system entered into force on 29 November 1999. It currently has forty-five States parties.

As the African Charter on Human and Peoples' Rights progressively established its credibility through the 1990s, the OAU mutated into the African Union. Article 4 of the African Union Constitutive Act adopted in Lomé on 11 July 2002 enumerates the principles on which the AU is founded. These include 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity', 'promotion of gender equality', and 'respect for democratic principles, human rights, the rule

Box 1.2. Human rights in South-East Asia: the ASEAN Intergovernmental Commission on Human Rights

At its Ministerial Meeting of 20 July 2009, the Association of South-East Asian Nations (ASEAN) agreed on the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR). This remains a very modest step towards implementing human rights effectively in the region. The AICHR is an intergovernmental body, composed of the representatives of the ASEAN Member States, with purely consultative powers: they may neither receive complaints, nor take decisions, nor conduct investigations. The tasks of the AICHR are promotional in nature: it should contribute to capacity-building, promote awareness, provide advisory services, prepare studies, and favour dialogue between the Members. According to the Terms of Reference adopted on 20 July 2009, five sets of principles should guide the action of the AICHR. A first set of principles are 'respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States'; 'non-interference in the internal affairs of ASEAN Member States' and 'respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion'; 'adherence to the rule of law, good governance, the principles of democracy and constitutional government'; 'respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice'; 'upholding the Charter of the United Nations and international law, including international humanitarian law, subscribed to by ASEAN Member States'; and 'respect for different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity'. The other sets of principles are first, 'respect for international human rights principles, including universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms, as well as impartiality, objectivity, non-selectivity, non-discrimination, and avoidance of double standards and politicisation'; second, the 'recognition that the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State'; third, 'pursuance of a constructive and non-confrontational approach and cooperation to enhance promotion and protection of human rights'; and fourth, 'adoption of an evolutionary approach that would contribute to the development of human rights norms and standards in ASEAN'. In sum, the AICHR is a human rights council at regional level, but with neither special procedures that can ensure an independent monitoring of compliance with human rights standards, nor a peer review of the performances of States in the field of human rights (on the mechanisms at the disposal of the UN Human Rights Council, see chapter 10).

of law and good governance' (paras. (h), (l) and (m), respectively). While the standing and visibility of human rights in the structure of the African Union thus has been enhanced – and rebalanced against the principle of non-interference with domestic affairs – it remains to be seen which concrete implications shall be drawn.

3 THE EMERGING *JUS COMMUNE* OF HUMAN RIGHTS

Since the 1990s, a movement towards the building of a transnational *jus commune* of human rights has become increasingly visible. The formation of this common law is the result of increasingly frequent cross-references between various international and domestic courts interpreting provisions which, although found in different treaties or domestic constitutions, are similarly worded and have their common inspiration in the Universal Declaration on Human Rights (see S. Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation', *Indiana Law Journal*, 74 (1999) 819; S. H. Cleveland, 'Our International Constitution', *Yale Journal of International Law*, 31 (2006) 1; L. Henkin, 'The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation', *Harvard Law Revie*w, 114 (2001) 2049; C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', *Oxford Journal of Legal Studies*, 20 (2000) 499–532; A.-M. Slaughter, 'Judicial Globalization', *Virginia Journal of International Law*, 40 (2000) 1103; A.-M. Slaughter, 'A Global Community of Courts', *Harvard International Law Journal*, 44 (2003) 191). A number of factors have encouraged this development. The single most important factor still has to do with the content and origins of the legal rules themselves. The Universal Declaration of Human Rights was derived from a comparison between the liberal constitutions of the Western nations. The initial draft, prepared by the Human Rights Division of the UN Secretariat under the supervision of its first director, the Canadian international law expert John P. Humphrey, 'may not have included every conceivable right, but it provided the drafting committee with a distillation of nearly two hundred years of efforts to articulate the most basic human values in terms of rights. It contained the first-generation political and civil rights found in the British, French, and American revolutionary declarations of the seventeenth and eighteenth centuries: protections of life, liberty, and property; and freedoms of speech, religion, and assembly. It also included the second-generation economic and social rights found in late-nineteenth- and early-twentieth-century constitutions such as those of Sweden, Norway, the Soviet Union, and several Latin American countries: rights to work, education, and basic subsistence. Each draft article was followed by an extensive annotation detailing its relationship to rights instruments then in force in the UN's member states, already numbering fifty-five and rising' (M.-A. Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) pp. 57–8).

Whether they are adopted at the universal or at the regional levels, all human rights treaties are derived from the UDHR, from which they borrow, sometimes quite literally, much of their language. It is therefore quite natural for international courts or

quasi-judicial bodies, whether they belong to regional or to universal systems, to cite one another, and to entertain a dialogue with national courts applying human rights recognized in constitutional instruments, where the wording is similar or identical. In addition, with the development of an international human rights jurisprudence, which brings life into the sometimes vague provisions of international human rights instruments which are thereby made more concrete, the impact of international human rights law on the practice of national courts has increased, a phenomenon which the growing recognition of the direct applicability of international human rights treaties before national authorities further increased (on the influence of the case law, including views adopted on individual communications, general comments, and concluding observations, of the UN human rights treaty bodies, see Committee on International Human Rights Law and Practice of the International Law Association, *Final Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals*, adopted at the 2004 Berlin Conference; and H. Niemi, *National Implementation of Findings by United Nations Human Rights Treaty Bodies. A Comparative Study* (Institute for Human Rights, Abo Akademi University, December 2003) (examining the national implementation of UN treaty body findings, including final views, concluding observations, and general comments, in Australia, Canada, the Czech Republic, Finland, Spain and Sweden); on the impact of the case law of the European Court of Human Rights on the national courts of the Member States of the Council of Europe, see J. Polakiewicz, 'The Status of the Convention in National Law' in R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe. The ECHR and its Member States, 1950–2000* (Oxford University Press, 2001), at pp. 31–53).

Other factors still have further encouraged this movement towards the building of a *jus commune* in the field of international human rights. The internet and the proliferation of legal databases have immensely facilitated the task of seeking information about the practices followed by other jurisdictions, from which inspiration may be sought. Non-governmental organizations have been increasingly present as *amici curiae* before certain human rights courts, both at regional and at national level, and they have been particularly eager to present those jurisdictions with comparative law materials, identifying the best practices available as a benchmark for all courts to achieve, and encouraging national courts to use international law to develop their own powers (see O. De Schutter, 'L'émergence de la société civile dans le droit international: le rôle des associations devant la Cour européenne des droits de l'homme', *Journal européen du droit international/European Journal of International Law*, 7 (1996), 372–410). Entering this global interjurisdictional conversation may be attractive to judges, finally, because by doing so, they gain in legitimacy, and they can emancipate themselves from the straightjacket of the texts which they are to interpret.

Exceptionally, courts may be directed to take into account the fact that the human rights provisions they are applying stem from a broader conversation in which both international and national bodies take part. For instance, the Commission and Court in charge of monitoring the African Charter on Human and Peoples' Rights are directed to 'draw inspiration from international law on human and people's rights, particularly

from ... the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members' (African Charter on Human and People's Rights, Art. 60). This has led the African Commission of Human and Peoples' Rights to seek inspiration, primarily, from the European human rights system, and constitutes a powerful counter-weight to the tendency to emphasize the unique nature of the values of the African Charter. Similarly, section 35(1) of the interim South African Constitution provides that 'In interpreting the provisions of [the Bill of Rights contained in a chapter of the Constitution] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.' In the case of *S* v. *Makwanyane and another* presented to the Constitutional Court, Chaskalson P made the following comment about this provision:

Constitutional Court of South Africa, *S* v. *Makwanyane and another* 1995 (3) S.A. 391 (CC), 1995 (6) B.C.L.R. 665 (CC):

[P]ublic international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights included in the South African Constitution] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].

Most often, however, the reference to human rights as recognized in general international law, particularly as embodied in the Universal Declaration of Human Rights, is made *sua sponte* by the organs concerned, which may find in such a reference a source of legitimacy for the interpretation they propound. In this process, judicial interpretation is increasingly detached from the text to be interpreted; instead, it resembles a conversation between jurisdictions, which are collectively engaged in the task of giving meaning to generally worded human rights provisions whose significance can only be discovered in the course of implementation in a variety of settings. This development has sometimes been controversial. Reliance on foreign human rights norms or judgments seems to presuppose a universalistic view of human rights, in which the solutions which are correct in one jurisdiction should be replicated elsewhere, rather

than a relativistic one, in which the broad principles of human rights should be applied differently depending on the specific context of each society. In addition, the development of a *jus commune* of human rights seems to revive the idea of human rights as natural law, detached from the positivist view of law as the set of norms that is recognized as valid in a specific jurisdiction as a result of institutional processes. Finally, and perhaps most obviously, this development favours judicial activism, at the expense of fidelity to the intent of the authors of the text – whether the human rights treaty or the domestic bill of rights – to be interpreted. This, it has been argued, may ultimately threaten the effectiveness of human rights protection, because it undermines the legitimacy of the positions adopted by human rights bodies interpreting specific treaties. In the context of the American Convention on Human Rights, for instance:

Gerald L. Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights', *European Journal of International Law*, 19, No. 1 (2008), 101 at 115:

Ignoring the role of the states [by interpreting the ACHR broadly, in line with universal trends, without seeking to ensure that the interpretation conforms with the evolving consensus among the OAS Member States] raises issues both of legitimation and of effectiveness. The character of a positive human rights treaty entails the involvement of states (jointly) in the design of the system, including the choice of rights to be protected and the means of enforcement. The OAS states went to considerable effort to negotiate and adopt their own regional human rights treaty. They did not reduce the treaty to a local enforcement mechanism for the global Covenants, and they did not simply delegate to the Court the task of adopting whatever standards it chooses from a future corpus of soft law texts. Ongoing partnership between the Court and the member states bolsters the Court's authority to define state obligations. The 'humanization' of international law has not proceeded so far as to make international human rights tribunals self-legitimating on the basis of their direct relationship with individual human rights. Moreover, accepting state influence on the evolution of human rights norms is important for the effectiveness of the system, a major factor in institutional interpretation. Making a human right more 'effective' does not necessarily mean giving the right a broader meaning. It means making the enjoyment of the right more of a reality, and that may require defining the positive content of the right in a manner that facilitates its implementation at a particular historical moment within the particular region … When states within the region participate in the progressive evolution of a right, their actions make national enforcement more feasible and provide insights into the methods of implementation that may succeed. States will also be more likely to assist the Court in influencing a fellow member state to comply with standards to which they themselves already subscribe.

In order to assess the conflicting claims about the merits and dangers of judicial comparativism in this area, it is necessary, however, to distinguish carefully between the different uses of foreign judgments before human rights courts. Consider the following typology proposed by McCrudden: