in office of the Democratic Republic of the Congo, Mr Abdulaye Yerodia Ndombasi. The application contended that Belgium had violated the 'principle that a State may not exercise its authority on the territory of another State', the 'principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations', as well as 'the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations'. The arrest warrant delivered by the Belgian investigating judge charged him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity. These crimes were punishable in Belgium under the Law of 16 June 1993 concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto, as amended by the Law of 10 February 1999 concerning the Punishment of Serious Violations of International Humanitarian Law, which provides for a universal jurisdiction of Belgian courts to prosecute certain international crimes.

The International Court of Justice concluded by thirteen votes to three that 'the issue against Mr Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law'. Without reaching the issue of whether Belgium was authorized to apply an extraterritorial legislation, the Court took the view, first, that 'the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State would hinder him her in the performance of his or her duties' (para. 54). It then found, having 'carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation', that it was 'unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity' (para. 58).]

Dissenting opinion of Judge Van den Wyngaert, judge *ad hoc* (para. 28):

The Court … adopts a formalistic reasoning, examining whether there is, under customary international law, an international crimes exception to the – wrongly postulated – rule of immunity for incumbent Ministers under customary international law (judgment, para. 58). By adopting this approach, the Court implicitly establishes a hierarchy between the rules on immunity (protecting incumbent former Ministers) and the rules on international accountability (calling for the investigation of charges against incumbent Foreign Ministers charged with war crimes and crimes against humanity).

By elevating the former rules to the level of customary international law in the first part of its reasoning, and finding that the latter have failed to reach the same status in the second part of its reasoning, the Court does not need to give further consideration to the status of the principle of international accountability under international law. As a result, the Court does not further examine the status of the principle of international accountability. Other courts, for example the House of Lords in the *Pinochet* case [see above] and the European Court of Human Rights in the *Al-Adsani* case [see above], have given more thought and consideration to the balancing of the relative normative status of international *jus cogens* crimes and immunities.

Questions concerning international accountability for war crimes and crimes against humanity and that were not addressed by the International Court of Justice include the following. Can international accountability for such crimes be considered to be a general principle of law in the sense of Article 38 of the Court's Statute? Should the Court, in reaching its conclusion that there is no international crimes exception to immunities under international law, not have given more consideration to the factor that war crimes and crimes against humanity have, by many, been considered to be customary international law crimes (see: American Law Institute, *Restatement of the Law Third. The Foreign Relations Law of the United States* (St Paul, Minn.: American Law Institute Publishers, 1987), vol. 1, para. 404, Comment; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (The Hague, Kluwer Law International, 1999); T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989); T. Meron, 'International Criminalization of Internal Atrocities', *American Journal of International Law* 89 (1995), 558; A. H. J. Swart, *De berechting van internationale misdrijven* (Deventer: Gouda Quint, 1996), p. 7; ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Tadic*, paras. 96–127 and 134 (common Art. 3))? Should it not have considered the proposition of writers who suggest that war crimes and crimes against humanity are *jus cogens* crimes (M. C. Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', *Law and Contemporary Problems*, 59 4 (1996), 63–74; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (The Hague: Kluwer Law International, 1999), pp. 210–17; C. J. R. Dugard, *Opinion In: Re Bouterse*, para. 4.5.5, to be consulted at: www.icj.org/objectives/opinion.htm; K. C. Randall, 'Universal Jurisdiction under International Law', *Texas Law Review*, 66 (1988), 829–32; ICTY, judgment, 10 December 1998, *Furundzija*, para. 153 (torture)), which, if it were correct, would only enhance the contrast between the status of the rules punishing these crimes and the rules protecting suspects on the ground of immunities for incumbent Foreign Ministers, which are probably not part of *jus cogens*?

1.3. Question for discussion: human rights as *jus cogens* norms and the normative hierarchy theory

Both the dissenting opinion of ad hoc Judge Van den Wyngaeert and the dissent expressed in the *Al-Adsani* v. *United Kingdom* case are based on the idea that rules regarding immunity should be set aside in order to recognize the primacy of human rights norms that have acquired the status of *jus cogens*. Indeed, although *Al-Adsani* v. *United Kingdom* was heavily debated

among the members of the European Court of Human Rights, other cases presented to the Court that raised a question of immunity were far less controversial, because at stake were ECHR rights other than the right not to be subjected to torture or inhuman or degrading treatment or punishment (for a discussion of this range of cases, see M. Kloth, 'Immunities and the Right of Access to Court under the European Convention on Human Rights', *European Law Review*, 27 (2002), 33). Yet, if the Court in *Al-Adsani* had arrived at the conclusion that the ECHR was violated by the United Kingdom, would this have opened the floodgates for a large number of claims unrelated to torture or inhuman or degrading treatment or punishment? Would the position adopted by the dissenting judges in *Al-Adsani* be practical? Consider the following view:

Lee M. Caplan, 'State Immunity, Human Rights, and *Jus Cogens*: a Critique of the Normative Hierarchy Theory', *American Journal of International Law*, 97 (2003), 741 at 773:

The undefined character of *jus cogens*, coupled with the general applicability of the normative hierarchy theory, which invests all peremptory norms with immunity-stripping potential, may present problems for the courts. Requiring application of the theory beyond cases of genocide, slavery and torture would place national courts in an awkward position. The theory not only would deprive the forum state of its right to regulate access to its own courts, but also would oblige them to determine whether a particular norm of international law had attained the status of *jus cogens*, a task that international legal scholars have grappled with for decades with only limited success. Further, the normative hierarchy theory logically requires courts to treat all violations of peremptory norms uniformly, even violations of norms that do not implicate human rights but are arguably *jus cogens*, such as *pacta sunt servanda*. In addition, allowing the courts to determine the parameters of *jus cogens* through application of the normative hierarchy theory may undermine the principle of separation of powers, in some case inappropriately transferring foreign-policymaking power from the political branches of government to the judiciary. Finally, … adoption of the normative hierarchy theory could be the first step on a slippery slope that begins with state immunity from jurisdiction but could quickly extend to state immunity from execution against sovereign property and ultimately threaten the 'orderly international co-operation' between states.

(c) Serious breaches of *jus cogens* norms

The International Law Commission's Articles on Responsibility of States for internationally wrongful acts provide that a 'serious breach' by a State of an obligation arising under a peremptory norm of general international law – i.e. 'a gross or systematic failure by the responsible State to fulfil the obligation' – imposes on all States an obligation to co-operate in order to put an end to such a breach; an obligation not to recognize as lawful a situation created by such a breach; and an obligation not to 'render aid or assistance in maintaining that situation' (Arts. 40 and 41 of the ILC's Articles on Responsibility of States for internationally wrongful acts, *Official Records*

of the General Assembly, Fifty-sixth Session, Supplement 10 (A/56/10)). This seems to be the position expressed by the International Court of Justice in the Advisory Opinion it delivered on 9 July 2004 on the question of the legal consequences of the construction of a wall in the Occupied Palestinian Territory (for a reminder of the circumstances in which the Advisory Opinion was delivered, see chapter 2, section 1). After having found that the construction of the wall on Palestinian territory amounts to a violation of the right of the Palestinian peoples to self-determination, the Court states the following:

International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, 136 at 199:

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

1.4. Questions for discussion: treating human rights as *jus cogens* norms

1. There remain controversies both about the list of human rights that have acquired the status of *jus cogens*, and about the consequences that follow such characterization. Are the two questions linked? Should the list of norms considered to be peremptory norms of international law vary, depending on the precise consequence that one seeks to attach to this qualification? For instance, could there be a long list of human rights norms treated as *jus cogens* for the purpose of finding void any treaty conflicting with such norms, but a shorter list of norms which could justify setting aside rules relating to immunity where such rules appear to create obstacles to their full implementation?
2. What do the cases above teach us about how a norm – such as, in these cases, the prohibition of torture – evolves into one which is considered to have acquired the status of *jus cogens*? Has

the prohibition of torture evolved into a norm 'accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted', as defined in Article 53 of the Vienna Convention on the Law of Treaties, or is this rather the result of judicial law-making? Is there anything specific to the prohibition of torture, distinguishing it from other human rights norms, that would justify treating it, like a few other such norms, as *jus cogens*, while excluding other human rights norms from this qualification?

3. In the case of *Al-Adsani* v. *United Kingdom*, how would you characterize the disagreement between the majority of the European Court of Human Rights and the dissenting judges? Does this disagreement stem from a difference in opinion as regards the consequences to be drawn from the *jus cogens* character of the prohibition of torture? Or is it rather that the issue presented to the Court was framed differently by the majority and by the dissenting judges?
4. If indeed the prohibition of torture has the status of a *jus cogens* norm, this means, at a minimum, that any treaty conflicting with this prohibition will be treated as void: this would be the case, for instance, of a treaty through which two States would mutually undertake to extradite individuals suspected of having committed certain crimes even though they may be subjected to torture in the State requesting the extradition. But the cases above illustrate that the consequences of the *jus cogens* character of the prohibition of torture reach much further. What are the limits to such an extension? Does the *jus cogens* character of a norm justify setting aside all other rules of international law that may be an obstacle to its effective implementation, for example rules relating to the limits of State jurisdiction or to immunities? May a State ignore all such rules, in the name of seeking to improve compliance with a norm having a *jus cogens* status?

4.3 The *erga omnes* character of human rights obligations

Human rights treaties do not have as their primary goal the exchange of reciprocal rights and obligations between the contracting States (see further section 4.4. below). In contrast to diplomatic protection – which one State has a right to exercise in favour of its nationals under the jurisdiction of another State – the respect for human rights in one State therefore is of interest to no other State in particular. It is perhaps paradoxical therefore that such respect is of interest to the international community as a whole, allowing each State to pursue remedies against the State alleged to have violated its obligations under the human rights recognized under customary international law or as general principles of law. Article 48(1)(b) of the International Law Commission's Articles on the Responsibility of States for internationally wrongful acts (invocation of responsibility by a State other than an injured State), provides that 'Any State other than an injured State is entitled to invoke the responsibility of another State ... if ... the obligation breached is owed to the international community as a whole.' Any State therefore 'may claim from the responsible State: (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition ...; and (b) Performance of the obligation of reparation ..., in the interest of the injured State

or of the beneficiaries of the obligation breached'. As noted above, the International Court of Justice has mentioned, among the obligations which are *erga omnes* (owed to the international community as a whole), not only the prohibition of acts of aggression and of genocide, but also the right to self-determination; the rules of humanitarian international law applicable in armed conflict; and even 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination' (Case concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, Second phase (judgment of 5 February 1970), I.C.J. Reports 1970, 3, 32 (paras. 33–34): see above, section 4.2., b)).

International Court of Justice, *Legal Consequences cf the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, 136, at 199:

155. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes.* As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature 'the concern of all States' and, 'In view of the importance of the rights involved, all States can be held to have a legal interest in their protection' *(Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, I.C.J. Reports 1970, 32, para. 33). The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

156. As regards the first of these, the Court has already observed … that in the *East Timor* case, it described as 'irreproachable' the assertion that 'the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character' (I.C.J. Reports 1995, 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), … 'Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle …'

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* it stated that 'a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" …', that they are 'to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law' (I.C.J. Reports 1996 (I), 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.

Whether all human rights obligations recognized in general public international law are 'owed to the international community as a whole' remains debated. It would be incorrect to limit the range of rights imposing *erga omnes* obligations to those which have the status of *jus cogens*, which constitutes a narrower category, as stated by G. Arangio-Ruiz: '… the concept of *erga omnes* obligation is not characterized by the

importance of the interest protected by the norms – this aspect being typical of *jus cogens* – but rather by the "legal indivisibility" of the content of the obligation, namely by the fact that the rule in question provides for obligations which bind simultaneously each and every addressee with respect to all others. This legal structure is typical not only of peremptory norms, but also of other norms of general international law and of a number of multilateral treaty rules (*erga omnes partes* obligations)' (Fourth Report on State Responsibility, A/CN.4/444/Add. 1, at 31 (1992)). Neither should too much weight be attached to the adjective 'basic' before the expression 'rights of the human person' in the *dictum* of the *Barcelona Traction* Case, since such an expression is generic and should be seen as a mere paraphrase to designate the notion of human rights as 'fundamental' in the guarantees they provide. On the other hand, although some authors have taken the view that all human rights internationally recognized should be considered as imposing *erga omnes* obligations (F. Ermacora, in B. Simma *et al.* (eds.), *The Charter of the United Nations: a Commentary* (Oxford University Press, 1995), at pp. 152–3; I. Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (Antwerp-Oxford: Intersentia-Hart, 2001), chapter IV), this would seem to be contradicted by the judgment delivered by the International Court of Justice in the *Barcelona Traction* Case itself. While recognizing that human rights include protection against denial of justice, the Court then added:

International Court of Justice, case concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, Second phase (judgment), I.C.J. Reports 1970 3, 47 (para. 91):

However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member [at the time of the judgment], the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim.

This statement would be in complete contradiction with para. 34 of the same judgment referring to 'the principles and rules concerning the basic rights of the human person' as imposing *erga omnes* obligations if there were no distinction between core human rights which do impose such obligations, and other rights of the individual, which may only be protected in inter-State proceedings through the traditional channel of diplomatic protection: the right of the shareholders to the protection of the investments made through the establishment of a company with a separate legal personality, which were at stake in *Barcelona Traction* litigation, clearly belongs to the second category. It is true that Section 703(2) of the 1987 *Restatement* of the American Law Institute does provide that all human rights recognized in customary international law impose

obligations *erga omnes*: 'Any State may pursue international remedies against any other state for a violation of the customary law of human rights rights', it notes, since 'the customary law of human rights are *erga omnes*'. The comment attached to this clause explains that, as regards human rights recognized in customary international law, 'the international obligation runs equally to all other states, with no state a victim of the violation more than any other. Any state, therefore, may make a claim against the violating state.' However, the list of rights concerned, as we have seen (section 4.1., b)), is in fact quite limited, and certainly does not encompass the full range of the rights listed in the international bill of rights.

The effect of obligations being *erga omnes* concerns the question of standing: all States have a legal interest in using any available remedies in order to ensure that the obligations are complied with. However, in order for remedies to be used against the infringing State, the forum must have jurisdiction over the issue. For instance, while a number of international and regional human rights instruments provide for the possibility of inter-State complaints, these typically require a declaration of acceptance by the defending State, and are subject to a condition of reciprocity (for details, see chapter 9). Article 41 of the International Covenant on Civil and Political Rights thus provides that any State party to this instrument 'may at any time declare … that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.' The Human Rights Committee would not be authorized, under the pretext that the civil and political rights enumerated in the ICCPR impose obligations *erga omnes*, to ignore the limits to its jurisdiction which are imposed by this provision, for instance in order to deal with a communication presented by a State which has not itself accepted inter-state communications to be directed against it.

The *erga omnes* character of human rights obligations sometimes has been linked to the fact that human rights are a recognized exception to the principle of non-interference with the domestic affairs of States, as expressed in Article 2(7) of the UN Charter. Consider for instance the Resolution adopted on 13 September 1989 by the International Law Institute, which concerns all measures – 'diplomatic, economic and other' – which may be adopted by any State, where human rights are violated in another State:

International Law Institute, 'The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States', *Institut de Droit International Annuaire*, 63 (1989), 338:

The Institute of International Law, …

Considering [that] the protection of human rights as a guarantee of the physical and moral integrity and of the fundamental freedom of every person has been given expression in both the

constitutional systems of States and in the international legal system, especially in the charters and constituent instruments of international organizations;

That the members of the United Nations have undertaken to ensure, in co-operation with the Organization, universal respect for and observance of human rights and fundamental freedoms, and that the General Assembly, recognizing that a common understanding of these rights and freedoms is of the highest importance for the full realization of this undertaking, has adopted and proclaimed the Universal Declaration of Human Rights on 10 December 1948;

That frequent gross violations of human rights, including those affecting ethnic, religious and linguistic minorities, cause legitimate and increasing outrage to public opinion and impel many States and international organizations to have recourse to various measures to ensure that human rights are respected;

That these reactions, as well as international doctrine and jurisprudence, bear witness that human rights, having been given international protection, are no longer matters essentially within the domestic jurisdiction of States;

That it is nonetheless important, in the interest of maintaining peace and friendly relations between sovereign States as well as in the interest of protecting human rights, to define more precisely the conditions and limitations imposed by international law on the measures that may be taken by States and international organizations in response to violations of human rights

Adopts the following Resolution:

Article 1. Human rights are a direct expression of the dignity of the human person. The obligation of States to ensure their observance derives from the recognition of this dignity as proclaimed in the Charter of the United Nations and in the Universal Declaration of Human Rights.

This international obligation, as expressed by the International Court of Justice, is '*erga omnes*'; it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world.

Article 2. A State acting in breach of its obligations in the sphere of human rights cannot evade its international responsibility by claiming that such matters are essentially within its domestic jurisdiction.

Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations in case of violation of the obligations assumed by the members of the Organization, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any other State which has violated the obligation set forth in Article 1, provided such measures are permitted under international law and do not involve the use of armed force in violation of the Charter of the United Nations. These measures cannot be considered an unlawful intervention in the internal affairs of that State.

Violations justifying recourse to the measures referred to above shall be viewed in the light of their gravity and of all the relevant circumstances. Measures designed to ensure the collective protection of human rights are particularly justified when taken in response to especially grave violations of these rights, notably large-scale or systematic violations, as well as those infringing rights that cannot be derogated from in any circumstances.

Article 3. Diplomatic representations as well as purely verbal expressions of concern or disapproval regarding any violations of human rights are lawful in all circumstances.

Article 4. All measures, individual or collective, designed to ensure the protection of human rights shall meet the following conditions:

(1) except in case of extreme urgency, the State perpetrating the violation shall be formally requested to desist before the measures are taken;
(2) measures taken shall be proportionate to the gravity of the violation;
(3) measures taken shall be limited to the State perpetrating the violation;
(4) the States having recourse to measures shall take into account the interests of individuals and of third States, as well as the effect of such measures on the standard of living of the population concerned.

Article 5. An offer by a State, a group of States, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies to another State in whose territory the life or health of the population is seriously threatened cannot be considered an unlawful intervention in the internal affairs of that State. However, such offers of assistance shall not, particularly by virtue of the means used to implement them, take a form suggestive of a threat of armed intervention or any other measure of intimidation; assistance shall be granted and distributed without discrimination.

States in whose territories these emergency situations exist should not arbitrarily reject such offers of humanitarian assistance.

Article 6. The provisions of this Resolution apply without prejudice to the procedures prescribed in matters of human rights by the terms of or pursuant to the constitutive instruments and the conventions of the United Nations and of specialized agencies or regional organizations.

Article 7. It is highly desirable to strengthen international methods and procedures, in particular methods and procedures of international organizations, intended to prevent, punish and eliminate violations of human rights.

4.4 Human rights treaties as non-contractual in nature

Human rights treaties have an 'objective' character in that they are not reducible to bilateral exchanges of advantages between the contracting States (on the specificity of human rights treaties from this point of view, see E. Schwelb, 'The Law of Treaties and Human Rights', *Archiv des Völkerrechts*, 16 1 (1973), reprinted in W. M. Reisman and B. Weston (eds.), *Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal* (New York: Free Press, 1976), at p. 262; or M. Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', *European Journal of International Law*, 11, No. 3 (2000), 489–519). The principle has been put concisely by the Human Rights Committee: 'Such treaties, and the [International Covenant on Civil and Political Rights] specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights' (Human Rights Committee, General Comment No. 24 (1994), *Issues relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant*, at para. 17). The idea is not a new one. Consider the following statements:

International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, 19 (28 May 1951):

[The 1948 Convention on the Prevention and Punishment of the Crime of Genocide] was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.

European Commission on Human Rights, *Austria* v. *Italy (the 'Pfunders' Case)*, Appl. No. 788/60, *European Convention on Human Rights Yearbook*, 4 (1961), 116 at 140:

[The] purpose of the High Contracting Parties in concluding the [European Convention on Human Rights] was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realize the aims and ideals of the Council of Europe … and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideas, freedom and the rule of law. [Thus,] the obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.

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-American Court of Human Rights (Series A) No. 2 (1982) at para. 29:

[M]odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose 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. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.

The Vienna Convention on the Law of Treaties recognizes the specificity of human rights treaties by stating in Article 60(5) that the principle according to which the material breach of a treaty by one party authorizes the other party to terminate or suspend the agreement does not apply to 'provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'. The reason for this is obvious: the rule allowing termination or suspension of a treaty in cases of material breach is based on the idea of reciprocity, where the obligations imposed on one party are set for the benefit of the other parties to the treaty. But the beneficiaries of human rights treaties are not the other parties: they are the population under the jurisdiction of the States concerned. It would not only be unjustifiable for State A to take the population under its jurisdiction as hostages (threatening to violate their rights if State B violates the rights of its own peoples); this would also be totally ineffective as a means of dissuading States from breaching their obligations: why would State B care about the sake of the population under the jurisdiction of State A, if that population is led to suffer as a result of counter-measures adopted by that State? See further on this, R. Higgins, 'Human Rights: Some Questions of Integrity' (mistakenly titled 'The United Nations: Still a Force for Peace' due to an editorial error), *Modern Law Review*, 52, No. 1 (1989), 1–21 at 11.

An important consequence of this specific character of human rights treaties is the role which monitoring bodies, or courts, are to play in the supervision of human rights treaties. This role shall be particularly important under such treaties since the other States parties can hardly be counted upon to exercise the kind of horizontal control which, in usual treaties, provides the required disciplining function. This is illustrated, for instance, by the relatively few objections raised to the reservations filed by States upon entering a human rights treaty, or by the striking underuse by States of mechanisms allowing for inter-State complaints, both at the universal level and even, with some exceptions, at the regional level. It is therefore fitting that, in international human rights law, the function of international judicial or quasi-judicial bodies has been so prominent, in comparison to the classical (diplomatic) means of treaty supervision and interpretation. The controversies surrounding the question of reservations to human rights treaties provide an excellent illustration of this. It is to these controversies that we now turn.

4.5 Reservations to human rights treaties

A reservation is 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State' (Article 2 §1(d) of the Vienna Convention on the Law of Treaties of 23 May 1969). What matters is the intention of the State, rather than the form of the instrument, as noted by the Human Rights Committee: 'If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty

in its application to the State, it constitutes a reservation. Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation' (General Comment No. 24, *Issues relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant*, 4 November 1994, para. 4). The question whether reservations to multilateral human rights treaties should be treated under the same regime as reservations to classical treaties is one to which the International Court of Justice made an important contribution when it delivered its Advisory Opinion on the reservations to the Genocide Convention (a). The Vienna Convention on the Law of Treaties subsequently confirmed the solution proposed by the International Court of Justice. However, it has been recognized, both by the Inter-American Court of Human Rights and by the European Court of Human Rights, that human rights treaties were specific and that the general rules regarding reservations to multilateral treaties might therefore not apply to those instruments (b). These positions have led to a considerable discussion in doctrine (see, e.g. B. Simma, 'Reservations to Human Rights Treaties – Some Recent Developments', in Gerhard Hafner *et al.* (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern* (The Hague: Kluwer Law International, 1998), pp. 659–82; J. P. Gardner and C. Chinkin (eds.), *Human Rights as General Norms and a State's Right to Opt out: Reservations and Objections to Human Rights Conventions* (London: British Institute of International and Comparative Law, 1997), p. 207; and R. Baratta and I. Ziemele (eds.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Leiden: Martinus Nijhoff, 2004), p. 319). When the Human Rights Committee transposed the doctrine regarding the specificity of human rights treaties in the context of the International Covenant on Civil and Political Rights, this was resisted by States, who denounced this position as exceeding the competence of the Committee under the ICCPR (c).

(a) The regime of reservations in international law

We may take as departure point the Advisory Opinion adopted by the International Court of Justice in response to the request of the UN General Assembly, which sought the opinion of the Court on the following questions relating to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification, the General Assembly asked: 'I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others? II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and: (a) The parties which object to the reservation? (b) Those which accept it? III. What would be the legal effect as regards the answer to Question I if an objection to a reservation is made: (a) By a signatory which has not yet ratified? (b) By a State entitled to sign or accede but which has not yet done so?' The following excerpts concern the first of these questions:

International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, 19 (28 May 1951):

It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison d'etre of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.

This concept, which is directly inspired by the notion of contract, is of undisputed value as a principle. However, as regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention. Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations-all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.

It must also be pointed out that although the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations. This observation is confirmed by the great number of reservations which have been made of recent years to multilateral conventions.

In this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. Account should also be taken of the fact that the absence of such an article or even the decision not to insert such an article can be explained by the desire not to invite a multiplicity of reservations. The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.

Although it was decided during the preparatory work not to insert a special article on reservations, it is none the less true that the faculty for States to make reservations was contemplated at successive stages of the drafting of the Convention ...

Furthermore, the faculty to make reservations to the Convention appears to be implicitly admitted by the very terms of Question I.

The Court recognizes that an understanding was reached within the General Assembly on the faculty to make reservations to the Genocide Convention and that it is permitted to conclude therefrom that States becoming parties to the Convention gave their assent thereto. It must now determine what kind of reservations may be made and what kind of objections may be taken to them.

The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, inter se, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

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

The foregoing considerations, when applied to the question of reservations, and more particularly to the effects of objections to reservations, lead to the following conclusions.

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that

of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.

Any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes.

It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.

On the other hand, it has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view, however, cannot prevail if, having regard to the character of the convention, its purpose and its mode of adoption, it can be established that the parties intended to derogate from that rule by admitting the faculty to make reservations thereto.

It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law. The considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits one to state that such a rule exists, determining with sufficient precision the effect of objections made to reservations. In fact, the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule. It cannot be recognized that the report which was adopted on the subject by the Council of the League of Nations on June 17th, 1927, has had this effect. At best, the recommendation made on that date by the Council constitutes the point of departure of an administrative practice which, after being observed by the Secretariat of the League of Nations, imposed itself, so to speak, in the ordinary course of things on the Secretary-General of the United Nations in his capacity of depositary of conventions concluded under the auspices of the League. But it cannot be concluded that the legal problem of the effect of objections to reservations has in this way been solved. The opinion of the Secretary-General of the United Nations himself is embodied in the following passage of his report of September 21st, 1950: 'While it is universally recognized that the consent of the other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State's objecting to a reservation.'

It may, however, be asked whether the General Assembly of the United Nations, in approving the Genocide Convention, had in mind the practice according to which the Secretary-General, in exercising his functions as a depositary, did not regard a reservation as definitively accepted until it had been established that none of the other contracting States objected to it. If this were the case, it might be argued that the implied intention of the contracting parties was to make the effectiveness of any reservation to the Genocide Convention conditional on the assent of all the parties.

The Court does not consider that this view corresponds to reality. It must be pointed out, first of all, that the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom. It must also be pointed out that there existed among the American States members both of the United Nations and of the Organization of American States, a different practice which goes so far as to permit a reserving State to become a party irrespective of the nature of the reservations or of the objections raised by other contracting States. The preparatory work of the Convention contains nothing to justify the statement that the contracting States implicitly had any definite practice in mind. Nor is there any such indication in the subsequent attitude of the contracting States: neither the reservations made by certain States nor the position adopted by other States towards those reservations permit the conclusion that assent to one or the other of these practices had been given. Finally, it is not without interest to note, in view of the preference generally said to attach to an established practice, that the debate on reservations to multilateral treaties which took place in the Sixth Committee at the fifth session of the General Assembly reveals a profound divergence of views, some delegations being attached to the idea of the absolute integrity of the Convention, others favouring a more flexible practice which would bring about the participation of as many States as possible.

It results from the foregoing considerations that Question I, on account of its abstract character, cannot be given an absolute answer. The appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case.

The Advisory Opinion of the International Court of Justice on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* sparked an important literature (see, e.g. W. W. Bishop, 'Reservations to the Convention on Genocide. International Court of Justice, Advisory Opinion, May 28, 1951', *American Journal of International Law*, 45 (1951), 579–90; Sir G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points', *British Yearbook of International Law*, 33 (1957), 202–93, esp. 272–93; H. Lauterpacht, 'Some Possible Solutions to the Problem of Reservations to Treaties' in *The Grotius Society Transactions for the Year 1953*, 39 (1954), 97–118; P.-H. Imbert, *Les réserves aux traités multilatéraux. Evolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de justice le 28 mai 1951* (Paris: Pedone, 1979)). When the Vienna Convention on the Law of Treaties was drafted, Articles 19–23 relating to reservations clearly sought to echo the Court's views:

Vienna Convention on the Law of Treaties

Article 19 Formulation of reservations

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

(a) the reservation is prohibited by the treaty;

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

Article 20 Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

   (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
   (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
   (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21 Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

   (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
   (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22 Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.
2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.
3. Unless the treaty otherwise provides, or it is otherwise agreed:

   (a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;
   (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23 Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.
2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.
3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.
4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

(b) Reservations in the Inter-American and European systems

The position of the Inter-American Court of Human Rights

Article 75 of the American Convention on Human Rights allows for reservations provided they are 'in conformity with the provisions of the Vienna Convention on the Law of Treaties [of 1969]'. The explicit reference to the Vienna Convention would suggest a strict adherence to the general regime of reservations for multilateral treaties. The Inter-American Commission of Human Rights requested an Advisory Opinion of the Court concerning the consequences of reservations on the entry into force of the Convention. In its application, the Commission noted that under the general regime – and particularly under the provisions of Article 20(4)(c) and (5) of the Vienna Convention – a treaty's entry into force could depend on the acceptance of the reservation by other States. In deciding that this was not the case, the Court relied on the special nature of human rights treaties:

Inter-American Court of Human Rights, Advisory Opinion OC-2/82 of 24 September 1982 on the effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75), Series A, No. 2:

26. Having concluded that States ratifying or adhering to the Convention may do so with any reservations that are not incompatible with its object and purpose, the Court must now determine which provisions of Article 20 of the Vienna Convention apply to reservations made to the Convention. The result of this inquiry will of necessity also provide the answer to the question posed by the Commission. This is so because, if under the Vienna Convention reservations to the Convention are not deemed to require acceptance by the other States Parties, then for the here relevant purposes Article 74 of the Convention applies and a State ratifying or adhering to it with or without a reservation is deemed to be a State Party as of the date of the deposit of the instrument of ratification or adherence. [Vienna Convention, Art. 20 (1)] On the other hand, if acceptance of the reservation is required under the Vienna Convention, a reserving State would be deemed to become a State Party only on the date when at least one other State Party has accepted the reservation either expressly or by implication. [Vienna Convention, Art. 20(4)(c) and (5)] ...

28. In deciding whether the Convention envisages the application of paragraph 1 or paragraph 4 of Article 20 of the Vienna Convention, the Court notes that the principles enunciated in Article 20(4) reflect the needs of traditional multilateral international agreements which have as their object the reciprocal exchange, for the mutual benefit of the States Parties, of bargained for rights and obligations. In this context, and given the vastly increased number of States comprising the international community today, the system established by Article 20(4) makes considerable sense ...

29. The Court must emphasize, however, that modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose 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. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction ...

31. These views about the distinct character of humanitarian treaties and the consequences to be drawn therefrom apply with even greater force to the American Convention whose first two preambular paragraphs read as follows:

'Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states.'

32. It must be emphasized also that the Convention, unlike other international human rights treaties, including the European Convention, confers on private parties the right to file a petition

with the Commission against any State as soon as it has ratified the Convention. (Convention, Art. 44.) By contrast, before one State may institute proceedings against another State, each of them must have accepted the Commision's jurisdiction to deal with inter-State communications. (Convention, Art. 45.) This structure indicates the overriding importance the Convention attaches to the commitments of the States Parties vis-à-vis individuals, which can be readily implemented without the intervention of any other State.

33. Viewed in this light and considering that the Convention was designed to protect the basic rights of individual human beings irrespective of their nationality, against States of their own nationality or any other State Party, the Convention must be seen for what in reality it is: a multilateral legal instrument of framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction.

34. In this context, it would be manifestly unreasonable to conclude that the reference in Article 75 to the Vienna Convention compels the application of the legal regime established by Article 20(4), which makes the entry into force of a ratification with a reservation dependent upon its acceptance by another State. A treaty which attaches such great importance to the protection of the individual that it makes the right of individual petition mandatory as of the moment of ratification, can hardly be deemed to have intended to delay the treaty's entry into force until at least one other State is prepared to accept the reserving State as a party. Given the institutional and normative framework of the Convention, no useful purpose would be served by such a delay.

35. Accordingly, for the purpose of the present analysis, the reference in Article 75 to the Vienna Convention makes sense only if it is understood as an express authorization designed to enable States to make whatever reservations they deem appropriate, provided the reservations are not incompatible with the object and purpose of the treaty. As such, they can be said to be governed by Article 20(1) of the Vienna Convention and, consequently, do not require acceptance by any other State Party.

The Inter-American Court also discussed the issue of reservations in the case of *Hilaire* v. *Trinidad and Tobago*. That case was filed before the Inter-American Court by the Inter-American Commission on Human Rights one day before the denunciation by Trinidad and Tobago of the American Convention on Human Rights – a result of the ruling of the Judicial Committee of the Privy Council in *Pratt and Morgan* v. *Attorney General for Jamaica* (Privy Council Appeal No. 10/1993, 2 November 1994) (see below, box 1.5.) – took effect. In its application, the Inter-American Commission sought a statement from the Court to the effect that the mandatory death penalty was incompatible with the American Convention. In its ruling on preliminary objections, the Inter-American Court considered whether a reservation made to the recognition of compulsory jurisdiction of the Court was compatible with the object and purpose of the treaty. In accepting the jurisdiction of the Court, Trinidad and Tobago had declared that '[a]s regards Article 62 of the Convention, the Government of the Republic of Trinidad and Tobago, recognizes the compulsory jurisdiction of the Inter-American Court of Human Rights, as stated in the said article, only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of

Trinidad and Tobago; and provided that Judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen'. Article 62(2) of the American Convention allows States to accept the jurisdiction of the Court on the 'condition of reciprocity, for a specified period, or for specific cases'. The reservation made by Trinidad and Tobago went considerably further, and in fact amounted to making the exercise of jurisdiction by the Court conditional upon its compatibility to that State's internal legal order.

Inter-American Court of Human Rights, case of *Hilaire* v. *Trinidad and Tobago*, Preliminary Objections, judgment of 1 September 2001, Series C, No. 80:

82. Interpreting the Convention in accordance with its object and purpose, the Court must act in a manner that preserves the integrity of the mechanism provided for in Article 62(1) of the Convention. It would be unacceptable to subordinate the said mechanism to restrictions that would render the system for the protection of human rights established in the Convention and, as a result, the Court's jurisdictional role, inoperative …

86. [The] purported 'reservation' contains two parts. The first intends to limit the recognition of the Court's compulsory jurisdiction in the sense that said recognition is only valid to the extent that it is 'consistent with the relevant sections' of the Constitution of Trinidad and Tobago. These expressions can lead to numerous interpretations. Nonetheless, it is clear to the Court that they cannot be given a scope that would impede this Tribunal's ability to judge whether the State had or had not violated a provision of the Convention. The second part of the purported restriction relates to the State's 'recognition' of the Court's compulsory jurisdiction so that its judgments do not 'infringe, create or abolish any existing rights or duties of any private citizen' (*sic*). Again, though the precise meaning of this condition is unclear, without a doubt it cannot be utilized with the purpose of suppressing the jurisdiction of the Court to hear and decide an application related to an alleged violation of the State's conventional obligations …

88. The Court observes that the instrument of acceptance of the Court's compulsory jurisdiction on the part of Trinidad and Tobago is not consistent with the hypothesis stipulated in Article 62(2) of the American Convention. It is general in scope, which completely subordinates the application of the American Convention to the internal legislation of Trinidad and Tobago as decided by its courts. This implies that the instrument of acceptance is manifestly incompatible with the object and purpose of the Convention. As a result, the said article does not contain a provision that allows Trinidad and Tobago to formulate the 'restriction' it made …

92. The declaration formulated by the State of Trinidad and Tobago would allow it to decide in each specific case the extent of its own acceptance of the Court's compulsory jurisdiction to the detriment of this Tribunal's compulsory functions. In addition, it would give the State the discretional power to decide which matters the Court could hear, thus depriving the exercise of the Court's compulsory jurisdiction of all efficacy.

93. Moreover, accepting the said declaration in the manner proposed by the State would lead to a situation in which the Court would have the State's Constitution as its first point of reference, and the American Convention only as a subsidiary parameter, a situation which would cause a fragmentation of the international legal order for the protection of human rights, and which would render illusory the object and purpose of the Convention.

94. The American Convention and the other human rights treaties are inspired by a set of higher common values (centered around the protection of the human being), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties. The latter govern mutual interests between and among the States parties and are applied by them, with all the juridical consequences that follow there from for the international and domestic systems ...

98. For the foregoing reasons, the Court considers that Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory jurisdiction of the Inter-American Court of Human Rights in virtue of what has been established in Article 62 of the American Convention, because this limitation is incompatible with the object and purpose of the Convention. Consequently, the Court considers that it must dismiss the second and third arguments in the preliminary objection submitted by the State insofar as they refer to the Court's jurisdiction.

The position of the European Court of Human Rights

The views expressed by the Inter-American Court of Human Rights imply both that certain reservations may be invalid, since they would run counter to the object and purpose of the American Convention on Human Rights or to the recognition of the compulsory jurisdiction of the Court, and that it is for the Inter-American Court itself, rather than for the other States parties by the classic mechanism of objections, to decide on the validity of any reservations which any State may have expressed upon ratification or notification of its acceptance of the jurisdiction of the Court. The European Court of Human Rights was even more explicit in the *Belilos* v. *Switzerland* case of 1988 (Eur. Ct. H.R. (plen.), *Belilos* v. *Switzerland*, judgment of 29 April 1988, Series A No. 132). This judgment sparked a number of comments on the doctrine, because it constituted an implicit, albeit unmistakeable, departure from an understanding of the European Convention on Human Rights as a treaty of a traditional kind (see I. Cameron and F. Horn, 'Reservations to the European Convention: the *Belilos* Case', *German Yearbook of International Law*, 33 (1990), 69; S. Marks, 'Reservations Unhinged: the *Belilos* Case before the European Court of Human Rights', *International and Comparative Law Quarterly*, 39 (1990), 300; H. J. Bourguigon, 'The *Belilos* Case: New Lights on Reservations to Multilateral Treaties', *Virginia Journal of International Law*, 29 (1989), 347). In contrast to what is generally the case for multilateral treaties, States parties to human rights instruments generally omit to object to any reservations made by States upon acceding to such instruments, since a human rights treaty does not primarily grant them rights or advantages: rather, as we have seen, such a treaty has an 'objective' character, stipulating rights for the benefit of persons under the jurisdiction of the States parties (see above, section 4.4.). In addition, human rights treaties are often seen as merely embodying, in treaty form, obligations of States which are pre-existing, whether they have their source in customary international law or in the general

principles of law, and which are not at the disposal of States (see above, section 4.1.). These characteristics of human rights treaties may explain the attitude of the European Court of Human Rights in *Belilos* which, after it found the Swiss reservation to Article 6 §1 of the Convention to be invalid, considered that it should be 'severed' from the main undertakings of Switzerland under the Convention.

The context was the following. Upon ratifying the European Convention on Human Rights on 28 November 1974, Switzerland made the following declaration on the interpretation of Article 6 para. 1: 'The Swiss Federal Council considers that the guarantee of fair trial in Article 6, paragraph 1 of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge.' In the *Belilos* case, the Court was called upon to examine this reservation under then Article 64 of the Convention (now 57), which states:

1. Any State may, when signing the Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.
2. Any reservation made under this Article shall contain a brief statement of the law concerned.

The Court considered that it had jurisdiction to examine the validity of the Switzerland's reservation to the ratification of the Convention, citing in this regard Articles 19, 45 and 49 of the Convention, which relate to the powers of the Court (para. 50 of the judgment). It found that the reservation did not comply with the conditions imposed under Article 64 (now 57) of the Convention. The wording of the Swiss declaration, the Court noted, did 'not make it possible for the scope of the undertaking by Switzerland to be ascertained exactly, in particular as to which categories of dispute are included and as to whether or not the "ultimate control by the judiciary" takes in the facts of the case. They can therefore be interpreted in different ways, whereas Article 64 §1 requires precision and clarity. In short, they fall foul of the rule that reservations must not be of a general character' (para. 55); in addition, Switzerland has not included in its reservation a 'brief statement of the law concerned' as required by Article 64 para. 2 (now 57 para. 2) of the Convention, whereas the purpose of this provision, said the Court, 'is to provide a guarantee – in particular for the other Contracting Parties and the Convention institutions – that a reservation does not go beyond the provisions expressly excluded by the State concerned. This is not a purely formal requirement but a condition of substance. The omission in the instant case therefore cannot be justified even by important practical difficulties' (para. 59). The Court concluded that it could go on to proceed with the examination of whether Article 6 para. 1 ECHR had been violated (para. 60):

[T]he declaration in question does not satisfy two of the requirements of Article 64 of the Convention, with the result that it must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration. Moreover, the Swiss Government recognised the Court's competence to determine the latter issue, which they argued before it. The Government's preliminary objection must therefore be rejected.

(c) From regional to universal human rights treaties: the doctrine of the Human Rights Committee

The position adopted by the European Court of Human Rights in *Belilos* inspired the Human Rights Committee when it was confronted with the wide-ranging reservations appended by the United States to their accession to the International Covenant on Civil and Political Rights:

Reservations, understandings, and declarations entered by the United States upon ratifying the International Covenant on Civil and Political Rights (8 June 1992):

Reservations:

(1) That article 20 [of the Covenant, providing in particular that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'] does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

(2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age. [As stated in the initial report submitted by the United States to the Human Rights Committee, this reservation has been adopted in consideration of the fact that 'approximately half the states have adopted legislation permitting juveniles aged 16 and older to be prosecuted as adults when they commit the most egregious offences, and because the Supreme Court has upheld the constitutionality of such laws' (CCPR/C/81/Add. 4, 24 August 1994, para. 148)].

(3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States. [Again, the initial report submitted by the United States to the Human Rights Committee states: 'As such proceedings and practices have repeatedly withstood judicial review of their constitutionality in the United States, it was determined to be appropriate for the United States to condition its acceptance of the United Nations Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment on a formal reservation to the effect that the United States considers itself bound to the extent that "cruel, inhuman treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States. For the same reasons, and to ensure uniformity of interpretation as to the obligations of the United States under the Covenant and the Torture Convention on this point, the United States took the [reservation above] to the Covenant' (CCPR/C/81/Add. 4, 24 August 1994, para. 148)].

(4) That because US law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of article 15 [according to which: 'If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby'].

(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14. The United States further reserves to these provisions with respect to States with respect to individuals who volunteer for military service prior to age 18.

Understandings [(5), which relates to the responsibility of the federal government for the measures to be adopted by states and local authorities, has been omitted here: see chapter 2, box 2.1.]:

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status – as those terms are used in article 2, paragraph 1 and article 26 – to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination, in time of public emergency, based 'solely' on the status of race, colour, sex, language, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

(2) That the United States understands the right to compensation referred to in articles 9(5) and 14(6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

(3) That the United States understands the reference to 'exceptional circumstances' in paragraph 2(a) of article 10 to permit the imprisonment of an accused person with

convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.

(4) That the United States understands that subparagraphs 3(b) and (d) of article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3(e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause …

Declarations:

(1) That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.

(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to article 19, paragraph 3 which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

(3) That the United States declares that the right referred to in article 47 [right of all peoples to enjoy and utilize fully and freely their natural wealth and resources] may be exercised only in accordance with international law.

In reaction, the Human Rights Committee adopted a General Comment on the issue of reservations to the International Covenant on Civil and Political Rights (for a discussion, see C. J. Redgwell, 'Reservations to Treaties and Human Rights Committee General Comment No. 24(52)', *International and Comparative Law Quarterly*, 46 (1997), 390–412; on the question whether the specificity of human rights treaties justifies the approach of the Human Rights Committee, see R. Baratta, 'Should Invalid Reservations to Human Rights Treaties be Disregarded?', *European Journal of International Law*, 11 (2000), 413; K. Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights', *European Journal of International Law*, 13 (2002), 437).

Human Rights Committee, General Comment No. 24, *Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994 (CCPR/C/21/Rev.1/Add. 6):

[General approach of the Committee]

6. The absence of a prohibition on reservations [in the text of the Covenant] does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19(3) of the Vienna Convention on the Law of Treaties provides relevant guidance. It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.

[The object and purpose of the Covenant]

7. In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

9. Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (article 2(1)) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (article 2(2)).

10. The Committee has further examined whether categories of reservations may offend the 'object and purpose' test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character – the prohibition of torture and arbitrary deprivation of life are examples. While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. The Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy. The Covenant also envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.

12. The intention of the Covenant is that the rights contained therein should be ensured to all those under a State party's jurisdiction. To this end certain attendant requirements are likely to be necessary. Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level. Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted.

And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

13. The issue arises as to whether reservations are permissible under the first Optional Protocol [the text of which is silent on the issue of reservations] and, if so, whether any such reservation might be contrary to the object and purpose of the Covenant or of the first Optional Protocol itself. It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognize the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.

14. The Committee considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose. The Committee must control its own procedures as specified by the Optional Protocol and its rules of procedure. Reservations have, however, purported to limit the competence of the Committee to acts and events occurring after entry into force for the State concerned of the first Optional Protocol. In the view of the Committee this is not a reservation but, most usually, a statement consistent with its normal competence *ratione temporis*. At the same time, the Committee has insisted upon its competence, even in the face of such statements or observations, when events or acts occurring before the date of entry into force of the first Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date. Reservations have been entered which effectively add an additional ground of inadmissibility under article 5, paragraph 2, by precluding examination of a communication when the same matter has already been examined by another comparable procedure. In so far as the most basic obligation has been to secure independent third party review of the human rights of individuals, the Committee has, where the legal right and the subject-matter are identical under the Covenant and under another international instrument, viewed such a reservation as not violating the object and purpose of the first Optional Protocol …

[The competence of the Committee to determine the validity of the reservations made to the Covenant or to an additional protocol, and the consequences attached to a finding of invalidity]

16. The Committee finds it important to address which body has the legal authority to make determinations as to whether specific reservations are compatible with the object and purpose of the Covenant. As for international treaties in general, the International Court of Justice has indicated in the Reservations to the Genocide Convention Case (1951) that a State which objected to a reservation on the grounds of incompatibility with the object and purpose of a treaty could, through objecting, regard the treaty as not in effect as between itself and the reserving State. Article 20, paragraph 4, of the Vienna Convention on the Law of Treaties 1969 contains provisions most relevant to the present case on acceptance of and objection to reservations. This provides for the possibility of a State to object to a reservation made by another State. Article 21 deals with the legal effects of objections by States to reservations made by other States. Essentially, a reservation precludes the operation, as between the reserving and other States, of the provision reserved; and an objection thereto leads to the reservation being in operation as between the reserving and objecting State only to the extent that it has not been objected to.

17. As indicated above, it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41 [inter-state communications]. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party none the less does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States *inter se*. However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a

communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

[Requirements of specificity and transparency of reservations]
19. Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. When considering the compatibility of possible reservations with the object and purpose of the Covenant, States should also take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law. States should not seek through reservations or interpretative declarations to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any other international treaty body.

20. States should institute procedures to ensure that each and every proposed reservation is compatible with the object and purpose of the Covenant. It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for maintaining reservations is periodically reviewed, taking into account any observations and recommendations made by the Committee during examination of their reports. Reservations should be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdraw reservations.

Probably the most important affirmations of the general comment were that the Human Rights Committee had the power to decide on the validity of a reservation to the ICCPR, and that an invalid reservation could be detached from the main commitment to the ICCPR as expressed by its ratification. This position was heavily contested (see, in particular, Observations by France on General Comment 24, 4 *International Human Rights*

Reports, 4 (1997), 6; Observations by the United Kingdom on General Comment 24, 3 *International Human Rights Reports*, 3 (1996), 261; Observations by the United States on General Comment 24, *International Human Rights Reports*, 3 (1996), 265). In 1997, the International Law Commission (ILC) considered the question of the unity or diversity of the juridical regime for reservations. Stating to be 'aware of the discussion currently taking place in other forums on the subject of reservations to normative multilateral treaties, and particularly treaties concerning human rights', the ILC proposed the following conclusions:

International Law Commission, The unity or diversity of the juridical regime for reservations, Preliminary Conclusions of 1997:

1. The Commission reiterates its view that articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations;
2. The Commission considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;
3. The Commission considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions govern reservations to such instruments;
4. The Commission nevertheless considers that the establishment of monitoring bodies by many human rights treaties gave rise to legal questions that were not envisaged at the time of the drafting of those treaties, connected with appreciation of the admissibility of reservations formulated by States;
5. The Commission also considers that where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them;
6. The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties;
7. The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation;
8. The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role;

9. The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future;
10. The Commission notes also that, in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty;
11. The Commission expresses the hope that the above conclusions will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights;
12. The Commission emphasizes that the above conclusions are without prejudice to the practices and rules developed by monitoring bodies within regional contexts.

The Human Rights Committee was not deterred. Following the adoption of these 'Preliminary Conclusions' of the International Law Commission, the Chair of the Human Rights Committee, Ms Christine Chanet, wrote a letter to the Chair of the International Law Commission as well as to the Special Rapporteur on the issue of reservations to treaties, expressing her disagreement (UN Doc. A/53/40, vol. I, p. 95). Upon examining the initial report of the United States of America under the International Covenant on Civil and Political Rights, the Human Rights Committee listed among its 'principal subjects of concern' the following:

Concluding Observations of the Human Rights Committee: United States of America, 3 October 1995 (CCPR/C/79/Add. 50)):

279. The Committee regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.

In its most recent Concluding Observations regarding the United States, the Human Rights Committee 'welcomes the Supreme Court's decision in *Roper* v. *Simmons* [543 U.S. 551] (2005), which held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when

their crimes were committed. In this regard, the Committee reiterates the recommendation made in its previous concluding observations, encouraging the State party to withdraw its reservation to article 6(5) of the Covenant' (CCPR/C/USA/CO/3/Rev.1, 18 December 2006).

In expressing the view in its 1997 preliminary conclusions that 'in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action' (para. 10), the International Law Commission clearly questions what may be called the 'severability thesis' held both by the European Court of Human Rights and subsequently by the Human Rights Committee – i.e. allowing the treaty to be binding on a State party even though the reservation attached by that State to its ratification might be invalid. It has been remarked, however, that this thesis could in fact better respect the requirements of State consent, since the costs involved by the opposite, 'non-severability' thesis – obliging the State to withdraw from the treaty, and to re-enter without the reservation attached – might on average impose higher reputational costs on States:

Ryan Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent', *American Journal of International Law*, 96 (2002), 531 at 556:

The record of state treaty practice strongly suggests that error costs derived from a nonseverance presumption exceed those from a presumption favoring severance. In most of the cases, states have consented to having aspects of their legal system modified by international legal developments. In the strongest cases of this kind – newly established democracies – states often prefer locking as much of their domestic fates as practicable into international structures. An adjudicator's erroneous expulsion of a state from a treaty risks significant costs along two dimensions: international (e.g. a sovereignty impact from the state's expulsion against its will, reputational costs to the state's international standing, loss of a leadership or participatory role in the regime) and domestic (e.g. the unhinging of a wide array of judicially enforceable civil and political rights protections, facilitation of illiberal rollbacks). The result would probably involve significant transaction costs in the process of reratifying the agreement.

On the other hand, erroneous severance by the adjudicator, maintaining the state's membership in the treaty, would also risk significant, but seemingly more limited, costs: international (e.g. a sovereignty impact from the state's being held against its will) and domestic (e.g. the creation of legal obligations the state was not prepared to accept; the potential infringement of 'counter-rights', such as limiting freedom of speech in the name of regulating hate speech). In this situation, however, the state has a relatively easy recourse: withdrawal. This back-end solution helps prevent such errors from producing severe impacts. There are potential reputational costs to withdrawal, but these should be balanced against the fact that the state would have preferred expulsion in the first place.

Box 1.5. The denunciation by Trinidad and Tobago of the ICCPR and the American Convention on Human Rights

The position of the Human Rights Committee as expressed in its General Comment No. 24 was reaffirmed after Trinidad and Tobago decided to denounce the Optional Protocol on 26 May 1998, and then immediately re-entered this instrument on 26 August 1998, the day when the denunciation became effective. That denunciation, as well as the denunciation by Trinidad and Tobago of the American Convention on Human Rights, also notified on 26 May 1998, were alleged to be the only means the State concerned had at its disposal in order to comply with the ruling of the Judicial Committee of the Privy Council in *Pratt and Morgan* v. *Attorney General for Jamaica* (Privy Council Appeal No. 10/1993, 2 November 1994). This ruling determined that capital sentence appeals should be heard within a reasonable delay (twelve months from conviction), and that it should be possible for the international human rights bodies, such as the United Nations Human Rights Committee and the Inter-American Commission on Human Rights, to dispose of complaints submitted to them in death penalty cases at most within eighteen months, or the detention following conviction to the death penalty could be considered inhuman or degrading treatment. As the possibility of appeals before the Inter-American Commission and Court could exceed this delay by a large margin – the Inter-American Commission of Human Rights could not provide assurances that, in death penalty cases, the petitions would be expedited in order to meet the time-frame requirements set by the Judicial Committee of the Privy Council – the State considered itself obliged to denounce the American Convention on Human Rights. For similar reasons, Trinidad and Tobago alleged it had to denounce the Optional Protocol to the International Covenant on Civil and Political Rights.

When re-entering the Optional Protocol to the ICCPR, Trinidad and Tobago included a reservation under the terms of which it 're-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith'.

A further decision of the Judicial Committee of the Privy Council was announced in March 1999. According to this decision, the execution of any death sentences should be stayed until the Human Rights Committee or the Inter-American Commission and Court of Human Rights have been provided an opportunity to examine the merits of communications filed with them (Judicial Committee of the Privy Council, *Thomas and Hilaire* v. *Attorney General and others*, Privy Council Appeal No. 60 of 1998, appeal from the Court of Appeal of Trinidad and Tobago, 17 March 1999). The decision was based essentially on the reasoning that 'The appellants are contending that their trials were unfair, and hope in due course to obtain binding rulings from the [Inter-American Court of Human Rights] that their convictions should be quashed or their sentences should be commuted. For the Government to carry out the sentences of death before the petitions have been heard would deny the appellants their constitutional right to due process.' This decision also introduced an exception to the time-limits for the execution of the

death penalty introduced in *Pratt and Morgan* v. *Attorney General for Jamaica* [1994] 2 A.C. 1 at 33: the Judicial Committee noted 'the delay occasioned by the slowness of the international bodies in dealing with such petitions', but they took the view that such delays 'should not prevent the death sentence from being carried out. Where, therefore, more than 18 months elapses between the date on which a condemned man lodges a petition to an international body and its final determination, [they] would regard it as appropriate to add the excess to the period of 18 months allowed for in *Pratt*.'

Despite these justifications, the reservation attached by Trinidad and Tobago when it re-entered the Optional Protocol to the International Covenant on Civil and Political Rights prompted a number of objections from the EU Member States. And in *Kennedy* v. *Trinidad and Tobago*, following a communication submitted by a person sentenced to the death penalty, the Human Rights Committee decided that the reservation cited above was incompatible with the object and purpose of the Optional Protocol, and that accordingly the Committee was not precluded from considering the communication under the Optional Protocol; on 2 November 1999, it therefore declared the communication admissible. Trinidad and Tobago took the view that 'in registering the communication and purporting to impose interim measures under rule 86 of the Committee's rules of procedure, the Committee has exceeded its jurisdiction, and the State party therefore considers the actions of the Committee in respect of this communication to be void and of no binding effect'. On 27 March 2000, with effect on 27 June 2000, Trinidad and Tobago denounced the Optional Protocol to the ICCPR a second time. The Human Rights Committee nevertheless examined the merits of the communication, on which it adopted a decision on 26 March 2002 (see *Kennedy* v. *Trinidad and Tobago*, Communication No. 845/1998, CCPR/C/74/D/845/1998 (2002)). The Committee noted that the communication was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000 and that, in accordance with article 12(2) of the Optional Protocol, it therefore continued to be subject to the application of the Optional Protocol. It found that the case revealed a number of violations of the Covenant and that, therefore, the State party was under an obligation to provide the author of the communication with an effective remedy, including compensation and consideration of early release.

1.5. Questions for discussion: reservations to human rights treaties

1. Arguably, the intention of the International Court of Justice in adopting its Advisory Opinion of 1951 on the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, was to achieve a compromise between two conflicting objectives: (1) to make accession to the Convention attractive even for States which felt they might not be able immediately to comply with all the obligations imposed by that instrument, and (2) to impose certain limits as to which reservations are acceptable, based on whether or not they are compatible with the object and purpose of the treaty. Has the Court succeeded? Was the position of the Court

guided primarily by the humanitarian character of the Genocide Convention, or by the fact that it was a multilateral treaty seeking to achieve as wide a ratification as possible?

2. Does the Vienna Convention on the Law of Treaties express correctly the position of the International Court of Justice in its Advisory Opinion on the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide? Are the articles of the Vienna Convention on reservations adapted to the needs of human rights treaties?
3. The 1965 International Convention for the Elimination of All Forms of Racial Discrimination provides that 'A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it' (Art. 20(2)). Is this solution more appropriate than the one adopted for the International Covenant on Civil and Political Rights by the Human Rights Committee?
4. In its General Comment No. 24, the Human Rights Committee takes the view that 'provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations' (para. 8). Is this statement compatible with the principle recalled by the International Court of Justice – and already referred to above – that 'customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content' (case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States*) [1986] I.C.J. Reports 14, para. 179 (judgment of 27 June 1986 on the merits))? Is a State entering a reservation related to a guarantee codified in the International Covenant on Civil and Political Rights where this guarantee is part of customary international law 'reserving the right' to violate this guarantee, or is it merely excluding the possibility for the Committee to monitor compliance with that obligation?
5. In general international law, the compatibility of the reservation to a multilateral treaty with its object and purpose is based on the recorded objections to the said reservation expressed by other parties to the multilateral treaty. The shift away from these objections and towards the independent evaluation role of judicial or non-judicial bodies is justified, as regards human rights treaties, by the fact that States parties to multilateral human rights treaties generally show little interest in sanctioning non-compliance with those treaties by other parties. However, is this distrust also justified where objections are in fact expressed? Should such objections be determinative, when they are formulated by a sufficiently representative number of parties? In other terms, should human rights monitoring bodies be bound to conclude that a reservation cannot be accepted, where it has led to a large number of objections being raised?
6. Once a reservation is found to be invalid, how should we balance the respective merits of the 'severability' and 'non-severability' theses, as regards the consequences of such finding? Is the option of withdrawal from a treaty always realistic, politically and legally, for a State whose reservation expressed upon acceding to a multilateral human rights treaty is found invalid?

2

State Responsibility and 'Jurisdiction'

INTRODUCTION

This chapter examines the relevance of the notions of 'national territory' and of 'jurisdiction' to the determination of situations in which the international responsibility of States may be engaged. This has become one of the most debated issues in international human rights doctrine (see, among many others, the essays collected in F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp-Oxford: Intersentia-Hart, 2004); M. J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', *American Journal of International Law*, 99 (2005), 119; T. Meron, 'Extraterritoriality of Human Rights Treaties', *American Journal of International Law*, 89 (1995), 78; O. De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', *Baltic Yearbook of International Law*, 6 (2006), 183–245). The main question addressed in much of the literature is whether the notion of 'jurisdiction' (taken separately or in combination with that of 'territory') designates a condition for a finding of State responsibility which is distinct from that of attribution, or whether instead the two notions – 'jurisdiction' and 'attribution' – are in fact synonymous and thus interchangeable. And this is indeed the question this chapter focuses upon, although breaking it down into a set of sub-questions corresponding to the different situations in which the question of State responsibility can be raised.

The various human rights treaties differ in their formulations as to the requirements of 'jurisdiction' or of 'territory', in order to define their scope of application. Under Article 2 para. 1 ICCPR, 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction' the rights recognized in the Covenant. Article 2 para. 1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.' Similarly, under Article 2 para. 1 of the 1989 Convention on the Rights of the Child, 'States Parties shall respect and ensure the rights set forth in the present Convention

to each child within their jurisdiction.' Certain other UN instruments, although silent on the question of 'jurisdiction', contain a 'federal clause' which implicitly refers to the fact that they impose obligations which are primarily territorial: for instance, Article 4 para. 5 of the Convention on the Rights of Persons with Disabilities provides that it shall extend 'to all parts of federal states without any limitations or exceptions'. By contrast, the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not make reference to any notion of 'jurisdiction', 'competence', or 'territory', apparently implying that its obligations apply irrespective of the place where the alleged violation takes place: although, in its Advisory Opinion of 9 July 2004, the International Court of Justice considered that it could explain this silence 'by the fact that this Covenant guarantees rights which are essentially territorial' (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, 136 at para. 112), this assertion is made without any justification grounded either on the text of the Covenant or on its *travaux préparatoires*.

In general, the regional human rights instruments also provide that they will impose obligations on States owed to all persons under their jurisdiction. Although the African Charter on Human and Peoples' Rights makes no reference either to jurisdiction or to territory, Article 1 of the European Convention on Human Rights provides that the States Parties shall 'secure to everyone within their jurisdiction' the rights and freedoms recognized under that instrument. Similarly, Article 1 para. 1 of the American Convention on Human Rights states that: 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms'.

This chapter examines the interrelationship between the notion of 'jurisdiction', as a condition for engaging State responsibility, and the notions of 'territory' and 'effective control' which are sometimes treated, albeit wrongly, as synonymous. First, section 1 examines the question of whether the human rights obligations of States follow them when they occupy foreign territory, whether legally or in violation of international law. It then asks whether the obligations of States extend to all situations arising on their national territory, even in cases where certain portions of the territory are not under the effective control of the State concerned. Section 2 examines, instead, which extra-territorial obligations may be imposed on States. This latter question, in turn, requires that we distinguish between (a) the responsibility of States for the activities of State agents operating outside the national borders; (b) the responsibility of States for the failure to protect human rights beyond the national territory; and (c) the obligations of international assistance and co-operation imposed under certain human rights treaties, particularly in order to impose on developed States to assist developing States in the realization of economic and social rights on their territory. Section 3 considers the specific questions of international responsibility that may arise when States co-operate internationally, and when the alleged violation of human rights results from their joint action.

1 NATIONAL TERRITORY AND 'EFFECTIVE CONTROL'

1.1 Occupied foreign territory

Even where it should play a central role in determining the scope of the 'jurisdiction' of a State for the purpose of defining the extent of its human rights obligations, the notion of 'national territory' should not necessarily be construed as limited to the territory which falls under the sovereignty of that State, as recognized under international law. The 'jurisdiction' of a State may extend beyond its national territory, where that State exercises effective control, for instance following a military invasion, of other portions of territory. It should not matter whether such occupation is, under international law, legal or illegal. Referring in this regard to the position of the International Court of Justice, the European Court of Human Rights has remarked that 'international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths and marriages', 'the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory' (Eur. Ct. H.R., *Loizidou* v. *Turkey*, judgment of 18 December 1996 (preliminary objections and merits), para. 45, referring to International Court of Justice, Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1970 16 at 56, para. 125). For similar reasons, the human rights obligations of the State illegally occupying foreign territories should extend to such territories under occupation: any other solution would result in depriving the population under occupation from the protection of human rights instruments, for the sole reason that the occupation is illegal under international law, which would be highly paradoxical.

European Court of Human Rights, *Loizidou* v. *Turkey*, judgment of 23 March 1995 (preliminary objections), Series A, No. 310:

[The applicant, a Cypriot national, is the owner of plots of land located in northern Cyprus, in an area occupied by the Turkish forces since their invasion of northern Cyprus on 20 July 1974, and now administered by the 'Turkish Republic of Northern Cyprus' (TRNC), a puppet regime not recognized by the international community. The applicant and the Cypriot Government maintained that ever since the Turkish occupation of northern Cyprus the applicant has been denied access to her property and has, consequently, lost all control over it: she has thus been prevented in the past, and is still prevented, by Turkish forces from returning to her land and 'peacefully enjoying' her property. In their submission this constituted a continued and unjustified interference with her right to the peaceful enjoyment of property in breach of Article 1 of Protocol No. 1 as well as a continuing violation of the right to respect for her home under Article 8 of the Convention. In a first judgment of 23 March 1995 on the preliminary objections raised by Turkey, the Court held that her application was 'capable of falling within' Article 1 of the Convention (at paras. 56–64), and that Turkey's territorial reservations were invalid (at paras. 65–89). In its judgment on the merits, delivered on 18 December 1996, the Court addresses the question whether the acts complained of are imputable to Turkey.]

62. [The] Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of 'jurisdiction' under the provision is not restricted to the national territory of the High Contracting Parties. According to its established case law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention [Eur. Ct. H.R., *Soering* v. *United Kingdom*, judgment of 7 July 1989 (see below, section 3.1. of this chapter)]. In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory [Eur. Ct. H.R., *Drozd and Janousek* v. *France and Spain*, judgment of 26 June 1992, para 91]. Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

63. In this connection the respondent Government have acknowledged that the applicant's loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the 'TRNC' [the 'Turkish Republic of Northern Cyprus']. Furthermore, it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property.

64. It follows that such acts are capable of falling within Turkish 'jurisdiction' within the meaning of Article 1 of the Convention. Whether the matters complained of are imputable to Turkey and give rise to State responsibility are thus questions which fall to be determined by the Court at the merits phase.

European Court of Human Rights, *Loizidou* v. *Turkey*, judgment of 18 December 1996 (preliminary objections and merits), paras. 49–57:

49. The applicant insisted … that the present case was exceptional in that the authorities alleged to have interfered with the right to the peaceful enjoyment of possessions are not those of the sole legitimate Government of the territory in which the property is situated. That particularity entailed that, in order to determine whether Turkey is responsible for the alleged violation of her rights under Article 1 of Protocol No. 1 with respect to her possessions in northern Cyprus, the Court should take into account the principles of State responsibility under international law. In this context Mrs Loizidou repeated her criticism that the Commission had focused too much on the direct involvement of Turkish officials in the impugned continuous denial of access. Whilst evidence of direct involvement of Turkish officials in violations of the Convention is relevant, it is not a legal condition of responsibility under public international law.

She went on to contend that the concept of State responsibility rested on a realistic notion of accountability. A State was responsible in respect of events in the area for which it is internationally responsible, even if the conduct or events were outside its actual control. Thus, even acts of officials which are *ultra vires* may generate State responsibility.

According to international law, in the applicant's submission, the State which is recognised as accountable in respect of a particular territory remained accountable even if the territory is administered by a local administration. This was the legal position whether the local administration is illegal, in that it is the consequence of an illegal use of force, or whether it is

lawful, as in the case of a protected State or other dependency. A State cannot by delegation avoid responsibility for breaches of its duties under international law, especially not for breaches of its duties under the Convention which, as illustrated by the wording of Article 1 of the Convention, involve a guarantee to secure Convention rights.

Mrs Loizidou maintained that the creation of the 'TRNC' was legally invalid and no State, except Turkey, or international organisation has recognised it. Since the Republic of Cyprus obviously cannot be held accountable for the part of the island occupied by Turkey, it must be Turkey which is so accountable. Otherwise the northern part of Cyprus would constitute a vacuum as regards responsibility for violations of human rights, the acceptance of which would be contrary to the principle of effectiveness which underlies the Convention. In any case there is overwhelming evidence that Turkey has effective overall control over events in the occupied area. She added that the fact that the Court, at the preliminary objections phase of the present case, had found Turkey to have jurisdiction created a strong presumption of Turkish responsibility for violations occurring in the occupied area.

50. According to the Cypriot Government, Turkey is in effective military and political control of northern Cyprus. It cannot escape from its duties under international law by pretending to hand over the administration of northern Cyprus to an unlawful 'puppet' regime.

51. The Turkish Government denied that they had jurisdiction in northern Cyprus within the meaning of Article 1 of the Convention. In the first place they recalled the earlier case law of the Commission which limited the jurisdiction of Turkey 'to the border area and not to the whole of northern Cyprus under the control of the Turkish Cypriot authorities' (see the Commission's decisions on the admissibility of applications nos. 6780/74, 6950/75 and 8007/77). In the second place, the presumption of control and responsibility argued for by the applicants was rebuttable. In this respect it was highly significant that the Commission in the *Chrysostomos and Papachrysostomou* v. *Turkey* report of 8 July 1993 found that the applicants' arrest, detention and trial in northern Cyprus were not 'acts' imputable to Turkey. Moreover, the Commission found no indication of control exercised by the Turkish authorities over the prison administration or the administration of justice by Turkish Cypriot authorities in the applicant's case …

In addition, the Turkish Government contended that the question of jurisdiction in Article 1 of the Convention is not identical with the question of State responsibility under international law. Article 1 was not couched in terms of State responsibility. In their submission this provision required proof that the act complained of was actually committed by an authority of the defendant State or occurred under its direct control and that this authority at the time of the alleged violation exercised effective jurisdiction over the applicant.

Furthermore they argued that seen from this angle, Turkey had not in this case exercised effective control and jurisdiction over the applicant since at the critical date of 22 January 1990 [when Turkey declared that it recognized the compulsory jurisdiction of the European Court of Human Rights for all matters relating to its exercise of its jurisdiction in the meaning of Article 1 ECHR] the authorities of the Turkish Cypriot community, constitutionally organised within the 'TRNC' and in no way exercising jurisdiction on behalf of Turkey, were in control of the property rights of the applicant.

In this context they again emphasised that the 'TRNC' is a democratic and constitutional State which is politically independent of all other sovereign States including Turkey. The administration in northern Cyprus has been set up by the Turkish Cypriot people in the exercise of its right to self-determination and not by Turkey. Moreover, the Turkish forces in northern Cyprus are there for

the protection of the Turkish Cypriots and with the consent of the ruling authority of the 'TRNC'. Neither the Turkish forces nor the Turkish Government in any way exercise governmental authority in northern Cyprus. Furthermore, in assessing the independence of the 'TRNC' it must also be borne in mind that there are political parties as well as democratic elections in northern Cyprus and that the Constitution was drafted by a constituent assembly and adopted by way of referendum.

52. As regards the question of imputability, the Court recalls in the first place that in its *Loizidou* v. *Turkey* judgment of 23 March 1995 (preliminary objections), Series A no. 310 (pp. 23–24, para. 62) it stressed that under its established case law the concept of 'jurisdiction' under Article 1 of the Convention is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration (see the above-mentioned *Loizidou* judgment (preliminary objections), *ibid.*).

53. In the second place, the Court emphasises that it will concentrate on the issues raised in the present case, without, however, losing sight of the general context.

54. It is important for the Court's assessment of the imputability issue that the Turkish Government have acknowledged that the applicant's loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the 'TRNC' (see the above-mentioned preliminary objections judgment, p. 24, para. 63). Furthermore, it has not been disputed that the applicant has on several occasions been prevented by Turkish troops from gaining access to her property ...However, throughout the proceedings the Turkish Government have denied State responsibility for the matters complained of, maintaining that its armed forces are acting exclusively in conjunction with and on behalf of the allegedly independent and autonomous 'TRNC' authorities ...

56. ... It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus ... that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC' ... Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.

In view of this conclusion the Court need not pronounce itself on the arguments which have been adduced by those appearing before it concerning the alleged lawfulness or unlawfulness under international law of Turkey's military intervention in the island in 1974 since, as noted above, the establishment of State responsibility under the Convention does not require such an enquiry (see para. 52 above). It suffices to recall in this context its finding that the international community considers that the Republic of Cyprus is the sole legitimate Government of the island and has consistently refused to accept the legitimacy of the 'TRNC' as a State within the meaning of international law ...

57. It follows from the above considerations that the continuous denial of the applicant's access to her property in northern Cyprus and the ensuing loss of all control over the property is a matter which falls within Turkey's 'jurisdiction' within the meaning of Article 1 and is thus imputable to Turkey.

Thus, what is determinative for the existence of 'jurisdiction' is effective control, rather than the formal existence of sovereignty. This view has been shared, broadly, by the UN human rights treaty bodies. For instance, in its Concluding Observations/ Comments on Israel, the Human Rights Committee noted that 'the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law' (see Concluding Observations/Comments on Israel (1999) (UN Doc. CCPR/C/79/Add. 93), para. 10; Concluding Observations/Comments on Israel (2003) (UN Doc. CCPR/CO/78/ISR), para. 11). The same position is adopted under the International Covenant on Economic, Social and Cultural Rights by the Committee on Economic, Social and Cultural Rights, which expresses the view that 'the State party's obligations under the Covenant apply to all territories and populations under its effective control' (Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 23 May 2003 (E/C.12/1/ Add. 90), at para. 31). This has been spectacularly endorsed by the International Court of Justice:

International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), I.C.J. Reports 2004, 136, paras. 107–13:

[By Resolution ES-10/14 adopted on 8 December 2003, the General Assembly of the United Nations requested from the International Court of Justice, in accordance with Article 96 of the Charter of the United Nations and pursuant to Article 65 of the Statute of the Court, urgently to render an Advisory Opinion on the following question: 'What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?' Part of the opinion relates to the obligations of Israel under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention on the Rights of the Child. However, Israel denies that the ICCPR and the ICESCR, both of which it has ratified, are applicable to the occupied Palestinian territory. The portions of the Advisory Opinion extracted below express the view of the Court on this issue.]

107. It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.

108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

This provision can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos* v. *Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego* v. *Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero* v. *Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, *vis-à-vis* their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, *Official Records of the General Assembly, Tenth Session, Annexes*, A/2929, Part II, chap. V, para. 4 (1955)).

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee. In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question 'whether individuals resident in the occupied territories were indeed subject to Israel's jurisdiction' for purposes of the application of the Covenant (CCPR/C/SR.1675, para. 21). Israel took the position that 'the Covenant and similar instruments did not apply directly to the current situation in the occupied territories' (*ibid.*, para. 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel's attitude and pointed 'to the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein' (CCPR/C/79/Add. 93, para. 10). In 2003 in face of Israel's consistent position, to the effect that 'the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza …', the Committee reached the following

conclusion: 'in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law' (CCPR/CO/78/ISR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

112. The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State which 'at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge'.

It is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights. In its initial report to the Committee of 4 December 1998, Israel provided 'statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied Territories'. The Committee noted that, according to Israel, 'the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant' (E/C.12/1/Add. 27, para. 8). The Committee expressed its concern in this regard, to which Israel replied in a further report of 19 October 2001 that it has 'consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction' (a formula inspired by the language of the International Covenant on Civil and Political Rights). This position, continued Israel, is 'based on the well-established distinction between human rights and humanitarian law under international law'. It added: 'the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights' (E/1990/6/Add. 32, para. 5). In view of these observations, the Committee reiterated its concern about Israel's position and reaffirmed 'its view that the State party's obligations under the Covenant apply to all territories and populations under its effective control' (E/C.12/1/Add. 90, paras. 15 and 31).

For the reasons explained in paragraph 106 above, the Court cannot accept Israel's view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

113. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which 'States Parties shall respect and ensure the rights set forth in the ... Convention to each child within their jurisdiction ...' That Convention is therefore applicable within the Occupied Palestinian Territory.

2.1. Question for discussion: extending the applicability of human rights treaties to territories occupied in violation of international law

1. Is there any risk in extending the applicability of human rights treaties to all territories occupied by a State party, even in violation of international law? Could this have the paradoxical effect of reinforcing the camp of those, within the occupying State concerned, who wish the occupation to become permanent and the control over the occupied territory more complete (see for instance the *Al-Skeini* case discussed below, in section 2.1. of this chapter)? Is there any way to mitigate this potential impact? Would it be more advisable to treat 'jurisdiction', rather than in an all-or-nothing fashion, along a sliding scale, with the scope of human rights obligations being more or less extended, depending on the degree of military occupation and, for instance, on the question of whether or not the Occupying Power also manages the educational or health systems? Or should a distinction be made between the imposition of obligations to respect human rights, and the imposition of obligations to protect and to fulfill human rights (for these different categories of State obligations, see chapter 3, section 1)?
2. In *Loizidou*, what seems to be the main reason for extending the applicability of the European Convention on Human Rights to the northern part of Cyprus, occupied by the Turkish armed forces since 1974? If the main concern is that the population in that part of the island would be deprived of the protection of the ECHR which it enjoyed before the Turkish invasion, does it mean, *a contrario*, that if the occupied territory had been located outside the territory of the Member States of the Council of Europe, the ECHR should not have been found applicable? Consider in this respect the discussion in section 2.1. of this chapter, and particularly the characterization, in the decision adopted by the European Court of Human Rights in the *Bankovic* case, of the ECHR as operating 'in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States' (para. 80).

1.2 The inability of the State to control all the national territory

It has been recalled that, where a State exercised on a foreign territory a form of control comparable to that of a territorial sovereign, assuming the governmental powers generally associated therewith, the situations occurring on that territory should be considered to fall under its 'jurisdiction' in the meaning of Article 1 ECHR or of other equivalent provisions of other human rights treaties. In their partly dissenting opinion to the judgment of the European Court of Human Rights in *Ilascu and others* v. *Moldova and Russia*, Judge Sir Nicolas Bratza, joined by Judges Rozakis, Hedigan, Thomassen and Pantîru, applying this logic *a contrario*, take the view that 'the presumption that persons within the territory of a State are within its "jurisdiction" for Convention purposes is a rebuttable one and, exceptionally, the responsibility of a State will not be engaged in respect of acts in breach of the Convention which occur within its territory' (judgment of 8 July 2004; for a more detailed discussion of this case, see also below, section 2.2.). In both situations, 'jurisdiction' thus would derive from control

(on the idea that responsibility follows control in the law of State responsibility, see C. Eagleton, 'International Organization and the Law of Responsibility', *Recueil des cours*, 76 (1950), 385). Far from being determinative, then, the fact that a particular event occurs on the national territory only would serve to establish a *presumption of control*: 'jurisdiction' should extend to the situations effectively under the control of the State, and in which the State may ensure the protection of the full range of the rights protected under the Convention; but it should be limited, conversely, where a State is *de facto* unable to exercise its governmental powers on some portions of the national territory.

Indeed, this was the position adopted by the European Court of Human Rights in the 2001 case of *Cyprus* v. *Turkey*, where the Court justified reiterating its conclusion that northern Cyprus was under the 'jurisdiction' of Turkey 'having regard to the ... *continuing inability [of the Government of Cyprus] to exercise their Convention obligations in northern Cyprus*, [so that] any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court' (Eur. Ct. H.R. (GC), *Cyprus* v. *Turkey* (Appl. No. 25781/94), judgment of 10 May 2001, §78, E.C.H.R. 2001–IV (emphasis added)). That statement seemed to imply, first, that the 'jurisdiction' of a State party to the Convention could not be considered to extend to the whole of the national territory if, on certain portions of that territory, the State is unable in fact to exercise its control in order to effectively guarantee the rights and freedoms set forth in the Convention; second, that the notion of 'jurisdiction' is an all-or-nothing concept, in the sense that any single event falls under the jurisdiction either of State A or of State B, depending on which State effectively could have controlled the event and, therefore, may be held internationally responsible for not having ensured compliance with the rights and freedoms recognized under the Convention. However, this view seems to be challenged by the judgment delivered by the European Court of Human Rights in the case of *Ilascu and others* v. *Moldova and Russia*. Although the Court finds that 'the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, *does not exercise authority over part of its territory*, namely that part which is under the effective control of the [Moldavian Republic of Transdniestria]' [emphasis added], the Court does not conclude therefrom that – it being impossible for Moldova to exercise its jurisdiction on the said territory – this State may not be held responsible for what occurs in the region concerned. Instead, the Court considers that '*even in the absence of effective control over the Transdniestrian region*, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention' (paras. 330–1) [emphasis added]. In the approach the Court took to the Cypriot cases, jurisdiction was an all-or-nothing concept, which therefore could constitute a threshold question to be answered before

examining whether the alleged violation may be attributed to the State and whether the State has violated its obligations under the Convention. In *Ilascu and others*, jurisdiction appears as a relative concept, a matter of degree determining the scope of the obligations of the State concerned:

European Court of Human Rights (GC), *Ilascu and others* v. *Moldova and Russia* (Appl. No. 48787/99), judgment of 8 July 2004, para. 333:

[W]here a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State.

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

It will be useful to contrast the *Ilascu and others* judgment with the attitude of the Court in its *Assanidze* v. *Georgia* judgment, delivered by the Grand Chamber only three months earlier. The applicant in this case had been held in custody in the Ajarian Autonomous Republic in Georgia since 1993, after having been arrested and convicted for allegedly illegal financial dealings. Although the Georgian President had granted him a pardon in 1999 suspending the remaining two years of his sentence, he had remained in detention. Indeed, soon after the presidential decree granting the pardon had been adopted, the Ajarian High Court had declared the pardon null and void, and the judgments of the Georgian Supreme Court quashing that latter judgment had been ignored by the local authorities in the Ajarian Autonomous Republic. After the applicant was again convicted on another ground in 2000 by the Ajarian High Court, the Supreme Court of Georgia acquitted him. That acquittal judgment also was never executed, however. Despite all the best efforts of the General Prosecutor's Office of Georgia, the Public Defender, the Georgian Ministry of Justice and the Legal Affairs Committee of the Georgian Parliament, and even the President of the Republic of Georgia, seeking the immediate release of Mr Assanidzé, the local authorities concerned in the Ajarian Autonomous Republic refused to comply, apparently believing that he has been conspiring against the President of the Autonomous Republic.

When the question whether Mr Assanidzé was being subjected to arbitrary detention in violation of Article 5(1) ECHR was presented to the European Court of Human Rights, the Georgian Government 'accepted that the Ajarian Autonomous Republic was an integral part of Georgia and that the matters complained of were within the