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**CONSTITUTIONALISM IN AN AGE OF
GLOBALISATION AND GLOBAL THREATS**

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Introduction

We meet in a time of exceptional challenges for humanity: global climate may be overheating; water is short; food is getting scarcer; energy is short; people are on the move in search of livelihood; there is great contestation between societies; poverty is widespread; there are many continuing conflicts; the international economic system favours the strong over the weak in an accelerating globalising world; international terrorism has struck in many places; gross violations of human rights are commonplace; inequality and discrimination is rife; governance is poor in many parts of the world; the will of the people is flouted with indecency in some countries and international pressure has been without effect on those doing the flouting; and international authority is weak. Where is the place for constitutionalism in the midst of all of this? The constitutionalism of the future will have to grapple with new threats and challenges, nationally, regionally, and internationally, mindful of the phenomenon and tensions of globalisation.

In the words of an African author:

“The fundamental political conflict in the coming decades will be between the forces of globalisation and the various forms of locally based social movements in both the North and the South seeking to redefine a just, democratic, and sustainable new world order. It is therefore important to identify potential agents of transformation in diverse contexts and to build a durable transnational civil society movement to check the excesses of the forces of globalization.”²

Globalization, Human Rights and Human Dignity

Globalisation is a process that has been underway for centuries. It involves the spread of trade, communications, people, ideas, culture and values. Globalisation has some positive attributes. In the twentieth century the human rights idea was itself being globalized. The idea of the universality of human rights, namely that all human beings have, and should enjoy, basic human rights, is a key tenet of our world. But economic globalisation can make it harder for smaller countries to survive and prosper. Globalisation is not necessarily altruistic as countries seek to advance their interests. It expands, but its results are uneven. There must therefore be an international policy framework on the future of globalisation and the way it impacts the lives of people world-wide.

The human rights idea proceeds from the point of departure that everyone is entitled to a social and international order in which the rights in the Universal Declaration can be achieved across the globe. It is the intersection of these two currents, globalisation and global human rights, that provides the backdrop for our consideration of constitutionalism in an age of globalisation. Economic and communications globalisation will undoubtedly go forward. But will the globalisation of human rights values go forward likewise, in norms and in practice? The evidence so far gives cause for concern and points to the need for strengthening of the international policy and legal framework.

Some argue that it is through political and economic freedom that one can advance growth and development. Some argue that globalisation brings benefits economically and that the challenge is to see that they are shared by all. But should economic freedom lead to the further marginalisation and impoverishment of vast numbers of the world's population? The human rights answer to this is a firm no. The Universal Declaration is the core international policy document that must have an influence on the future of globalisation. Systems of governance and economic and social activities must have as their targets the realization of basic human rights. This should be at the heart of the constitutionalism of the future, nationally, regionally, and internationally.

The synthesis of globalisation and human rights, in our view, would be the pursuit of human rights strategies of governance. Governments should have as their priority objective the realization of the basic rights contained in the Universal Declaration. The key

² Fantu Cheru, “New Social Movements, Democratic Struggles and Human Rights in Africa”, in J.H. Mittleman (Ed.), *Globalization. Critical Reflections* (Boulder, London, Lynne Rienner Publishers, 1997) pp 145-164 at p. 164.

civil and political rights are mandatory and immediate: no one should torture or enslave another human being. Some of the economic and social rights are to be realized progressively provided that there is no discrimination in the allocation of available resources.

Human rights strategies of governance apply not only to governments but to all organs of society, including corporations. It should be the shared mission of all to advance the basic rights, and none should be guilty of violating them. This is particularly important in the case of corporations. The United Nations Global Compact with business seeks to encourage corporations to contribute to human rights causes. A related but somewhat different approach was advanced in the former United Nations Sub-Commission on the Promotion and Protection of Human Rights, namely that there should be a human rights code of conduct for corporations. There is room for further dialogue here.

How can one ensure respect for human rights in a globalizing world? A key point of departure is that all governments should commit themselves to abide by the core international human rights conventions. This requires the emplacement, in all countries, of adequate and effective national human rights protection systems. United Nations human rights work should increasingly emphasize the importance of effective national protection systems in each country.

As a point of departure of the responsibility to protect, it is also crucial to identify and take urgent corrective measures in respect of the plight of the vulnerable and the extreme poor in our societies. The international community should bring to the fore two concepts, namely gross violations of economic and social rights and the concept of preventable poverty. There are many situations where more efficient and equitable governance, using the resources already available to a state, could prevent the incidence of extreme poverty. This would be a way of giving human rights practical relevance to the poor and the vulnerable.

From this it follows that the push for better governance must be a basic tenet of our globalising world. Better governance involves constitutional democracy, participatory governance and the rule of law grounded in international human rights law. In short, international human rights law must be the indispensable legal and policy framework for a globalising world and the responsibility to protect must be shared by all.

The Concept of Constitutionalism

One of the great international and constitutional lawyers of our times, Professor Louis Henkin, has given us a magisterial presentation of the concept of constitutionalism. At the end of the twentieth century, he wrote, virtually every State has a constitution and, with rare exception, the constitution is a written formal document. Generally, a constitution sets forth the forms and institutions of government. Usually, it expresses or reflects a political-economic ideology, including the principles governing relations between individual and society.³

No two constitutions, he continued, are or should be the same. But whether a constitution prescribes for a unitary or federal State, a presidential or a parliamentary system, a socialist, free-market or mixed economy, a constitution that is authentically *constitutionalist* must secure constitutional legitimacy and constitutional review, authentic democracy, accountable government and one that will respect and ensure individual human rights and secure basic human needs.⁴

This is a superb statement of constitutionalism. We would add, however, that having regard to contemporary threats and challenges, the constitutionalism of the future must also embrace the following additional elements:

- Human solidarity for the preservation of the planet and its resources.

³ L. Henkin, "Elements of Constitutionalism", in: *The Evolving African Constitutionalism. Special Issue of the Review of the International Commission of Jurists* (June 1998) pp. 11-22. This author proposed, compiled and arranged for the publication of the Special Issue and wrote the Introduction to it.

⁴ *Ibid*, p. 23. See also, J. Oloka-Onyango (Ed.), *Constitutionalism in Africa. Creating opportunities, Facing challenges* (Kampala, Uganda, Fountain Publishers, 2001).

- International solidarity behind the right to development for all peoples.
- Equitable principles in the allocation of scarce resources within and among countries.
- Support for the principle of international justice, where national justice is not in a position to meet the challenges of particular situations.
- Respect for the international norms of *jus cogens*, or norms of international public policy.
- Respect for norms of international customary law.
- Respect for international authority as represented, particularly, by the United Nations Security Council and the International Court of Justice.
- A harmonious relationship between domestic legal systems and the international legal order.
- The principle of democratic legitimacy within the national legal order.

The Principle of Democratic Legitimacy

The principle of democratic legitimacy is one of the founding principles of international human rights law and of our contemporary world order.⁵ There are at least seven aspects that are particularly important: conflict prevention; development; justice; human rights; terrorism; world order; and, democratic legitimacy and international security.

Bruce Russett, writing the afterword to a three-volume collection of the Papers of UN Secretary-General Boutros-Boutros Ghali, referred to the significance of the Secretary-General's *Agenda for Democracy*, issued at the end of 1995, and commented: "Internationally as well as nationally, institutions must be seen as legitimate, not just as immediately effective. In the long run, effectiveness depends on legitimacy. Democracy is an instrument for achieving both."⁶ Democracy is also an important factor in the prevention of conflicts. As Dr David Hamburg has put it, "The building of democratic institutions would be one of the greatest conflict prevention measures that could be taken, especially if one thinks in terms of both political and economic democratic structures."⁷

In his *Agenda for Democracy*, Secretary-General Boutros-Ghali had emphasized the role of democracy in conflict prevention:

19. Lacking the legitimacy or real support offered by free elections, authoritarian Governments all too often take recourse to intimidation and violence in order to suppress internal dissent. They tend to reject institutions such as a free press and an independent judiciary which provide the transparency and accountability necessary to discourage such governmental manipulation of citizens. The resulting atmosphere of oppression and tension, felt in neighbouring countries, can heighten the fear of war. It is for this reason that the Charter declares that one of the first purposes of the United Nations is "to take effective collective measures for the prevention and removal of threats to the peace". Threatened by the resentment of their own people, non-democratic Governments may also be more likely to incite hostilities against other States in order to justify their suppression of internal dissent or forge a basis for national unity.⁸

Indeed, such is the importance of the role of democratic legitimacy in conflict prevention that we submit that this should be one of the leading policy planks of the UN Human Rights Council. It is our submission that the Council should its influence to

⁵ D. Beetham, *Democracy and Human Rights* (Cambridge: Polity Press, 1999); R. Dahl, *A Preface to Democratic Theory*, (Chicago and London: University of Chicago Press, 1956); E. Newman and R. Rich, *The UN Role in Promoting Democracy: Between Ideals and Reality* (Toyko, New York, Paris: UN University Press, 2004); and Inter-Parliamentary Union, *Democracy: Its Principles and Achievement* (Geneva: IPU, 1998).

⁶ C. Hill, *The Papers of United Nations Secretary-General Boutros-Boutros Ghali*, 3, (New Haven and London: Yale University Press, 2003), 2070.

⁷ See "Foreword," in L. Diamond, *Promoting Democracy in the 1990s: Actors and Instruments, issues and Imperatives* (New York: Carnegie Commission on Preventing Deadly Conflict, 1995), vii.

⁸ *ibid*, 2018.

reinforce the principle of constitutional, democratic legitimacy. The following considerations should guide the Council in seeking to advance the principle of constitutional, democratic legitimacy: first, constitutional democracy is what is being sought, namely governance in accordance with a constitution that has the support of the people and represents their hopes and aspirations. Second, the right of each people to determine freely its own political, economic and social systems. Third, the importance of democratic legitimacy for peace, human rights and development. Fourth, that democratic legitimacy and governance is a basic human right. Fifth, the role that constitutional democratic legitimacy can play in the prevention of conflicts. Sixth, the role that constitutional democratic governance can play in spurring development. Seventh, the role that constitutional democratic governance can play in the prevention of terrorism. Eighth, the role of constitutional democratic governance can play in advancing justice and equity locally and internationally.

The idea of justice, philosophers such as Mortimer Adler⁹ have claimed, should be the supreme inspirational principle of all human societies. The pursuit of justice can best be conducted in an environment of democratic legitimacy. It was in recognition of this that Article 21 of the UDHR proclaimed that the will of the people shall be the basis of the authority of government. This will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 25 of the International Covenant on Civil and Political Rights states that everyone shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his or her country.

Likewise, the European Convention on Human Rights and Fundamental Freedoms calls for an effective political democracy. In the Handyside case, the ECHR referred to the notions of pluralism, tolerance, broadmindedness that should be characteristics of a democratic society. In the Klass case the Court considered that one of the fundamental principles of a democracy is the rule of law. Justice is best served by constitutional democracy under the rule of law.

Not only is democratic legitimacy an important requirement for justice, but there are those who make the claim for democracy to be recognized as a basic human right. The World Conference on Human Rights (1993) declared that democracy, development and respect for human rights are interdependent and mutually reinforcing. It emphasized that "The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms of the entire world."

Professor Louis Henkin has argued that:

The human rights ideology and the law of human rights represented in the International Covenant (on Civil and Political Rights) include, I believe, a right to democracy in the sense of constitutional democracy and its elements – authentic popular sovereignty, respect for individual rights, the rule of law, due process of law and commitment to the principle of justice. I think that these principles of justice were what those who drafted the Covenant contemplated and what states that became parties to the Covenant committed themselves to abide by.¹⁰

In the human rights treaty and case law we find important expressions of the links between democracy and human rights. In some instances, limitations are accepted in that

⁹ Mortimer Adler, *Six Great Ideas* (New York: MacMillan Publishing Co., 1981).

¹⁰ N. Ando (ed.) *Commemorative Volume on the Occasion of the Twenty-Fifth Anniversary of the Human Rights Committee*, (The Hague: Martinus Nijhoff), p. 176. See also T. Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law*, 86, no. 46 (1992), p. 541. Professor Larry Diamond has also asserted the universal right to democratic governance in *Promoting Democracy in the 1990s*, (Carnegie Corporation of New York, December 1995).

they are 'necessary in a democratic society'. The Human Rights Committee has held that the principle of legality and the rule of law require that fundamental requirements of a fair trial must be respected during a state of emergency.¹¹ The ECHR has held that measures affecting fundamental rights must be subject to some form of adversarial proceedings before an independent and competent tribunal.¹²

Democratic legitimacy is as key requirement for the prevention and suppression of terrorism. Moreover, human rights monitoring bodies have made an important distinction between democracies and dictatorships in their evaluations of whether there is an emergency threatening the life of the nation. Regional and international supervisory human rights bodies have granted the governments of democracies, as opposed to those of unrepresentative governments, a wider margin of appreciation in determining whether a state of emergency exists, be it an external or internal threat. However, national courts and regional or international supervisory bodies, hold themselves competent to supervise the application of emergency measures. In scrutinising the application of such measures, the principles of legality, proportionality, non-derogability of certain fundamental rights, and the principle of non-discrimination are kept in mind.

In the case of *Ireland v. The United Kingdom* (1978), the ECHR declared:

It falls in the first place to each Contracting State, with its responsibility for 'the life of the nation, to determine whether that life is threatened by a public emergency. ... By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge, to decide ... on the presence of such an emergency. ... In this matter, article 15(1) leaves those authorities a wide margin of appreciation.¹³

The domestic margin of appreciation is subject to supervision and control by the European Court of Human Rights, and the case law indicates that a democratic Government's opinion as to the existence of a public emergency will not be questioned by the Convention organs. However, in the Greek case, the then European Commission of Human Rights disagreed with the military governments of Greece as to the existence of a state of emergency.¹⁴

At the UN, attention to the issue of New and Restored Democracies began to be emphasized in 1988, with thirteen countries participating in the first International Conference on this topic in Manila. By the time the last conference was held in Doha in 2006 there were over one hundred countries present, together with a large number of participants in the Parliamentarians and Civil Society Forums.

In a recent report to the GA, the Secretary-General announced his intention to ask relevant United Nations entities to initiate a study on the comparative advantages, complementarity and desirable distribution of labor of intergovernmental democracy movements, organizations, and institutes, whether global or regional and how the United Nations system has worked and could work further with them in a mutually supportive way.

There is significant recent practice of the recognition and application of the principle of democratic legitimacy. A recent study found that from 1993 through 2000, the UNSC had referred to 'democracy' in fifty three resolutions. The Council, according to the same study, had praised democratic governance for reasons ranging from its role in fostering national reconciliation, to ensuring security in states recently emerging from civil war, to assisting in the reconstruction of governing infrastructures.

The Council has refused to recognize regimes that overthrew the elected leaders as legitimate. It also authorized the use of armed force to depose the usurpers and return the elected leaders to office. The UNSC and the African Union have registered that they would not accept the violent overthrow of a democratically-elected government.

¹¹ UN, OHCHR, *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights While Countering Terrorism* (New York and Geneva: UN, 2003), p. 40.

¹² *Al Nashif v. Bulgaria* (App.50963/99), ECHR Judgment of 20 June 2002.

¹³ *Ireland v. The United Kingdom*, 18 January 1978, Series A, No.25; (1979-80) 2 EHRR 25, para. 207.

¹⁴ See, generally, I. Cameron, *National Security and the European Convention on Human Rights*, (The Hague, Kluwer Law International, 2000).

Constitutionalism in an Age of Globalization

Constitutionalism has been the subject of important scholarly literature and significant new theories have been advanced.¹⁵ In this presentation we shall base ourselves essentially on positive law and on hard facts about contemporary threats to humanity, and we shall pose some questions as to how the international legal system might respond to those challenges.

National constitutionalism

The principle of self-determination indicates that it is for each people to define its own constitutional order in free choice. Freedom under democratic constitutional rule is increasingly claimed by peoples the world over. The principles of freedom and of free constitutional choice are our starting points. However, in an age of globalisation and global threats and challenges, and as a matter of hard law, we think it important to insist on the following propositions:

- National constitutional orders must respect peremptory norms of international law, norms of *jus cogens*.
- National constitutional and legal orders must respect and require respect for norms of international customary law.
- National constitutional orders must integrate the principle of international cooperation in good faith with the competent organs of the United Nations in addressing global threats and in acting for the prevention of crises and conflicts.
- National constitutional orders should demonstrate respect for the principles of the responsibility to protect and of justice, at least in respect of genocide, ethnic cleansing, crimes against humanity and war crimes.

Regional constitutionalism

In our submission, regional framework treaties and the competent regional institutions should also incorporate and reflect the three policy and legal propositions adduced earlier with respect to national constitutionalism.

International constitutionalism

There is a lively academic discussion as to whether the United Nations Charter represents international constitutional law or whether it should be considered on for what it is, an international treaty among sovereign states. We shall not enter into a discussion of this issue here. Rather, we submit that the desirable synergy between international norms and international authority on the one hand, and national legal systems, on the other, should have direct bearing on the constitutionalism of the future, as we shall endeavour to demonstrate next.

The Relationship between International Legal Obligations and Domestic Law: From Dualism, Monism, and Coordination, to Responsibility

Dualist doctrine, as summarily presented by Ian Brownlie,

'points to the essential differences of international law and municipal law, consisting primarily in the fact that the two systems regulate different subject-matter. International law is a law between sovereign states; municipal law applies within a state and regulates the relations of its citizens with each other and with the executive. On this view, neither legal order has the power to create or alter rules of the other. When municipal law provides that international law applies in whole or in part within the jurisdiction, this is merely the exercise of the authority of municipal law, an adoption or transformation of the rules of international law. In case of a

¹⁵ See e.g. Ronald St. John Macdonald and Douglas M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, (Martinus Nijhoff Publishers, 2005).

conflict between international law and municipal law the dualist would assume that a municipal court would apply municipal law."¹⁶

Monism, as advocated by the great Sir Hersch Lauterpacht asserts the supremacy of international law even within the municipal sphere. International law, "is seen as the best available moderator of human affairs, and also as a logical condition of the *legal* existence of states and therefore of the municipal systems of law within the sphere of the legal competence of states."¹⁷

The theory of coordination was posited, among others, by Sir Gerald Fitzmaurice, a former judge of the International Court of Justice. His view was that international law and municipal law did not come into conflict as systems since they worked in different spheres. Each was supreme in its own field. However, there may be a conflict of *obligations*, an inability of the State on the domestic plane to act in the manner required by international law; the consequence of this will not be the invalidity of the internal law but the responsibility of the state on the international plane.¹⁸

It is our submission that while the two systems of law are essentially interdependent, the theory of coordination does not suffice in the circumstances of our contemporary world. There are areas involving, for example, planetary security, global threats such as terrorism, norms of *jus cogens*, the prevention of genocide, and fundamental guarantees of human rights that require norms of municipal law which correspond to international law as a matter of fundamental obligation of the State within the international legal system. This is the doctrine of responsibility: the responsibility to prevent and to protect. In order to lay the ground for this submission we look, next, at the basis of obligation in international law.¹⁹

The Basis of Obligation in International Law

The principle of the supremacy of international law over municipal law has been included in the following provisions either drafted or subsequently accepted by the International Law Commission: Articles 13 and 14 of the Draft declaration on Rights and Duties of States; Articles 27, 46, 53, 64 of the Vienna Convention on the Law of Treaties (1969), and its draft Article 3 on State Responsibility.

The Preamble of the Draft Declaration on the Rights and Duties of States proclaimed that "the States of the world form a community governed by international law." According to Article 13 of the Draft Declaration, "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty." According to Article 14, "Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law." This principle was based on postulate 4 of the "International Law of the Future", published by the Carnegie Endowment for International Peace in 1944.

The Commission approved these articles without any debate on their substance. The principles contained in them were taken as self-evident by the Commission. Mr Alfaro, in the draft prepared by him, which was used as the basis of discussion in the Commission, commented on these provisions as follows: Article 14 "deals with the authority of international law including everything agreed upon in the Charter of the United Nations and in the Statute of the World Court, which are international treaty law." Article 14 "proclaims that international law is obligatory for all States."²⁰ In the written comments of governments, the principle was accepted and, on the whole, taken as self-evident.²¹

¹⁶ I. Brownlie, *Principles of Public International Law*. Second Edition (1973), pp. 33-34.

¹⁷ *ibid*, p. 34.

¹⁸ *ibid*, p.36.

¹⁹ See, generally, J.L. Brierly, *The Basis of Obligation in International Law and Other Papers*, Oxford: Oxford: Clarendon Press (1958).

²⁰ *Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States*, A/CN.4/2, (15 December, 1948), p. 43.

²¹ *ibid*. See the written comments of Mexico, p. 86, the United Kingdom, p. 86, Venezuela, p. 88.

Sir Gerald Fitzmaurice, in his course of lectures at the Hague Academy of International Law on "The General Principles of International Law Considered from the Standpoint of the Rule of Law", took as his starting point Article 14 of the International Law Commission's draft on Rights and Duties of States, which he commented on as follows:

"This provision enunciates the important principle of the subordination of the sovereignty of each State to the supremacy of international law – in short, of the sovereignty of the rule of law in the international field which might indeed be called the first and greatest principle of international law. From it all the rest follows: without it there may be customs, practices, habits, courtesies... but there is no law."²²

Sir Gerald proceeded to demonstrate that this principle applied automatically, and that at the back of the principle, the ultimate source or basis of legal obligation in international law rested in the explanation of law as a social necessity.

Professor Hans Kelsen, while making some criticism of the actual formulation of this principle by the International Law Commission, accepted it as part of general international law. The duty laid down in Article 14, he felt, "is implied in the concept of international law. ... The concept of international law implies the duty of every State to behave in all its relations in accordance with international law."²³

He explained this more fully elsewhere:

"There is, above the commonwealth described as the State, a legal order which defines the respective scopes of power of individual States by forbidding the encroachment of one into the sphere of another... a legal order which regulates the relations of States by means of rules equally applicable to all. International law does this –but only when its supremacy over the legal systems of individual States is recognized, when ...it is contemplated as a legal system standing above the States, i.e. when the legal systems of individual States are regarded as component parts of a universal legal order."²⁴

Principle I of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, as drafted by the International Law Commission, stated that any person who committed an act which constituted a crime under international law was responsible therefor and liable to punishment. In the commentary to Principle 1, the Commission stated that the general rule underlying it was that international law may impose duties on individuals directly without any interposition of internal law. In its commentary to Principle II, which stated that the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the persons who committed the act from responsibility under international law, the Commission stated that "The principle that a person who has committed an international crime is responsible therefor and liable to punishment under international law, independently of the provisions of internal law, implies what is commonly called the 'supremacy of international law over national law.'²⁵

The Commission's draft on *jus cogens*, which became Articles 53 and 64 of the Vienna Convention on the Law of Treaties, was also clearly based on the assumption that international law overrides municipal law in matters of international public policy.

²² Sir Gerald Fitzmaurice, Q.C., "The General Principles of International Law Considered from the Standpoint of the Rule of Law", 92 RCADI (1957, II), p. 6.

²³ H. Kelsen, "The Draft Declaration of Rights and Duties of States", 44 American Journal of International Law (1950), pp. 259-276.

²⁴ *Der Begriff der Souveranität und die Theorie des Völkerrechts* (1920), cited in H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1933), p. 55.

²⁵ I.L.C. Report 1950, para. 102 of commentary to Principle II, YBILC 1950, Vol. II, p. 375.

The Law of State Responsibility

In the draft articles on State responsibility which it adopted recently, the International Law Commission included the following provision in article 3:

“The characterization of an act of State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”

This article was first proposed by the Commission's then Special Rapporteur, Roberto Ago and discussed in the Commission in 1973.²⁶ When the article was first discussed in the Commission at its 1209th and 1210th meetings in 1973 the principle contained in it received support from every member of the Commission who took part in the debate: Commissioners Ramangasoavina, Tsuruoka, Yasseen, Kearney, Sette Camara, Hambro, Ushakov, Elias, Vallat, Bartos, Ustor, Castaneda, Tammes, Bilge and Reuter.

In drafting the article the Commission followed its own draft on rights and duties of States discussed above, as well as Article 27 of the Vienna Convention on the Law of Treaties, which provides that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

Obligations under the United Nations Charter

According to the very first article of the United Nations Charter, the purposes of the United Nations are, among others, to achieve international cooperation in solving international problems of an economic, social cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, language, sex, or religion and to be a centre for harmonizing the action of nations in the attainment of these common ends. Article 55 of the Charter gives the United Nations a mandate to promote universal respect for and observance of human rights and fundamental freedoms for all. In Article 56, all members pledged themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

In Resolution 2625 (XXV) of 24 October 1970, the General Assembly adopted the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, which is considered a codification of the legal principles of the United Nations Charter. In that declaration the General Assembly proclaimed that States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations in order to maintain international peace and security and to promote international stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences. To this end: States shall co-operate with other states in the maintenance of international peace and security; States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance; States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention; States members of the United Nations have the duty to take joint and separate action in cooperation with the United Nations in accordance with the relevant provisions of the Charter.

Furthermore, States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.²⁷

Goodrich, Hambro and Simons in their commentary on the Charter noted that the United Nations was not intended to have the powers of a government; rather, its function

²⁶ The article was discussed at the 1209th and 1210th meetings of the Commission in 1973.

²⁷ GA Resolution 2625 (XXV), (24 October 1970).

was conceived as that of serving as a means of promoting cooperation between States in finding solutions to common problems and of achieving maximum support from members for the work of the Organization.²⁸

On the legal thrust of Article 56 of the Charter, Goodrich, Hambro and Simons pointed out that as regards the phrase "in cooperation with the Organization" while it did not mean that recommendations of UN organs become binding, it did mean "that members are obligated to refrain from obstructionist tactics and to cooperate in good faith to achieve the goals specified in Article 55."²⁹

The commentary on the Charter of the United Nations edited by Bruno Simma noted that as far as the protection of human rights was concerned Article 1(3) had been invoked with respect to the improvement generally within the United Nations system of the effective enjoyment of human rights and fundamental freedoms and with respect to particular human rights issues and situations.³⁰

The same commentary concluded that Article 56 represented a specification of the obligations of member states set forth in Article 2(2) and Article 55. This specification dealt with the three elements of Article 56: joint action, separate action, and cooperation with the organization and with the obligations assumed under Article 55. Wolfrum, the author of the Commentary on Article 56 in this volume agreed with Goodrich, Hambro and Simons, that Article 56 did "require that member states cooperate with the UN in a constructive way; obstructive policies are thus excluded".³¹

Article 103 of the Charter lays down that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.

International Norms of *Jus cogens*

The concept of peremptory norms of international law is that "certain overriding principles of international law exist, forming a body of *jus cogens*."³² Examples cited include the prohibition of aggression, the prohibition of genocide, the principle of racial non-discrimination, crimes against humanity and the rules prohibiting trade in slaves.³³ The concept of *jus cogens* was included by the International Law Commission in its final draft on the law of treaties in 1966. Article 50 of that draft provided that 'a treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

The Vienna Conference on the Law of Treaties included a provision similar to that drafted by the Commission. The Vienna Convention on the Law of Treaties defined a peremptory norm as 'a norm accepted and recognized by the international community as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

Authoritative bodies of the international community have provided some guidance as to what norms of *jus cogens* are. In the Barcelona Traction case (Second Phase), the majority judgment of the International Court of Justice, supported by twelve judges, drew a distinction between obligations of a State arising vis-à-vis another State and obligations 'towards the international community as a whole'. The Court said:

"Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the

²⁸ L. Goodrich, E. Hambro and A. Simons, *Charter of the United Nations: Commentary and Documents*, (New York, London: Columbia University Press, 1969), p. 35.

²⁹ L. Goodrich, E. Hambro and A. Simons, *Charter of the United Nations: Commentary and Documents*, Third Ed. (New York, London: Columbia University Press, 1969), p. 381.

³⁰ B. Simma (Ed.), *The Charter of the United Nations. A Commentary* (Oxford: Oxford University Press, 1985), pp. 55-56.

³¹ *ibid*, p. p. 794.

³² Brownlie, Second Edition, *op.cit.* p. 499.

³³ *ibid*, p. 500.

principles and rules concerning the basic rights of the human person, including protection from slavery and discrimination."³⁴

In the Sixth Edition of his *Principles of Public International Law*, Ian Brownlie took the view that the notion of *delicta juris gentium*, as opposed to torts as reparation obligations between tortfeasor and claimant, takes four forms: (1) that of high illegality or breach of *jus cogens*, as in the case of genocide; (2) reference to cases where international law recognizes a general competence to exercise jurisdiction to apprehend, and perhaps to punish, irrespective of the nationality of the wrongdoer, as in the case of piracy; (3) acts which harm all states indiscriminately and which are difficult to trace to particular tortfeasors, as in the case of successive nuclear tests in the atmosphere; (4) acts infringing principles of law creating rights the beneficiaries of which do not have legal personality or, more correctly, do not have presently effective means of protecting their rights, as for example, non-self-governing peoples and the populations of mandate or trust territories.³⁵

In our submission, the domestic law of every Member State must incorporate peremptory norms of international law or norms of *jus cogens*. Under no circumstances should any Member State or its agents, including its courts, act at variance with peremptory norms of international law. There is a fundamental duty of care on the part of governments as well as their courts to be in compliance with such norms and to take special care not to act at variance with them.

Norms of international customary law

In *R. v. Hape*,³⁶ the Supreme Court of Canada recently provided important guidance on the place of international customary law in the domestic law of States, in this particular instance, Canada. The Supreme Court stated that international custom, as the law of nations, was also the law of Canada unless, in a valid exercise of its sovereignty, Canada declared that its law was to the contrary.³⁷ In the assessment of Glen Linder:

"The majority also appears to endorse the view that if the rule of customary international law changes, so too will domestic law. Apparently endorsing the relevant passage from Lord Denning's landmark judgment in *Trendtex*³⁸ our highest court has now clarified that even where a common law precedent exists that is contrary to a newer customary international law rule, courts must follow the customary international law rule, and not the inconsistent common law precedent."³⁹

If the legislature wishes to enact legislation that is inconsistent with international law, the majority held that there must be 'unequivocal legislative intent to default on an international obligation.'

There is also respectable Commonwealth precedent for the proposition that where there is uncertainty international law may be used in ascertaining the meaning of national legislation, for example in the interpretation of human rights and fundamental freedoms.⁴⁰

Mandatory Decisions of the United Nations Security Council

Under Article 24, paragraph 1 of the United Nations Charter Members of the United Nations, in order to ensure prompt and effective action by the United Nations, confer on

³⁴ ICJ Reports (1970), 3 at p. 32.

³⁵ Brownlie, Sixth Edition, pp. 486-487.

³⁶ (2007) SCC 26.

³⁷ *ibid*, paras. 37-39.

³⁸ *Trendtex Trading Corp v. Central Bank of Nigeria*, (1977) 1 Q.B., p. 529.

³⁹ Glen Linder, Canadian Council of International Law, Case Comment, *R.v. Hape – The International Law Aspects*.

⁴⁰ See e.g. The Bangalore Principles on the Domestic Application of International Human Rights Norms. On this, also see e.g. a speech by Justice Michael Kirby, "The First Ten Years of the Bangalore Principles on the Domestic Application of International Human Rights Norms" (available online).

the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

The International Court of Justice, in the Expenses Case and the 'Wall Case', has taken the view that since, under Article 24 of the United Nations Charter, the Security Council has the primary responsibility for the maintenance of international peace and security, it can, in that regard impose on States 'an explicit obligation of compliance if for example it issues an order or command...under Chapter VII' of the Charter. The Council can, to that end, 'require enforcement by coercive action'.⁴¹ Professor Ian Brownlie has pointed out that 'When competent organs of the United Nations make a binding determination that a situation is illegal, the states which are the addressees of the resolution or resolutions concerned are under an obligation to bring that situation to an end.'⁴²

According to Article 43 of the Charter, all Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

The mandatory decisions of the Security Council on anti-terrorism measures, adopted under Chapter VII of the Charter, provide solid examples of actions required by Member States within their national legal orders.

Both the General Assembly and the Security Council have been prominent in the struggle against terrorism. The General Assembly has adopted numerous resolutions setting down policies and strategies and the Security Council, especially after September 11, 2001, has adopted a series of binding resolutions setting out policies and strategies for countering terrorism.

In resolution 48/122 adopted on 20 December 1993, the General Assembly unequivocally condemned all acts, methods and practices of terrorism and called upon States, in accordance with international standards of human rights, to take all necessary and effective measures to prevent, combat and eliminate terrorism. In resolution 49/60 adopted by consensus on 9 December 1994, the General Assembly defined terrorism as "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in circumstance unjustifiable, whatever the consideration of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."

On 14 September 2005 the International Convention for the Suppression of Acts of Nuclear Terrorism was adopted at the United Nations. It provided that any person committed an offence if that person unlawfully and intentionally possessed radioactive material or made or possessed a device with the intent to cause death or serious bodily injury or with the intent to cause substantial damage to property or to the environment. It is also an offence for anyone to use radioactive material or a device in any way or to use or damage a nuclear facility in a manner which risked the release of radioactive material:

- i. with the intent to cause death or serious bodily injury; or
- ii. with the intent to cause substantial damage to property or the environment; or
- iii. with the intent to compel a natural or legal person, and international organization or a State to do or refrain from doing an act.

In 2006 the General Assembly adopted a Global Counter Terrorism Strategy in which it resolved to undertake measures aimed at addressing the conditions conducive to the spread of terrorism and to strengthen and make best possible use of the capacity of the United Nations in areas such as conflict prevention, negotiation, mediation, conciliation, judicial settlement, rule of law, peacekeeping and peace-building in order to contribute to

⁴¹ *Certain Expenses of the United Nations* (Article 17, paragraph 2 of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 163. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 26.

⁴² Brownlie, op cit. Second Edition, p. 504.

the successful prevention and peaceful resolution of prolonged unresolved conflicts. It invited the United Nations to improve coordination in planning a response to a terrorist attack using nuclear, chemical, biological or radiological materials.

The Security Council for its part, in resolution 1269 (1999), had called upon all States to cooperate with one another to prevent and suppress terrorist acts and to prevent and suppress in their territories, through all lawful means, the preparation and financing of any acts of terrorism. After the terrorist attack which took place in New York, Washington DC and Pennsylvania on 11 September 2001, the Security Council, acting under Chapter VII of the Charter of the United Nations, decided that all States shall take the necessary steps to prevent the commission of terrorist acts including by provision of early warning to other States through the exchange of information. The Security Council also decided that all states shall prevent and suppress the financing of terrorist acts.

In the same resolution the Security Council decided to establish a committee consisting of all members of the Council to monitor implementation of its resolution with the assistance of appropriate expertise and called upon all States to report to the committee periodically on the steps take to implement it resolution. In resolution 1377 (2001) the Security Council recognized that many States would require assistance in implementing all the requirements of resolution 1373 (2001), and invited States to inform the Counter-Terrorism Committee of areas in which they required such support. In that context, the Council invited the Counter-Terrorism Committee to explore ways in which States could be assisted, and in particular to explore with international, regional and sub-regional organizations:

- the promotion of best-practices in the areas covered by resolution 1373 (2001), including the preparation of model laws as appropriate;
- the availability of existing technical, financial, regulatory, legislative or other assistance programs which might facilitate the implementation of resolution 1373 (2001); and
- the promotion of possible synergies between these assistance programmes.

The Security Council continued to press the line of preventive action in its resolution 1624 adopted on 14 September, 2005. In that resolution the Council called upon States to adopt such measures as may be necessary and appropriate and in accordance with international law to prohibit by law incitement to commit a terrorist act or acts, to prevent such conduct, and to deny safe haven to any persons with respect to which there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.

The Security Council, as part of its preventive strategies, called upon States to continue international efforts to enhance dialogue and broaden understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions and cultures, and to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance and to prevent the subversion of educational, cultural and religious institutions by terrorists and their supporters.

The Council called upon States to report to the Counter-Terrorism Committee, as part of their ongoing dialogue, on the steps they have taken to implement the resolution. The Council directed the Counter-Terrorism Committee to include in its dialogue with Member States their efforts to implement its resolution. The Council also directed the Counter-Terrorism Committee to work with Member States to help build capacity, including through spreading best legal practice and promoting exchange of information.

The dialogue of the Counter Terrorism Committee with Member States has, in its essence, the goal of prevention. This dialogue is being carried out through Member States submission of written reports, the exchange of comments and views between the Committee and Member States, and the conduct of visits to Member States for discussions on preventive strategies. To date the Counter-Terrorism Committee has conducted visits to Albania, Algeria, FYR Macedonia, Jordan, Kenya, Malaysia, Morocco, the Philippines, Tanzania, Thailand, and...

The Framework Document for CTC Visits states that one of the objectives of the visits is to assess whether deficiencies are attributable to needs that could be met through technical assistance, and to propose solutions to correct them.

The preventive thrust in counter-terrorism strategies, which we have seen above on the part of the General Assembly, the Security Council, and the Secretary-General, was particularly highlighted by Secretary-General Kofi Annan in his address in Madrid on 10 March, 2005. In that address, the Secretary-General laid out a five pronged preventive strategy: first to dissuade disaffected groups from choosing terrorism as a tactic to achieve their goals; second, to deny terrorists the means to carry out their attacks; third, to deter states from supporting terrorists; fourth, to develop state capacity to prevent terrorism; and fifth, to defend human rights in the struggle against terrorism.

The Secretary-General, in addition to highlighting, as we saw above, the dangers of nuclear terrorism, also drew attention to the dangers of biological terrorism:

Few threats more vividly illustrate the imperative of building state capacity than biological terrorism, which could spread deadly infectious disease across the world in a matter of days. Neither states nor international organizations have yet adapted to a new world of biotechnology, full of promise and peril.

The Secretary-General called for a major initiative to build up local health systems that would be in the front-line of such a situation.

The Security Council, as we have seen above, has definitely imposed mandatory obligations binding upon Member States under Chapter VII of the Charter. There are those who have asked the question whether the Security Council has the competence to act legislatively, as it has done on counter-terrorism issues. But then there is the doctrine of the International Court of Justice, in the Expenses case, that it is for a competent organ of the United Nations to determine, in the first instance, the province of its jurisdiction. This applies even more so in the case of the organ with the strongest authority in the United Nations, the Security Council.

Actions of the kind the Security Council has taken, and could well take in the future in dealing with global threats, would lend support to the view of those who argue that the membership of the Security Council should be expanded to give it a modern, more representative image.

Obligations under international human rights conventions⁴³

The constitutionalism of the future will have to address the issue of what are the obligations upon Governments that have ratified international human rights conventions. The Bloemfontein Statement adopted by leading African and Commonwealth lawyers and judges in 1995 addressed these questions in terms of the rule of law and human rights as follows:

“In democratic societies fundamental human rights and freedoms are more than paper aspirations. They form part of the law. And it is the special province of judges to ensure that the law’s undertakings are realised in the daily life of the people. In a society ruled by law, all public institutions and officials must act in accordance with the law. The judges bear particular responsibility for ensuring that all branches of government – the legislature and the executive, as well as the judiciary itself, conform to the legal principles of a free society. Judicial review and effective access to courts are indispensable, not only in normal times, but also during periods of public emergency threatening the life of the nation. It is at such times that fundamental human rights are most at risk and when courts must be especially vigilant in their protection.”

⁴³ Professor John Humphrey, one of the drafters of the Universal Declaration of Human Rights, had proposed that “The provisions of the International Bill of Rights shall be deemed fundamental principles of International Law and of the national law of every member state of the United Nations”.

What are the legal consequences of a state becoming a party to an international human rights convention? The Human Rights Committee, which functions under the International Covenant on Civil and Political Rights, has adopted a series of 'General Comments' spelling out the obligations of states. General Comment No 31/80 of 29 March 2004 deals with the obligations of states that are parties to a human rights treaty. The principles contained in General Comment No. 31, although based on the Covenant, are reflective of the general obligations of a State Party to a human rights treaty.

The Human Rights Committee recalled the legal obligations of States Parties under Article 2 of the Covenant under which, among other things, each State Party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the 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. The Human Rights Committee observed that while Article 2 is couched in terms of the obligations of States Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the rules concerning the basic rights of the human person are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a UN Charter obligation to promote universal respect for and observance of human rights and fundamental freedoms.

It noted that a general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction. Pursuant to the principle articulated in Article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to their obligations under the Covenant in good faith.

The obligations in the Covenant in general and under Article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. This understanding flows directly from the principle contained in Article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The obligation to respect and to ensure the rights recognized in the Covenant has immediate effect for all States Parties. Reservations to Article 2 would be incompatible with the covenant when considered in the light of its objects and purposes. The legal obligation under Article 2, paragraph 1, is both negative and positive in nature. States parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, states must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

Article 2 of the Covenant requires that State Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and state agents but also among the population at large.

The positive obligations on State Parties to ensure Covenant rights will only be discharged if individuals are protected by the state not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment Covenant rights insofar as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by State Parties of those rights as a result of State Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of Article 1 (the right of self-determination), the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant may be enjoyed in community with others.

State parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. The enjoyment of Covenant rights is not limited to citizens of State Parties, but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

The Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

The Article 2 obligation, requiring that State Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control, entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.

Article 2, paragraph 2 of the Covenant requires that State Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless the Covenant's rights are already protected by their domestic law or practices, State Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, Article 2 requires that the domestic law or practice be changed to meet the standards required by the Covenant's substantive guarantees.

Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts by incorporation of the Covenant into national laws. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those states where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invited those State Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by Article 2.

The requirement under Article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the state.

Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights State Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including, in particular, children. The Committee attaches importance to State Parties establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.

The Human Rights Committee noted that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

Article 2, paragraph 3, of the Covenant requires that State Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by Article 9, paragraph 5, and Article 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee noted that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

In general, the purposes of the Covenant would be defeated without an obligation integral to Article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee, in its consideration of individual petitions, to include in its views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.

Where investigations reveal violations of certain Covenant rights, State Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (Article 7), summary and arbitrary killing (Article 6) and enforced disappearance (Articles 7 and 9 and frequently 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (Rome Statute of the ICC, Article 7).

Accordingly, where public officials or state agents have committed violations of the Covenant rights just referred to, the State Parties concerned may not relieve perpetrators from personal responsibility. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable. State Parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.

The Committee further took the view that the right to an effective remedy may in certain circumstances require State Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.

General Comment 31 is a magisterial summary of the idea of international obligation under international human rights treaties. It represents, in many respects, the heart of international human rights law. Its principles are applicable, subject to textual variations, to human rights treaties in general.

The Doctrine of the Responsibility to Prevent and to Protect

The report of the International Commission on Intervention and State Sovereignty launched the concept of the responsibility to protect.⁴⁴ In the Commission's view, the responsibility to protect embraced three specific responsibilities: the responsibility to prevent, namely, to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk; the responsibility to react, namely, to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention; the responsibility to rebuild, namely, to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

The Commission was firm in its view that prevention was the single most important dimension of the responsibility to protect. Prevention options should always be exhausted before intervention was contemplated, and more commitment and resources must be devoted to it. The exercise of the responsibility to prevent and react should always involve less intrusive and coercive measures before more coercive and intrusive ones are applied.

The United Nations Summit of world leaders, meeting to mark the organizations 60th anniversary in 2005 endorsed the responsibility to protect and declared their readiness, if need be, to refer to the UN Security Council for its attention situations of genocide, ethnic cleansing, crimes against humanity and war crimes.

It would be our submission that the national legal order of every country must provide adequate and effective guarantees against genocide, ethnic cleansing, crimes against humanity, and war crimes.

Conclusion

In light of the foregoing discussion, we may conclude that while international law and municipal law remain interdependent spheres, international law imposes upon Governments a number of obligations as regards their domestic law, including the following:

- (a) Municipal law must provide for adequate and effective safeguards for planetary security, protection of the environment and protection against genocide, ethnic cleansing, war crimes and crimes against humanity.
- (b) Municipal law must incorporate international norms of *jus cogens* and a Government is internationally responsible if it fails to ensure that this is the case.
- (c) Municipal law must incorporate fundamental guarantees of respect for the human rights and fundamental freedoms consistent with international customary norms of human rights. Where a State fails to ensure that this is so it is internationally responsible.
- (d) Where ordered by the Security Council acting under Chapter VII of the Charter, municipal law must include legislation prohibiting internationally wrongful acts.

⁴⁴ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001. See also *The Responsibility to Protect: Research, Bibliography, Background*, December 2001.