

State Responsibility In International Law

Annette Culley



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COVER PHOTO

This West Papua Aboriginal mural in Darwin was painted in 2015 during a commemoration of the 1998 Biak Island massacre. After relentless pressure from the Indonesian Government, it was painted over on 4 March 2017

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'[T]he conditions under which sovereignty is exercised and intervention is practiced have changed dramatically since 1945. The defence of state sovereignty, by even its strongest supporters, does not include any claim to the unlimited power of a state to do what it wants to its own people'

The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty. Ottawa, International Development Research Centre, 2001

'As human rights are of universal concern and are universal in value the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty'

Bangkok NGO Declaration of Human Rights. In Report by the Secretariat, Regional meetings, UN General Assembly. A/Conf.157/PC/83 19 April 1993.

PREFACE

The catalyst for writing this paper was an event in Darwin on 2 August 2015. Peter Elaby tells the story: 'a group of West Papua freedom supporters attended a morning tea fundraiser. The special guest was Foreign Affairs Minister Julie Bishop. "We wanted to meet her and discuss human rights in West Papua". He was keen to ask a question but felt that his raised hand was being ignored. Later his group approached the minister and she agreed to speak with just one of them. He asked her why the Australian government did not try to solve the human rights problem in the Pacific and West Papua. She replied that the Australian government could not do that as they have to respect Indonesian sovereignty over West Papua. Peter Elaby's report of his meeting with the minister can be found in Green Left Weekly, 4 August 2015 *Julie Bishop: Australia cannot do anything to stop West Papuan genocide.*

I was surprised by Julie Bishop's response. I thought it was quite clear that it was inadequate. The question I asked myself was, what are the actual responsibilities of States in regard to human rights abuses in other States? Many documents written over centuries refer to the fact that a State is responsible for the well-being of its citizens. A big change came about in international law with the pronouncement by the International Court of Justice, in the Barcelona Traction Case, that States had obligations to speak out about human rights violations that occur in States other than their own. This obligation applied in particular to serious crimes considered to be peremptory norms of *jus cogens*, principles that have an *erga omnes* character. A peremptory norm is a principle accepted in common international law as one that cannot be disobeyed for any reason as it is 'compelling law' and must be obeyed by all States without exception. Examples are genocide, slavery, torture and grievous human rights abuses. Even a third State, one not directly affected by a wrongful act, has a legal interest in the cessation of a wrongful act.

The theory of State Responsibility was not well developed prior to 1945 but was, as a part of international law, a subject of great interest to the United Nations from its earliest days. Beginning in 1956 and onwards until 2001, six rapporteurs worked on the International Law Commission's Draft Articles. Draft articles on Responsibility of States for Internationally Wrongful Acts (2001) contain 59 Articles that deal with the responsibility of States in international law. The Article that is of concern to us as we attempt to answer the question asked of July Bishop in August 2015, Article 48, deals with the invocation of responsibility by a third State.

Article 48.1 provides: 'Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
b) the obligation breached is owed to the international community as whole'.

Article 48. 2 deals with responses such as (a) cessation of the internationally wrongful act ...; (b) performance of the obligation of reparation

A large section of this work considers the development of human rights in international law; the increased recognition that sovereignty involves responsibility and that sovereignty may be threatened where a State abuses its citizens. Sovereignty is conditional upon States '[C]onducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory...'. (UNGA Resolution 2625 (XXV) 1970).

The work also considers United Nations Conventions in the light of Indonesia's continued use of torture and the strong possibility that the treatment meted out to the peoples of West Papua since 1963 may amount to genocide. Kofi Annan summed up the situation regarding human rights violations and the claims to sovereignty by States such as Indonesia:

[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that appeal every precept of our common humanity?

During the second half of the 20th century the notion that a sovereign State could treat its own people in any way that it liked came under the increased scrutiny of lawmakers. The concept that the State existed to enhance the wellbeing of its citizens had been considered by philosophers for centuries. This was emphasised in the French *Declaration of the Rights of Man and the Citizen* of 1789 and in the *Declaration of Independence* (US 1776); the Charter of the United Nations 1945; the *Universal Declaration of Human Rights* 1948 and the twin Conventions of 1976: *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, the three together making up the Bill of Rights. This was also emphasised in the *Vienna Declaration and Programme of Action* 1993; the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* of 2001 and in the *Responsibility to Protect (R2P)* that is firmly based in international law. The International Court of Justice *Barcelona Traction Case* (1970) provided a breakthrough in international law with the pronouncements in paragraphs 33 and 34 that States owe obligations regarding the violation of peremptory norms such as slavery, racial discrimination and genocide 'to the international community as a whole' by reason of the importance of the human rights so violated. The evolution of international law as expressed in the above instruments recognized the validity of the concept of norms of *jus cogens* and enshrined in Article 53 of the *Vienna Declaration on the Law of Treaties* 1969.

Draft Articles makes it apparent that a State is responsible for the violation of human rights committed by any of the organs of that State and that violations are the legitimate concern of other States who have a legal responsibility to protest these violations. Violations can take many forms: the denial or subversion of self-determination, the acquisition of territory by threat or use

of force, the 'subjection of peoples to alien subjugation, domination and exploitation constitut[ing] a denial of the principle as well as a denial of fundamental human rights', by serious human rights abuses and the denial of fundamental freedoms.

The *Draft Articles on Responsibility of States* distinguish between an injured State and a 'third State'. A third State is one not directly affected by a wrongful act, but by reason of the importance of the rights involved has a legal interest in the cessation of the wrongful act. That sovereignty is conditional upon a State's willingness to protect all of its populations has been explicitly enunciated as has the responsibility of injured or third States to speak about human rights abuses in their own or in other States.

This paper will affirm that States have a responsibility to protect all those within their territory; that third States have a right and obligation to complain of wrongful acts committed by a sovereign State, and finally that sovereignty comes under question where a people within a sovereign state are subject to alien subjugation or serious violations of their human rights.

I would like to acknowledge the invaluable input of Louise Byrne in this project. My thanks also to Adele O'Connor and Judith Kohn for editing the text and for their many suggestions. I am immensely grateful to both of them. They were a pleasure to work with. Thanks also to Isabelle Skaburskis ICJ for agreeing to launch the book. Last but not least, I would like to thank my lovely grandson, Zephyr Culley for the stunning cover design.

*Annette Culley
Melbourne, Australia
March 2017*

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1. INTRODUCTION

The laws of State responsibility are the principles governing when and how a State is held responsible for a breach of an international obligation. These obligations are enumerated in the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001*. These articles establish firstly the conditions for an act to qualify as internationally wrongful and the defences that a State might rely upon to avoid its responsibilities (Part 1, Chapters I to V). Secondly, the consequences of the breaches of international obligations are considered: the obligation to make restitution and the obligation to put an end to the wrongful acts are dealt with (Part 2, Chapters I to II) and serious breaches of obligations under peremptory norms of general international law (Part 2, Chapter III). Finally the question of which States may invoke the wrongdoing of the responsible State and the ways in which responsibility may be implemented are considered (Part 3 Chapter I). Attention is paid to the adoption of countermeasures (Part 3 Chapter II).¹

Historically, international law had been about the relationship of States one to another. Throughout the second half of the 20th century there was a shift in emphasis in international law. Less focus was placed on sovereignty as a right to *control*, to an emphasis on sovereignty as a responsibility to *protect* the human rights of its peoples. In the area of minority rights the League of Nations, the forerunner of the United Nations that was active from 1919 until its dissolution in 1946, focused on *group* rights as important. This changed with the formation of the United Nations and various declarations. The *United Nations Charter* and *Statute of the International Court of Justice*, 1945, the *Universal Declaration of Human Rights* of 1948 and the twin Conventions: *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights* of 1966 all placed an emphasis on the rights of *individuals* within a group.

¹ BORELLI, S., *State responsibilities Oxford Bibliographies: International Law*, ed. Tony Carty, pp. 1-2.

1.1 Organizations and Legal personality

Formerly, only States were considered to have legal personality. However the International Court of Justice (ICJ) found in the *Reparations Case*² that the United Nations, an organization founded by States, also had what is called 'legal personality'. This has been considered to be one of the most important decisions of the Court. It confirmed international law as revealing flexibility and a willingness to change according to the will of States and changing circumstances in the international arena.

From this judgement there followed the recognition of many other organizations as possessing legal personality, for example, the International Committee of the Red Cross, the Holy See, other international organizations, non-government organizations (NGOs) such as Amnesty International and Human Rights Watch, as well as organs of national liberation movements. By the end of the 20th century the *Yearbook of International Organizations* listed over 5,800 international NGOs and an additional 5,500 domestic NGOs that are internationally oriented.³ International law of itself does not confer the status of legal personality, it is conferred by 'the facts of international life'.⁴ It is a measure of the success of the judgement in the *Reparations Case* that repressive regimes have actively sought to close down organizations considered to have legal personality.⁵

² Reparation for injuries suffered in the service of the United Nations. Advisory Opinion, I.C.J. Reports, 1949, pp. 174, 178, 185.

³ LE ROY BENNETT, A., Oliver, J., *International organizations: principles and issues*, Prentice Hall, 2002, p. 282. Cited in Smith, C.B. *Politics and process at the United Nations*, Lynne Rienner Publishers, Inc., 2006, p.111.

⁴ OKEKE, CN., *Controversial subjects of contemporary international law*, Rotterdam University Press, 1974, p. 19.

⁵ *Choking on bureaucracy: State curbs on independent civil society activism*, Human Rights Watch, 19 February 2008.

1.2 Sovereign rights and people's rights

International law became focused for the first time on people's rights not sovereign rights. Most of the instruments mentioned in the following pages speak of the protection of human rights – that States have a responsibility to protect the peoples living within their territory; that States are obliged to speak out about human rights abuses whenever and wherever they occur. Although it is an old concept, at the close of the 20th Century and the beginning of the new century, the concept that sovereignty implies rights has taken on a new life as a 'conscientiousness'⁶ and has become part of international law. The *Vienna Declaration and Programme of Action* adopted by consensus at the World Conference on Human Rights 19 June 1993 enunciates that all human rights are of equal importance and are the responsibility of the State:

[d]emocracy, development and respect for human rights are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.⁷

The *High Commissioner for Human Rights* was established by the United Nations in April 1994 with aims of responding to emergencies, taking preventive action, strengthening democratic institutions, protecting vulnerable groups and combating racism.⁸

This change of emphasis from sovereign rights to people's rights had its roots in the past and in fact can be traced back to classical times and thereafter to writers of the 17th and 18th centuries such as C. Wolf's *Jus Gentium* (1764) and E. de Vattel's *Le droit des gens ou principes de le loi naturelle* (1758).

⁶ A term used by Kofi Annan.

⁷ Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

⁸ ALAYA-LASSO, J., Foreword In RAMCHARAN, BG *The United Nations High Commissioner for Human Rights: the challenges of international protection*, Martinus Nijhoff Publishers, 2002, pp. vii-viii.

These works spoke of the existence of "necessary law" that was natural to all States and that all treaties and customs which contravened this necessary law were illegal. This was the concept that certain principles of natural law transcended but also encompassed all States and it was thought to be unchangeable.⁹ The opening phrases of the *Declaration of Independence* (US 1776)¹⁰ promulgated by the Congress of the United States of America, 'We hold these truths to be self evident: that all men are created equal: that they are endowed by their Creator with certain unalienable rights: that among these are life, liberty and the pursuit of happiness' are well known to us all. The Declaration states that in order to secure these rights it is necessary that a stable government 'derives its power from the consent of the governed'. It is the right of the governed to alter or abolish a government that does not uphold the rights of the people. These sentiments were echoed in the 1789 *Declaration of the Right of Man and the Citizen*,¹¹ and similar statements made during the French Revolution (1789-1799).

⁹ NIETO-NAVIA, R., 'International peremptory norms (*jus cogens*) and international humanitarian law'. In *Man's inhumanity to man. Essays in honour of Antonio Cassese*, edited by Lal Chand Vohrah et al., Kluwer Law International, the Hague, 2003, p. 597.

¹⁰ The Charters of Freedom. Declaration of Independence: a transcription. In Congress July 4, 1776.

¹¹ FRANCE. *Declaration of the Right of Man and the Citizen*. 26 August 1789.
< <http://www.refworld.org/docid/3ae6b52410.html> > [accessed 27 January 2015]

2. THE UNITED NATIONS CHARTER AND HUMAN RIGHTS

*The United Nations Charter and Statute of the International Court of Justice 1945*¹² opens with the words '[w]e the peoples determined to reaffirm faith in fundamental human rights...'. Article 1.2 of the Charter of the United Nations entrusts the General Assembly with the realisation of 'equal rights and self-determination of peoples'. Article 1.3 speaks of 'assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. However the Charter's mandate does not extend to upholding and policing human rights as is outlined in Article 2.7 which prevents the United Nations from intervening 'in matters "essentially" within domestic jurisdiction'. Krasner asserted that '[f]or more than twenty years after the founding of the United Nations, human rights were considered as still falling within that set of rules. Strongly Westphalian States¹³ considered that their treatment of their subjects was their own concern'.¹⁴ 'This rule has virtually nothing to do with the Peace of Westphalia signed in 1648. In fact that document established a regime for religious toleration in Germany that violated the principle of non-intervention'. Non-intervention was a concept that was first articulated in the 18th century.¹⁵ The following two provisions in the Charter, however, deal with the formation of human rights *as a task to be fulfilled* by the Organization. Article 68 of the Charter provides that '[t]he Economic and Social Council shall set up commissions in economic and social fields and for the formation of human rights and such other commissions as may be

¹² UNITED NATIONS. Charter And Statute of The International Court of Justice, San Francisco, 1943. < <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> >

¹³ Traditionally the Treaty of Westphalia was thought to be the foundation of international law, the sovereignty of the State and the belief that the actions of States cannot be called into question by other entities. This is now considered to be a myth. See BEAULAC, S., *The Westphalian model in defining international law: challenging the myth*, Australian Journal of Legal History, Vol.9, 2004 [unpaginated], accessed online 1/11/2016.

¹⁴ KRASNER, SD., *Pervasive not perverse: semi-sovereigns as the global norm*, Cornell International Law Journal, vol 30, no. 1, Article 3, 1997, pp. 656-658.

¹⁵ Ibid.

required...'; Article 62.2 stated that ECOSOC 'may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all'.¹⁶ Prior to the late 1950's the United Nations Commission on Human Rights¹⁷ did not welcome cries for help; racism was widespread in the United States and colonial situations left many States wary of human rights complaints. The Economic and Social Council (ECOSOC) Resolution 1235 (XLII) of 1967 was a step forward. Article 5 of ECOSOC Resolution 1503 (XLVIII) 27 May 1970, *Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms* requested the Sub-Commission on the Prevention of Discrimination and Protection of Minorities 'to consider ... whether to refer to the Commission on Human Rights particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission'.¹⁸ Christian Tomuschat explains that

[p]ublic opinion expects their government to take a forceful stance against massive violations of human rights in other countries. No legal objections may be raised against such attempts to resolve through open dialogue human rights issues that because of their gravity transcend a purely national dimension.¹⁹

These rights are encoded in law in the Council of Europe's *European Convention on Human Rights* (1950) that Economic Union member States must sign up to. Article 33 provides that '[a]ny High Contracting Party²⁰ may

¹⁶ TOMUSCHAT, C., *Collected courses of the European Academy of European Law : human rights : Between idealism and realism, 2nd ed.*, Oxford University Press, 2008, p. 266.

¹⁷ The United Nations Commission on Human Rights was founded in 1946 with 53 State members who met annually. It is not the same as the Office of the United Nations High Commissioner for Human Rights that came into being in 1994.

¹⁸ ECOSOC Res. 1503 (XLVIII), *Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms* < <http://www1.umn.edu/humanrts/procedures/1503.html> >

¹⁹ TOMUSCHAT, C., *Collected courses of the European Academy of European Law : human rights : between idealism and realism, 2nd ed.*, Oxford University Press, 2008, p. 139.

²⁰ High Contracting Party means the representatives of states who have signed or ratified a treaty.

refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party'.²¹ The international community has to rely on the power of States that are willing to act *pro bono commune* in order to address breaches of human rights by sovereign States.²²

More recently former Secretary-General Kofi Annan was at the forefront in making the case that assertions of sovereignty cannot excuse the perpetration of gross violations of human rights. Annan saw the United Nations as 'an association of sovereign states, but the *rights* it exists to uphold belong to peoples, not governments'. 'Sovereignty implies responsibility', not just power and is not 'a licence to trample on human rights and human dignity'.²³ The concept of individual sovereignty, meaning the human rights and fundamental freedoms of each and every individual to control his or her own destiny, has been 'enhanced by a new conscientiousness'. State frontiers should no longer be seen as a water-tight protection for war criminals and mass murderers.²⁴ The principle of international concern for human rights as expressed in the *Universal Declaration of Human Rights* takes precedence over the claim of non-interference in internal affairs. He said that:

'[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that appeal every precept of our common humanity?'²⁵

²¹ Convention on the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and No. 14. Rome 4.xi.1950, European Treaty Series, no. 5 (see Article 33).

²² TOMUSCHAT, C., *Collected courses of the European Academy of European Law : human rights : between idealism and realism*, 2nd ed., Oxford University Press, 2008, p. 266.

²³ RAMCHARAN, BG., *The United Nations Commissioner for Human Rights: the challenges of international protection. International studies in human rights; volume 71*, Martinus Nijhoff Publishers, 2002, p. 26.

²⁴ ANNAN, K., *On intervention*. 35th Annual Ditchley Foundation Lecture, Ditchley Park, England, 26 June 1998. In ANNAN, K., *We the peoples: a UN for the 21st century*, edited by E. Mortimer, London, Paradigm Publishers, 2004, p. 196.

²⁵ ANNAN, K., *"We the peoples": the role of the United Nations in the 21st century*, United Nations, Millenium Report, 2000.

3. THE UNITED NATIONS AND STATE RESPONSIBILITY

Background

Prior to 1945 the theory of State responsibility was not well developed but was nevertheless, an early priority for the newly formed United Nations. After forty-five years and more than thirty reports, and the work of five Rapporteurs, the last of whom was Australia's James Crawford, the International Law Commission has produced *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001*.²⁶

The laws of State responsibility have arisen from the bilateral²⁷ mechanism of general international law concerning diplomatic protection. These Draft Articles are however applicable to 'the whole field of State obligations, whether the obligation is owed to one or more States, to an individual or to a group or to the international community as a whole'.²⁸ They are secondary rules as they contain no primary rules' catalogue of specific wrongful acts; they are rules that provide a framework in which primary rules sit. Primary rules are to be found in a multitude of United Nations Security Council and General Assembly resolutions; the *Universal Declaration of Human Rights* and UN conventions such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic*

²⁶ BIRKLAND, BH., *Reining in non-state actors: state responsibility and attribution in cases of genocide*. New York University Law Review, vol. 84, no. 12, 2009, p. 1627; From title page of Draft Articles: "Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission 2001, vol. II. Part 2, as corrected" < http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf >

²⁷ Bilateral refers to a treaty or an agreement between two States.

²⁸ INTERNATIONAL LAW COMMISSION. *Report of the International Law Commission on the work of its fifty-third session. Draft articles on responsibility of States for internationally wrongful acts, with commentaries, 2001*, p. 32 < http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

Social and Cultural Rights (ICESCR) that together make up the Bill of Rights; *Genocide Convention*, UN legislative series, regional human rights instruments as well as customary international law.

For certain Draft Articles, legal consequences for third States already exist and apply to serious breaches of peremptory norms of general international law, or when a breach of an obligation owed to the international community as a whole is committed.²⁹ However existing inter-state responsibility for breaches of international law, designated for reciprocal obligations has been called a 'bilateral straitjacket',³⁰ that is a responsibility that exists primarily between an injured State and another State.

The Draft Articles are distinctive in that they distinguish between injured States and States other than injured states. A 'third State' is one or more than one State that is not directly injured by a wrongful act of a State but has a legal interest in compliance on account of the 'importance of the rights involved'.³¹ An injured State is one, or more than one State, that has actually *experienced* a wrongful act by another State. The two situations are covered in two separate Draft Articles. These articles are not mutually exclusive in that third States may also support an invocation of responsibility brought by an injured State.

3.1 Barcelona Traction Case

The above quote, 'the importance of the rights involved' comes from a decisive case, the International Court of Justice *Barcelona Traction Case* of 1970. The paragraph is worth quoting in full:

²⁹ BIRD, A., *Third state responsibility for human rights violations*, The European Journal of International Law, vol. 21, no. 4, 2011, pp. 883-884.

³⁰ Ibid. p. 883.

³¹ *Barcelona Traction, Light And Power Company, Limited (Belgium v Spain)*, Second Phase, International Court of Justice, 5 February 1970, p. 33, par. 34; Bird, A., *Third state responsibility for human rights violations*. European Journal of International law, vol. 31, no. 4, pp. 883-884.

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations however are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the *obligations of a State towards the international community as a whole*, and those arising vis a vis another State in the field of diplomatic protection. *By their very nature the former are the concern of all States*. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.³²

Paragraph 34 further clarifies the above statement :

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law, one example being *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide ICJ Reports 1951, p. 23*.³³

Christian Tomuschat's summation of this landmark case was that:

On the level of general international law the judgement of the ICJ in the *Barcelona Traction Case*, '[O]pened the gates for states to concern themselves with human rights violations committed in other states by inflicting upon them disadvantages consisting of breaches of the rules applicable in mutual relationships. By holding that the prohibition of genocide as well as the basic rights of the human person, including protection from slavery and racial

³² *Barcelona Traction, Light And Power Company, Limited (Belgium v Spain) Second Phase*, International Court of Justice, 5 February 1970, par. 33 (Emphasis added). The *Barcelona Traction Case* concerned the question of the rights protection of the investment of Belgian citizens in a company that although Belgian, was incorporated in Canada, and provided power for the Spanish province of Catalonia (Par.8). The damage alluded to 'was allegedly sustained by Belgian nationals, who were shareholders in the company, on account of acts said to be contrary to international law, committed by organs of the Spanish State' (Par.2). *Erga omnes* means that the obligations are required to be met by all States whether or not they have signed up to a relevant treaty.

³³ *Barcelona Traction, Light And Power Company, Limited (Belgium v Spain) Second Phase*, International Court of Justice, 5 February 1970, Par. 34; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, 28 May 1951, I.C.J. Reports, p. 23.

discrimination are owed towards the entire international community as obligations *erga omnes*, the ICJ suggested that states not directly affected are indeed legitimated to vindicate the rights of the victims...³⁴ (Emphasis added).

Christian Tams has pointed out that prior to the *Barcelona Traction Case* there were open approaches to standing³⁵ and that, although on many occasions such approaches received considerable support, on other occasions '[t]hese assertions were not always universally welcomed; in fact claims of self-proclaimed guardians of general interests at times met with rather sceptical responses'.³⁶

3.2 The South West Africa case

It has been pointed out that this 'stray dictum' of the International Court of Justice in the *Barcelona Traction Case* arose as a result of a judgement in the *Second West Africa Case* in which the Empire of Ethiopia and the Republic of Liberia had taken the Republic of South Africa to the International Court of Justice.³⁷ The Court, in the 1966 judgement, looking into the rules of the Covenant of the League of Nations, found that the Applicants had no legal right or interest in the subject matter of their claims and rejected them.³⁸ This, in spite of the Applicants' concerns about South Africa's continued

³⁴ TOMUSCHAT, C., *Collected courses of the European Academy of European Law : human rights : Between idealism and realism*, 2nd ed., Oxford University Press, 2008, p. 273.

³⁵ Standing or *locus standi* means that a party should be able to demonstrate to a tribunal or court that they have a sufficient connection to the case and to identify the tribunal or court before which the case may be heard. Human rights conventions usually indicate these within their provisions.

³⁶ TAMS, C., *Enforcing obligations erga omnes in international law*, Cambridge University Press 2005, p. 72

³⁷ CRAWFORD, J., Foreword In TAMS, CJ., *Enforcing obligations erga omnes in international law*, Cambridge University Press, 2005, p. xiii.

³⁸ SOUTH WEST AFRICA (*Liberia v. South Africa*) Judgement, I.C.J. Reports, 1966, p. 51, par. 99.

occupation of the Mandated Territory of West Africa and imposition of apartheid upon the population; nor to mention the Preliminary Objections Judgement of 21 December 1962 that

[F]or the manifest scope and purport of the provisions of the Article [i.e. article 7 (2) Covenant of the League of Nations] indicated that the members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both towards the inhabitants of the Mandated Territory and towards the League of Nations and its members.³⁹

It has been claimed by 'States, courts, commissions and commentators'⁴⁰ that the 1966 Judgement was a public relations disaster for the ICJ and that the statement on the *Barcelona Traction Case* was a way of acknowledging that international law had moved on from a strict interpretation of the rules such as those contained in the Covenant of the League of Nations.⁴¹ 'What matters are not bilateral but multilateral relations and multilateral norms—self-determination, non-discrimination, prohibition of aggression, fundamental human rights'.⁴² These norms had already been adopted almost unanimously by the *Vienna convention on the law of treaties, 1969*.

³⁹ South West Africa cases (*Ethiopia v. South Africa; Liberia v. South Africa*) Preliminary Objections, Judgement of 21 December, 1962; I.C.J. Reports, 1962, p. 343.

⁴⁰ TAMS, CJ *Enforcing obligations erga omnes in international law*, Cambridge University Press, 2005, p. 2.

⁴¹ The Covenant of the League of Nations (including amendments adopted to December 1924) < http://avalon.law.yale.edu/20th_century/leagcov.asp >; CRAWFORD, J., Foreword In TAMS, CJ., *Enforcing obligations erga omnes*, Cambridge University Press, 2005, p. xiii.

⁴² CRAWFORD, J., Foreword In TAMS, CJ., *Enforcing obligations erga omnes*, Cambridge University Press, 2005, p. xv.

4. UNITED NATIONS, INTERNATIONAL LAW COMMISSION. ARTICLES ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS 2001

This document contains 59 Articles and was the work of five successive International Law Commission Rapporteurs over a span of 45 years. It is divided into four parts.

- Part One: Articles 1-27 define the conditions that must exist in order that State responsibility can be invoked;⁴³
- Part Two: Articles 28-41 deal with the consequences of State responsibility for an internationally wrongful act and 'serious breaches of obligations under peremptory norms of general international law';⁴⁴
- Part Three: Articles 42-54 deal with implementation of State responsibility;
- Part Four: Articles 55-59 deal with various contingencies.

These are secondary rules and do not provide a catalogue of any specific wrongdoing as associated primary rules would be far too numerous to list. Primary rules govern conduct and secondary rules govern procedural methods.⁴⁵ Not all Draft Articles have been included here. The reader is referred to the *Report of the International Law Commission on the work of its fifty-third session, 2001* for a very comprehensive coverage.⁴⁶

⁴³ INTERNATIONAL LAW COMMISSION. Report of the International Law Commission on the work of its fifty-third session. *Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, 2001, p. 86 < http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf >

⁴⁴ CRAWFORD, J., *Articles on responsibility of States for internationally wrongful acts*. United Nations Audiovisual Library of International Law, 2012, pp. 4, 6.

⁴⁵ Hart, HLA., *The concept of law*, Clarendon Press, 1961, pp. 78-79. Cited in CASSESE, A *International law*, 2nd ed., Oxford University Press, 2005, p.18.

⁴⁶ INTERNATIONAL LAW COMMISSION. Report of the International Law Commission on the work of its fifty-third session. *Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, 2001 < http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf >

Part One: The Internationally Wrongful Act of a State

Chapter I lays down the following three basic principles for responsibility from which the articles as a whole depend.

Article 1. Responsibility of a State for its internationally wrongful acts. Every internationally wrongful act of a State entails its international responsibility.

Article 2. Elements of an internationally wrongful act of a State. There is an internationally wrongful act of a State when conduct consisting of an action or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

'First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of a State, the conduct must constitute a breach of an international legal obligation in force for that State at that time'.⁴⁷

Article 3. Characterization of an act of a State as internationally wrongful. The characterization of an act of a 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.

Chapter II: Attribution of conduct to a State

Article 4. Conduct of organs of a State.

- 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.**
- 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.**

⁴⁷ INTERNATIONAL LAW COMMISSION. Report of the International Law Commission on the work of its fifty-third session. *Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, 2001. Commentary, p. 34.

Article 7. Excess of authority or contravention of instructions.

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Chapter III: Breach of an international obligation

Article 12. Existence of a breach of an international obligation.

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is requires of it by that obligation, regardless of its origin or character.

Obligations may arise for a State by treaty and by a rule of customary international law and these treaties and customary laws interact with each other. Multilateral treaties especially can contribute to customary international law.⁴⁸

Chapter IV: Responsibility of a State in connection with the act of another State

Article 16. Aid or assistance in the commission of an internationally wrongful act. A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.

Article 16 provides for the responsibility of a State which ‘aids or assists’ another State in committing an internationally wrongful act, the assisting State having ‘knowledge of the circumstances of the internationally wrongful

⁴⁸ INTERNATIONAL LAW COMMISSON. Report of the International Law Commission on the work of its fifty-third session. *Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, 2001. Commentary, p. 55.

act' committed by the other State and that providing aid or assistance, would constitute a breach of its own international obligations.⁴⁹

Part Two: Content of the International Responsibility of a State

This part deals with **the legal consequences** for a State that is responsible for a wrongful act.

Chapter I: General Principles

Article 28. Legal consequences of an internationally wrongful act. The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this part.

The core legal consequences of an internationally wrongful act set out in Part Two are the obligations of the responsible State to cease the wrongful conduct and make assurances regarding the cessation of the wrongful conduct (Art. 30) and to make full reparation for the injury caused by the internationally wrongful act (Art. 31).⁵⁰ Article 32 makes clear that the responsible State may not rely on its internal law to avoid the obligations of cessation and reparation arising under Part Two.⁵¹

Chapter II: Reparation for Injury

This chapter 'deals with the **forms of reparation** for injury ... and in particular [is] seeking to establish more clearly the relations between the different forms of reparation, viz. restitution, compensation and

⁴⁹ INTERNATIONAL LAW COMMISSION. *Report of the International Law Commission on the work of its fifty-third session. Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, 2001. Commentary, p. 55.

⁵⁰ Ibid. p. 87-89.

⁵¹ Ibid. p. 94.

satisfaction'.⁵² Articles 35 to 39 deal with these forms of reparation.

The above outlines Draft Articles up to Article 39 in a general way, but the following articles are of particular interest and concern for those peoples who are still suffering under the yoke of colonialism or neo colonialism or are still awaiting a genuine act of self-determination, and for those brave States that are increasingly speaking out on their behalf.

Chapter III: Serious Breaches Of Obligations Under Peremptory Norms of General International Law

This chapter lists the criteria and sets out *consequences* for the different breaches of international law. 'First they must involve breaches of obligations under *peremptory norms* of general international law; and secondly the breaches concerned are in themselves *serious...*'.⁵³ As mentioned above, the *Barcelona Traction Case* was the catalyst for contrast between 'diplomatic protection with the position of all States in respect of the breach of an obligation towards the international community as a whole'.⁵⁴ The emphasis of Draft Articles on obligations to the international community as a whole lies in the legal interest in *compliance*. Breaches of obligations under peremptory norms can invoke additional consequences for not only the responsible State but for all other States.⁵⁵

Article 40. Application of this chapter.

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

⁵² Ibid. p. 95.

⁵³ Ibid. p. 110.

⁵⁴ Ibid. p. 111.

⁵⁵ Ibid. p. 112. Emphasis added

2. A breach of such an obligation if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

This article states that firstly, a breach by a State must entail a serious breach of an obligation arising under a peremptory norm of international law and that secondly, '[a] breach of such an obligation is serious if it involves a gross or systematic failure by the responsible state to fulfil the obligation'.⁵⁶

The 1969 Vienna Convention on the Law of Treaties, Article 53,⁵⁷ defines a peremptory norm as one '[A]ccepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character'.⁵⁸

When an injured State or a third State invokes the responsibility of a State committing a wrongful act in violation of a peremptory norm, the Draft Articles lay down consequences for States (Article 40). These are, briefly, that no State, including the State that is responsible for the violation, shall recognize a serious breach within the meaning of Article 40 as lawful and that no State shall render aid or assistance in the maintenance of that situation. The notion of crime and the criminal responsibility of States was removed from Article 19 of the original drafts of the Articles and replaced in Article 40 with the notion of a 'serious breach'. This was because there had been no development of penal consequences for States. Japan and Germany were not treated as 'criminal' by either the Nuremberg Trials or the Tokyo Military Tribunal. These States together with the more recent tribunals for Rwanda and Yugoslavia were not treated as criminal, the rationale being

⁵⁶ Ibid.

⁵⁷ *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986*. United Nations, 2005
< http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf >

⁵⁸ INTERNATIONAL LAW COMMISSION. *Report of the International Law Commission on the work of its fifty-third session. Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, 2001, p. 112.

that individuals commit crimes not States. In these cases, emphasis lay with the prosecution of *individuals*. In the past when States violated bilateral rules or multilateral rules protecting reciprocal interests such as economic, environmental or diplomatic relations the result was a bilateral relation between each State party to a treaty.⁵⁹

The commentary to Article 40 states that this article 'does not lay down any procedure for determining whether or not a serious breach has been committed' as it is not the function of the Articles 'to establish new institutional procedures for dealing with individual cases...'. Serious breaches of obligations under peremptory norms of general international law dealt with in Part Two Chapter III are likely to be addressed by the competent international organizations, including the Security Council and the General Assembly.⁶⁰

Article 41, Parts 1 and 2. Particular consequences of a serious breach of an obligation under this chapter.

- 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.**
- 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.**

⁵⁹ INTERNATIONAL LAW COMMISSION. *Report of the International Law Commission on the work of its fifty-third session. Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, 2001, p. 111.

⁶⁰ This may not always be the case as, for example, there have been strong suggestions that Indonesia's actions in the provinces of Papua and West Papua amount to a slow motion genocide. See *The neglected genocide: human rights abuses against Papuans in the central highlands 1977-1978*. Human Rights Watch, International Coalition for Papua, September 2013
< http://freewestpapua.org/wp-content/uploads/2013/10/AHRC_TheNeglected_Genocide-lowR.pdf >.

While the report only covers events from 1977-1978 it also acknowledges that '[d]ecades of conflict ... continue to cost the lives of civilians, soldiers and resistance group members. Ongoing human rights violations range from extra-judicial killings and intimidation of journalists to discrimination in healthcare, education and access to economic opportunities, and these are just the tip of the iceberg...'. To date there has been no action taken by the Security Council or the General Assembly.

Article 41 par. 2 provides that '[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40 nor render aid or assistance in maintaining that situation'. States are under a positive obligation to cooperate in order to bring an end to serious breaches. In fact the whole community of States including the responsible State has a duty to act. The commentary provides that '[c]ooperation could be organized in the framework of a competent international organization, in particular the United Nations. Paragraph 1 envisages the possibility of non-institutionalised cooperation'. The international community has an obligation of non-recognition of the legality of situations arising from serious breaches of an obligation such as an 'attempted acquisition of sovereignty over territory by denial of the right of self-determination of peoples.'⁶¹

The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (UNGA Resolution 2625 (XXV))⁶² 'affirms the principle ... that States shall not recognize as legal any acquisition of territory brought about by the use of force'. In very serious situations the Security Council will act as it did following Iraq's invasion of Kuwait.

Part Three: The Implementation of the Responsibility of a State

Chapter 1: Invocation of the Responsibility of a State

Article 42. Invocation of responsibility by an injured State. A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) that state individually; or**
- (b) a group of States including that State, or the international community as a whole, and where the breach of the obligation:**

⁶¹ INTERNATIONAL LAW COMMISSION. *Report of the International Law Commission on the work of its fifty-third session. Draft articles on responsibility of States for internationally wrongful acts, with commentaries, 2001*. p. 114.

⁶² General Assembly Resolution 2625 (XXV). A/RES/25/2625. 24 October 1970, annex, first principle.

(i) specially affects that State; or

(ii) is of such a character as to radically change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

This article defines an 'injured State' as an individual State that is entitled to invoke⁶³ the responsibility of another State that has caused a wrongful act. It is not a mere criticism of the other State as these can be raised in informal diplomatic contacts. Articles 43, 44, 45, 46 and 47 deal with the invocation of the responsibility of another State: Notice of claim by an injured State (43); Admissibility of claims (44); Loss of the right to invoke responsibility (45); Plurality of injured States (46) and Plurality of responsible States (47).

Article 48. Invocation of responsibility by a State other than an injured State.

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

- (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or**
- (b) the obligation breached is owed to the international community as a whole.**

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under Articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

⁶³ Definition of invoke: "To put a law or penalty etc. into use". Collins Concise Dictionary, 5th Australian edition, HarperCollins, 2001.

Article 48 is complementary to Article 42 and 'deals with the invocation of responsibility by States other than the injured State acting in the collective interest'. A third State is acting 'in its capacity as a member of a group of States to which the obligation is owed, *or* indeed as a member of the international community as a whole'.⁶⁴

Article 48 paragraph 1(a) provides that a breach of an obligation that has given rise to a responsibility must be owed to a *group* to which the State invoking responsibility belongs and the obligation must have been established for the protection of a common interest such as the protection of the environment and must transcend the bilateral relations of the State Party. This interest may derive from multilateral treaties (such as the *Covenant on Civil and Political Rights*) or customary international law.

Article 48 Paragraph 1(b) concerns obligations owed to and protecting interests held by the international community as a whole; they are *erga omnes* and involve the violation of human rights including the denial of self-determination.

A reference to an obligation to the international community as a whole was specifically referred to in the International Court of Justice in the *Barcelona Traction Case*: that ' [i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'. This does not mean that obligations are owed only to parties to a treaty, but are obligations that are 'owed to the international community as a whole'.⁶⁵

⁶⁴ INTERNATIONAL LAW COMMISSION. *Report of the International Law Commission on the work of its fifty-third session. Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, 2001. p. 126.

⁶⁵ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) Second Phase*, International Court of Justice, 5 February 1970. p. 32, par. 33, < <http://www.icj-cij.org/docket/files/50/5387.pdf> >

The 1970 *Barcelona Traction* case judgement provides examples: '[s]uch obligations derive ... from the outlawing of acts of aggression, and genocide and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'.⁶⁶ The ICJ Court in the *East Timor Case* added the right of self-determination of peoples saying that, 'Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character is irreproachable'.⁶⁷ Peremptory norms that are mentioned elsewhere vary but the following have been mentioned: the prohibition of genocide, slavery and slave trade, apartheid, murder, disappearance of individuals, torture, prolonged arbitrary detention and racial discrimination and other gross violations of human rights.⁶⁸

Article 48 Paragraph 2 states that: [a]ny States entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

- (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30, and
- (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

Article 48 Paragraph 3 States other than injured States that invoke a responsible State for an unlawful act are subject to the conditions that govern invocation by an injured State, including articles 43, 44, 45 as follows:

Article 43. As stated in the commentary to Article 43 and in *Republic of Guinea v. Democratic Republic of Congo* where Judge ad hoc Mampuya, in

⁶⁶ Ibid. p. 32, par. 34.

⁶⁷ East Timor (*Portugal v. Australia*) Judgement, I.C.J. Reports, 1995. p. 90, par. 29
< <http://www.icj-cij.org/docket/files/84/6949.pdf> >

⁶⁸ MERON, T., Discussion emanating from Part II, Ch.1 'To what extent are the traditional categories of *Lex Lata* and *Lex Ferenda* still viable' presented by J. Brownlie. In CASSESE, A., WEILER, JHH., eds. *Change and stability in international-law-making*, Walter de Gruyter, 1988, p. 93.

his separate opinion, pointed out that a dispute may exist between private individuals but these disputes remain 'simple facts' until they become inter-State disputes. Article 43 stipulates that a State that invokes the responsibility of another State should notify its claim, so as to specify: (a) the conduct that the responsible State should take in order to cease the wrongful act if it is continuing; (b) what form reparation should take. It is not until such a claim has remained without a response that a dispute arises.⁶⁹

Firstly, **Article 44** states that responsibility cannot be invoked if the claim is not brought in accordance with any applicable rule relating to the nationality of claims. Should a third state invoke the responsibility of a State for racial discrimination of part of its population, then the claiming State would need to ascertain that *the part of the population subject to wrongful acts* was in fact comprised of nationals of the State committing the wrongful act.

Secondly the State invoking responsibility needs to ascertain that all local remedies have been exhausted. There is no requirement that a remedy that is patently useless in a given situation be applied. Draft Article commentary to Article 44 Paragraph 5 states that '[o]nly those remedies which are "available and effective" have to be exhausted before invoking the responsibility of a State' or that 'which offers no possibility of redressing the situation, for instance, where it is clear from the outset the law which the local court would have to apply can lead only to the rejection of any appeal'.⁷⁰

Article 45. Loss of the right to invoke responsibility. This article deals with the possibility that the State which invokes responsibility for a wrongful act may waive the claim and thus be considered, as a result of its conduct in

⁶⁹ Ahmadov Sadio Diallo (Republic of Guinea v Democratic Republic of Congo), Preliminary objections, Judgement, I.C.J. Reports 2007, p. 582, par.98; OLLESON. S., *The impact of the ILC's Articles on Responsibility of States for Internationally Unlawful Acts. Preliminary draft*. British Institute of International and Contemporary Law 10 October, 2007, p. 250.

⁷⁰ INTERNATIONAL LAW COMMISSION. *Report of the International Law Commission on the work of its fifty-third session. Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, 2001, p. 121, par. 5.

waiving the claim, to have validly acquiesced in the lapse of the claim. This waiver may result in the injured State losing the right to claim reparation. This will not be so if a waiver is made by a claiming State that is not an injured State. If it becomes apparent that a State that is responsible for an unlawful act has placed coercive pressure upon the claiming State then the matter may be referred to law to determine if the waiver is valid. Where a breach of an obligation arises from a *peremptory norm* of international law, the interest of the international community is involved and the waiver does not extinguish that interest.

Part Four: General Provisions

Article 55. *Lex specialis.*

These articles do not apply where and to the extent that the conditions for the existence of an international wrongful act ... are governed by special rules of international law.

'Article 55 constitutes a saving clause, making clear that each of the Articles applies only to the extent that there is *no more specific rule* governing the aspect of the law of State responsibility to which it relates in relation to the particular obligation in question'.⁷¹

Where breaches in the Draft Articles involving peremptory norms involving serious human rights violations are already covered by general international law such as treaties, conventions or international customs and general principles of law, these will prevail over Draft Articles.

States which ratify human rights conventions may seek to exclude the enforcement regimes of the Draft Articles. Treaties and covenants were designed for reciprocal obligations between States but Draft Articles have *expanded the concept of the injured state* to 'reflect that there are certain

⁷¹ OLLESON. S., *The impact of the ILC's Articles on Responsibility of States for Internationally Unlawful Acts. Preliminary draft*. British Institute of International and Contemporary Law 10 October, 2007, p. 281. Emphasis added.

consequences flowing from the basic concepts of peremptory norms of general international law and obligations to the international community *as a whole* within the field of State responsibilities'.⁷²

When a norm emerges from the same source (customary or treaty law), a later law repeals an earlier one; a *later* law that is *general* in character does not take precedence over an earlier one which is *special* in character. A *special law* prevails over a general law.⁷³

⁷² INTERNATIONAL LAW COMMISSION. *Report of the International Law Commission on the work of its fifty-third session. Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, 2001 p. 111, par. 7. Emphasis added.

⁷³ CASSESE, A., *International law*, 5th ed., Oxford University Press, 2005 p. 154. Emphasis added.

5. HUMAN RIGHTS, FROM SECONDARY RULES TO PRIMARY RULES

5.1 Sources of law

The principal methods employed by the international community for creating legally binding rules are treaties and custom which together make up general international law. The Draft Articles could be compared to the hull of a ship, providing a framework of responsibilities of States in various situations. Primary rules are the engine or sails that power the ship: the rules that require States to do or to abstain from certain actions.⁷⁴

Draft Article 1 for example, states that: '[e]very wrongful act of a State entails its international responsibility'. A State may commit wrongful acts in thousands of ways and these acts are the concern of primary rules that are employed to sift through the evidence provided and hopefully produce a fair judgement. In the case of obligations that are peremptory norms of *jus cogens*⁷⁵ the rules are mostly embedded in treaties that were part of the great codification of international law that took place during the 20th century.

Article 38 (1) of the Statute of the International Court of Justice enumerates sources of international law:

- (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- (b) international custom, as evidence of a general practice, accepted as law;
- (c) the general principles of law recognised by civilised nations; and
- (d) subject to the provisions of Article 59, judicial decisions and the

⁷⁴ Primary rules have been defined as 'a rule that requires legal subjects to do or to abstain from certain actions'. Hart, HLA *The concept of law*, Clarendon Press, 1961 p. 78-79. In CASSESE, A. *International law*, 2nd ed. Oxford University Press, 2005, p.18.

⁷⁵ *Jus cogens* means compelling law in Latin and peremptory norm in English. That is, a law that cannot be ignored or evaded for any reason (such as genocide, slavery).

teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rule of law.⁷⁶

5.1.1 Treaty law

The 20th century saw the emergence of many new States all with different political, ideological and cultural backgrounds. The time that followed the Second World War saw a veritable explosion of treaties that dealt with human rights and other important subjects and at the same time presented challenges to the old view of the sovereign State as inviolable. The push towards a paradigm shift⁷⁷ was led by the developing and socialist States as, with their growing numbers, they came to dominate the UN General Assembly.⁷⁸ There was a need to have closer regulation of treaties and a 'consequent need to codify, reshape and develop traditional rules'. Out of this there emerged an entire treaty *about* treaties, the *Vienna Convention on the Law of Treaties* of 1969, that was devoted to regulating 'the "birth", "life", and "death" of international agreements.' This convention regulated all the main features of international treaties'.⁷⁹

The new States insisted on self-determination and racial equality resulting in the *UN Convention on the Elimination of Racial Discrimination*, General Assembly Resolution 2106 (XX), 4 January 1965. During the 1960's and up to the 1980's the codification of many important subjects took place, e.g. the law of the sea, diplomatic relations, treaty law, state secession.⁸⁰

⁷⁶ NIETO-NAVIA, R., International peremptory norms (*jus cogens*) and international humanitarian law. In *Man's inhumanity to man. Essays in honour of Antonio Cassese*, Kluwer Law International, the Hague, 2003, p. 597.

⁷⁷ Paradigm shift is a term coined by Thomas S. Kuhn. See his monograph: *The structure of scientific revolutions*, University of Chicago Press, 1962.

⁷⁸ CASSESE, A., *International law*, 2nd.ed., Oxford University Press, 2005, p. 43.

⁷⁹ *Ibid.*, p. 155.

⁸⁰ *Ibid.*, p.167. These treaties have been important in the formation of customary international law.

On 14 December 1960 the United Nations adopted General Assembly Resolution 1514 (XV) *On the Granting of Independence to Colonial Countries and Peoples*. The right of nations to self-determination is a cardinal principle of international law (*jus cogens*) and was already enshrined in Chapter 1 of the Charter with Article 1.2 speaking of equal rights and self-determination of peoples.

The two UN Covenants on Human Rights (1966) *Covenant on Civil and Political Rights*, and the *Covenant on Economic, Social and Cultural Rights* with their decisive Article 1 followed. 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. The obligations enshrined in the ICCPR are 'binding on every state Party as a whole' and a State cannot invoke its own domestic law to excuse itself from the obligations inherent in the treaty.⁸¹

The *Declaration on Friendly Relations*, UNGA Resolution 2625, 1970 emerged from this era with its important clause providing that the territorial integrity of States is dependent upon then '[C]onducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.⁸²

5.1.2 Peremptory norms of *jus cogens*

From the earliest years of the 20th Century and more particularly following WWI, fundamental values had emerged and as a result there was a need to reshape traditional rules. States agreed on the importance of the new

⁸¹ UNITED NATIONS HUMAN RIGHTS COMMITTEE. *General comment 31, nature of the general legal obligation on State Parties to the Covenant*, UN document., CCPR/C/21/Add.13 (2004).

⁸² *Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations*, General Assembly Resolution 2625 (XXV), A/RES/25/2625. 24 October 1970.

category of general international rules: peremptory norms of *jus cogens*, rules that States cannot derogate from through customary rules or treaties. A consensus was reached during the Vienna Conference in 1969 and was codified in Article 53 *Vienna Convention on the Law of Treaties* of 1969:

A peremptory norm of international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

These norms heralded the end of an era where States regarded the treatment of their subjects as their own affair. In addition, a hierarchy of norms appeared for the first time in international law. Peremptory norms are recognized in 'international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine'.⁸³ As these rules were developed by consensus it is appropriate to speak of the validity of international law.⁸⁴ When peoples are subjected to racist regimes or to alien domination, or are part of national liberation movements, or are injured or third States (where obligations are owed *erga omnes*) they look to international law, as it is to these codified norms, treaties, covenants etc. that they turn.

5.1.3 Treaty Law and International law

Although there is no law-making body as such in international law, in an era of increasing awareness of human rights, Pierre Dupuy reminded us that:

[o]ne of the most essential principles of international law in our day is the

⁸³ INTERNATIONAL LAW COMMISSION. Report of the International Law Commission on the work of its fifty-third session. *Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, 2001. Commentary to Article 40, par.1, p. 112.

⁸⁴ NIETO-NAVIA, R., International peremptory norms (*jus cogens*) and international humanitarian law. *Man's inhumanity to man. Essays in honour of Antonio Cassese*, Kluwer Law International, the Hague, 2003, p. 595.

principle of respect for the rights of peoples.⁸⁵ These rights are derived from various equally relevant sources. Two are of the nature of treaties: the Charter of the United Nations and the two human rights Covenants. Customary law is general international law that continues to exist and to apply, separately from international treaty law, even when the two categories of law have an identical content.⁸⁶

This last paragraph alludes to the fact that in the *Nicaragua v. United States Case* the United States made a reservation, called the 'multilateral treaty reservation' to Article 36, Paragraph 2, proviso (c) of the Statute of the International Court of Justice. This reservation excluded disputes arising under multilateral treaties and the Court added this to its declaration of jurisdiction. There was also a need by the ICJ to satisfy itself that the Parties' attitude to General Assembly Resolutions and common general international law constituted *opinio juris*.⁸⁷ The Court found that it was satisfied, that the United States had breached international law by intervening in the affairs of Nicaragua, used force, violated sovereignty and interrupted peaceful maritime commerce. As a result of this reservation, the judgement on the merits of this case had to rely on *customary international law*.⁸⁸ It relied upon Article 2.4 of the UN Charter that: '[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations'. The United

⁸⁵ East Timor (*Portugal v. Australia*), 1995 I.C.J. Reports, p. 4 (31 January 1995) (separate pleading of Pierre-Marie Dupuy).

⁸⁶ Case concerning military and paramilitary activities in and against Nicaragua (*Nicaragua v. United States of America*) I.C.J. Reports, Judgement, 27 June 1986, p. 96, par. 179.

⁸⁷ *Opinio juris* means a legal opinion. In customary international law *opinio juris* is the second element (along with state practice) needed to establish a legally binding custom. Cornell University Law School. Legal Information Institute. *Opinio juris* (international law).

⁸⁸ The Court by twelve votes to three: *Decides* that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation *under customary international law* not to intervene in the affairs of another State. (Emphasis added).

States had clearly violated this Article. The prohibition against threat or the use of force are norms of *jus cogens* and applicable *erga omnes*. Territorial integrity of a State is not violated when an injured or third State *speaks* about human rights violations that occur within a territory of a sovereign State. Customary international law exists side by side with treaty law and together they make up general international law. The Draft Articles rely upon both for their implementation. The two cases below illustrate the way in which general international and treaty laws can be invoked in relation to specific cases. Although the taking of countermeasures applies mainly to an injured State, any State identified in article 48, paragraph 1 may make a demand for the cessation of a wrongful act and be accompanied by an offer to negotiate if an obligation is owed to a group of States or, according to Article 48, paragraph 2 to the international community as a whole if the obligation involves a peremptory norm of *jus cogens*. The Commentary describes the taking of countermeasures as embryonic.⁸⁹ For most peremptory norms there exists a Convention that contains a clause or clauses that deal with dispute settlement.

⁸⁹ INTERNATIONAL LAW COMMISSION. Report of the International Law Commission on the work of its fifty-third session. *Draft articles on responsibility of States for internationally wrongful acts, with commentaries*, 2001. p. 129.

6. THE DRAFT ARTICLES IN ACTION

James Crawford characterized the instances where draft articles have been invoked as 'enormous ... almost an unpredictable level of reliance on the ILC articles by international and ... national courts'. The Articles have been cited in international judicial decisions up to the level of the International Court of Justice.⁹⁰ A study by the British Institute of International and Contemporary Law has, up to 2014, recorded over one hundred uses of the Draft Articles.⁹¹ Several examples of the use of and interaction between these articles follow.

6.1 Democratic Republic of the Congo v. Uganda

Judge Simma, in the 2005 case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, in his Separate Opinion stated that the victims of the attack at Congo's Ndjili International Airport, in spite of Uganda's failure to show that these people were Ugandan nationals, were entitled to diplomatic protection, and were legally entitled to be protected irrespective of their nationality by other branches of international law, namely human rights and international humanitarian law.⁹² He stated that Uganda would have had standing to raise a claim in regard to the persons maltreated. Human rights law could for example be invoked by the *International Covenant on Civil and Political Rights*, the *African Charter on Human and Peoples Rights* and the *Covenant against Torture*, or as provided in International humanitarian law, Article 1 of the *Geneva Fourth Convention*: '[t]he high contracting Parties undertake to respect and ensure

⁹⁰ CRAWFORD, J., United Nations, Office of Legal Affairs, Audio Visual Library [videorecording] < http://legal.un.org/avl/ls/Crawford_S_video_1.html >

⁹¹ OLLESON, S., *The impact of the ILC's Articles on Responsibility of States for Internationally Unlawful Acts*. Preliminary draft. British Institute of International and Contemporary Law, 10 October 2007 < http://www.biicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf >

⁹² *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Separate Opinion of Judge Simma, I.C.J. Reports, 2005, par. 34; OLLESON, S. *The impact of the ILC's Articles on Responsibility of States for Internationally Unlawful Acts*, Preliminary draft. British Institute of International and Contemporary Law 10 October, 2007, pp. 263-264.

respect for the present convention in all circumstances'. The obligation is owed to international conflicts and non-international conflicts ... to 'respect' and 'ensure respect'.⁹³

Judge Simma then referred to Article 48 of the Draft Articles: that a State other than an injured State could invoke a violation of human rights and that attempts to break down international law in the name of the 'war' on international terrorism were of great concern; that they weakened the community interest underlying humanitarian and human rights laws fundamental to the 'respect of the human person'; that they are *erga omnes* and must be observed by all States whether or not they have ratified the Convention because they constitute untransgressible principles of international customary law.⁹⁴ If the international community allowed the erosion of these laws with their *erga omnes* character then that would 'open black holes in the law in which human beings may be disappeared and deprived of any legal protection whatsoever for indefinite periods of time...'.⁹⁵ As the Court indicated in the *Barcelona Traction Case*, obligations *erga omnes* are by their nature the 'concern of all States' and '[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection...'⁹⁶

⁹³ Armed activities on the territory of the Congo (*Democratic Republic of the Congo v. Uganda*), I.C.J. Reports, 2005, paragraphs 31, 33 (Separate Opinion of Judge Simma); International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 United Nations Treaty Series 287 < <http://www.refworld.org/docid/3ae6b36d2.html> > [accessed 10 November 2015].

⁹⁴ Armed activities on the territory of the Congo (*Democratic Republic of the Congo v. Uganda*), I.C.J. Reports, 2005, pars 35, 36, 37, 40 (Separate Opinion of Judge Simma).

⁹⁵ Ibid. par. 41; OLLESON. S. *The impact of the ILC's Articles on Responsibility of States for Internationally Unlawful Acts*. Preliminary draft. British Institute of International and Contemporary Law, 10 October 2007, p. 234.

⁹⁶ Ibid. p. 265; Armed activities on the territory of the Congo (*Democratic Republic of the Congo v. Uganda*) I.C.J. Reports, 2005, par. 40 (Separate Opinion of Judge Simma).

6.2 Jegatheeswara Sarma v Sri Lanka

A further example illustrates the ways in which the Draft Articles complement or interact with treaty law. The case of *Jegatheeswara Sarma v Sri Lanka* came before the Human Rights Committee. The Author's complaint was that his son was kidnapped by an officer of the Sri Lankan army on 23 June 1990. The Committee found that it was irrelevant that the officer had acted *ultra vires* (beyond the law) and concluded that the State Party was responsible for the disappearance of the author's son. In fact large scale disappearances of youth by members of the army had been taking place with the encouragement of political figures during parts of 1989 and 1990.⁹⁷ This case involved Articles 4, 5 and 7 of Draft Articles. Article 3 states that '[t]he characterization of an act of a State as internationally wrongful' is governed by international law ... [and] is not affected by the characterization of the same act as lawful by internal law. Article 4: [t]he conduct of any state organ shall be considered an act of that State. Article 5 provides that the acts of a person or entity that is not a State organ but is acting for that State shall be attributed to the State. Article 2(3) of the *International Covenant on Civil and Political Rights* ensures that all individuals within a State without distinction as to race, colour, sex, language, religion, or political opinion shall have their rights and freedoms protected by the law even if a violation is committed by an official of the State.

⁹⁷ Ibid. p. 234; *Mr S Jegatheeswara Sarma v. Sri Lanka* Human Rights Commission Case No. 950/2000, par. 8.2.

7. CONVENTIONAL (TREATY) LAW AND GENERAL INTERNATIONAL LAW

Draft articles provide the framework upon which the implementation of primary rules relies.⁹⁸ The Draft Articles do not exist on their own but also rely upon and exist side by side with general international law. When a State violates a rule that is a community obligation *erga omnes* protecting fundamental values that are peremptory norms, the responsibility is owed to all States party to a treaty or to the international community as a whole. This includes States that are not signatories to a relevant treaty. Article 48 para. 1, makes a distinction between obligations owed to a *group*⁹⁹ of States (I (a)), and those owed 'towards the *international community* as a whole': (I (b)) as these are peremptory norms of *jus cogens* applicable *erga omnes*. It is expected that new norms will be added from time to time and will affect treaties that may conflict with a new peremptory norm of general international law.¹⁰⁰ These norms are derived from general international law, recognized in international practice, and by courts and tribunals, and are mostly covered by conventions that include provisions for action.

Treaty law, also called conventional law, has been designed to further explore and strengthen general international law. Treaty law is, however, designed for the implementation of obligations that the ratifying State owes *to another State* with whom a treaty has been signed, or in the case of a multilateral treaty, owed to *more than one* State. In the case of peremptory norms, obligations are owed to the international community *as a whole*.

⁹⁸ Primary rules have been defined as 'a rule that requires legal subjects to do or to abstain from certain actions'. Hart, HLA *The concept of law*, Clarendon Press, 1961 at 78-79. Cited in CASSESE, *A International law*, 2nd ed. Oxford University Press, 2005, p.18.

⁹⁹ These obligations may refer to an interest common to a group of States, for example the protection and care of a shared site of biological or archaeological significance or a common source of water or a shared riparian area.

¹⁰⁰ *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986*, United Nations, 2005, Article 53
< http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf >

General international law has created treaty law and treaty law through the mechanism of *usus* (usage of States) and *opinio juris* in its turn strengthens, elaborates and becomes part of general international law.

8. PROMOTING COMPLIANCE WITH PRIMARY RULES OF INTERNATIONAL LAW

Over time and more significantly since the establishment of the United Nations, States have set up mechanisms to deal with the settling of disputes. Christian Tams asserts that 'If violations of obligations *erga omnes* did not trigger any special right of response, the concept at least for the purposes of law enforcement would be of rhetorical value only'.¹⁰¹

The United Nation Charter in Chapter I: Purposes and Principles outlaws the use of force or the threat of the use of force, except in unusual circumstances. Referring to Chapter VII, Article 39, the Security Council may determine the existence of any threat and by Article 40 call upon the parties involved to comply with such measures. Article 41 provides that the Security Council decides on measures that may be employed short of armed intervention. Article 42 provides that should these measures be inadequate '[I]t may take such action by air, sea or land forces as may be necessary to maintain or restore peace and security'.

8.1 Negotiation, inquiry, mediation and conciliation

Negotiation is the first and most obvious way of settling disputes and has both pros and cons. Ideally there should be no winners or losers, however in negotiation the opportunity does exist for coercion by a stronger State over a weaker State. Negotiation does not always lead to in-depth analysis of the causes of a dispute.

Inquiry is a long established method of dealing with disputes and involves the contending parties setting up an international body made up of impartial individuals with the purpose of throwing light upon the 'facts by means of

¹⁰¹ TAMS, C., *Enforcing obligations erga omnes in international law* Cambridge University Press, 2005, p. 158.

an impartial and conscientious investigation'.¹⁰² Article 3 of the *Hague Convention* suggests that strangers to a dispute 'should on their own initiative offer their good offices or mediation to the State at variance'. The Article suggests that strangers to the dispute 'have the right to offer good offices or mediation even during the course of hostilities' and that '[t]he exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act'.¹⁰³ The way that good offices, mediation and conciliation work is that there are three graded steps in third-party participation in the settlement of disputes. Antonio Cassese outlines these steps as follows:

In the case of *good offices* a third state or an international body is asked or offers, to induce the contending parties to negotiate an amicable settlement. In mediation the third party takes a more active role in the dispute settlement by participating in the negotiations between the two disputants and informally promoting ways of settling the dispute. As a rule *mediation* is all the more effective when the mediator is a dignitary of a Great Power or a senior civil servant of an international organization. *Conciliation* designates an even more active role of the third party, which carefully considers the various factual and legal elements of the dispute and formally proposes the terms of settlement (which however are not legally binding on the disputants).¹⁰⁴

Negotiation may lead to more formal judicial or arbitral enquiry as outlined in Article 50 of the Statute of the International Court of Justice. Compulsory conciliation and arbitration procedures have been revived and strengthened in the following way: 'Compulsory conciliation or adjudication procedures are laid down in multilateral treaties of great importance and they rest on the basic consent of the overwhelming majority of member States of the international community'.¹⁰⁵ Although the conclusions and proposals of

¹⁰² *Laws of War: Pacific Settlement of International Disputes (Hague I) October 18, 1907*, Article 9 < http://avalon.law.yale.edu/20th_century/pacific.asp - art1 >; CASSESE, A., *International Law*, 2nd ed., Oxford University Press, 2005, p. 279.

¹⁰³ *Laws of War: Pacific Settlement of International Disputes (Hague I) October 18, 1907*, Article 3.

¹⁰⁴ CASSESE, A., *International Law*, 2nd ed., Oxford University Press, 2005, p. 280.

¹⁰⁵ *Ibid.* p. 287.

conciliation are not binding on parties to the dispute, the fact that the setting up of a body seeking to encourage States to reach an amicable settlement is a major step forward.¹⁰⁶

8.1.1 Intergovernmental organizations and human rights treaty bodies

It has been pointed out that the simple fact of a breach by a State of an international obligation binding upon it is sufficient to engage its responsibility as a matter of international law. In the area of human rights, States have set up special bodies and institutions charged with supervising compliance and if needs be, requesting the responsible States to take remedial action. These bodies are either United Nations Charter-based or treaty-based bodies. Charter based bodies are overseen by the Office of the High Commissioner for Human Rights (OHCHR) and include the Human Rights Council, Universal Periodic Review, Special Procedures of the Human Rights Council that oversee special rapporteurs for both thematic and country mandates, and Human Rights Complaint Procedures. There are ten human rights treaty bodies that monitor implementation of the core international human rights treaties. The Human Rights Committee monitors the *International Covenant on Civil and Political Rights* (ICCPR) and reports by the State Parties who are obliged to submit regular reports.

This section will look briefly at several important United Nations Conventions in the light of one country, Indonesia; firstly to respond to the ongoing wrongful acts of torture that still plague this State as a result of the near total impunity it accords to its security forces. Secondly it will analyse the effect of the Genocide Convention and contend that the ongoing human rights abuses committed by Indonesia amount to genocide.

¹⁰⁶ Ibid.

8.1.2 United Nations Covenants and Conventions. Indonesia and the Convention against Torture

In the case of East Timor, the then 27th province of Indonesia, and following the November 1991 Santa Cruz massacre, a happening that was witnessed by the United Nations Rapporteur on Torture, discussions took place between the Human Rights Commission and Indonesia. As a result of a series of meetings between 1993 and 1997, Indonesia moved from denial of torture to an acknowledgment of the practice of torture and a desire to minimize its occurrence. This was a sign that Indonesia acknowledged the validity of the norm and the first time that this country had accepted allegations of torture. Over time Indonesian government officials came to accept NGOs such as Amnesty International as credible witnesses and at the same time one of East Timor's prominent leaders acknowledged '[t]he legitimate concerns of countries in preserving their national unity and territorial integrity. Many developing countries, Indonesia being a prime example, experienced a traumatic nation-building process with numerous attempts from within and without to undermine the unity of the state'.¹⁰⁷

Indonesia's ratification of the Convention may have taken place as a result of pressure placed upon her as a result of the involvement of the Human Rights Commission following the Santa Cruz massacre. The ratification is, however hedged about with reservations that make it near impossible for this State to accept any responsibility for ongoing acts that are a violation of the whole intent of the Convention. This ability to avoid any meaningful attempts to hold those who have been, and in the case of West Papua, are still responsible for ongoing and outrageous human rights abuses frustrates the whole intent of the Convention.

The well-meaning attempt of the United Nations to wean Indonesia from the practice of torture perhaps did not address the reasons that torture has

¹⁰⁷ Nobel Peace Prize winner Jose Ramos Horta at the 1997 session of the Human Rights Commission; RISSE, T. "Let's argue!" Communication action in world politics, *International Organization*, vol. 54, no. 1 Winter 2000, p. 30.

continued especially in West Papua and, in that place in particular, demonstrates Indonesia's way of handling secession movements. This theme has been introduced and fully developed by Franciscan Friar Yohanes Budi Hernawan in his PhD thesis of 2013.¹⁰⁸ Hernawan argues that torture in this context displays the power of the sovereign State over its citizens, as a means of governance and as a communication to a wider and horrified audience of the power of the torturer over the abject and powerless victim.¹⁰⁹ Torture is also a means to extract confessions and its use has become habitual; it may also reflect a lack of police training in more benign and subtle interrogation methods. The practice of torture violates Article 5 of the Universal Declaration of Human Rights; Article 7 of the *International Covenant on Civil and Political Rights*; *Convention against torture and other cruel, inhuman or degrading treatment or punishment*, UNGA Resolution 39/46, 10 December 1984.

8.1.3 Convention Against Torture: Indonesia's reservations

As mentioned above, Indonesia has signed and ratified the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment*,¹¹⁰ and has made a declaration to the effect that paragraphs 1, 2 and 3 of article 20 will have to be implemented 'in strict compliance with the principles of sov-

¹⁰⁸ HERNAWAN, YB., *From the theatre of torture to the theatre of peace: the politics of torture and re-imagining peace building in Papua, Indonesia*. A thesis submitted for the degree of Doctor of Philosophy at the Australian National University, March 2013.

¹⁰⁹ *Ibid.*, pp. 164, 171.

¹¹⁰ UN General Assembly. *Convention against torture and other cruel, inhuman or degrading treatment or punishment*, 10 December 1984, United Nations Treaty Series, vol. 1465 p. 85.

ereignty and territorial integrity of States'.¹¹¹ These three paragraphs deal with the receipt by the Committee Against Torture of well-founded and reliable information that torture is systematically practiced in the territory of a State; that the Committee shall invite the State Party to cooperate in the examination and submission of observations with regard to the information received. Article 22 concerns the recognition by the State Party of the Committee's competence to receive and consider communications by individuals who claim to be victims of violations.

Indonesia's declaration implies that State sovereignty includes a non-acceptance of notifications of human rights abuses and this denial and protection of human rights abuses committed by organs of the State, mainly the military, Tentara Nasional Indonesia (TNI) or the Police, Polisi Republik Indonesia (POLRI) is total. Indonesia also submitted a reservation under Article 30 meaning that Indonesia is not bound to settle any disputes between State parties before the International Court of Justice.¹¹²

Recommendation No. 46 from a 2012 follow-up by Special Rapporteur Juan Mendez to the 2007 report by Special Rapporteur Manfred Nowak, (see below), reiterated the appeal to the Indonesian Government to make a declaration under Article 22 of the *Convention Against Torture*, which provides the UN Committee Against Torture with the competence to receive and consider individual complaints. In Recommendation 42 the Rapporteur 'Takes note of Law No. 39/1999 ... and regrets that the draft Bills to

¹¹¹ A State can make a declaration or a reservation to certain provisions of a multilateral treaty but regardless of the terminology a declaration becomes a reservation if it excludes or modifies the legal effect of certain provisions of a treaty. From *Reservations and declarations in multilateral treaties: capacity-building workshop on treaty law and practice and the domestic implementation of treaty obligations*, Wuhan, China, 13-17 October 2009. [Powerpoint presentation: Annebeth Rosenboom]. Accessed online 6 January, 2016.

¹¹² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*, 10 December 1984, Ratified by Indonesia 28 October 1998.

introduce legal provisions containing a definition and prohibition of torture in line with the Convention have not been adopted'. He expressed concern that torture is equated to 'maltreatment' in the criminal code thus lacking several elements of purpose, mental pain and agency [action or power]; 'The Special Rapporteur encourages the government to define torture as a matter of priority in accordance with Articles 1 and 4 of the *Convention Against Torture* with penalties commensurate with the gravity of torture'.¹¹³ Article 1 defines an act of torture as 'an act by which severe pain or suffering, physical or mental is intentionally inflicted upon a person'. Article 4 provides that each State Party shall ensure that acts of torture or attempts to commit torture or complicity or participation in torture are offences under its domestic criminal law.

Antonio Cassese, when speaking of important innovations regarding the question of reservations to treaties provides the following conclusion: that where a State makes reservations to some of the provisions of a treaty these reservations will be null and void if the reservation is contrary to the object and purpose of the treaty. Human rights must prevail over State sovereignty.¹¹⁴

In spite of these advances the Special Rapporteur on Torture, Manfred Nowak, found on his 2007 visit to Indonesia that in spite of some improvements, torture and other degrading punishments were still widespread with almost total impunity afforded to police and military and *that* because no law against torture had been set up. He did find instances of regional discrepancies with torture being routine practice in Jakarta police stations. Although the Indonesian government had invited the Rapporteur to their country, his movements were, nevertheless, monitored. At the *Polres* in

¹¹³ UN Human Rights Council. *Report of the Special Rapporteur on Torture and other Inhuman or Degrading Treatment and Punishment. Addendum: follow-up to the recommendations made by the Special Rapporteur's visits to China, Denmark, Equatorial Guinea, Georgia, Greece, Indonesia [...]* 1 March 2012. A/HRC/19/61/Add.3.

¹¹⁴ CASSESSE, A., *International law*, 2nd ed., Oxford University Press, 2005, p. 175.

Wamena, West Papua, a severe beating was ongoing during his visit. Types of torture that he became aware of were beating with fists, rattan canes, wooden sticks, chains, cables, iron bars and hammers, kicking with heavy boots, electrocution, shots into legs and the placing of heavy objects onto body parts. Torture was often used to extract confessions used in trials; objections ignored by judges.¹¹⁵

8.1.4 International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR) is part of international human rights law. Every State Party to the ICCPR has a legal interest in the way that every other State performs its obligations under the 'basic rights of the human person' as these rights are *erga omnes* obligations. In the fourth preambular paragraph of the Covenant there is a United Nations Charter obligation to promote respect for, and observance of human rights and fundamental freedoms.¹¹⁶ Indonesia has ratified the Convention but has made a reservation to Article 1 dealing with self-determination:

The Government of the Republic of Indonesia declares that the words "the right of self-determination" ... do not apply to a section of people within a sovereign independent state and cannot be construed as authorizing or encouraging any action that dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent states.

Looking further into the *International Covenant on Civil and Political Rights*, (one of many conventions that have hard legal substance), remedies however do become apparent and relate to the right of a State Party to

¹¹⁵ Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, mission to Indonesia (10-23 November, 2007), A/HRC//7/3/Add.7, p. 12
< <http://www.ohchr.org/EN/Issues/Disability/Pages/UNStudiesAndReports.aspx> >

¹¹⁶ Article 1.3 of the UN Charter speaks of cooperation to solve 'problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion'; UN Human Rights Committee. *General comment 31, nature of the general legal obligation on State Parties to the Covenant*. UN Document, CCPR/C/21/Add.13 (2004).

communicate in writing to another State Party considered to not be fulfilling its obligations under the present Convention. Within three months the receiving State should provide the requesting State with a written communication that should include detailed and presumably credible explanations of 'procedures and remedies taken, pending, or available in the matter'.¹¹⁷ States may make representation to other States as part of normal foreign policy.¹¹⁸ Article 41, 1 (b) makes provision for an unsatisfactory response to result in the matter being forwarded to the Human Rights Committee of the United Nations, thus having consequences that normal diplomatic exchanges do not.

States that are signatories to the ICCPR, including Indonesia, violate many of its provisions. When a party does not fulfil the obligations imposed upon it by the Convention in question both the *International Convention on Elimination of All Forms of Racial Discrimination* (ICERD) and the *International Covenant on Civil and Political Rights* (ICCPR) set out procedures for the resolution of disputes between States. These involve the establishment of an ad hoc Conciliation Commission that will apply to any State party to the ICERD. In the case of the ICCPR this provision only applies to States that have made a declaration *accepting the competence* of the relevant committees. In the case of the ICCPR the Human Rights Committee monitors the implementation of civil and political rights and will issue a finding of violations, non-violations, or a mixture of both.¹¹⁹ The possibilities for a State that is Party to this Convention to query violations are outlined in Articles 41 and 42 and 43 as attached in Annex 2 of this document.

¹¹⁷ Refer to Annex 2 in this paper for Articles 41 and Article 42.

¹¹⁸ TOMUSCHAT, C., *Human rights: between idealism and realism*, 2nd ed., Cambridge University Press, 2008.

¹¹⁹ UN Human Rights Office of the High Commissioner, *Human rights bodies-complaint procedures. State to State complaints* < <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> >

8.1.5 Convention on the Prevention and Punishment of the Crime of Genocide

The Genocide Convention was adopted on 9 December 1948 in General Assembly Resolution 260 (III) and entered into force on 12 January 1951. The full title is *Convention on the Prevention and Punishment of the Crime of Genocide*, Treaty Series 1021. Genocide had already been declared a crime under international law in General Assembly Resolution 96 (I) on 11th December 1946. The Genocide Convention was the work of a Polish-Jewish jurist Raphael Lemkin.¹²⁰

Whilst the 1948 Genocide Convention held out the promise that mankind would be liberated from the scourge of genocide '[t]he dismal record of the past sixty years, however, suggest that the international community has fallen drastically short of delivering on this promise'.¹²¹ The crime of genocide is defined under international law as:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group (Article 2).¹²²

The Asian Human Rights Commission's report, *The Neglected Genocide*,

¹²⁰ The hard work of bringing this convention to light is described in Raphael Lemkin's work *Totally Unofficial* in which he refers to the help he received from Herbert Vere Evatt, Australian Minister for External Affairs in the Chifley Labour Government and President of the United Nations General Assembly.

¹²¹ BIRKLAND, BH., *Reining in non-state actors: state responsibility and attribution in cases of genocide*. New York University Law Review, vol. 84, no. 12, 2009, p. 1624, note. 3.

¹²² < [https://treaties.un.org/doc/Publication/UNTS/Volume 78/volume-78-I-1021-English.pdf](https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf) >

raised the question of genocide in West Papua between 1977-1978 and stated that:

[a]lthough the prohibition against genocide is manifested in the form of international treaties such as the *Genocide Convention* and the ICC Rome Statute, it does not apply only for countries that have ratified such treaties. The prohibition against genocide amounts to a peremptory norm – elsewhere also referred as *jus cogens*. 'Compelling law' contrary to *jus dispositivum*—international law that accommodates opting out or derogation, is *erga omnes*. Consequently, no derogation shall be permissible and each state is legally obliged to comply with this prohibition. A state has the obligation to prevent and punish genocide and this obligation should be fulfilled by the international community as a whole, as it has the legal interest in the prevention of genocide (obligations *erga omnes*)'.¹²³

Indonesia is not a signatory to the Genocide Convention.

The label of genocide has been applied to mass murders by the Khmer Rouge in Cambodia, and the conflicts in Rwanda and Darfur. Indonesia's occupation of East Timor has been labelled as genocide by Ben Kiernan and John G Taylor.¹²⁴ A stream of activists and others have raised this issue in regard to Indonesia's treatment of the peoples of East Timor and West Papua. In the case of West Papua egregious violence is perpetrated upon mostly young men on an almost daily basis. Horrendous images appear regularly on social media but do not penetrate the barrier of denial put in place by the mainstream Australian media.

¹²³ Asian Human Rights Commission, *The neglected genocide: human rights abuses against Papuans in the Central Highlands, 1977-1978*, September 2013, p. 20
< http://freewestpapua.org/wp-content/uploads/2013/10/AHRC_TheNeglected_Genocide-lowR.pdf >

¹²⁴ KIERNAN, B., *Genocide and resistance in Southeast Asia: documentation, denial and justice in Cambodia and East Timor*; Transaction Publishers, 2008, pp. 118-120; TAYLOR JG, 'Encirclement and annihilation, the Indonesian occupation of East Timor', In GELLATELY, R., KIERNAN, B. *The specter of genocide: mass murder in historical perspective*, Cambridge University Press, 2003, pp.163-188.

Prior to the *Bosnian Genocide Case* it was a widely held view that genocide could only be committed by individuals.¹²⁵ Signatories were obligated to prevent individuals from perpetrating genocide and to punish perpetrators. It was as late as 2007 that the International Court of Justice in the *Bosnian Genocide Case* brought State responsibility into the framework of the *Genocide Convention*, in the context of State responsibility for the possible or actual genocidal acts perpetrated by non-State actors. The Court concluded that Serbia, in spite of its role in the well documented massacre of Bosnian Muslims and other non-Serbs in Srebrenica, had not committed genocide. The findings were that Serbia 'had violated the obligation to prevent genocide that had occurred in Srebrenica'.¹²⁶ The Court also found that 'the obligation to prevent the commission of the crime of genocide is imposed by the *Genocide Convention* on any State Party which, in a given situation, has in its power to contribute to restraining in any degree the commission of genocide'.¹²⁷

States are liable for the actions of their own entities even if they act in a manner contrary to expected standards. They are also liable for the actions of non-State actors within their borders. From this time onward there was also an affirmative obligation upon States to refrain from committing genocide. This however was controversial. Article 4 of the Convention states: 'Persons committing genocide or any other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals.'

Article 9 suggests that States *can* be held responsible under the Convention:

Disputes between the Contracting Parties relating to the interpretation,

¹²⁵ BIRKLAND, BH., *Reining in non-state actors: state responsibility and attribution in cases of genocide*, New York University Law Review, vol. 84, no. 12, 2009, p.1635, note 64.

¹²⁶ Case concerning application of Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) Judgement, I.C.J. Reports 2007, par. 471.

¹²⁷ *Ibid.*, par. 461.

application, or fulfilment of the present Convention, *including those related to the responsibility of a State for genocide* or any other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. (Emphasis added).

Many States were not prepared to go this far; thus for sixty years the ICJ made no pronouncement. The silence was eventually broken when Bosnia filed a complaint before the ICJ against the Federal Republic of Yugoslavia.¹²⁸ The Judgment that Serbia was not directly responsible for what the Court described as genocide by non-State actors caused much dismay,¹²⁹ but did strengthen the case that States *could* be held responsible for genocide. The Court Judgement is important in another way in that judgements of the Court contribute to the evolution of international law. This is one way in which State responsibility has become an important element of international law.

¹²⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J.Reports 2007, p.43, pp. 237-238, par. 471.

¹²⁹ SIMONS, M., *Genocide Court ruled for Serbia without seeing full war archive New York Times*, 9 April 2007 < http://www.nytimes.com/2007/04/09/world/europe/09archives.html?pagewanted=1&_r=2 >

9. TERRITORIAL INTEGRITY, SOVEREIGNTY AND SELF-DETERMINATION

This chapter will firstly define the concepts of territorial integrity and sovereignty and will then consider these principles as bulwarks of the State. That these bulwarks can be threatened is also considered. The ways in which the Charter of the United Nations protects and safeguards these barriers is then examined. The Charter contains articles that protect but also articles that were seen as possible threats or contradictions to the perceived sanctity of the sovereign State. The ways in which the Charter and UNGA resolutions deal with the strengths, opportunities and threats that decolonization posed during the era of decolonization are also considered.

Definition of Territorial integrity

Territorial integrity means that a State is free from control or interference by the government of another State. It is related to the principle of inviolability that protects the frontiers of States from *incursions* by other States and is also related to sovereignty. Territorial integrity refers to the prohibition of the threat or use of force of one State against another State and is a peremptory norm of *jus cogens* that has been stressed in treaty law. There are two United Nations Charter articles connected with this principle: Article 2.4 of the United Nations Charter states that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the Purposes of the United Nations'. Article 2.7 is concerned with the obligation of the United Nations to not interfere with matters that are within the domestic jurisdiction of any State.

Definition of Sovereignty

Crawford, provides that '[i]n its most common modern usage, sovereignty is the term for the "totality of international rights and duties recognized by

international law"¹³⁰ as residing in an independent territorial unit—the State'. It is not a right or a necessary attribute for statehood.¹³¹ While the term suggests total independence and autonomy, that a State has total authority over all aspects of its internal affairs including the right to do whatever it likes with the peoples who reside within its boundaries, the State of today is constrained by customary international law, by United Nations Conventions or by regional human rights instruments such as the *European Convention on Human Rights*. Sovereignty also means that a sovereign State has a territory, a population, a government and formal juridical autonomy, that it is accepted as an equal by other States, can enter into agreements with other States and be a member of international organizations.¹³²

Crawford comments that '[T]he notion of "sovereignty" has been seen to be both unhelpful and misleading as a criterion for full competence of a State. No State today is all powerful or is seen by international law as such and the term 'sovereignty' does imply an 'overriding omnipotence which States do not possess in law or in fact'. Rejection of sovereignty as a criterion involves rejection of the old notion of the 'semi-sovereign State'. There are entities that may be 'dependent, devolving or *sui generis*¹³³ entities' but nevertheless do qualify under the general criteria for statehood despite specific limitations. Those that do not qualify are not States. In situations where a judgement proves difficult the recognition by other States is important.¹³⁴

¹³⁰ Advisory opinion on reparations for injuries suffered in the service of the United Nations organization, I.C.J. Reports 1949, 174, 180 [p.10]

¹³¹ CRAWFORD, J., *The creation of States in international law*, 2nd ed., Oxford University Press, 2006, pp. 32-33.

¹³² SCHARF, MP., *Earned sovereignty: juridical underpinnings*, Denver Journal of International Law and Policy, vol, 31, no. 3, 2004, p. 375.

¹³³ *Sui generis*, of its own kind or unique.

¹³⁴ CRAWFORD, J., *The creation of States in international law*, 2nd ed., Oxford University Press, 2006, p. 718.

The dissolution of the League of Nations took place on 18 April 1946, acknowledging that:

the Charter of the United Nations has created for purposes of the same nature as those for which the League of Nations was established, an international organization known as the United Nations Considering that, since the new organization has now commenced to exercise its functions, the League of Nations may be dissolved; and Considering that under Article 3, paragraph 3, of the Covenant, the Assembly may deal at its meetings with any matter within the sphere of action as the League ...'¹³⁵

Representatives of fifty nations met in San Francisco April-June 1945 to complete the Charter of the United Nations. The era of active decolonization saw self-determination as one of the important purposes of the United Nations as expressed in Article 1 (2) of the Charter.

The principles of territorial integrity and sovereignty are often mentioned by States when they wish to hide or deny human rights abuses. In fact both sovereignty, limited as it is today, and territorial integrity are safeguards for a State. The framers of the UN Charter, however concerned they were for both these principles, introduced a Trojan horse into its articles. There were assertions of the right of self determination in Articles 1.2 and 55 and more importantly Chapter XI that dealt with decolonization. Article 1.2 of the Charter speaks of the development of friendly relations, respect for the 'equal rights and self-determination of peoples' and measures that would strengthen universal peace, and Article 55 of the Charter proclaims that:

[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and *self-determination* of peoples, the United Nations shall promote (a) higher standards of living, full employment and conditions of economic social progress and development; (b) solutions of international economic, social, health and related problems; (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. (Emphasis added).

¹³⁵ Resolution for the dissolution of the League of Nations, adopted by the Assembly on April 18, 1946, *International Organization*, vol 1, no. 1, February 1947, p. 246.

Article 73, Ch. XI speaks of the paramount interests of 'peoples [who] have not yet attained a full measure of self-government'; of those administering these territories as having a 'sacred trust' to freely develop their political aspirations and to report regularly to the Secretary General on the educational, economic and social conditions of the non-self-governing or trust territories.¹³⁶

Aware of the problems that would arise as a result of decolonization the young organization concerned itself with situations that were sure to arise. Many States considered that their colonies were actually a part of the metropolitan State and were extremely reluctant to relinquish them. As a result the United Nations, commencing with UNGA Resolution 66 (1) 1946 began by asking States for their input into the production of a document that would aid a metropolitan state in deciding whether or not its colonial territory was entitled to be regarded as a non-self-governing territory and thus entitled to an act of self-determination. This endeavour resulted in five documents produced over a period of time: UNGA Resolutions 334 (IV) December 1949, 567 (VI) 18 January 1952, 648 (VII) December 1952, 742 (VIII) 1953 and 1541 (XV) 1960, the last entitled *Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter of the United Nations*. Resolution 1541 (XV) December 1960¹³⁷ was a more serious effort to stipulate the test for determining whether or not a territory is non-self-governing within the meaning of Article 73(e).¹³⁸

The Annex to this document is headed '[p]rinciples which should guide members in determining whether or not an obligation exists to transmit the

¹³⁶ UN Charter, Chapter XI, Article 73, *Declaration regarding non-self governing territories*.

¹³⁷ UN General Assembly Resolution 1541 (XV) December 1960, *Principles which should guide Members in determining whether or not an obligation should exist to transmit the information called for under Article 73(e) of the Charter*.

¹³⁸ FRANCK, T., *The emerging right of democratic governance*, American Society of International Law, vol. 86, no. 1, 1992, p.57.

information called for in Article 73(e) of the Charter of the United Nations'.¹³⁹ It contains 12 principles; notable among these are:

Principle III '[t]he obligation to transmit information under Article 73(e) of the Charter constitutes an international obligation and should be carried out with due regard to the fulfilment of international law'.

Principle IV '*Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and /or culturally from the country administering it'.

Principle V Once it has been established that a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia* [among others], of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination they support the presumption that there is an obligation to transmit the information under Article 73(e) of the Charter.

Principle VI A non-self governing territory can be said to have reached a full measure of self-governance by:

- a) emergence as a sovereign independent state;
- b) free association with an independent state; or
- c) integration with an independent state.

Principle IX Integration should come about in the following circumstances:

(a) the integrating territory should have attained an advanced stage of self-government, with free political institutions, so that its peoples have the capacity to make a responsible choice through informed and democratic processes;

(b) The integration should be the result of the *freely expressed wishes* of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through *informed and democratic processes, impartially conducted and based on universal adult suffrage*. [Emphasis added].

At the same time as this document was adopted during the 15th Session (1960) another document of importance for the process of decolonisation was also adopted. The principle of self-determination drew legal force from

¹³⁹ An earlier document was UNGA Resolution 742 (VIII) 1952 and the annex to this document is headed: *The factors that are indicative of the attainment or of other separate systems of self-government*.

1960 onwards when the UN General Assembly adopted Resolution 1514 (XV) *Declaration on the Granting of Independence to Colonial Countries and Peoples*.¹⁴⁰ Christian Tomuschat declared that the '[e]xisting structural network of international relations was profoundly shaken by that almost revolutionary act'.¹⁴¹ This resolution, 'in conjunction with the UN Charter has contributed to the gradual transformation of the "principle" of self-determination into a legal right for non-self governing peoples'.¹⁴²

Article 1 of Resolution 1514 (XV) proclaims that '[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation'.

Article 2 of the same resolution proclaims that '[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.¹⁴³

Resolutions 1514 (XV) and 1541 (XV) work together in that the colonial declaration sets out principles involving the disposition of colonial territories and 1541 (XV) is concerned with the criteria that needs to be brought into play in order to decide whether or not a territory is distinct from the metropolitan State or from any other country that may claim part or all of a territory.

¹⁴⁰ TOMASCHAT, C., ed. *Modern law of self-determination*, Martinus Nijhoff Publishers, 1993. p. vii.

¹⁴¹ *ibid.*

¹⁴² CASSESE, A., *Self-determination of peoples: a legal reappraisal*, Cambridge University Press, 1995, p. 70.

¹⁴³ UN General Assembly Resolution 1514 (X), *Declaration on the granting of independence to colonial countries and peoples*, 24 October 1960.

Resolution 742 (VIII) 1953 is a precursor to Resolution 1541(XV) 1960 but is distinctive in that, with the words 'or any other country', it refers more broadly to the type of State listed in Resolution 1541 (XV) Principle VI (b) Free association with an independent State. With Resolution 742 (VIII)

'The General Assembly

...

Considers that the validity of any form of association between a Non-Self-Governing Territory and a metropolitan or any other country essentially depends on the freely expressed will of the people at the time of the taking of the decision'. (Emphasis added).

Another important resolution was 2625 (XXV), the Declaration on Friendly Relations that was essentially an elaboration of the principles of the Charter. It states in part that:

[b]y virtue of the equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

The era of decolonization saw many situations come before the International Court of Justice and United Nations resolutions were validated as a result of the judgements and Opinions handed down by this Court. International Court of Justice cases have validated the progressive interpretations of the above mentioned Resolutions 1514 (XV) and 1541 (XV) 1960. Pierre Marie-Dupuy¹⁴⁴ reminds us that in 1971 the International Court of Justice, in the Namibia Opinion, 'ruled on the validity and scope to be attributed to' UNGA Resolution 1514 (XV), saying that:

[T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all 'territories whose peoples have not

¹⁴⁴ East Timor (*Portugal v. Australia*), I.C.J. Reports 1995, p. 10 (June 30) (separate pleading of P-M Dupuy).

yet attained a full measure of self-government' (Art.73). Thus it clearly embraced territories under a colonial regime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier.

A further stage in the development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolution 1514 (XV) of 14 December of 1960) which embraces all peoples and territories which have not yet attained independence.¹⁴⁵

Before the completion of the decolonization process, the right of self-determination cannot be derogated from on the basis of the need to preserve the territorial integrity of the metropolitan State.¹⁴⁶ Judge Dillard, in his Separate Opinion in the *Western Sahara Case* stated that:

'[i]t seems hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people'.¹⁴⁷

Indonesia argued that paragraph 6 of United Nations Declaration 1514 (XV) should be interpreted as to allow them to 'reintegrate' West Irian (Papua). Paragraph. 6 proclaims: 'Any attempt aimed at the partial or total disruption of the national unity of the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.

In the *Western Sahara Case*, the ICJ concluded that it was unlikely that paragraph 6 could be regarded as a principle over-riding the right of people of non-self governing territories to self-determination. Judge Nagendra Singh in his 1975 Advisory Opinion stated that:

[t]he consultation of the people of the territory awaiting decolonization is an

¹⁴⁵ Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Res. 276 (1970), Advisory Opinion, I.C.J. Reports, 1971, p. 16, par. 53 (June 21).

¹⁴⁶ SHAW, M., *International law*, 5th ed, Cambridge University Press, 2003. p. 391.

¹⁴⁷ Western Sahara, I.C.J. Reports, 1975, p. 12, at 122 (separate opinion of Judge Dillard) (16 October).

inescapable imperative whether the method followed on decolonization is integration or association or independence ... thus even if integration of territory was demanded by an interested State, as in this case [Western Sahara], it could not be had without ascertaining the freely expressed will of the people-the very *sine qua non* of all decolonization.¹⁴⁸

Territorial integrity and human rights. Article 2.7

Article 2.7 of the Charter concerns itself with the obligations of the United Nations not to 'intervene in matters which are essentially within the domestic jurisdiction of any State ...'. Vera Gowlland-Debbas explained that 'over time ... the Assembly turned increasingly to the international law criteria in cases involving the systematic violation of human rights and colonial questions, arguing that there was sufficient body of legal rules to remove such matters from the scope of Article 2.7' and that 'over time the majority came to assert the view in colonial issues that the existence of obligations in Chapter XI of the Charter over rides objections to competence and that resolutions such as General Assembly Resolutions 742 (VII), 1514 (XV) and 1541 (XV) asserting the competence of the Assembly were essential to the interpretation and application of the obligations asserted by that Article [XI: *Declaration regarding Non-Self-Governing Territories*]'.¹⁴⁹

These resolutions gave the United Nations the right and the duty to ensure that the obligations of administrators of colonial territories were carried out.¹⁵⁰ The progressive interpretation of Chapter XI of the Charter by the United Nations has been endorsed by a number of authorities and received the imprimatur of the International Court of Justice.

¹⁴⁸ LALONDE, S., *Determining boundaries in a conflicted world: the role of Uti Possidetis*, Montreal, McGill-Queen University Press, 2002, p. 155; Western Sahara I.C.J. Advisory Opinion, 16 October 1975, pp. 12, 68.

¹⁴⁹ GOWLLAND-DEBBAS, V., *Collective responses to illegal acts in international law: United Nations action in the question of Southern Rhodesia*, M. Nijhoff, 1990, p. 130.

¹⁵⁰ *Ibid.*, pp. 128-130.

Protesting human rights

In the past, measures that were designed to induce a State to change its domestic policies might have been seen as unlawful. The former socialist States maintained that any criticism of their human rights policies were unlawful interference in their domestic affairs.¹⁵¹ Indonesia today makes similar claims that any criticism of her human rights record is a violation of her territorial integrity. Christian Tomuschat maintains that this type of charge has failed for several reasons. Firstly the International Court of Justice in *Nicaragua v United States* 1986 confirmed that UNGA Resolution 2625 (XXV) 1970 on Friendly Relations¹⁵² was an authoritative statement of the law as it stands,¹⁵³ and secondly that:

[A]ctions complained of must in fact interfere with matters which are committed to the sole competence of the targeted State. Since the two Covenants entered into force, and since the ICJ determined that States are bound, under the UN Charter, to respect human rights, the issue has lost its character as an exclusive area of national jurisdiction.¹⁵⁴

UNGA Resolution 2625 (XXV) 1970 explicitly states that: [no] State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'.¹⁵⁵

¹⁵¹ TOMUSCHAT, C., *Human rights: between idealism and realism*, Collected courses of the Academy of European Law; v. 13/1, 2nd ed., Cambridge University Press, 2008, pp. 269-270.

¹⁵² General Assembly Resolution 2625 (XXV) Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, A/RES/25/2625, 24 October 1970.

¹⁵³ Case Concerning military and paramilitary activities in and against Nicaragua (*Nicaragua v. United States of America*), I.C.J. Reports, Judgement, 27 June 1986, p. 96, par. 188.

¹⁵⁴ TOMUSCHAT, C., *Human rights: between idealism and realism*, Collected courses of the Academy of European Law; v. 13/1, 2nd ed., Cambridge University Press, 2008, p. 270.

¹⁵⁵ General Assembly Resolution 2625 (XXV) Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, A/RES/25/2625. 24 October 1970.

States are, in fact, expected, without criticism, to legitimately uphold the rights of the tortured, the maimed, the murdered and the persecuted.

An example of the contravention of this resolution is Indonesia's attempts to suppress the support that States such as those of the Pacific give to the right of self-determination for West Papua. The Lombok Treaty signed between Indonesia and Australia is a further example of possible pressure applied to Australia by Indonesia in an attempt to suppress any effort made by Australia to support self-determination for West Papua.

If non-violent means are used in situations where one State intervenes in the affairs of another then this intervention does not violate a peremptory norm. To raise and seek remedy for the human rights abuses that a State inflicts upon its subjects is not a violation of a State's territorial integrity; only an intervention that involves force or the threat of force of one State against another State does that. States can make unilateral agreements between them that disregard ordinary norms of international law as long as their constitutive instruments allow and the norms violated are not peremptory norms of *jus cogens* (compelling law). The United Nations Security Council is bound, just like States are, to respect legal standards¹⁵⁶ and above all respect *jus cogens* norms, those values that are fundamental to human rights. The Security Council can, however, act under Article VII of the United Nations Charter but must still obey the prohibition of force. Force is legal if the principle of proportionality is applied but illegal if the principle is ignored. The principle must be explicitly stated in the Security Council's intention. Force can only be used if there is a threat to the peace that necessitates this reaction. There must be a threat to peace and an explicit acknowledgement of the Security Council's intention to use force in proportion to the threat to peace. There must be clear evidence that these two stages have been accomplished. It is also necessary for other organizations such as NGOs to adhere to these protocols. The Security Council, however, cannot authorize

¹⁵⁶ ORAKHELASHVILI, A., *The impact of peremptory norms on the interpretation and applications of United Nations Security Council resolutions*. European Journal of International Law, vol. 16, no. 1, 2005, p. 62.

an action that violates humanitarian law or human rights law which by nature of its application to humans is a peremptory norm of *jus cogens*.¹⁵⁷

Progressive Developments in international law

Malcolm Shaw speaks of changing attitudes in international law:

[s]tructural changes in the political, economic, social and cultural environments are altering the fundamental basis on which the exclusivity of the territorial state developed. As a result of this the state-centred framework of international law is in the process of being modified to accommodate these changes in the world system.¹⁵⁸

Long before the International Court of Justice in the *East Timor Case* confirmed that the right of self-determination applied to all peoples saying that 'Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character is irreproachable',¹⁵⁹ there had been authoritative statements regarding the potential mutability of States.

The *Aaland Island Case* of 1920 concerned a Swedish population inhabiting islands in the Gulf of Bothnia between Sweden and Finland. These islands are part of Finland but their Swedish inhabitants wished to secede to Sweden. The League of Nations Commission of Jurists of 1920 acknowledged that as a result of various disruptions the 'transformation and dismemberment of States' were facts that called into play the principle of self-determination of peoples. These new aspirations of certain sections of a nation, 'which are sometimes based on old traditions or on a common lan-

¹⁵⁷ ORAKHELASHVILI, A., *The impact of peremptory norms on the interpretation and application of United Nations Security Council resolutions*, European Journal of International Law, vol.16, no.1, 2005, pp. 62-64.

¹⁵⁸ SHAW, MN., *Title to territory in Africa: international legal issues*, Clarendon Press, 1986, p. 5. Cited in SHARMA, SP *Territorial acquisition, disputes and international law*, Martinus Nijhoff, 1997, p. 8.

¹⁵⁹ East Timor (*Portugal v. Australia*) Judgement, I.C.J. Reports, 1995. p. 90, par. 29
< <http://www.icj-cij.org/docket/files/84/6949.pdf> >

guage and civilisation' may arise and 'must be taken into account in the interests of the internal and external peace of nations'.¹⁶⁰

The League of Nations Commission of Rapporteurs in 1921 report held that the Aaland islanders had the right to separate if their culture was subject to disrespect. As this was not the case no separation occurred. The Rapporteurs stated that:

The separation of a minority from the State of which it forms part and its incorporation into another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.¹⁶¹

The Swedes were entitled to guarantees for the preservation of their social, ethnic and religious character. Finland agreed to respect these rights. The Rapporteurs suggested too, that 'justice and liberty' were 'embodied in the formula of self-determination'. Both League bodies, the Commission of Jurists in 1920 and the Commission of Rapporteurs in 1921, understood the importance of the protection of minorities and that this protection was no longer a purely domestic issue. The *Aaland Island Case* raised the proposition that sovereignty could be regarded as conditional.

This theme was introduced by the Declaration of Independence (US 1776) with its statement that it is the right of the governed to alter or abolish a government that does not uphold the rights of the people. It has been strengthened by developments in international law and expressed in the Friendly Relations Declaration, UNGA Res. 2625 (XXV) (1970):

[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part *the*

¹⁶⁰ Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question, League of Nations *Official Journal*, October 1920.

¹⁶¹ Report presented to the Council of the League of Nations by the Commission of Rapporteurs, UN Council Document B7 21/68/106 (1921) p.4.

territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. (Emphasis added).

It was stressed by former Secretary-General Kofi Annan when he asked the question '[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that appeal every precept of our common humanity?'.¹⁶²

As we have seen the principles of self-determination and territorial integrity have been most hotly contested throughout the decolonization process that took place after 1945. This was because, as mentioned above, the Charter's clause regarding territorial integrity together with United Nations General Assembly resolutions and several ICJ cases have contributed to *opinio juris* in this matter. The Charter does not stand alone but is reinforced by all that has come before and all that has followed on from it: the resolutions and declarations, International Court of Justice judgements, the *opinio juris* of States confirmed by the practice of States and the opinions of influential jurists.

Self-determination as a right and the prohibition against force

As regards territorial integrity, sovereignty and self-determination the ICJ Advisory Opinion in the 2004 *Kosovo Case* states that '[d]uring the second half of the 20th century the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.' Examples of the latter were the presence of South Africa in Namibia, Indonesia's invasion of East Timor and the construction of a wall

¹⁶² ANNAN, K., *"We the peoples": the role of the United Nations in the 21st century*, United Nations, Millenium Report, 2000.

in the occupied Palestinian territory.¹⁶³ 'There were, however, also instances of declarations of independence outside the above contexts. The practice of States in these latter cases does *not* point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.'¹⁶⁴ (Emphasis added). Finland, in its written statement in the *Kosovo Case*, speaking of territorial integrity and self-determination provided that: '[i]n post-1945 law, self-determination is accompanied by a strong rule in favour of the territorial integrity of existing States. However, although the nexus is strong it is not, and has never been absolute'.¹⁶⁵ Austria, in her written statement in the same case remarked:

The proclamation of independence in the [Kosovo] Declaration does not contradict general international law which does not prohibit any part of a population of a State to declare its independence. As such it is not subject to the obligation to respect the territorial integrity of States as was confirmed by the ILC.¹⁶⁶

When discussing Draft Article 18 of the *Declaration on the Rights and Duties of States* the International Law Commission (ILC) reiterated that the duty not to recognize acquisitions of territory by the use of force did not apply to secessions as secessions addressed only States. Paragraph 127 of the ILC *Declaration* states: 'In case of secession there was no territorial acquisition since the situation developed within the frontiers of the original State. Hence the principle of non-recognition [of territory acquired by the

¹⁶³ Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971, pp. 31-32, par. 52-53; East Timor (*Portugal v. Australia*), Judgement, I.C.J. Reports 1995, p. 102, par. 29; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 171-172, par.88.

¹⁶⁴ Accordance with International Law of the unilateral declaration of independence the Provisional Institutions of Self-Government of Kosovo. I.C.J. Report 2010, p.37, par.79.

¹⁶⁵ Accordance with International Law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. I.C.J. Report (2010). Statement of Finland, p. 3, par. 6.

¹⁶⁶ Accordance with International Law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. I.C.J. Report (2010), Statement by the Government of Austria, p. 21, par. 37.

use of force] should not be applied'. With Paragraph 131 'The Chairman proposed the following text: "[e]very State has a duty to refrain from recognizing any territorial acquisition made *by another State* through force or the threat of force". The addition of the words "by another State" eliminated the case of secession'.¹⁶⁷ James Crawford states that '[s]ecession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally'.¹⁶⁸

Self-determination and the prohibition against force

Article 2, paragraph 4 of the Charter states that '[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations'. The *Declaration on Principles of International Law Concerning Friendly Relations* Resolution 2625 (XXV) 1970, in Principle 1, concerning the threat or use of force, *elaborates* on this Article of the Charter, that:

[e]very state has a duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence. (Principle 1, par. 7).¹⁶⁹

The elaboration of Charter Article 2 in Principle 5, paragraph 5 of UNGA Resolution 2625 (XV) concerning equal rights and self determination of

¹⁶⁷ Yearbook of the International Law Commission. Draft Declaration on the Rights and Duties of States. Summary records and documents of the 1st session including the report of the Commission to the General Assembly, 14th Meeting, 3 May 1949. A/CN.4/SR.14, p. 112, pars 127-131.
< legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr14.pdf&lang=E >

¹⁶⁸ CRAWFORD, J., *The creation of States in international law*, 2nd ed, Oxford University Press, 2006, p. 390.

¹⁶⁹ Declaration on Principles of International Law Concerning Friendly Relations, UNGA Resolution 2625 (XXV). (The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner is inconsistent with the purposes of United Nations, Principle 1).

peoples *repeats* this formulation as follows:

[e]very State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their *action against, and resistance to*, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to *seek and to receive support* in accordance with the purposes and principles of the Charter.¹⁷⁰ (Emphases added).

Crawford contends that, taken literally, these propositions establish a close relationship between the two relevant principles, with the principle of self-determination taking priority over the prohibition of the use of force against the territorial integrity of a State. That primacy can best be expressed in the proposition that the phrase "territorial integrity of any state" in Article 2, paragraph 4 of the Charter excludes, so far as action in furtherance of self-determination is concerned, the territory of any self-determination unit as defined.¹⁷¹ This presumably refers to Principle 5 paragraph 1 which states that '[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the UN, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development ...'

This interaction of two principles, self-determination and the prohibition against the use of force are elucidated further by Antonio Cassese who characterizes the outcome as 'plainly the result of the conflicting views of groups of States' that 'represents a *via media* or compromise between two views in order that 'wars of self-determination are not ignored by international law or left in a legal vacuum as being outside the realm of law *qua* [as being] mere factual occurrences'. The result is that liberation movements 'do not possess a *legal right* to enforce their right to self-determination

¹⁷⁰ The Declaration on Principles of International Law Concerning Friendly Relations, UNGA 2625 (XXV) (The principle of equal rights and self-determination of peoples, Principle 5, par. 5).

¹⁷¹ CRAWFORD, J., *The creation of States in international law*, 2nd ed., Oxford University Press, 2006, p. 136.

but rather a *legal licence* to do so'. The consequences that flow from this legal position is that liberation movements do *not* breach international law if they engage in armed action against the state that denies them self-determination as this armed action is not an international wrongdoing. No State from which they wish to separate, nor any third State is authorized to take suppressive measures against the liberation movement. Third States are legally authorized to grant assistance to liberation movements short of sending in troops.

Finland, in its written submission to the Kosovo Case stated that the concept that self-determination was a principle that applied only to decolonisation during a certain period of time is however a misunderstanding of this principle.¹⁷² Antonio Cassese provided the following: 'All States have the right to demand that a State depriving a people of the right of self-determination comply with relevant international rules; ... the duty to grant self-determination is a duty *erga omnes*'.¹⁷³

Treaty reservations and the right to self-determination

The Republic of Indonesia, as mentioned above, has made a reservation to Article 1¹⁷⁴ of the ICCPR that the

Government of the Republic of Indonesia declares that the words "the right of self-determination" ... do not apply to a section of people within a sovereign independent state and cannot be construed as authorizing or encouraging any action that dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent states.

¹⁷² Accordance with International Law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo (request for advisory opinion), I.C.J. Report (2010), written statement of Finland, April, 2009, p. 4.

¹⁷³ CASSESE, A., *Self-determination of peoples: a legal reappraisal*, Cambridge University Press, 1995. p. 152.

¹⁷⁴ UN General Assembly. International Covenant on Civil and Political Rights, 16 Dec 1966, UN Treaty Series, vol. 999, p. 171. Art. 1: All peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

No treaty reservation can permit the violation of a peremptory norm of *jus cogens*. No State can make a reservation to the *Covenant against Torture* in order to permit torture under some circumstances, nor can a reservation be made to the *Genocide Convention* that would permit genocide under certain conditions. The International Court of Justice in the Advisory Opinion on *Reservations to the Convention on Genocide* stated that at successive stages during the drafting the facility to make reservations was contemplated but decided that '[I]t would seem that reservations of a general scope have no place in a convention of this kind which does not deal with the private interests of a State, but with the preservation of an element of international order'.¹⁷⁵ A reservation that is 'incompatible with the object and purposes of a treaty' is void as a matter of the *Vienna Convention on the Law of Treaties* and International law.¹⁷⁶ The International Court of Justice in the *East Timor Case* firmly placed self-determination onto the list of peremptory norms. The United Nations Human Rights Committee's *CCPR General Comment 24* states that reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant.

Applying more generally the object and purpose test to the Covenant [on Civil and Political Rights], the Committee noted that, for example, reservations to Article 1 denying people the right to determine their own political status and to pursue their economic, social and cultural development would be incompatible with its object and purpose (Article 9).

And further, the Committee, in Article 17, commented that '[t]he absence of protests by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant In short, the pattern is so unclear that it is not safe to assume that a non-objecting State

¹⁷⁵ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 22. Comments on the draft Convention prepared by the Secretary-General.

¹⁷⁶ Vienna Convention on the Law of Treaties, Art. 19 1155 UN Treaty Series 331 entered into force on 27 January 1980.

thinks that a particular reservation is acceptable'.¹⁷⁷ It could be concluded from the above that Indonesia's reservation to the ICCPR is at best questionable and its purpose is to discourage any part of the Republic from declaring independence.

It is the task of the Committee to apply legal principles regarding reservations. Provisions in the Covenant should not be watered down in such a way that they conform to inadequate domestic law. An unacceptable reservation may be severable in that the Covenant will be operative for the reserving party without benefit of the reservation. Sweden, for example, accepted the entry into force of the Covenant between the Republic of Turkey and Sweden without Turkey benefiting from its reservation.

Andrew Johnson has pointed out that Indonesia has not signed or ratified the Vienna Convention on the Law of Treaties. A State that has not ratified may still be bound by customary international law in cases where the Vienna Convention has codified already existing international law. Article 103 of the Charter states that '[i]n the event of a conflict between the Members of the United Nations ... under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

Secession

The Supreme Court of Canada, concerning the right of Quebec to secede from Canada, found that the right of secession was tied to the right to internal self-determination and if this right was not respected then it had the right of secession:

A right of secession only arises under the principle of self-determination of

¹⁷⁷ UN Human Rights Committee *CCPR 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 Comment No. 24.

people at international law where "a people" is governed as part of a colonial empire, where "a people" is subject to alien subjugation, domination or exploitation and possibly where "a people" is denied any meaningful exercise of the right of self-determination within the State of which it forms a part.¹⁷⁸

The prohibition of the threat or use of force by one State against another is a peremptory norm of *jus cogens* and cannot be derogated from but the denial of self-determination is not absolute.¹⁷⁹ There are abnormal situations where the only possible outcome for a peoples who are sorely oppressed and who find themselves in situations brought about by war or in the case of West Papua, by irregular means that involved an Act of Free Choice in 1969 that did not even remotely comply with international practice, is separation from the oppressive State. Namibia and East Timor have been given as examples of these abnormal situations.¹⁸⁰ As well, the denial of self-determination where the oppressed people affected are of a distinct race and civilization with a geography and history that differs markedly from that of the oppressor state 'would create [an] arbitrary distinction' between entities seeking self-determination and the various "situations of fact" in which such claims are made. It also misunderstands the rationale of the principle itself as expressed in the Aaland Island case and later. This rationale was echoed in the Friendly Relations Declaration of 1970, which referred to States conducting themselves in compliance with the relevant principles and possessing a government representing the whole people belonging to the territory.¹⁸¹

The right of self-determination did not end when most peoples claiming the right, including Indonesian nationalists, attained statehood. External self-

¹⁷⁸ Reference re Secession of Quebec, Supreme Court Judgement, 1998-08-20, Report [1998] 2 SCR 217, Case 25506, (3) Question 2.

¹⁷⁹ Accordance with International Law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. Request for advisory opinion, I.C.J. Report, 2010, written statement of Finland, April, 2009, p. 4.

¹⁸⁰ Ibid. p. 3.

¹⁸¹ Ibid. p. 4.

determination will continue to be a right when the facts under which claims are made are considered in the light of a number of criteria. These may include an ongoing history of brutality committed by the State against a distinct population especially where there is a strong element of racial discrimination, as we see in West Papua, where any expression of race or culture is used as an excuse for sometimes unspeakable brutality. An example is the attacking and sometimes murder of young men for refusing to cut off their 'dreadlocks' or for handing out leaflets or even praying for the success of a meeting of outside groups that support self-determination. As the right to self-determination is a norm of *jus cogens* applicable *erga omnes* then by its very nature it cannot have a time or date limit placed upon it: this would 'misunderstand the rationale of the principle itself, as expressed in the *Aaland Island* case and later'.¹⁸²

The right to self-determination is mentioned in the UN Charter, Articles 1 and 55; in Article 1 of the *Covenant on Civil and Political Rights* and the *Covenant on Economic, Social and Cultural Rights*; in UNGA 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), and in the Declaration on Friendly Relations UNGA Resolution 2625 (1970), which states that:

[b]y virtue of the equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

Central to the question regarding the past history and future of what was West New Guinea is a careful consideration of those factors taken into account during that time known as decolonisation. Firstly there was an acknowledgment that colonialism was an unjust anachronism. Looking back, two principles stand out, the first being that of self-determination.

¹⁸² Accordance with International Law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. Request for advisory opinion, I.C.J. Reports, 2010, (written statement of Finland), April, 2009, p. 4, par. 8.

Secondly there are to be considered the ties of a peoples to the territory that they inhabit; in some cases these ties have existed for thousands of years. Endorsing this in the *Western Sahara* case, the International Court of Justice, while addressing the question of legal ties of sovereignty between Western Sahara and the Kingdom of Morocco and the Mauritanian entity, remarked that such legal ties could not have been 'limited to ties established directly with the territory and without reference to the people who may be found in it'. The ICJ added that 'legal ties are normally established in relation to people'.¹⁸³ The Court did not find any legal ties of such a nature as might affect the application of Resolution 1514 (XV) in the decolonization of Western Sahara and in particular, of the principle of self-determination.¹⁸⁴ In an ICJ case concerning the Philippines' claim of historic title over North Borneo Judge Franck in a separate opinion stated that:

[t]he point of law is quite simple but ultimately basic to the international rule of law. It is this: historic title, no matter how persuasively claimed on the basis of old legal instruments and exercises of authority, cannot-except in the most extraordinary circumstances-prevail in law over the rights of non-self-governing people to claim independence and establish their sovereignty through the exercise of *bona fide* self-determination.¹⁸⁵

The League of Nations Commission of Rapporteurs defined some of the characteristics of the Finnish people that they saw as important criteria for independence: a 'clearly defined territory and a well developed national life, fulfilling all the conditions necessary for constitution as an independent State'.¹⁸⁶ Had the Swedish population inhabiting the Aaland Islands been oppressed by the Finns then the Rapporteurs would have considered separation.

¹⁸³ *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p.12, par. 85.

¹⁸⁴ *Ibid.* par. 162.

¹⁸⁵ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*. Application for permission to intervene. Separate opinion, ad hoc Judge Franck, I.C.J. Reports, 2001. p. 575, par. 2 p. 652.

¹⁸⁶ *Report presented to the Council of the League of nations by the Commission of Rapporteurs*, LN Council Doc. B7 21/68/106, p. 3.

10. INDONESIA, AUSTRALIA AND THE LOMBOK TREATY

The Preamble to the UN Charter proclaims that '[w]e the peoples of the United Nations determined'

- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women...
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.¹⁸⁷

These words appear at the beginning of the Lombok Treaty but the main thrust of this treaty is Article 2, Point 2 that speaks of '[m]utual respect and support for the sovereignty, territorial integrity, national unity and political independence of each other, and also non-interference in the internal affairs of one another'.

Various points can be made here including that most States including Indonesia are not totally sovereign.¹⁸⁸ The word 'sovereign' itself can be considered an anachronism harking back to the days when the sovereign had absolute control over his or her subjects. Sovereignty has been described as meaning in today's parlance 'the "totality of international rights and duties recognised by international law"¹⁸⁹ residing in an independent territorial unit— the State'.¹⁹⁰

¹⁸⁷ UN Charter, 24 October 1945. UN Treaty Series XVI, Preamble.

¹⁸⁸ KRASNER, SD., *Pervasive not perverse: semi-sovereigns as the global norm*, Cornell International Law Journal, vol 30, No. 1, Article 3, 1997. pp. 656-658.

¹⁸⁹ Advisory opinion on reparations for injuries suffered in the service of the United Nations organization, I.C.J. Reports, 1949, 174 at 180.

¹⁹⁰ CRAWFORD, J., *The creation of States in international law*, 2nd.ed., Oxford, Clarendon Press, 2006, p. 32.

Respect for territorial integrity means that we must refrain from the threat or use of force against another State. This does not include silence in the face of well-documented human rights abuses as have been consistently recorded for fifty-three years in West Papua and in other parts of Indonesia. The victims of such abuses have repeatedly campaigned for independence from the Unitary Republic of Indonesia. There are strong suggestions that these abuses may amount to genocide under international law.¹⁹¹

During the New Order regime (1966-1998), and in the years since the end of the Suharto era in 1998, more advanced States have used Indonesia's geopolitical status as a bulwark, firstly against the threat of communism and now against the threat of terrorism. During the New Order's 32-year reign as a rentier-militaristic State, genocidal violence and serious crimes against humanity were perpetrated by the military against a defenceless citizenry. These crimes occurred in various parts of Indonesia from 1965-66 under the guise of the PKI (Indonesian Communist party) revolt; in Aceh from the 1980's until 2004; in East Timor from 1975 until 1999, and in West Papua from 1963 to the present.

No State today is so absolutely sovereign that it can justify the use of terror in order to maintain that sovereignty. When the unity of a sovereign State is based on violence, brutality and neglect of its minorities then the legitimacy of that unity must be called into question. It takes us back to the statement made by the Rapporteurs in the Aaland Island case:

[t]he separation of a minority from the state and its incorporation in another state can only be considered as an altogether exceptional solution, a last resort when the *state lacks either the will or the power to enact and apply just and effective guarantees*. (Emphasis added).¹⁹²

¹⁹¹ KIERNAN, B., *Genocide and resistance in Southeast Asia: documentation, denial and justice in Cambodia and East Timor*, Transaction Publishers, 2008, pp 118-120.

¹⁹² *Report presented to the Council of the League of Nations by the Commission of Rapporteurs*, UN Council Doc. B7 21/68/106 (1921) p.4.

Kayt Davies has pointed out that Australia has ratified the Rome Statute of 2002 and embedded it in Australian law.¹⁹³ The Rome Statute established the International Criminal Court that was set up to try perpetrators of the crime of genocide, serious crimes against humanity, war crimes and the crime of aggression. The Preamble provides '[t]he State Parties to the Statute ...[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.¹⁹⁴

Before signing a bilateral treaty, good practice suggests that both States would ensure that the principles espoused in the treaty were understood and acceded to by the other. That Australia has ratified the Rome Statute would suggest that it takes seriously the obligation 'to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes'.¹⁹⁵ Instead it is entirely possible that Australia might contribute to the perpetration of crimes against humanity, human rights violations and possibly acts of genocide in West Papua. To provide training and war material to security forces already corrupted by the ultra-nationalist mindset of their superiors may involve the risk of the accusation of complicity. Above all, treaties such as the Lombok Treaty, signed in order to 'promise to say nothing'¹⁹⁶ makes Australia complicit in murder, rape, the infliction of horrific wounds on the bodies, minds and natural environment of the peoples of West Papua.

Article 48 Paragraph 1(b) of *Draft Articles* concerns obligations owed to and protecting interests held by the international community as a whole; they are *erga omnes* and involve the violation of human rights including the denial of self-determination. These obligations are owed, not just to all parties to a

¹⁹³ DAVIES, K., *Lombok: our promise to say nothing*, Opinion, The Drum, ABC News, 11 January 2012.

¹⁹⁴ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Preamble.

¹⁹⁵ Ibid.

¹⁹⁶ DAVIES, K. *Lombok: our promise to say nothing*, Opinion, The Drum, ABC News, 11 January 2012.

treaty, but are 'owed towards the international community as a whole'.¹⁹⁷ As we have already seen, the 1970 *Barcelona Traction* case judgement provides examples: '[s]uch obligations derive ... from the outlawing of acts of aggression, and of genocide and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'.¹⁹⁸ States have a legal obligation to speak out about human rights violations, particularly neighbouring States and even more so where there are economic ties to the offending State. This obligation is owed to both injured States and third States. Third States have an obligation to speak out about human rights abuses committed by other States against their own citizens.

¹⁹⁷ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Second Phase, International Court of Justice (I.C.J.), 5 February 1970. p. 32, par. 34
< <http://www.icj-cij.org/docket/files/50/5387.pdf> >

¹⁹⁸ *ibid.* par. 33.

11. RESPONSIBILITY TO PROTECT

The expression 'responsibility to protect' was 'first presented in the report of the *International Commission on Intervention and State Sovereignty* (ICISS) set up by the Canadian Government in December 2001'¹⁹⁹ and was a response to Kofi Annan's question:

[i]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that appeal every precept of our common humanity?.

The ICISS report *The Responsibility to Protect*²⁰⁰ found that sovereignty not only gave the State a right to control its affairs, it also conferred on the State primary responsibility for protecting the people within its borders. It proposed that when a State fails to protect its people either through lack of ability or a lack of willingness the responsibility shifts to the broader international community. Basic principles and foundations of responsibility are listed, including that 'state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself'; and when a people is suffering serious harm and the state is unwilling or unable to stop that harm then 'the principle of non-intervention yields to the international responsibility to protect'.²⁰¹

The 2005 World Summit Outcome,²⁰² in three separate paragraphs, made the propositions, that:

¹⁹⁹ Outreach programme on the Rwanda genocide and the United Nations, The responsibility to protect, Background note, [United Nations] Department of Public Affairs, 2014.

²⁰⁰ *The responsibility to protect: report of the International Commission on Intervention and State Sovereignty*, Ottawa, International Development Research Centre, 2001.

²⁰¹ Ibid. p. xi.

²⁰² UN General Assembly resolution adopted by the General Assembly, 60/1, World Summit Outcome 2005, 24 October 2005. A/RES/60/1, pars 138, 139, 140.

[e]ach individual state has a responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity (**para. 138**); [and to] use appropriate diplomatic humanitarian and other peaceful means, in accordance with Chapters VI & VIII of the Charter to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context we are prepared to take collective action in a timely and decisive manner through the Security Council, in accordance with the Charter, including Chapter VII ... (**para. 139**); [and to] fully support the mission of the Special Advisor of the Secretary General on the Prevention of Genocide (**para. 140**).

The Responsibility to Protect (R2P) as enunciated by the World Summit was reaffirmed by the Security Council's Resolution 1674 (2006).²⁰³ This resolution, *Importance of Preventing Conflict through Development, Democracy Stressed*, 28 April, 2006, deals with the protection of civilians in armed conflict. In this resolution the Security Council 'reaffirms the paragraphs 138 and 139 of the 2005 World Summit Outcome document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. This document was described by China as the 'legal framework' for the protection of civilians.²⁰⁴

Following Ban Ki-Moon's report in 2009 the UN Secretary General has released an annual report on the R2P principle. The first, *Implementing the Responsibility to Protect* (2009) translated paragraphs 138 and 139 from the 2005 World Summit into a 'three pillar approach':

Pillar One Each individual State has the 'enduring responsibility to protect its populations whether nationals or not from genocide, war crimes, ethnic cleansing and crimes against humanity and from their incitement'.²⁰⁵

²⁰³ ASIA-PACIFIC CENTRE FOR THE RESPONSIBILITY TO PROTECT, The right to protect and the protection of civilians, Asia-Pacific in the UN Security Council, 22 June 2008, p. 16 < [http://www.r2pasiapacific.org/docs/R2P Reports/Asia-Pacific POC June 08.pdf](http://www.r2pasiapacific.org/docs/R2P%20Reports/Asia-Pacific%20POC%20June%2008.pdf) >

²⁰⁴ Ibid., p. 11.

²⁰⁵ *Implementing the responsibility to protect: Report of the Secretary-General*, United Nations General Assembly sixty-third session, 17 January 2009. A/63/677. p. 8.

Pillar Two The international community has a commitment 'to assist States in meeting these obligations. It seeks to draw on the co-operation of the Member States, regional and sub-regional arrangements, civil society and the private sector' and the United Nations system.

Pillar Three When a State manifestly fails to protect its population or is in fact the perpetrator of these crimes, the international community has a responsibility to take collective action 'in a timely and decisive manner' to prevent or halt the commission of mass atrocities. Such action must be on a case-by-case basis using a broad range of political, economic and humanitarian means, and should peaceful means prove inadequate, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.

The 2009 report of the Secretary General further elaborates:

It should be underscored that the provisions of paragraphs 138 and 139 of the Summit Outcome are firmly anchored in well-established principles of international law. Under conventional [treaty] and customary international law, States have obligations to prevent and punish genocide, war crimes and crimes against humanity. Ethnic cleansing is not a crime in its own right under international law, but acts of ethnic cleansing may constitute one of the other three crimes. The Summit's enunciation of the responsibility to protect was not intended to detract in any way from the much broader range of obligations existing under international humanitarian law, international human rights law, refugee law and international criminal law. It should also be emphasized that actions under paragraphs 138 and 139 of the Summit Outcome are to be undertaken only in conformity with the provisions, purposes and principles of the Charter of the United Nations.²⁰⁶

²⁰⁶ UN General Assembly. *Implementing the responsibility to protect : report of the Secretary General* , 12 January 2009, A/63/677, Par. 3.

The basis for the responsibility to protect lies in

[o]bligations inherent in the concept of sovereignty; the responsibility of the UN Security Council under Article 24 of the UN Charter for the maintenance of international peace and security and in the legal obligations set down in declarations of human rights, in covenants and treaties and humanitarian law and national laws, the developing practice of states, regional organizations and the Security Council itself.²⁰⁷

This report lists key documents that have brought international law to its present stage and these include

- Universal Declaration of Human Rights, 1948;
- The four Geneva Conventions of 1949 and their two Additional Protocols on international humanitarian law in armed conflict;
- Convention on the Prevention and Punishment of the Crime of Genocide, 1948;
- The twin covenants: International Covenant on Civil and Political Rights (ICCPR) 1966; International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966;
- The establishment of the International Criminal Court (ICC), 1998;
- The Convention Against Torture (CAT).²⁰⁸

The informal dialogues that occurred each year from 2009 have evolved over from debating the existence of the responsibility to protect to discussions involving the implementation of the norm. Many documents about the responsibility to protect can be found via this site using the drop-down menu at < <http://www.responsibilitytoprotect.org/index.php/publications> >.

²⁰⁷ *The responsibility to protect*, Report of the International Commission on Intervention and State Sovereignty, Ottawa, International Development Research Centre, 2001, p. xi.

²⁰⁸ *Ibid.*, p. 6, par. 1.25

SUMMING UP

Some States may complain that mention of their human rights record constitute a violation of their territorial integrity. A reference to an obligation owed to the international community as a whole was specifically raised by the International Court of Justice in the *Barcelona Traction Case* (1970) that '[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their [rights] protection; they are obligations *erga omnes*', obligations that are 'owed towards the international community as a whole'.²⁰⁹

Human rights instruments such as the *Universal Declaration of Human Rights* of 1948 and the twin conventions of 1966, *International Covenant on Civil and Political Rights* and *the International Covenant on Economic, Social and Cultural Rights*, which make up the Bill of Rights can be studied as core United Nations human rights instruments. The same can be said of the *Optional Protocol to the Convention Against Torture*, in particular the *Draft Articles on State Responsibility*; the three pillars of the *Responsibility to Protect*, and regional instruments such as the *European Convention on Human Rights*. This reveals that international law requires that States are obliged to protect all persons within their territory regardless of race, sex, language or religion. Moreover it is legally incumbent upon injured States or third States to protest wrongful acts committed by another State. This message is also reinforced by General Assembly Resolutions such as 2625 (XXV) (1970) on Friendly Relations,²¹⁰ and is emphasised in particular in *Draft Article 48*. Article 28 of the *Covenant on Civil and Political Rights* that provides for the establishment of a Human Rights Committee. Article 40 provides that States, as long as they have made a declaration that they

²⁰⁹ *Barcelona Traction, Light And Power Company, Limited (Belgium v Spain)*, Second Phase, International Court of Justice (I.C.J.), 5 February 1970, p. 33. Par. 34.

²¹⁰ General Assembly Resolution 2625 (XXV) Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations. A/RES/25/2625, 24 October 1970.

respect the competence of the Committee, may make a claim that another State Party is not fulfilling its obligations under the present Charter.

The Lombok Treaty between Indonesia and Australia has been seen as an initiative designed to suppress criticism by Australia of Indonesia's human rights record. The treaty 'reaffirms the commitment of both Australia and Indonesia to the Charter of the United Nations' and its '[F]aith in fundamental human rights, the dignity and worth of the human person...'.²¹¹ Even though it goes on to state that the establishment of 'conditions under which justice and respect arising from treaties and other sources of international law can be maintained' it ignores the fact that Australia, as a ratifier of the Rome Statute has embedded this statute in Australian laws through the *International Criminal Court Act* of 2002. As a signatory Australia has declared that it is determined to put an end to such acts of violence as torture, rape, enforced disappearance, and disadvantage or brutality based on racial or cultural or political or religious bias.²¹²

Various international instruments have been looked at in the context of Indonesia's human rights abuses. Indonesia has signed the *Convention Against Torture* but has made reservations that render it meaningless.

²¹¹ UN Charter, 24 October 1945, United Nations Treaty Series XVI, Preamble.

²¹² Parts of this segment are based on Kayt Davies 'Lombok: our promise to say nothing', Opinion, The Drum, ABC News, 11 January 2012.

ANNEX 1: West Papua's struggle for self-determination

The following has been written to acquaint those who have little knowledge of the situation that the peoples of West Papua find themselves or the historic details that have led to their desire for independence. It also contains a perusal of the various United Nations resolutions that were intended to guide a metropolitan State in deciding whether or not a part or all of its colonial territories were legally entitled to be regarded as non-self-governing entities. Metropolitan States were required by Article 73(e) of the Charter of the United Nations to 'transmit regularly to the Secretary-General for information purposes, statistical and other information of a technical nature relating to the economic, social and educational conditions in the territories to which they are respectively responsible'. The metropolitan country was obliged to actively aid its colony in progress towards the improvement of their economic, social and educational conditions.

West Papuans as Melanesians

When, as a result of decolonization, Indonesia in 1949 became a separate State called the Federal Republic of Indonesia (now the Unitary Republic of Indonesia), the Netherlands withheld West New Guinea from the process. They reasoned that the peoples of the territory were different racially and culturally, geographically and historically from the Malay-dominated Indonesians. The West New Guinea peoples were in fact Melanesians and the island of New Guinea a part of the continental landmass of Australia.

The New York Agreement and Act of Free Choice

A mix of threats of war and numerous attempts at invasion on the part of Indonesia plus the involvement of the United States of America in the protracted negotiations led to the signing on 15 August 1962 of a treaty between the Republic of Indonesia and the Kingdom of the Netherlands,

commonly referred to as the New York Agreement. The West Papuans were not consulted at any stage of the process and were entirely reliant upon the Dutch to advocate for them. The Netherlands was denied any support from the major powers including Australia, and not prepared to precipitate a war, withdrew from the administration of the territory. On 21 September 1962 at the seventeenth session of the General Assembly, the draft resolution came up for the vote. Indonesia's Foreign Minister Subandrio spoke of the development of West Irian 'so that the people of the territory can be emancipated into the social conditions prevailing among their brethren in the other parts of the Republic' (par. 177). The Netherlands representative, Mr Schurmann spoke, amongst other things, of his country's faithful reporting as required by Article 73(e) and the need for an act of genuine self-determination for the people of the Territory (pars 182-196). The President put the draft resolution to the vote. A vote was taken by roll-call and 89 countries voted for the draft resolution and 14 abstained (par. 197).

Following the vote Dahomey and Togo expressed their dismay at the lack of consultation with the Papuan people and the haste in which the vote had been taken. Australia expressed the opinion that the matter should have been taken to the International Court of Justice and also commented that the peoples of Papua and New Guinea had expressed concern for their own right of self-determination. This brought to an end the preparations that the Netherlands had been making to ready the Papuans for self-government. The administration of the territory, a self-determination unit, was handed first to the United Nations Temporary Executive Authority and in 1963 to Indonesia. A right to an act of self-determination was contained in Article XVIII of the Agreement. Both the Netherlands and Indonesia promised this but to date no genuine act of self-determination has taken place. The 1969 Act of Free Choice was intended to fulfil the requirements of Article XVIII of the Agreement but was a farce dominated by threats of the most extreme kind. One thousand cowed people raised their hands to indicate that they 'wished' to be part of Indonesia. What does international law say about this?

The United Nations Charter

Firstly, the United Nations Charter in Article 1.2 speaks of '[R]espect for the principle of equal rights and self-determination of peoples...'. It was apparent right from the foundation of the United Nations that a major purpose and task of that organization was that decolonization should take place, overseen by the United Nations, in an orderly and peaceful fashion.

Secondly, Chapter XI of the Charter, Declaration Regarding Non-Self-Governing Territories, Article 73, speaks of Members of the United Nations who 'have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government', that 'the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost ... the well-being of the inhabitants of these territories'.

Thirdly, Article 73(e) of the Charter requires Members to transmit to the Secretary-General information regarding the 'economic, social and educational conditions in the territories for which they are respectively responsible ...'. The result of this responsibility was the steady production of resolutions of particular relevance to decolonization concerning 'factors that should be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-government'.²¹³

United Nations Resolutions

Article 66 (1) 1946 was the first of these with the General Assembly requesting the Secretary-General to include in his annual report on the work of the Organization, a statement summarizing such information as may have been transmitted to him by Members of the United Nations under 73(e) of the Charter, relating to 'economic, social and educational conditions in the

²¹³ UN General Assembly. Future procedure for the continuation of the study of factors which should be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-government. United Nations General Assembly Resolution 567 (VI), 1951.

territories for which they are responsible, other than those [Trust Territories] to which Chapters XII and XIII apply'.²¹⁴

This resolution was followed by UNGA Resolution 334 (IV), 2 December 1949. The General Assembly referred to Resolution 66 (I) in which 74 territories were enumerated ... as falling within the scope of Article 73(e). The General Assembly also invited 'any special committee which the General Assembly may appoint on information transmitted under Article 73(e) of the Charter to examine the factors which should be taken into account in deciding whether any territory is or is not a territory whose people have not yet attained a full measure of self-government'.²¹⁵

United Nations General Assembly Resolution 567 (VI) of 18 January 1952, referring to decisions made by Resolution 334 (IV) 1949 in which special committee involvement was requested, decided after examining the report prepared by the Special Committee on Information that a more definitive list of factors be drafted. The General Assembly invited United Nations members to write to the Secretary General stating the views of their governments on factors which should be taken into account in deciding whether or not a territory is or is not a territory whose people have not yet attained a full measure of self-government. The Annex to this resolution refers to those territories covered by Chapter XI of the Charter whose people have not yet attained a full measure of self-government. Article 3 of the introduction states that '[t]he condition under which the provisions of Chapter XI of the Charter cease to apply will be that the inhabitants of the territory have attained, through political advancement, a full measure of self-government. The fulfilment of this condition may be achieved by various means, involving in all cases the expression of the free will of the people'.

²¹⁴ Information from Non-Self-Governing Territories transmitted under Article 73(e) of the Charter, UN General Assembly Resolution 66 (I), 14 December 1946.

²¹⁵ Territories to which Chapter XI of the Charter applies, UN General Assembly Resolution 334 (IV), 2 December 1949.

UNGA Resolution 648 (VII) 10 December 1952 refers both to Resolutions 222 (III) and 567 (VI), 18 January 1952. Resolution 222 refers to the obligation to transmit information regarding any change that may take place in the constitutional status of any Non-Self-Governing Territory. UNGA Resolution 648 (VII) itself provides '*Taking into account* that this obligation [to transmit information] remains in force with regard to each territory until such time as the objectives of Chapter XI of the Charter are fulfilled'.

UNGA resolution 742 (VIII) 1953²¹⁶ states:

The General Assembly

...

5. Considers that the validity of any form of association between a Non-Self-Governing Territory and a metropolitan *or any other country* essentially depends on the freely expressed will of the people at the time of the taking of the decision. (Emphasis added).

6. Considers that self-government can also be achieved by association with another State if this is done freely and on the basis of absolute equality.

This series of resolutions culminated in UNGA 1541 (XV) 1960, a later instrument used to assess when a territory ceased to be non-self-governing or not. It provided (as did Resolutions 567 (VI) of 18 January 1952, 648 (VII) 10 December 1952 and 742 (VIII) 1953), criteria such as geographical, racial and cultural distinctiveness in order for the General Assembly to decide whether or not a territory fulfilled the criteria of a non-self-governing unit and was thus entitled to a genuine and free act of self-determination. The following principles in UNGA Resolution 1541 (XV) are pertinent:

The obligation to transmit information under Article 73(e) of the Charter constitutes an international obligation and should be carried out with due regard to the fulfilment of international law (Principle III)

²¹⁶ UN General Assembly. Factors that should be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-government, UNGA Resolution 742, 27 November 1953.

Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it (Principle IV).

Once it has been established that a *prima facie* case of geographical or ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination they support the presumption that there is an obligation to transmit the information under Article 73(e) of the Charter (Principle V).

A non-self governing territory can be said to have reached a full measure of self-governance by:

- a) emergence as a sovereign independent state;
- b) free association with an independent state; or
- c) integration with an independent state (Principle VI).

United Nations General Assembly Declaration 1514 (XV) 1960, the Colonial Declaration, guarantees the right of the peoples inhabiting former colonized territories the right to independence. There were other declarations of at least equal importance.

International Jurists

With regard to the fact that the Netherlands withheld West New Guinea from the rest of the Netherlands East Indies at the time that sovereignty was formally transferred on 27 December 1949, was commented upon by Andres Rigo Sureda:

For the purpose of determining the subject of self-determination an Administering Authority can unilaterally change the territorial boundaries of a non-self-governing territory until the very moment of its independence, provided the change is not made with a view of defeating a claim by the emerging state to self-determination as a whole. Once a claim to the independence of the whole territory is made, the unilateral competency to partition the territory becomes questionable and the validity of any partition will depend upon the extent to which the

partition is a recognition of the distinct claims of two separate peoples.²¹⁷

Once this decision has been contemplated then the criteria mentioned in the above United Nations General Assembly Resolutions, 742 (VIII) 1953 and 1541 (XV) 1960 should have come into play. Rigo Sureda commented that

[a]fter the Agreement of 1962 was concluded the General Assembly approved it without any reference to the fact that West Irian was a non-self-governing territory; it is suggested that while before the signature of the agreement the General Assembly may have been reluctant to take any action because of doubts about its competence, the failure of the General Assembly to determine whether West Irian was a non-self-governing territory or not after the settlement of the territorial claim can be interpreted as an implicit acceptance of the Indonesian view that the territory was part of Indonesia. Indeed, since the Agreement between Indonesia and the Netherlands was not in accord with the factors listed by the General Assembly [in GA Res. 742 (VIII) 1953 or Res. 1541 (XV), 1960] as indicative of a territory ceasing to be non-self-governing, the attitude taken by the General Assembly can be taken to mean that West Irian was regarded already as 'an integral' part of Indonesia, and therefore there was no need for it to go through the process indicated by the General Assembly to achieve self-determination.²¹⁸

An important factor here, apart from the racial, cultural and geographical distinctiveness of the peoples concerned, is that the wishes of the peoples of the territories concerned must be taken into account.

Thus the Agreement as signed between the Republic of Indonesia and the Kingdom of the Netherlands made no reference to UNGA Resolution 742 (VIII) 1953 or Resolution 1541 (XV) 1960 that listed factors that must be taken into consideration in determining the status of the territory. In a

²¹⁷ RIGO SUREDA, A., *Evolution of the right of self-determination: a study of United Nations practice*, Leiden, Sijthoff, 1973, p.147-148; *Factors which should be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-government*, UN General Assembly Resolution 742 (VIII), 27 November 1953.

²¹⁸ RIGO SUREDA, A *Evolution of the right of self-determination: a study of United Nations practice*, Leiden, Sijthoff, 1973, p. 151.

completely different context but again involving the United States, Puerto Rico's status as a part of the 'commonwealth' of the United States was approved by United Nations General Assembly Resolution 748 (VIII) 27 November 1953.²¹⁹ By this resolution the United States declared that it was able to cease transmission of the information required by Article 73 of the United Nations Charter.²²⁰

When it took favourable note of the cessation of transmission of information regarding the non-self-governing territory of Puerto Rico, the General Assembly did not apply the full list of criteria listed in Resolution 567 (VI) 18 January 1952 and Resolution 648 (VII) of 10 December 1952.²²¹ In its written submission to the United Nations in 1953 the United States did not represent that, with Resolution 748 (VIII) Puerto Rico would be subject to the power of the United States Congress. Lopez and Reardon characterized this as being 'a result of U.S. hegemony within the United Nations'.²²²

Puerto Rico has been put back onto the Decolonization Committee. From 1972 onwards the Special Committee on Decolonization has made numerous

²¹⁹ Cessation of the transmission of information under Article 73(e) of the Charter in respect of Puerto Rico. UNGA Resolution 748 (VIII) 27 November 1953.

²²⁰ The actual wording of part of Resolution 748 (VIII) reads as follows: '*Having received the communications dated 19 January and 20 March 1953 informing the United Nations of the establishment of the Commonwealth of Puerto Rico, as a result of the entry into force of 23 July 1952 of the Constitution of Puerto Rico and stating that, in consequence of these constitutional changes, the government of the United States of America would cease to transmit information under Article 73e of the Charter*'.

²²¹ Factors that should be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-determination. UNGA Res. 648 (VII), 10 Dec 1952.

²²² LOPEZ, AM., REARDON, G., *Puerto Rico at the United Nations*. NACLA. [n.d.]

resolutions regarding the status of Puerto Rico. Resolutions in 2014 and 1998 are footnoted here.²²³ A 2004 report reads, in part, as follows:

Since 1953 the United States has maintained a consistent position regarding the status of Puerto Rico and the competence of United Nations organs to examine that status based on General Assembly Resolution 748 (VIII) of 27 November 1953 by which the Assembly released the United States from its obligation under Chapter XI of the Charter of the United Nations. Since then the United States has maintained that Puerto Rico has exercised its right of self-determination, has attained a full measure of self-government, has decided freely and democratically to enter into free association with the United States, and is therefore, as stated explicitly in Resolution. 748 (VIII) beyond the purview of United Nations consideration.²²⁴

International Court of Justice cases

International law is always evolving and the concept of self-determination has had a corresponding evolution. As already mentioned in Chapter 9, the International Court of Justice has progressively added weight to the contention that the will of a people of a territory seeking self-determination must take precedence over claims based on historic titles.

This situation arose as a result of a case concerning the ownership of two islands, Lidgitan and Sipadan, contested by Indonesia and Malaysia. Indonesia's claim was based on an 1891 convention between Great Britain and the Netherlands. The Court found that neither party had a treaty-based

²²³ UN GENERAL ASSEMBLY. Special Committee on the situation with regard to the implementation of the Declaration on the Granting of Independence to Colonial countries and Peoples, Special Committee of 17 June concerning Puerto Rico, 18 June 2014, A/AC.109/2014/L.6

< http://www.un.org/ga/search/view_doc.asp?symbol=A/AC.109/2014/L.6 >;

UN Special committee on the situation with regard to the implementation of the Declaration on the Granting of Independence to Colonial countries and Peoples, Special Committee decision 11 August 1998 concerning Puerto Rico. Report by Rapporteur of the Special Committee Mr Fayssal Mekdad (Syrian Arab Republic). A/AC.109/2000/L.3

< <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N00/432/46/PDF/N0043246.pdf?OpenElement> >

²²⁴ UN GENERAL ASSEMBLY. Special committee on the situation with regard to the implementation of the Declaration on the Granting of Independence to Colonial countries and Peoples. Special Committee decision of 14 June 2004 concerning Puerto Rico. Report prepared by the Rapporteur of the Special Committee Mr Fayssal Mekdad (Syrian Arab Republic). A/AC.109/2005/L.3, p.12.

claim to sovereignty over the islands. *Effectivities* were considered next. Malaysia had taken control of the collection of turtle eggs and had enshrined this care in legislation. Lighthouses built and maintained were also considered. As a result, the Court concluded that sovereignty over Lidgitan and Sipadan belonged to Malaysia.²²⁵

The Philippines Application to intervene had no interest in the subject matter of the case under consideration but based its claim to historic sovereignty of one of the States of the federated State of Malaysia, North Borneo. The claim by the Philippines to sovereignty over North Borneo was based on historical titles and did not take into consideration the fact that the peoples concerned had taken part in a valid and fair act of self-determination that had taken place in an election held in 1963. Following the successful act of self determination, Great Britain filed its last report to the United Nations on North Borneo as an Article 73e Non-Self-Governing Territory.

Judge Franck lists a selection of Court judgements and other instruments as contributing to the right of non-self-governing peoples to self-determination.²²⁶

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 1971, pp.31-32, paras. 52-53.

Western Sahara, Advisory Opinion 16 Oct, 1975, pp. 31-33, paras. 54-59.

Both these cases contribute to and recognize the development of the right of non-self-governing peoples to self-determination which "requires a free and

²²⁵ Pulau Lidgitan and Pulau Sipidan (Indonesia/Malaysia). Overview of the case.

²²⁶ Sovereignty over Pulau Ligitan and Pulau Sipadan (*Indonesia/Malaysia*). Application for permission to intervene. Separate opinion ad hoc Judge Franck, I.C.J. Reports, 2001, pp. 654-655, pars, 8,10.

genuine expression of the will of the peoples concerned" (Western Sahara, *ibid.* p. 32, par. 55).

In the *Namibia* case the court recognized that "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them". (I.C.J. Reports 1971, p.31, para. 52.). In the case concerning East Timor (*Portugal v. Australia*), the Court recognized the principle of self-determination to be one of the essential principles of contemporary international law (I.C.J. Reports 1995, p.102, par.29).

The right of self-determination is firmly ensconced in universal treaty law, *opinio juris* and the practice of States. The principle is reiterated in the United Nations Charter and in both the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights. Resolutions 1514 (XV) and 1541 (XV) both stress self-determination for all territories that have not yet obtained independence. As far back as 1953, UNGA Resolution 742 (VIII) emphasised that 'any form of association between a non-self-governing territory and a metropolitan *or any other country* essentially depends on the freely expressed will of the people at the time of the taking of the decision'. (Emphasis added).

Resolution 2625 (1970) provides that 'all peoples have the right freely to determine when and as they wish, their internal and external political status without external interference, and to pursue as they wish their political, economic, social and cultural development'.

In his separate opinion, par. 8, Judge Franck explained that ' [i]t is essential...in determining whether the Philippines has a legal interest in protecting its claim of historic sovereignty over most of North Borneo-that the Court take into account all the relevant international law, including the modern law of decolonization and self-determination'.

Judge Franck referred to the Philippine's claim of historic title over North Borneo:

The point of law is quite simple but ultimately basic to the international rule of law. It is this: historic title, no matter how persuasively claimed on the basis of old legal instruments and exercises of authority, cannot - except in the most extraordinary circumstances - prevail in law over the rights of non-self-governing people to claim independence and establish their sovereignty through the exercise of bona-fide self-determination'.²²⁷

²²⁷ Sovereignty over Pulau Ligitan and Pulau Sipadan (*Indonesia/Malaysia*). Application for permission to intervene. Separate opinion ad hoc Judge Franck, I.C.J. Reports, 2001, p. 652, par. 2.

ANNEX 2

Article 41 International covenant on civil and political rights (ICCPR)

1. A State Party to the present Covenant may at any time declare under this article 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. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by

notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1 (a) If a matter referred to the Committee in accordance with Article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under Article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at

Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter.

THE LAWS OF STATE RESPONSIBILITY
are the principles governing when and how
a State is held responsible for a breach
of an international obligation.

This paper affirms that States have a
responsibility to protect all those within their
territory; that third States have a right and
obligation to complain of wrongful acts
committed by a sovereign State; and finally,
that sovereignty comes under question where
a people within a sovereign state are subject
to alien subjugation or serious violations
of their human rights.