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INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE

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REPORT

Final Report on the Impact of International Human Rights Law on General International Law

Introduction

At the Association's 2004 Conference in Berlin the Executive Council entrusted the Committee on International Human Rights Law and Practice with the task of preparing a report on the relationship between general international law and international human rights law. This is the Committee's final report on the subject. An interim report was presented at the Association's 2006 Toronto Conference.[1] That report was prepared at a Committee workshop held in Maastricht under the auspices of the Maastricht Centre for Human Rights. The present report was prepared at a workshop held at the Certosa di Pontignano near Siena, Italy at the kind invitation of Committee member Professor Riccardo Pisillo Mazzeschi.

[1] *Report of the 72nd Conference of the International Law Association* (2006) 457.

Before starting its work the Committee considered two broad, alternative approaches to the study of the relationship between general international law and international human rights law. The first approach emphasizes the special, distinctive nature of international human rights law and assumes that the rules and principles of general international law, or at least some of them, are not applicable to it. This was associated with a more general trend of identifying so-called self-contained regimes within public international law and labelled the "fragmentation" approach. The other approach is to take as the point of departure that international human rights law is part of general international law and that the two branches of law should be reconciled with each other as much as possible. This was labelled the "reconciliation" approach. The Committee unanimously considers that the reconciliation approach is preferable to the fragmentation approach if only because it is overwhelmingly in conformity with international practice.

The relationship between general international law and international human rights law obviously is a two-way process. International human rights courts and UN human rights treaty bodies have often relied on norms of general international law such as contained, for example, in the Vienna Convention on the Law of Treaties. Increasingly, they also use other rules and principles of international law. However, this process is comparatively well-known and well-documented. The Committee considers that the reverse process, i.e. the impact of international human rights law on general international law, is a topic both less explored and more interesting.

International human rights law, in the sense of the present report, includes not merely human rights law *stricto sensu* but any international norm capable of conferring rights and duties directly on individuals regardless of nationality including under international humanitarian law and international criminal law.

General international law is a concept that is often used but rarely defined. It is the opposite of special international law (*lex specialis*) which governs particular topics (international trade law, law of the sea etc.). Examples of general international law are the law of treaties as codified in the Vienna Convention on the Law of Treaties and the law of state responsibility as codified in the Articles on the Responsibility of States for Internationally Wrongful Acts.

At the beginning of the 21st century one of the defining characteristics of the development of international law is the emergence on the global plane of the individual and other non-state actors (international organisations, international financial institutions, non-governmental organisations, multinational enterprises etc.). Usually, discussion of this phenomenon is framed in terms of the increasing role non-state actors are playing. Questions often arise as to the rights and obligations of these entities under international law and whether these rights and duties are enforceable on the international plane. But a more interesting question, in the view of the Committee, is whether the increasing role of the individual and other non-state actors is also having an impact on the *substance* of international law. The process is sometimes referred to as the 'humanization' of international law.[2] Is international law changing from a state-centred system based on bilateral obligations towards a normative system reflecting the interests and values of a wider range of actors and of the international community? More specifically, are the changes beginning to affect general international law or do they remain limited to the *lex specialis* of international human rights law, international humanitarian law and international criminal law?

There are few systematic examinations of the impact of international human rights law on general international law. Simma,[3] Cassese[4] and Meron[5] are among the few scholars that have undertaken this task with varying degrees of intensity. The lack of broader scholarly interest is surprising in view of the importance of the topic. In order to become recognized and acquire legitimacy as the law of the world community international law will have to become more reflective of the interests and values of a wider

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[2] The term was employed already more than 50 years ago in an article by Maurice Bourquin entitled 'L'humanisation du droit des gens', in *Etudes en l'honneur de Georges Scelle* (1950) vol. I, 21.

[3] B. Simma, *International Human Rights and General International Law: A Comparative Analysis*, in Collected Courses of the Academy of European Law, (Dordrecht: Kluwer, 1993), vol. IV-2, 153-256.

[4] A. Cassese, *International Law*, 2nd ed., (Oxford: Oxford University Press, 2005) 396.

[5] T. Meron, *The Humanization of International Law*, (Leiden/Boston: Martinus Nijhoff Publishers, 2006).

range of actors. Mere development of the *lex specialis* of human rights law, international humanitarian law and international criminal law will not sufficiently serve this purpose because of the limitations imposed by general international law.

The Committee adopted the following method of work. First, it identified a set of legal issues where the approaches developed by international human rights bodies (including international human rights treaty bodies, regional human rights courts and international criminal courts and tribunals) are at first sight difficult to reconcile with traditional international law because they purport to reflect the interests of individuals rather than states. Next, the Committee considered whether these concepts have affected general international law or whether they have remained *lex specialis.* This was done primarily by examining the practice of two institutions that may be regarded as the guardians of general international law: the International Court of Justice and the International Law Commission. In quite a few cases, the ICJ and the ILC have either explicitly borrowed concepts and findings from human rights bodies or they have taken those approaches on board without identifying their source. The borrowing process is of course facilitated by the fact that an increasing number of ICJ judges and ILC members are themselves former members of international human rights bodies.

The present report was written by Menno Kamminga and is based on the following papers by members of the Committee discussing different aspects of the impact of human rights law on general international law: Martin Scheinin, Human Rights Treaties and the Vienna Convention on the Law of Treaties; Jan Wouters and Cedric Ryngaert, The Impact of International Human Rights law on the Process of the Formation of Customary International Law; Sandesh Sivakumaran, The Impact of International Human Rights Law on the Structure of International Obligations; Thilo Rensmann, The Impact of International Human Rights Law on the Immunity of States and their Officials; Christina Cerna, The Impact of International Human Rights Law on the Right to Consular Notification; Jonas Christoffersen, The Impact of International Human Rights Law on General Principles of Treaty Interpretation; Ineke Boerefijn, The Impact of International Human Rights Law on the International Regime of Treaty Reservations; Menno Kamminga, The Impact of International Human Rights Law on the Law of State Succession in Respect of Treaties; Mahulena Hofmann, The Impact of International Human Rights Law on the Relationship between International Law and Domestic Law; Riccardo Pisillo Mazzeschi, The Impact of International Human Rights Law on the Law of Diplomatic Protection. The report has benefited from comments and suggestions made by the following Committee members: Anne Bayefsky, Andrew Byrnes, John Dugard, Hurst Hannum, Matthias Herdegen, Robert McCorquodale, Nicoletta Parisi, Sir Nigel Rodley, Charles Siegal, Geir Ulfstein and Ralph Wilde. A collection of the papers mentioned above will shortly be published in a volume edited by Menno Kamminga and Martin Scheinin entitled *The Impact of International Human Rights Law on General International Law*.

The Committee is well aware that the survey contained in the present report is incomplete and that the impact of international human rights law on general international law is a process that has only just started. Moreover, as will be seen below, in quite a few instances there have been challenges from international human rights law that have not resulted in noticeable impact on general international law. The Committee has nevertheless included those instances in its report because it regards them as instructive about the process.

The Committee considers that the impact of international human rights law on general international law is highly desirable in order to soften the international legal order's predominantly state-centred nature and to accommodate the special, non-reciprocal nature of international obligations in the field of human rights. However, the Committee has attempted not to engage in wishful thinking, "human rightsism"[6] or "human rights triumphalism": the trap of attributing each and every innovation in international law to creative thinking by human rights lawyers. The Committee has tried to faithfully and succinctly record developments in a wide range of areas but it has been careful when drawing conclusions *de lege lata*. To prevent this report from being regarded as reflecting merely the narrow views of a group of human rights

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[6] A. Pellet, "Human Rightsism" and International Law, 10 *Italian Yearbook of International Law* (2000) 3-16.

experts the Committee considers it important that it receives the imprimatur from the ILA Conference as a whole.

1. The structure of international obligations

Two concepts have strongly influenced the structure of international obligations: obligations *erga omnes* and peremptory norms (rules of *jus cogens*). Unlike some of the other notions discussed in this report, it cannot be maintained that international human rights bodies have had a significant impact on the development of these two concepts. Although international criminal tribunals and supervisory human rights bodies have occasionally made reference to them they have mainly been shaped by the International Court of Justice and the International Law Commission, respectively. Furthermore, although most erga omnes obligations and jus cogens rules are human rights norms not all of them belong to this category. Finally, although the two concepts have had an important symbolic effect and have generated much interest among scholars and human rights activists they have not yet had much effect in practice. While the existence of the concepts is beyond doubt, the floodgates have not opened; states have remained reluctant to rely on them in their legal arguments.

1.1 Obligations erga omnes

Under traditional international law, a state can only protect its own rights and those of its own nationals. This fits uncomfortably with the notion of community interest. To help fill the gap, the International Court of Justice began using the concept of obligations *erga omnes*. The concept was introduced by the Court as an *obiter dictum* in the *Barcelona Traction* case in an apparent response to widespread criticism of its refusal to recognize the jus standi of Ethiopia and Liberia in the *South West Africa* cases.[7] In its obiter dictum the Court suggested that the obligation not to commit or tolerate racial discrimination has an erga omnes character and therefore may be invoked by any state.[8] The finding represented a significant recognition by the Court of the existence of such a thing as the international community and the values and interests with which it is imbued. Since that time, the Court has appeared keen to make reference to obligations erga omnes in its findings, including the *East Timor*[9] and *Bosnian genocide*[10] cases. In its advisory opinion on *The Wall* the Court went a step further and proceeded to draw legal consequences from the concept.[11] It observed that all states were under an obligation not to recognize the consequences of the breaches committed by Israel. As pointed out by Judge Kooijmans in his separate opinion, it would have been more appropriate to base this conclusion on the fact that the breaches committed amounted to violations of rules of jus cogens.[12]

The International Law Commission has also embraced the concept of obligations erga omnes. Article 48 of its Articles on Responsibility of States for Internationally Wrongful Acts provides that "any State other than an injured State is entitled to invoke the responsibility of another State … 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."[13]

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[7] *South West Africa Cases*, Second Phase, International Court of Justice, judgment of 18 July 1966.
[8] *Barcelona Traction, Light and Power Company, Limited*, International Court of Justice, judgment of 5 February 1970, par. 33.
[9] *East Timor Case* (Portugal v Australia), judgment of 30 June 1995, par. 29.
[10] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, judgment of 11 July 1996, par. 31.
[11] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, International Court of Justice, advisory opinion of 9 July 2004, par. 159.
[12] Ibid., separate opinion of Judge Kooijmans, par. 40.
[13] Article 48, Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly Resolution 56/83, 12 December 2001.

1.2 Jus cogens

Traditional international law is based on consent and there is no hierarchy of obligations: all obligations are of equal rank. In such a system there is no special place for community values that trump other norms such as in a domestic constitutional system. In order to fill this gap the International Law Commission introduced the concept of peremptory norms (*jus cogens*). Under Article 53 of the Vienna Convention on the Law of Treaties "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." But the concept of jus cogens also has increasing relevance outside the field of the law of treaties. The ILC has included the concept in its Articles on Responsibility of States for Internationally Wrongful Acts. The Articles provide that states shall cooperate to bring to an end any serious breach arising under a peremptory norm of general international law.[14] The prohibitions against aggression, genocide, slavery, racial discrimination, crimes against humanity and torture and the right to self-determination are generally regarded as peremptory norms.[15]

The concept of jus cogens has in recent years been applied not only by international human rights courts, (*Al-Adsani* v *United Kingdom*[16]) and international criminal tribunals (*Prosecutor* v *Furundzija*[17]) but also by other international courts such as the Court of First Instance of the European Communities (*Kadi* v *Council*[18]) and by domestic courts (*Ex Parte Pinochet*[19], and *Ferrini* v *Germany*[20]).

The International Court of Justice, on the other hand, for reasons that are not difficult to guess has been reluctant to rely on the notion of jus cogens in its judgments.[21] In the *Arrest Warrant* case the Court declined to even discuss the argument raised by Belgium according to which immunity could not be invoked if a norm of jus cogens had been violated. The Court for the first time referred to the concept of jus cogens in *Congo* v *Rwanda* but this occurred in a narrow context. The Court observed that the prohibition of genocide has the character of a peremptory norm but refused to accept that genocide could override the requirement of consent to jurisdiction.[22] In sum, the existence under general international law of the notion of jus cogens is beyond doubt but its application in inter-state cases is still very rare.

2. The formation of customary international law

The traditional approach to identifying a rule of customary international law is to rely on *opinio juris* to confirm state practice or even to infer *opinio juris* from state practice. Accordingly, in the *North Sea Continental Shelf* cases the Court observed that in order for state practice to qualify as custom the practice must "be carried out in such a way, as to be evidence of a belief that that this practice is rendered obligatory by the existence of a rule of law requiring it."[23] Moreover, when weighing different types of state acts the traditional approach is to attach more value to what states do (physical acts) than what they say (verbal acts). In his dissenting opinion in the *Fisheries* case Judge Reid wrote that "(t)he only convincing evidence

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[14] Articles 40 and 41, ibid.

[15] J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002) 188.

[16] *Al-Adsani v United Kingdom*, European Court of Human Rights, judgment of 21 November 2001, par. 61.

[17] *Prosecutor v Furundzija*, International Criminal Tribunal for the Former Yugoslavia, judgment of 10 December 1998, par. 153.

[18] *Kadi v Council*, Court of First Instance of the European Communities, judgment of 21 September 2005, par. 226. At the time of writing the European Court of Justice had not yet adopted its judgment on appeal.

[19] *Ex parte Pinochet* (No. 3), House of Lords, judgment of 24 March 1999.

[20] *Ferrini v Federal Republic of Germany*, Italian Court of Cassation, judgment of 11 March 2004, 99 AJIL (2005) 242.

[21] See in particular the separate opinion of Judge Ad Hoc Dugard in *Case concerning armed activities on the territory of the Congo* (Democratic Republic of the Congo v Rwanda), International Court of Justice, judgment of 3 February 2006.

[22] *Ibid.,* par. 64.

[23] *North Sea Continental Shelf cases*, International Court of Justice, judgment of 20 February 1969, par. 77.

of State practice is to be found in seizures, where the coastal state asserts its sovereignty over the waters in question by arresting a foreign ship ..."[24]

In areas inspired by community values (*jus ad bellum,* armed conflict, human rights, the environment) this traditional approach is problematic. The significance to be attached to omissions is difficult to assess in these areas because it has be demonstrated that the abstention occurred out of a sense of legal obligation.[25] For example, in a debate on the lawfulness of cluster munitions the traditional approach emphasizes that these weapons have been used by at least 23 states and that they are being produced by at least 34.[26] The new approach stresses the fact that these weapons are unlawful because they are indiscriminate.

Human rights treaty bodies and international criminal courts and tribunals have tended to follow an approach that is based on deduction from fundamental principles rather than on induction from state practice. Moreover, when identifying state practice they emphasize what states say rather than what they do. There also is a tendency to regard the pronouncements of the supervisory bodies of human rights treaties and international tribunals as indications of state practice, especially if these pronouncements are acquiesced in by states (see below, Section 3.1).

The new approach was followed by the International Court of Justice in *Nicaragua.* In that case the Court observed that it "must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice" thus turning around the approach it had taken in the *North Sea Continental Shelf* cases.[27] Also in *Nicaragua* the Court recognized that contrary practice does not undermine the formation of a rule of customary international law as long as the practice is condemned and the state in question does not claim to act as a matter of right.[28]

However, the new approach is by no means uncontroversial as is illustrated by the reaction of the United States to the ICRC study *Customary International Humanitarian Law*, one of the most ambitious efforts ever undertaken to identify rules of customary international law. Two years after the publication of the study, a lengthy letter from the Legal Adviser of the US Department of State and his colleague of the US Department of Defense to the President of the ICRC complained that the study did not take sufficient account of battlefield practice. It argued "that the Study places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict. Although manuals may provide important indications of State behaviour and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations."[29]

It follows that techniques for the identification of rules of customary international law differ depending on the subject-matter. It should not be assumed that they are the same for commercial shipping as for warfare. As the international legal order becomes more and more concerned with areas governed by community values, the "new" ways of identifying rules of customary international law will gain importance in due course.

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[24] *Fisheries case*, International Court of Justice, judgment of 18 December 1951, 191.
[25] J.-M. Henckaerts, Study on Customary International Law: A Contribution to the Understanding and Respect for the rule of Law in Armed Conflict, 87 *Review of the International Committee of the Red Cross* (2005) 175, 182.
[26] See U.S. Policy Regarding Cluster Munitions, 101 AJIL (2007) 501.
[27] *Case concerning military and paramilitary activities in and against Nicaragua* (Merits), International Court of Justice, judgment of 27 June 1986, par. 184.
[28] Ibid., par. 186.
[29] Letter from John Bellinger III, Legal Adviser, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, 3 November 2006, 46 ILM (2007) 514, 515. See also the response to this letter by J.-M. Henckaerts, ICRC Legal Adviser, 46 ILM (2007) 959.

3. Treaty law

The International Law Commission's Study Group on Fragmentation of International Law has concluded that the Vienna Convention on the Law of Treaties is the appropriate instrument for dealing with problems of fragmentation in international law. But even the Study Group recognizes that the VCLT's uniform rules for interpreting and applying different types of treaties are problematic.[30] Already at the time of its conclusion in1969 the VCLT was criticised for its failure to distinguish between different types of treaties, in particular between "bilateral" and "non-bilateral" treaties. The Convention also did not take account of one of the special characteristic of multilateral treaties: that they have their own monitoring bodies developing institutionalized practices of interpretation under the treaty in question. The provisions of the VCLT are therefore not always easily reconcilable with the special requirements of human rights treaties or other multilateral treaties establishing independent monitoring bodies. The special nature of the European Convention on Human Rights was famously characterised by the European Court of Human Rights in the following terms:

"Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'."[31]

3.1 Treaty interpretation

It is sometimes suggested that the special nature of human rights treaties requires special rules of interpretation that differ from the general rules of treaty interpretation. For example, the European Court of Human Rights has observed that in interpreting the European Convention on Human Rights "regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms."[32]

Such a claim for special treatment finds no support in the rules on treaty interpretation contained in the VCLT, however. When drafting general rules of interpretation the ILC specifically decided to omit from the VCLT a distinction between "law-making" and other treaties.[33] This was in spite of the fact that the concept of treaties that pursue a common interest had already been recognised by the International Court of Justice. In its advisory opinion on *Reservations to the Genocide Convention* the Court famously observed:

"In such a convention the contracting States do not have any interests of their own ; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties."[34]

It would appear, however, that the principles for the interpretation of human rights treaties that have been relied upon by the European and Inter-American Courts of Human Rights do not differ substantially from the methods of treaty interpretation that are available under general international law, especially if it is assumed that the VCLT is not a complete codification of the customary international law on treaties, including its norms on treaty interpretation. It therefore cannot be said that there has been a significant

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[30] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682, 250-251.

[31] *Mamatkulov v Turkey*, European Court of Human Rights (Grand Chamber), judgment of 4 February 2005, par. 100. *Loizidou v Turkey* (preliminary objections), European Court of Human Rights, judgment of 23 March 1995, par. 70.

[32] *Soering v United Kingdom*, European Court of Human Rights, judgment of 7 July 1989, par. 87.

[33] *Yearbook of the International Law Commission*, 1966, vol. II, 219, par. 6.

[34] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice, advisory opinion of 28 May 1951, 23.

impact from international human rights law on general international law in this field. For example, emphasis on the object and purpose of a treaty (the necessity "… to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations of the Parties.")[35] is reflected in Article 31(1) of the VCLT. The principle of dynamic interpretation ("… the Convention is a living instrument which … must be interpreted in the light of present-day conditions")[36] is reflected to a considerable extent in Article 31(3)(b) of the VCLT.

In one of its previous reports the ILA Committee on International Human Rights Law and Practice suggested that human rights treaty body findings constitute "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the sense of Article 31(3)(b) of the VCLT. Or, alternatively, states' acquiescence in such findings constitutes such practice.[37] Although the International Court of Justice has not formally endorsed such an approach implicitly it has adopted this course of action, e.g. in its advisory opinion on *The Wall* in which it closely follows the findings of the UN human rights treaty bodies.

3.2 Treaty reservations

Under traditional international law a state is bound by a treaty only to the extent that it has consented to be bound. From the point of view of international human rights law this point of departure is problematic. Unlike most other treaties, human rights treaties create obligations of a non-reciprocal nature which establish rights for individuals. Reservations to human rights treaties therefore primarily affect the interests of individuals and not those of other states.

The approach to reservations taken by the UN human rights treaty bodies is reflected inter alia in guidelines adopted by the chairpersons of human rights treaty bodies[38] and a General Comment by the Human Rights Committee.[39] The line taken in these documents is similar to the attitude adopted earlier by the European Court of Human Rights.[40] The International Law Commission has worked on the issue of treaty reservations since 1994. Its work is not yet finished but it has already resulted in various draft guidelines. In his reports ILC Special Rapporteur Alain Pellet has made frequent reference to the work on reservations carried out by the human rights treaty bodies. In 2007 there even was a meeting on the issue between the ILC and representatives of human rights treaty bodies.[41] Because of this frequent interaction the impact of international human rights law on general international law in the area of treaty reservations is comparatively well documented. Three questions may be distinguished in this field: (1) what are the grounds for determining that a reservation is impermissible; (2) who may determine whether a reservation is impermissible; and (3) what are the consequences of an impermissible reservation.

(1) In its advisory opinion on *Reservations to the Genocide Convention* the International Court of Justice adopted the "object and purpose" test to determine the validity of a reservation.[42] The test was subsequently included in Article 19(3) of the Vienna Convention on the Law of Treaties and is widely regarded as reflecting customary international law. ILC Special Rapporteur Alain Pellet has called it the "pivot between the need to preserve the nature of the treaty and the desire to facilitate accession to multilateral treaties by

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[35] *Wemhoff v Federal Republic of Germany*, European Court of Human Rights, judgment of 27 June 1968, par. 8.
[36] *Tyrer v United Kingdom*, European Court of Human Rights, judgment of 25 April 1987, par. 31.
[37] Committee on International Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, *Report of the 71st Conference of the International Law Association* (2004) 621, 628-629.
[38] See, for example, Report of the meeting of the Working Group on Reservations, UN Doc. HRI/MC/2007/5.
[39] Human Rights Committee, General Comment No. 24, 4 November 1994.
[40] *Belilos v Switzerland*, European Court of Human Rights, judgment of 29 April 1988.
[41] Report of a meeting with human rights bodies, 15-16 May 2007, UN Doc. ILC(LIX)/RT/CRP.1.
[42] *Reservations to the Convention on the Prevention and Punishment of the Crime and Punishment of Genocide*, International Court of Justice, advisory opinion of 28 May 1951, p. 15.

the greatest number of States."[43] From the point of view of international human rights law this test is not controversial although in practice it may not always be easily applicable.

(2) Under Article 20 of the VCLT a reservation is presumed permissible unless it is objected to by other states parties. This system was designed for treaties in which states have reciprocal interests but it functions inadequately for human rights treaties. States parties to human rights treaties have little incentive to critically examine and object to reservations made by other states since their own direct interests are not affected. The Human Rights Committee, among others, has therefore taken the view that the task of determining the validity of reservations necessarily falls to the Committee.[44] ILC Special Rapporteur Alain Pellet has accepted that it makes sense for treaty bodies to perform this role. One of his draft-guidelines provides as follows: "Where a treaty establishes a body to monitor application of the treaty, that body shall be competent, for the purpose of discharging the functions entrusted to it, to assess the validity of reservations formulated by a State or an international organization."[45] Although the ILC has not yet pronounced on this draft the impact from international human rights law on general international law appears to have been straightforward in this case.

(3) Under Articles 20-21 of the VCLT a state objecting to a reservation has the option of either taking the view that the reservation precludes the entry into force of the convention between it and the reserving state or to take the view that the convention will enter into force between it and the reserving state minus the provision burdened by the contested reservation. Neither of these options is attractive in respect of human rights treaties. The European Court of Human Rights has therefore decided that invalid reservations are severable.[46] The Human Rights Committee has adopted a similar position. It has observed that if it has determined that a reservation is incompatible with object and purpose of the ICCPR, the reservation is generally severable and the treaty is "operative for the reserving party without the benefit of the reservation."[47] The ILC has not yet formulated a draft guideline on this question and it remains to be seen whether it will follow the approach of the human rights treaty bodies. Clearly, however, of all the issues arising in respect of treaty reservations this is the most controversial. The United States, the United Kingdom and France have already taken the unusual step of registering formal objections to the severability doctrine adopted by the Human Rights Committee.[48]

3.3 State succession in respect of treaties

In accordance with the 'clean slate' doctrine, under traditional international law a state is free to become or not to become a party to treaties that were binding on the predecessor state. Although the Vienna Convention on Succession of States in Respect of Treaties provides for the continuity of obligations in respect of all treaties, this position is not part of customary international law.[49] The only exception to the clean slate doctrine that is accepted under traditional international law is the rule of the continuity of treaties relating to territorial regimes (including boundary regimes) as provided for in the Vienna Convention on Succession of states in Respect of Treaties.[50] That rule on territorial regimes has been qualified as a rule of customary international law by the International Court of Justice.[51]

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[43] Tenth Report on Reservations to Treaties, by Alain Pellet, Special Rapporteur, UN Doc. A/CN.4/558/Add.1 (2005) par. 55.
[44] Human Rights Committee, General Comment No. 24, 4 November 1994, par. 18.
[45] Tenth Report on Reservations to Treaties, by Alain Pellet, Special Rapporteur, UN Doc. A/CN.4/558/Add.1 (2005), par. 166-171.
[46] *Belilos v Switzerland*, European Court of Human Rights, judgment of 29 April 1988, par.60.
[47] Human Rights Committee, General Comment No. 24, par. 18.
[48] Report of the Human Rights Committee, UN Doc. A/50/40, vol. I (1996), Annex VI.
[49] Articles 31-35 of the Vienna Convention on Succession of States in Respect of Treaties (1978). See, for example, I. Brownlie, *Principles of Public International Law*, (Oxford: Oxford University Press, 5th ed. 1998) 663; A. Cassese, *International Law*, (Oxford: Oxford University Press, 2nd ed. 2005) 78; M. Shaw, *International Law*, (Cambridge: Cambridge University Press, 5th ed. 2003) 875.
[50] Articles 11-12 of the Vienna Convention on Succession of States in Respect of Treaties.
[51] *Case concerning the Gabcikovo-Nagymaros project* (Hungary/Slovakia), International Court of Justice, judgment of 25 September 1997, par. 123.

In contrast, the UN human rights treaty bodies have taken the view that the special nature of human rights treaties entails that their protection devolves with territory and that protection is not affected by state succession.[52] Successor states therefore remain bound by human rights treaties from their date of independence and this is not dependent on any confirmation made by them. This therefore puts human rights treaties in the same league as treaties on territorial regimes.

However, although no state appears to have formally objected to the rule of automatic succession in respect of human rights treaties so far the rule has not been formally enshrined under general international law. The rule is not reflected in the Vienna Convention on the Law of Treaties or the Vienna Convention on Succession of States in Respect of Treaties. Neither has it been endorsed by the International Court of Justice or the International Law Commission. In the *Bosnian genocide* case the Court decided not to respond to an argument in favour of automatic succession in respect of human rights treaties made by Bosnia-Herzegovia. Among the separate opinions to this judgment only Judge Weeramantry expressed the view that there was indeed a rule of automatic succession with regard to the Genocide Convention. President Higgins has expressed sympathy for the idea in an academic article.[53]

4. International law and domestic law

Under traditional international law states are free to determine their relationship between international law and domestic law as long as they ensure compliance with their international obligations. In accordance with this general principle, it has long been assumed that human rights treaties leave states parties the choice of means for the performance of their obligations.[54]

Subsequent practice of international human rights courts, however, demonstrates an apparent underlying assumption that judgments may be applicable in the domestic legal sphere directly without prior transformation into domestic law despite a domestic legal rule to the contrary. For example, the European Court of Human Rights has ordered the return of property[55] and the immediate release of a detainee.[56] The Inter-American Court of Human Rights has ordered the opening of a school and a medical dispensary,[57] the release of a detainee[58] and declared amnesty laws without legal effect.[59] Although these decisions may still require implementation by domestic authorities their room for manoeuvre in such cases is very limited indeed.

States do not seem to have objected to these interventionist initiatives. In fact, an increasing number of constitutions, particularly in Eastern Europe, have made provisions of human rights treaties directly applicable in their domestic law. However, it would be wrong to suggest that this type of judgments is now generally accepted. In *Avena* the International Court of Justice found that the United States was obliged to provide “by means of its own choosing, review and reconsideration” of the convictions of the Mexican nationals sentenced to death without consular access.[60] Following this judgment, the US President ordered

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[52] Declaration by the 5th meeting of chairpersons of human rights treaty bodies, UN Doc. E/CN.4/1995/80, 4. Human Rights Committee, General Comment No. 26: Continuity of obligations, 8 September 1997.
[53] R. Higgins, The International Court of Justice and Human Rights, in K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, (The Hague: Nijhoff, 1998), 691, 696-697.
[54] *Marckx v Belgium*, European Court of Human Rights, judgment of 13 June 1979, par. 58.
[55] *Papamichalopoulos and Others v Greece* (just satisfaction), judgment of 31 October 1995. *Brumarescu v Romania* (just satisfaction), European Court of Human Rights, judgment of 23 January 2001.
[56] *Assanidze v Georgia*, European Court of Human Rights, judgment of 8 April 2004.
[57] *Aloeboetoe et al. v Suriname* (just satisfaction), Inter-American Court of Human Rights, judgment of 10 September 1993.
[58] *Loayza Tamayo* case, Inter-American Court of Human Rights, judgment of 17 September 1997.
[59] *Barrios Altos* case (Chumbipuma et al. v Peru), Inter-American Court of Human Rights, judgment of 14 March 2001.
[60] *Case Concerning Avena and other Mexican Nationals* (Mexico v United States of America), International Court of Justice, judgment of 31 March 2004.

state courts to give effect to the decision "in accordance with general principles of comity".[61] However, the US Supreme Court subsequently decided that the ICJ decision was not enforceable in the absence of implementing legislation.[62]

5. Immunity

Immunity of the state and its (senior) officials from proceedings before a foreign court is based on the traditional maxim *par in parem non habet imperium*. It follows from the sovereign equality of states and is therefore one of the clearest examples of the "statist" nature of international law.

In several recent cases this rule was challenged with human rights-based arguments but so far with little success even before international human rights courts. In 2001, in *Al-Adsani*, the European Court of Human Rights decided that even when acts of torture are alleged a state enjoys immunity from civil suit in another state.[63] In 2006, in *Jones* v. *Saudi Arabia* the House of Lords endorsed this finding.[64] Decisions going the other way, such as *Ferrini*, carry less weight.[65]

In 2002, in the *Arrest Warrant* case, the International Court of Justice made a similar finding with regard to criminal proceedings. It held that incumbent heads of state, heads of government and foreign ministers were immune from criminal proceedings before foreign courts even if they were charged with crimes under international law.[66] The Court did not attempt to balance the need for stable inter-state relations with the need to fight impunity for serious human rights violations. The International Law Commission has not pronounced on the issue until now.

No significant impact from international human rights law on general international law has therefore occurred so far in this area. Nevertheless, in view of the controversial nature of these decisions (*Al-Adsani* was decided by nine votes to eight and the *Arrest Warrant* decision was accompanied by 11 individual opinions) the law should be regarded as far from settled.

6. Diplomatic protection

Under traditional international law diplomatic protection is an instrument for the protection of persons and companies against injury by foreign states. However, because of its firmly established "statist" nature the cards are stacked heavily against the individual. As pointed out by the Permanent Court of International Justice in the *Mavrommatis* case a state resorting to diplomatic action is asserting its own right to ensure, in the person of its subjects, respect for the rules of international law.[67] The underlying doctrine was repeatedly confirmed by the International Course of Justice, most recently in no uncertain terms in the *Barcelona Traction* case: "The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case."[68]

It follows that under the classic regime a person injured by a foreign state who wishes to benefit from diplomatic protection faces several difficulties. First of all, states enjoy an entirely discretionary power

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[61] Memorandum by the President for the US Attorney-General, 28 February 2005, 44 ILM (2005) 964.
[62] *Medellin v Texas*, US Supreme Court, judgment of 25 March 2008.
[63] Supra note 16.
[64] *Jones v Saudi-Arabia*, House of Lords, judgment of 14 June 2006.
[65] *Ferrini v Federal Republic of Germany*, Italian Court of Cassation, judgment of 11 March 2004, 99 AJIL (2005) 242.
[66] *Case Concerning the Arrest Warrant of 11 April 2000*, International Court of Justice, judgment of 14 February 2002.
[67] *Mavrommatis Palestine Concessions* (Jurisdiction), Permanent Court of International Justice, judgment of 30 August 1924, 12.
[68] *Case concerning the Barcelona Traction Traction, Light and Power Company, Limited* (Second Phase), International Court of Justice, judgment of 5 February 1970, par. 79.

whether to exercise diplomatic protection or not. Furthermore, only a person's state of nationality may exercise diplomatic protection on his behalf. Finally, if the state exercising diplomatic protection receives compensation it is not obliged to transmit it to the injured person. These features of the system of diplomatic protection are particularly problematic if the individual has no alternative enforcement possibilities because domestic remedies are ineffective and remedies on the international plane are lacking.

Since diplomatic protection generally does not arise as an issue in the work of human rights treaty bodies and international criminal tribunals there is not much pressure emanating from that side to change the system. Within the International Law Commission, Special Rapporteur on Diplomatic Protection John Dugard has attempted to soften some of the system's harshest features but with very limited success. Article 1 of the Draft Articles is drafted in such a way that it leaves open the question whether a state exercising diplomatic protection does so in its own right or that of its national or both.[69] But proposals by the Special Rapporteur to include in the Draft Articles a provision providing for an obligation to exercise protection under certain circumstances, in particular when the injury results from a grave breach of a peremptory norm of international law, were not accepted by the ILC. The final version of the Draft Articles mere includes a provision *recommending* that states should: give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred; take into account, wherever feasible, the views of injured persons with regard to diplomatic protection and the reparation to be sought; and transfer to the injured person any compensation obtained for the injury from the responsible state subject to any reasonable deductions.[70] The accompanying Commentary duly explains that these are desirable practices which have not yet achieved the status of customary international law.

Attempts to convince the ILC to dispense with the rule that diplomatic protection may only be exercised by the state of nationality of the injured person were similarly unsuccessful. However, the Articles on Diplomatic Protection provide for some softening of the traditional rule. Article 8 introduces the possibility for a state to exercise diplomatic protection on behalf of stateless persons and recognized refugees that are lawfully and habitually resident on its territory.[71] The Commentary qualifies this provision as an exercise in the progressive development of the law.

The International Court of Justice similarly has not shown much inclination to dispense with the nationality requirement. In *DRC v Uganda*, Uganda alleged by way of counter-claim that Congolese troops had maltreated certain Ugandan nationals at Ndjili International Airport. The Court decided to treat this claim as an attempt to exercise diplomatic protection on behalf of these persons and declared it inadmissible because no evidence had been presented to identify them as Ugandan nationals.[72] As pointed out by Judge Simma in his separate opinion, the Court failed to observe that instead of choosing the avenue of diplomatic protection Uganda could also have invoked the responsibility of the DRC under Article 48(1)(a) of the Articles on Responsibility of States for Internationally Wrongful Acts. According to that provision any state is entitled to invoke the responsibility of another state if "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." Such obligations were clearly at stake here since the abuses suffered by the injured individuals amounted to violations of obligations under international human rights law and international humanitarian law that have an erga omnes character. From the point of view of the clarification of the law it is regrettable that Uganda failed to take advantage of this possibility and that the Court failed to draw attention to it.

7. The right to consular notification

Article 36(1)(b) of the Vienna Convention on Consular Relations provides for the right of a detained foreign national to be informed without delay that he may communicate with the consular officers of his

[69] Art. 1, Draft Articles on Diplomatic Protection, Report of the 58th Session of the International Law Commission, UN Doc. A/61/10, par. 49.
[70] Art. 19, Draft Articles on Diplomatic Protection, Report of the 58th Session of the International Law Commission, UN Doc. A/61/10, par. 49.
[71] Art. 8, ibid.
[72] Case *Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda), International Court of Justice, judgment of 18 December 2005, par. 333.

own country. In its advisory opinion No.16, the Inter-American Court held that "failure to observe this right is prejudicial to the due process of law and, in such circumstances, imposition of the death penalty is a violation of the right not to be deprived of life "arbitrarily"" as provided for in various human rights treaties.[73]

In the *La Grand* case Germany, apparently inspired by this advisory opinion, argued that the right of the detainee to be informed had assumed the character of a human right. In response, the International Court of Justice observed that Article 36 creates individual rights for the detained individual and that consequently the reference to "rights" in par. 2 must be read as applying not only to the rights of the sending state "but also to the rights of the detained individual."[74] But in *Avena* the Court took a more restrictive approach. Without referring to the Inter-American Court's advisory opinion - of which it clearly was aware - it declined to follow Mexico's suggestion to qualify the right to be informed of the right to consular access as a human right. It stated rather sweepingly: "Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires*, support the conclusion that Mexico draws from its contention in that regard."[75]

In this area, therefore, the impact from international human rights law on general international law has so far been very limited.

8. State responsibility

Although the Articles on Responsibility of States for Internationally Wrongful Acts are mostly fairly traditional and state-centred they are nevertheless generally more human rights-minded than the provisions of the Vienna Convention on the Law of Treaties, another result of the work of the International Law Commission. Presumably, this is partly due to the fact that they were adopted more than 30 years later when international human rights law had developed stronger roots.

8.1 Attribution

An important question that has divided the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia for a number of years is what degree of control over an armed group is required for its conduct to become attributable to a state. In 1986, in the *Nicaragua* case, the World Court concluded that abuses committed by the *contras* in Nicaragua could not be attributed to the United States because the US had not exercised "effective control" over this group.[76] In 1999, in the *Tadic* case, the Appeals Chamber of the ICTY criticised this test and took the view that the exercise of "overall control" is sufficient to render analogous conduct attributable to the state.[77] In 2007, in the *Bosnian genocide* case, the International Court of Justice responded. It explicitly rejected the ICTY's approach and reiterated its view that "effective control" is the appropriate test on the grounds that the test adopted by the ICTY would stretch "too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility."[78]

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[73] The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Inter-American Court of Human Rights, Advisory Opinion OC-16/99, 1 October 1999.
[74] *La Grand* case (Germany v United States of America), International Court of Justice, judgment of 27 June 2001, par. 89.
[75] Ibid, at para. 124.
[76] *Military and Paramilitary Activities in and Against Nicaragua*, International Court of Justice, judgment of 27 June 1986, par. 115.
[77] *Prosecutor v Tadic*, International Criminal for the Former Yugoslavia – Appeals Chamber, judgment of 5 July 1999, par. 115-145.
[78] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), International Court of Justice, judgment of 26 February 2007, par. 396-407 at 406.

On this question, therefore, there has been no impact from international human rights law on general international law. It appears obvious that the difference in approach is due to a difference in starting point. While the ICTY takes the individual victim as its point of departure, the World Court has the interests of states uppermost in its mind. The ILC has taken the side of the ICJ in this clash between international courts. Article 8 of the Articles on Responsibility of States for Internationally Wrongful Acts provides that "[t]he conduct of … a group of persons shall be considered an act of a State under international law if the … group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

8.2 Positive obligations

International law's traditional approach is to emphasize a state's negative obligations, such as the prohibition of aggression reflected in Article 2(4) of the UN Charter and the prohibition of interference in internal affairs reflected in Article 2(7). The duty to exercise due diligence and state responsibility arising from an omission exist but they are underdeveloped.[79]

International humanitarian law and international human rights law, on the other hand, have long recognised the importance of positive obligations. For the protection of human rights and fundamental values positive obligations are often more important than negative ones. Accordingly, under common Article 1 of the Geneva Conventions parties undertake not only to respect but also "to ensure respect" for the Conventions. Under Article 2 of the International Covenant on Civil and Political Rights parties undertake not only to respect but also "to ensure" the rights recognized in the Covenant. Under Article 2 of the International Covenant on Economic, Social and Cultural Rights parties inter alia undertake to take steps through international cooperation to achieve the full realization of the rights contained in the Covenant. The precise content of the positive obligations hinted at in these provisions has been applied in numerous cases by international human rights courts including most famously the *Velásquez Rodríguez* case decided by the Inter-American Court of Human Rights.[80]

That the International Court of Justice has also often applied the positive obligations derived from primary rules contained in international human rights instruments is hardly surprising in view of the increasing number of cases in which it is being called upon to interpret those instruments. In its advisory opinion on *The Wall* the Court observed that it followed from common Article 1 of the Geneva Conventions that "that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with."[81] In the *Bosnian genocide* case the Court found Serbia guilty not of having committed genocide but of having violated its obligation to prevent genocide and its obligation to co-operate with the International Criminal Tribunal for the Former Yugoslavia by transferring Ratko Mladic for trial.[82]

But the concept of positive obligations has also made its way into secondary rules of general international law. The concept was incorporated, for example, into Article 41 of the Articles on Responsibility of States for Internationally Wrongful Acts: "States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40." This duty therefore arises in response to a serious breach of a peremptory norm of international law. The accompanying commentary expresses hesitation whether

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[79] However, according to the commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, cases in which the responsibility of states has been invoked on the basis of an omission have been 'as least as numerous' as those based on positive conduct. J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002) 82.
[80] *Velásquez Rodríguez* case, Inter-American Court of Human Rights, judgment of 29 July 1988, 28 ILM (1989) 291.
[81] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, advisory opinion of 9 July 2004, par. 158. The Court's broad interpretation was criticized by Judge Kooijmans in his separate opinion.
[82] *Case concerning the Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovia v Serbia and Montenegro), International Court of Justice, judgment of 26 February 2007.

the positive duty of cooperation set out in Article 41 is already part of general international law or whether it reflects progressive development.[83] At the same time, the "responsibility to protect" was recognized by the UN General Assembly in the World Summit Outcome[84] and more recently the Security Council reaffirmed states' "responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity."[85]

8.3 Crimes of state

Traditional international law does not distinguish between serious and less serious categories of internationally wrongful acts. Inspired by the codification of individual crimes under international law - in the draft Code of Crimes against the Peace and Security of Mankind[86] and subsequently in the Statute of the International Criminal Court - there has been some support for the codification of the concept of international crimes of state. The ILC introduced this concept in Article 19 of its Draft Articles on State Responsibility. [87] The provision divides internationally wrongful acts into international crimes and international delicts. However, the proposal elicited considerable criticism from states. By way of compromise, the International Law Commission therefore proposed a more restricted version of the same underlying idea: "serious breaches of obligations under peremptory norms of general international law."[88] Peremptory norms, it may be recalled, include the prohibitions of aggression, genocide, slavery, racial discrimination, torture and the right to self-determination.[89] According to Article 41 of the Articles on Responsibility of States for Internationally Wrongful Acts "States shall bring to an end through lawful means any serious breach" within the meaning of this concept.

This result may therefore be regarded as an example of limited but not insignificant impact of international human rights law on general international law. While the term state crimes has been consigned to the dustbin it is now generally accepted that certain breaches of international law are more serious than others and therefore entail more serious consequences.

Conclusions

1. This report is not an exhaustive list of instances in which international human rights law has had an impact on general international law or in which it has failed to do so. Moreover, the report has been a mere stocktaking; the process of international human rights law impacting the evolution of general international law is ongoing and likely to continue.

2. The process is a response to a deeply and widely felt need to make the international legal order more responsive to the needs of a wider range of actors than just states, including the international community (understood as referring to humankind as a whole and not just the community of states).

3. The impact of international human rights law upon general international law is not always generated by human rights bodies but sometimes merely by human rights "thinking" by the International Court of Justice (obligations *erga omnes*) and the International Law Commission (*jus cogens*).

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[83] J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002) 249.
[84] General Assembly Resolution 60/1 (2005), World Summit Outcome, par. 138-139.
[85] Security Council Resolution 1674 (2006), Protection of civilians in armed conflict, par. 4.
[86] *Yearbook of the International Law Commission*, 1976, vol. II, Part Two.
[87] Yearbook of the ILC, 1976, vol. II, Part Two, 95-96. Adopted by consensus 'to the applause of the members of the Commission.' B.G. Ramcharan, *The Concept and Present Status of the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1989) 299.
[88] Article 40 of the Articles on Responsibility of States for Internationally Wrongful Acts.
[89] Supra note 15.

4. The receptivity of the International Court of Justice and the International Law Commission to the process has been mixed. The Court has often been prepared to incorporate output from human rights treaty bodies and international criminal courts in its findings (most clearly in its advisory opinion on *The Wall* and in the *Bosnian genocide* case). But in other cases the Court has been quite unwilling to balance traditional state interests against the interests of the individual even when the latter are reflected in rules of jus cogens (such as in its advisory opinion on *Nuclear Weapons* and in the *Arrest Warrant* case).

5. It has been suggested that the Court's general approach is to acknowledge the existence of concepts derived from international human rights law, and thereby to "educate" states, but to apply these concepts cautiously in order not to cause a backlash.[90] If this is indeed the Court's - or some of the judges' - underlying strategy it is understandable and deserving of support.

6. For the International Law Commission the question of the impact of international human rights law on general international law has particularly arisen in recent years in the context of its codification exercises on state responsibility, treaty reservations and diplomatic protection. The ILC has not been fully averse to the process but the actual steps it has taken have been rather modest, for example by acknowledging that human rights treaty monitoring bodies have the authority to assess the validity of treaty reservations**.**

7. An inquiry into the impact of international human rights law on general international law is to be distinguished from discussions about the so called fragmentation of international law. The International Law Commission's Study Group on the Fragmentation of International Law regards the VCLT as the answer to any difficulties arising from the fragmentation of international law.[91] This position is debatable because the VCLT is not very human rights-minded. In the end, human rights rather than the VCLT may be the ultimate unifying factor contributing to the coherence of international law.

8. The permeation of international human rights law through general international law constitutes a quiet revolution which invariably targets international law's most "statist" features.

[90] J. Dugard, The Future of International Law: A Human Rights Perspective, valedictory lecture, Leiden University, 20 April 2007, 9.
[91] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682, 15 and 262.