

Human Rights in a World-Wide Framework Some Current Issues

*Christian Tomuschat**

International protection of human rights is a topic of frightening dimensions. Legal and political writings dealing with its manifold facets have rapidly grown to fill entire libraries. Consequently, what new elements can be added to the bulk of already existing knowledge? There is no need to present basic facts which are known to everyone. On the other hand, the broad title of this paper does not admit of focusing on specific details which the process of implementation has brought to the fore. In these circumstances, it would appear to be appropriate to discuss some pivotal issues of a general character capable of clarifying the chances of international efforts to make a meaningful contribution to upholding and strengthening common human rights standards. It goes without saying that the following explanations cannot purport to draw a comprehensive picture of all or even the major present-day problems. They are simply designed to highlight a number of questions which deserve to be explored more fully at a stage when the international machinery, gradually established over more than three decades, has undergone the test of practical experience during sufficiently long periods of time. Hence, there are now

* Professor Dr. iur., University of Bonn; Member of the UN Human Rights Committee and the International Law Commission.

Abbreviations: AJIL = American Journal of International Law; ARSP = Archiv für Rechts- und Sozialphilosophie; CCPR = Covenant on Civil and Political Rights; CESCR = Covenant on Economic, Social and Cultural Rights; GDR = German Democratic Republic; GYIL = German Yearbook of International Law; HRLJ = Human Rights Law Journal; HRQ = Human Rights Quarterly; ICLQ = International and Comparative Law Quarterly; IJIL = Indian Journal of International Law; NILR = Netherlands International Law Review; RGDIP = Revue Générale de Droit International Public.

enough elements to permit a kind of first balance-sheet to be struck almost fourty years after the end of the second world war, the event which precisely through all of its horrors has exercised such a stimulating effect on the idea of establishing international mechanisms for the protection of human rights.

Before starting to deal with the substance of the topic thus defined, a short word of clarification should be given. International protection of human rights is a somewhat misleading term. Basically, it is at the national level that the individual needs support against infringement of his rights by the authorities of his country. With the exception of the European Communities, holders of supranational prerogatives, no other international organization has hitherto been endowed with powers which directly affect the individual. It is, therefore, in his dealings with national authorities that the individual requires the benefit of the rights granted to him by the relevant international agreements¹. In other words, "international protection" is an abbreviated formula for saying that the focus is on substantive standards and procedural safeguards designed to afford protection to the individual within a national context.

I. Philosophical and Political Foundations

1. *Universality of Human Rights:* As time goes on and a more sober attitude replaces the optimistic and even euphoric ambiance of the founding years of the United Nations, a question returns with renewed insistence which many specialists in the field of human rights had already believed to be settled for good. Can there be a common standard of human rights for mankind as a whole? Were the drafters of the universal instruments, starting with the Universal Declaration of Human Rights, blinded by their own ambitions so that they did not realize that the existing cultural differences between the many nations and other ethnic as well as linguistic communities of this globe simply could not be reconciled with the kind of uniformity which the establishment of universal principles implies as a logical corollary? In an article just published, a staff member of the United

¹ There is broad agreement on this proposition see, for instance, L. Henkin, *International Human Rights and Rights in the United States*, in: T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, 25-67, at 25, vol.1 (1984); F. Jhabvala, *On Human Rights and the Socio-Economic Context*, 31 NILR 149-182, at 176 (1984); C. Tomuschat, *Background paper for UN Seminar on the Experiences of Different Countries in the Implementation of International Standards on Human Rights*, UN Doc. HR/GENEVA/1983/BP.3, at 2 para.1 (1983).

Nations Centre for Human Rights has asserted that "evidently, there can be no universal understanding of human rights"². She thereby joins a broad stream of other voices which, in recent years, have also called into question the concept of establishing human rights on a world-wide scale³. It is the view shared by all these critics that the variety in religious and cultural values upheld by human communities is such that no truly common denominator can be found. Along similar lines, a prominent spokesman for the Third World has even denounced the unity of international law in general as the expression of a persistent "cultural imperialism" allegedly practiced by Western States⁴.

In addition, the present international debate centres on an issue of an essentially philosophical nature. While a prevalent current in the West, still adhering to concepts shaped by Locke and Kant, considers that man as such, just because of his quality as a human being, is endowed with a certain number of basic rights without which his existence would be devoid of his specificity as a self-responsible being⁵, the communist school of thought, following ideas expressed by Marx, unanimously holds that

² Y. Khushalani, *Human Rights in Asia and Africa*, 4 HRLJ 403-442, at 405 (1983).

³ For some recent criticisms see S. K. Agrawala, *Human Rights, Humanitarian Law, Intervention*, in: *New Directions in International Law. Essays in Honour of Wolfgang Abendroth*, 375-385, at 376-377 (1982); S. Prakash Sinha, *Human Rights Philosophically*, 18 IJIL 139-159, at 144 (1978); *id.*, *Human Rights: A Non-Western Viewpoint*, 67 ARSP 76-91, at 88-89 (1981); for further references see R. Howard, *Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons*, 6 HRQ 160-179, at 162 (1984); C. Tomuschat, *Is Universality of Human Rights Standards an Outdated and Utopian Concept?*, in: *Das Europa der zweiten Generation. Gedächtnisschrift für Christoph Sasse*, 585-609, at 585, vol.2 (1981). K. Doehring, *Zum »Recht auf Leben« aus nationaler und internationaler Sicht*, in: *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit. Menschenrechte. Festschrift für Hermann Mosler*, 145-157, at 147 (*Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Vol.81) (1983), even doubts whether a common understanding of the right to life may be identified.

⁴ M. Bedjaoui, in: R. Dupuy (ed.), *The Future of International Law in a Multicultural World. Workshop, The Hague, 17-19 November 1983*, at 193 (1984).

⁵ See, for instance, M. Cranston, *Are There Any Human Rights?*, 112/4 *Daedalus* 1-17, at 11 (1983); J. Rivero, *Les droits de l'homme: droits individuels ou droits collectifs?*, in: *Les droits de l'homme: droits collectifs ou droits individuels (Actes du Colloque de Strasbourg des 13 et 14 mars 1979)* 17-25, at 23-24 (1980); B. H. Weston, *Human Rights*, 6 HRQ 257-283, at 263 (1983); for an attempted synthesis between different conceptions see H. Ryffel, *Philosophische Wurzeln der Menschenrechte*, 70 ARSP 400-415 (1984). Opinions are divided as to whether social welfare rights may be derived from the basic premise of dignity of man. While Cranston, at 13, gives an emphatically negative answer, Ryffel, at 412, and J. Schwartländer, *Staatsbürgerliche und sittlich-institutionelle Menschenrechte*, in: *id.* (ed.), *Menschenrechte. Aspekte ihrer Begründung und Verwirklichung*, 77-95, at 80 (1978), reply in the affirmative.

human rights cannot be conceived of without and outside the State⁶. It is even one of its main assumptions that human rights can become a reality, viz. acquire specific legal substance, only within the framework of the social community. Speakers from the Third World also tend to underline the societal character of human rights⁷.

At first glance, the objections raised with reference to the cultural diversity of the world seem to be reasonably well-founded. On the other hand, it would appear to be obvious that a solution to the debate on the justification and origin of human rights cannot be stated in objective terms, because any view is pre-determined by the *Weltanschauung* of the speaker concerned⁸. However, all these controversies should not be overrated. The fact is that agreement has indeed been reached on an International Bill of Rights. First of all, the Universal Declaration of Human Rights (Universal Declaration)⁹, the cornerstone of the human rights movement since 1948, has been reaffirmed time and again. Not only has it become an undisputed orientation mark for all bodies of the United Nations, but it has also been integrated in a large number of national constitutions. Formally and ceremonially, therefore, all States, at least at the United Nations level, have declared their adherence to the values and principles embodied in the Universal Declaration. Even if at its origin the Declaration may have been strongly influenced by Western thinking¹⁰, simply because most of the

⁶ See, for instance, V. Kartashkin, The Socialist Countries and Human Rights, in: K. Vasak/Ph. Alston (eds.), *The International Dimensions of Human Rights*, 631-650, at 631-632, vol.2 (1982); H. Klenner, *Marxismus und Menschenrechte*, 164, 180, 191-192 (1982); *id.*, *Freedom and Human Rights*, 10/1 GDR Committee for Human Rights Bulletin, 13-22, at 16 (1984); I. Szabó, *Human Rights and Socialism*, in: G. Haraszti (ed.), *Questions of International Law*, 171-189, at 177, vol.2 (1981). For a summary review of Marx' thesis of man being conditioned by and integrated in society see A. Verdross, *Statisches und dynamisches Naturrecht*, 39-42 (1971).

⁷ See, for instance, Khushalani (note 2), at 414; Prakash Sinha, *Freeing Human Rights from Natural Rights* (note 3) *passim*.

⁸ For an extensive discussion of the different view-points see J. J. Shestack, *The Jurisprudence of Human Rights*, in: Meron (ed.) (note 1), vol.1, 69-133, at 74 *et seq.* (1984). An attempt at reconciliation between cultural diversity and moral universality of human rights is made by J. Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HRQ 400-419 (1984).

⁹ Adopted by UN General Assembly resolution 217 (III) of 10 December 1948.

¹⁰ See J. Morsink, *The Philosophy of the Universal Declaration*, 6 HRQ 309-334 (1984); H. Saba, *La Charte internationale des droits de l'homme, son élaboration et son application dans un monde multiculturel*, in: *The Future of International Law* (note 4), 331-340, at 332-333 (1984); H. Yamane, *Asia and Human Rights*, in: *The International Dimensions of Human Rights* (note 6), vol.2, 651-670, at 654-655. The last two authors

Third World countries were still absent from the United Nations in 1948¹¹, these defects from the time of birth were later remedied by massive and unequivocal approval.

Of course, the significance of such acts of endorsement is not without ambiguity. First of all, it has often been stressed that governments and the entire bureaucratic structure of many emerging new States did not really represent the true aspirations of their peoples¹². In order to gain international legitimacy, governments simply bowed to external pressures, following verbally a strong current of political doctrine which they felt they could not resist. In this way, a kind of two-stage political culture developed. On the one hand, there were, for instance, policy statements, formalized through legislative enactments which closely resembled legislative texts from Western European countries, while on the other hand in the country-side life went on as it had evolved over centuries, in no way or only very slightly affected by the new governing structure whose influence appeared to be confined to the big urban centres.

These and similar observations may well serve as an accurate description of what is happening in a number of countries where governments established through and ruling by undemocratic methods do not really respond to the needs and aspirations of their peoples¹³. However, they cannot detract from the fact that normally there exists a sincere will on the part of public authorities to be guided by the standards enshrined in the existing international instruments in dealings with their citizens. One may even

usefully draw the attention to the conclusions reached by an international symposium which was held in Oxford in 1965.

¹¹ It should not be overlooked, however, that a Committee on the theoretical bases of human rights set up by UNESCO in 1947, drawing on the views expressed by a number of eminent thinkers and writers from all over the world, came to the conclusion that a worldwide understanding was possible and could be translated into legal terms, see UNESCO (ed.), *Human Rights. Comments and Interpretations*, 258-272 (1949). Along these lines comments by M. Khadduri, *Islamic Law and International Law*, in: *The Future of International Law* (note 4), 157-161, at 159 (1984).

¹² For a recent statement to that effect see Donnelly (note 8), at 411-413, and A. Mazrui, *Die Privatisierung des nachkolonialen Staates: Schwarzafrika zwischen Shaka und Shylock*, 32 *Vereinte Nationen* 122-124 (1984).

¹³ As far as Africa is concerned, see the cogent remarks by A. B. Bozeman, *An Introduction to Various Cultural Traditions of International Law - A Preliminary Assessment*, in: *The Future of International Law* (note 4), 85-104, at 95-96 (1984); M. Haile, *Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality*, 24 *Virginia Journal of International Law*, 575-615, at 587 *et seq.* (1984); W. Weinstein, *Human Rights and Development in Africa: Dilemmas and Options*, 112/4 *Daedalus*, 171-196 (1983).

venture to say that some critics at least display a neo-colonialist kind of patronizing paternalism in stating that Third World governments which declare their attachment to human rights do not really mean what they say, just paying lip-service to some political necessities. Such verbalism does exist¹⁴. There are indeed instances of sheer hypocrisy, well-known to everyone, where Governments care very little about what they have undertaken to honour. But such a faked attitude of law-compliance is certainly not the norm and should therefore not be depicted as such¹⁵.

Half of the countries of the world have also ratified the two International Covenants of 1966, the International Covenant on Civil and Political Rights (CCPR)¹⁶ and the parallel Covenant on Economic, Social and Cultural Rights (CESCR)¹⁷. These instruments were adopted by the UN General Assembly at a time when it was already dominated numerically by Third World countries. Among the Contracting Parties there are States from all regions of the world, ranging from North to South and from East to West. Of course, there still exist major gaps in the present membership. While India ratified the two Covenants in 1979, China is still absent from the circle of participating States. One should also be aware of the clearly noticeable reluctance of the more conservative Islamic world which does not seem to share the basic premise of both Covenants that men and women should be equal in rights¹⁸. In addition, renewed reliance on traditional punishments involving amputation sentences is becoming a major source of concern¹⁹. Within the Western world, the USA has until now

¹⁴ Rightly, Bozeman insists on the necessity of human rights being "genuinely, not merely rhetorically, accepted" (note 13), at 85; see also R. Falk, *Theoretical Foundations of Human Rights*, in: P. R. Newberg, *The Politics of Human Rights*, 65-112, at 66 (1980).

¹⁵ This is recognized even by Donnelly (note 8), at 405.

¹⁶ As at 31 December 1984, there were 80 States parties.

¹⁷ As at 31 December 1984, there were 83 States parties.

¹⁸ Islam as such does not discriminate against women, see, for instance, S. Belmir, *La condition de la femme en matière de régime matrimonial entre les recommandations des Nations Unies et le droit musulman*, 38/2 *Revue juridique et politique, indépendance et coopération*, 245-250 (1984); *Commission économique des Nations Unies pour l'Asie occidentale, Le statut légal de la femme musulmane dans plusieurs pays du Moyen-Orient*, in: *Papers of the World Population Conference Bucharest, 1974*, 440-450, vol. II (1975); summaries of three papers devoted to women's rights, in: *International Commission of Jurists (ed.), Human Rights in Islam 79-81* (1982). Undeniably, on the other hand, "a large gap remains today between these principles and actual practice in the majority of Islamic States", conclusion of a seminar held in Kuwait, December 1980, in: *Human Rights in Islam*, 7-11, at 8 para. 9.

¹⁹ Concerning Sudan, see E. Abrams, *Human Rights Practices in Sudan, Ethiopia, Somalia and Uganda*, 84 *Department of State Bulletin*, 62-65, at 62-63 (November 1, 1984).

refrained from assuming any international obligation²⁰. Finally, among the States legally bound by the Covenants, Iran has taken a position which is clearly at variance with its commitments²¹. But apart from these lacunae and inconsistencies, which should of course in no way be belittled, there has been no direct challenge of the rules and principles of the two Covenants on the political plane by Third World countries²². Philosophical reasoning about the justifiability of universal instruments should be fully aware of this basic fact. Even a Government which is not possessed of true democratic legitimacy is still the spokesman of its people. Consequently, if governments continue to manifest their adherence to the two Covenants of 1966, this signifies that those instruments do enjoy widespread recognition and legitimacy. This is all the more true since ratifications, although they have slowed down to a rather modest pace in recent years, are still being received from all the regions of the world. Thus, within the political context, the idea of establishing world-wide standards of human rights has lost nothing or only very little of its former appeal.

Although communist States also fit into this picture to a large extent, their political philosophy almost inevitably leads them to mistrusting the judgment of the ordinary citizen. Since it is the marxist party which, because of its alleged deep knowledge about historical evolution, has been granted a privileged position and holds a monopoly of political truth, the oligarchic wielders of power cannot accept the democratic principle of political equality. Therefore, political freedoms may only be exercised to the extent that they further the interests of the prevailing ideology. This

²⁰ For a comprehensive analysis of the relevant problems see R. B. Lillich (ed.), *U.S. Ratification of the Human Rights Treaties* (1981).

²¹ Statement of the Iranian representative before the Human Rights Committee, UN Doc. CCPR/C/SR.368, para. 12 (1982), also reproduced in: 3 HRLJ 393-403, at 395 (1982): "Whenever divine law conflicted with man-made law, divine law would prevail. When a nation recognized and accepted the principles of Islam as the basis for its existence, Islamic precepts would be followed in resolving all problems, since such precepts were all derived from God". This statement was also meant to justify the persecution of Baha'is in Iran. Clarifying those general ideas, on 7 December 1984 the Permanent Representative of Iran to the UN pointed out the following in addressing the Third Committee of the UN General Assembly: "Our new political order ... recognises no authority or power but that of Almighty God and no legal tradition but the Islamic Law ... In our view, international conventions, including the Human Rights Declaration and its Covenants, remain valid only to the extent that they are consistent with Islam. In other words, we have no intention of breaking or not breaking human rights; the Declaration or its Covenants are no longer relevant".

²² Indeed, no government today could morally afford such a denial, see also L. Henkin, *The Rights of Man Today*, 28 (1978).

massive restriction of, in particular, freedom of speech is today laid down explicitly in all constitutional documents concerned²³. In addition, the constitutions of communist countries never list political opinion as a forbidden ground of discrimination²⁴. The main function of freedom of speech, namely, to serve as a check against possible abuses of governmental power, finds itself clearly frustrated by such a totalitarian understanding of what socialism amounts to in the political field²⁵. It is above all this major divergency which has led many Western writers to assert that the unity of the relevant texts hardly conceals the "cacophony of meanings" attached to them²⁶. Conversely, on the Eastern side the assertion of the present writer that the International Covenant on Civil and Political Rights "establishes the international community as an alliance to guarantee human rights all over the world"²⁷ has met with unreserved hostility by Hermann Klenner who is afraid that, if such were the case, socialist States would have consented to a treaty on self-abandonment²⁸. In fact, what socialist States try rather unconvincingly is to inject into the Covenant their specific doctrine of collectivized rights. In particular, they seek to place the ordinary citizen under political tutelage, allowing him to manifest his opinion only within the framework and under the guardianship of the ruling party.

²³ USSR Constitution, 1977, Art.50 (1): "In accordance with the interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations"; GDR Constitution, 1974, Art.27 (1), first sentence: "Every citizen of the GDR has the right, in accordance with the spirit and aims of the Constitution, to express his opinion freely and publicly".

²⁴ See Art.34 (1) USSR Constitution; Art.20 (1) GDR Constitution.

²⁵ For a doctrinal echo of these limitations, see, for instance, Kartashkin (note 6), at 633: "socialist ideology ... rules out the 'freedom' ... to organize counter-revolutionary forces against the fundamentals of socialism"; Szabó (note 6), at 181: "narrowed down to the right of the free profession of the socialist types of various ideas, i.e. to the profession of ideas in a manner affirmative of the socialist system" (but see also p.183).

²⁶ J. G. Ruggie, *Human Rights and the Future International Community*, 112/4 *Daedalus*, 93-110, at 98 (1983); see also Bozeman (note 13), at 9; F. Ermacora, *Menschenrechte - weltweiter Anspruch und Wirklichkeit*, in: Schwartländer (ed.), *Menschenrechte* (note 5), 169-175, at 173-185 (1978); M. Merle, *Le point de vue du politologue*, in: *The Future of International Law* (note 4), 39-47, at 44, 47; H. Rumpf, *Der internationale Schutz der Menschenrechte und das Interventionsverbot*, 34-35 (1981).

²⁷ C. Tomuschat, *Der Internationale Pakt von 1966*, 28/1 *Das Parlament*, 3, 6, at 6 (1978): »Der Pakt konstituiert die internationale Gemeinschaft als Garantieverbund für die Sicherung der Menschenrechte überall in der Welt«.

²⁸ H. Klenner, *Marxismus und Menschenrechte*, 193 (1982); *id.*, *Völkerrecht als zwischenstaatliches Verfassungsrecht am Beispiel der Menschenrechte*, in: *New Directions* (note 3), 479-498, at 495 (1982).

Anyone who ventures to oppose this rigid system must expect fierce retaliation. It is hard to see how such a strategy can be reconciled with a provision which simply says (Art.19 para.1): "Everyone shall have the right to freedom of expression".

2. *Human Rights as General Principles for State and Society?* To be sure, the debate about the concept of universality cannot be confined to the political and legal fields. As has already been mentioned, critics maintain that there exists in many developing countries a fundamental split between a stratum of organized statehood, on the one hand, and societal groups with their traditional thinking and beliefs, on the other hand. Nobody can deny that societies are structured according to fundamentally divergent criteria in different regions of the world. African writers, for instance, keep insisting on the importance of the group of which the individual feels himself to be an integral part²⁹, and indeed this particular emphasis has found its legal reflection in the African Charter of Human and Peoples' Rights³⁰. Societies culturally dominated by Buddhism show a high degree of tolerance, even of passivity and submissiveness, so that government actions are rarely challenged³¹. In China, it is rather difficult to identify a

²⁹ See in particular K. M'Baye, *Human Rights in Africa*, in: *The International Dimensions of Human Rights*, vol.2 (note 6), 583-601, at 589; *id.*, in: *The Future of International Law* (note 4), 361-362, at 362; see also R. Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HRQ 467-490, at 479 (1983); E. A. B. van Rouveroy van Nieuwaal, *Quelques réflexions sur le droit et sur l'étude socio-juridique en Afrique*, in: *The Future of International Law* (note 4), 143-156, at 144-145; further references are given by Tomuschat (note 3), at 595.

³⁰ For a first assessment of the Charter see M. G. Ahanhanzo, *Introduction à la Charte africaine des droits de l'homme et des peuples*, in: *Droit et libertés à la fin du XX^e siècle. Influence des données économiques et technologiques. Etudes offertes à Claude-Albert Colliard*, 511-537 (1984); R. Dolzer, *Die afrikanische Banjul-Charta der Rechte der Menschen und Völker* (1981), in: *Deutsche UNESCO-Kommission* (ed.), *Menschenrechte und »Rechte der Völker«*, 21-35 (1983); R. Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 22 *Virginia Journal of International Law*, 667-714 (1982); Ph. Kunig, *The Protection of Human Rights by International Law in Africa*, 25 *GYIL* 138-168, at 143-163 (1982); E.-R. Mbaya, *Die Afrikanische Charta der Rechte des Menschen und der Völker von 1981*, 32 *Vereinte Nationen* 132-136 (1984); B. O. Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, 6 HRQ 141-159 (1984); U. O. Umzurike, *The African Charter on Human and Peoples' Rights*, 77 *AJIL* 902-912 (1983); recently also F. Castro-Rial Garrone, *Le Carte Africana de Derechos Humanos y de los Pueblos*, 36 *Revista Española de Derecho Internacional*, 491-526 (1984).

³¹ See Khushalani (note 2), at 440-441; Yamane (note 10), at 655.

concept of law as distinguished from other systems of societal discipline³². From that view-point, human rights are frequently portrayed as a product of Western thinking, which in a one-sided way accentuates individual assertiveness alien to other societies.

Although all these observations rest on a careful analysis of realities, they are not really directed at the heart of the matter, at least to the extent that civil rights and fundamental freedoms are concerned. The CCPR does not aim at restructuring societies in general according to its precepts. In the interpretation of national constitutions, doctrine and practice may have departed long since from the traditional idea which views human rights as a safeguard of the citizen against the invasion of his private sphere by governmental action. The CCPR, however, refrains from thus extending its scope in general. It does not impose observance of its rights on society in its entirety, but simply establishes legal guarantees which the individual may invoke against interference by the State. This is an extremely important distinguishing feature. Protection afforded against the State is not provided to the same extent against the group – the family, the clan, the village. If, for instance, public authorities are duty-bound to respect every citizen's freedom of expression, this does not automatically mean that the individual should be free to the same extent within the group to which he belongs. The same is true of the concept of equality. In general, both Covenants confine themselves to setting forth equality of men and women with regard to the rights laid down elsewhere in these instruments (CCPR, Arts.2 [1], 3, 26; CESCR, Art.2 [2])³³. These rights, on their part, are all directed against the State. As far as direct applicability is concerned, the CCPR transcends the relationship between the State and the citizen only in

³² For a summary discussion see Khushalani, at 406 *et seq.*; J. L. Kunz, *Pluralismus der Naturrechte und Völkerrecht*, 6 *Österreichische Zeitschrift für öffentliches Recht*, 185–220, at 210–213 (1955); Prakash Sinha, *Human Rights: A Non-Western Viewpoint* (note 3), at 80–82; Tomuschat (note 3), at 599–600.

³³ Admittedly, however, this is a controversial issue; see on the one hand, B. G. Ramcharan, *Equality and Nondiscrimination*, in: L. Henkin (ed.), *The International Bill of Rights*, 246–269, at 255 (1981), who advocates an activist use of the terms equality and non-discrimination as enshrined in the CCPR; on the other hand, C. Tomuschat, *Equality and Non-Discrimination under the International Covenant on Civil and Political Rights*, in: *Staatsrecht – Völkerrecht – Europarecht. Festschrift für Hans-Jürgen Schlochauer*, 691–716, at 698–712 (1981), who considers equality and non-discrimination under the CCPR to be confined to supplementing the remainder of the substantive guarantees. The latter interpretation has been endorsed by R. B. Lillich, *Civil Rights*, in: *Human Rights in International Law* (note 1), vol.1, 115–170, at 133 (1984). The jurisprudence of the Human Rights Committee under the Optional Protocol has not yet settled this controversy.

Art.23 (2) where it enjoins States to take "appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution", as well as in Art.23 (1). In addition, there exists a limited number of specific values of such significance that absolute protection against any kind of infringement is required. This is true, for instance, of the right to life (Art.6 [1])³⁴, of the prohibition of torture (Art.7)³⁵ as well as of the rule forbidding slavery (Art.8 [1]) and forced labour³⁶. Life should not be subject to any threats, whether from private or public quarters, and torture and slavery should likewise be ruled out in general, irrespective of the nature of the potential perpetrators. To deny protection in such instances would undermine the very bases of civilized society³⁷. But apart from these specific rules, no general provision exists which would aim at permeating the texture of society, thereby creating tensions and perhaps even shattering institutions of which the societies concerned approve in spite of their not being streamlined according to

³⁴ The Human Rights Committee has recently even gone so far as to establish a relationship between the right to life and nuclear weapons, see comment of 2 November 1984, UN Press Release HR/1611 = UN Doc. CCPR/C/21/Add.1 (1984); see also B. G. Ramcharan, *The Right to Life*, 30 NILR 297-329, at 303, 328 point 10 (1983).

³⁵ A specific duty of protection is now embodied in Art.2 (1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment, adopted by UN General Assembly resolution 39/46 of 10 December 1984.

³⁶ Concerning bonded labour in India see, for instance, Jhava (note 1), at 169-175. See also the examination of India's report by the Human Rights Committee, UN Docs. CCPR/C/SR.493, at para.24; CCPR/C/SR.494, at paras.2, 15; CCPR/C/SR.498, at paras.11, 34 (1984).

³⁷ It is only in this perspective that protective obligations of the State may be construed. Many principles of the CCPR, in particular the prohibition against political discrimination, make no sense if applied to society in general. Indeed, to distinguish on political grounds is an essential prerequisite of the citizen's political freedom. Thus, general comment 3/13 of the Human Rights Committee, [Fifth] Report of the Human Rights Committee, 36 UN GAOR, Supp. (No.40), UN Doc. A/36/40, at 109 (1981), if taken literally, would be too broad in scope. Th. Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Obligations*, in: *The International Bill of Rights* (note 33), 72-91, at 77 (1981), rather cautiously states that "possibly" States are required to remove "also some private obstacles to the enjoyment of these rights". Along the lines indicated above, E. Suy, *Droit des traités et droits de l'homme*, in: *Festschrift Mosler* (note 3), 935-947, at 937, suggests that the notion of «l'ordre public de la communauté internationale» should become the focal point (see H. Mosler, *The International Society as a Legal Community*, 17-20 [1980]). The Canadian Government in its report to the Human Rights Committee, UN Doc. CCPR/C/1/Add.62 (1983), at 23, rightly takes the view that Art.6 of the CCPR only imposes "minimum requirements" and that it must be supplemented by the provisions of the CESC.

modernistic ideas of what is appropriate³⁸. In sum, this deliberate limitation in scope, which is often overlooked³⁹, renders irrelevant many criticisms which erroneously proceed from the assumption that human rights have been conceived of as a comprehensive device for the structuring and restructuring of societies. In addition, it should be recalled that the CCPR deliberately extends its protection to the family (Arts.17, 23), to freely formed associations (Art.22) as well as to minorities (Art.27), thereby emphasizing the importance which it attaches to the group as the natural environment of all human beings. In spite of its main focus being directed at the individual, the CCPR, therefore, does not establish individualism and subjectivism as its guiding principles.

As far as the relationship between public power and the citizen is concerned, the viability of a common standard is far less challengeable. One may certainly call into question the rather naive contention that human rights is a concept which originated in Western societies⁴⁰. In every stable and just human community the rulers have always striven to ensure the common good, which includes also the realization of the interests or rights of the individual, and, conversely, closer scrutiny invariably succeeds in identifying some institutions and mechanisms enabling the citizen to seek a remedy against unjust treatment by governmental authorities. But the

³⁸ Curiously enough, many writers from the Third World, among them even persons who tend to dissociate themselves from the concept of universality of human rights, consider the structure of societies in their respective countries to be fundamentally unjust, therefore being in need of total re-adjustment to basic precepts of equality and emancipation of man as embodied in the international instruments for the protection of human rights, see, for instance, Agrawala (note 3), at 381; Jhabvala (note 1), at 152-153. For a balanced empirical evaluation as to the continuing existence of autonomous communities see Donnelly (note 8), at 410-411.

³⁹ Saba (note 10), at 334; Yamane (note 10), at 655. Possibly, the African Charter of Human and Peoples' Rights is broader in scope - and would therefore encounter tremendous difficulties of implementation: with reference to equality this is pointed out by St. C. Neff, *Human Rights in Africa: Thoughts on the African Charter on Human and Peoples' Rights in the Light of Case Law from Botswana, Lesotho and Swaziland*, 33 ICLQ 331-347, at 334-338 (1984).

⁴⁰ See, in particular, Henkin (note 1), at 39: "Most of the provisions of the Universal Declaration of Human Rights, and later of the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the World". If this were so, all aspirations for universality would be doomed to failure. For a rejection of such eurocentric views see recently Khushalani (note 2), at 403-404; A. H. Robertson, *Human Rights in the World*, 8-9 (2nd ed. 1982); P. Saladin, *Die Rechtsgeltung von Menschenrechten als Beispiel für die Rechtserheblichkeit ethischer Kriterien*, in: *Handbuch der christlichen Ethik*, 197-220, at 204-205, vol.3 (1982); Szabó (note 6), at 171-172; further references are given by Tomuschat (note 3), at 588 note 13.

modern State, with its assertion of being endowed with sovereign powers to regulate each and every aspect of social life, did spring from Western minds. In a technical sense, the specific legal concept of human rights arose as a response to the claim of State power to be, in principle, almighty ("internal sovereignty"). To the extent, therefore, that the concept of a State machinery with all-embracing governing authority has extended to other parts of the globe⁴¹, it has become necessary to counter-balance that authority by rights granted to the citizen. State sovereignty and human rights are two elements inseparably tied to each other. One may like or dislike the expansion of the modern State, but one cannot deny the simple fact that the process of decolonization has brought about its establishment all over the world. At the present time, government authorities everywhere claim the same powers as those known in consolidated States dating back to the 18th or 19th century. In all countries, formal procedures for the enactment of legislation have been established. There exist executive authorities which are enjoined, by virtue of the relevant national legislation, to be guided by nothing else than the applicable rules of law. In the same fashion, judicial bodies have originated which again base their pronouncements not on traditions and custom – if not explicitly mandated to do so –, but on the orders imparted to them in the form of laws by the competent legislature. In other words, a process of formalizing the law creation process as well as the application of the law has in general pushed to the background other forms of formulating and enforcing precepts of societal behaviour⁴². This means at the same time that in most countries the traditional devices and mechanisms designed to protect society and its individual members against abuses by the wielders of power have largely lost ground or have even disappeared completely. Just as the State is an artificial creation, the defence of the citizen has now to be organized in a calculated manner⁴³. Given the preponderance of the new governmental structures, little reliance can be placed on traditional safeguards which in the past were a natural and inherent element of society.

⁴¹ R. Falk, *Theoretical Foundations of Human Rights*, in: P. R. Newberg (ed.), *The Politics of Human Rights*, 65–109, at 67–69 (1980); M. Flory, *Le droit international est-il européen?*, in: *The Future of International Law* (note 4), 287–297, at 289–292 («Le triomphe de l'Etat»); H. Krüger, *Allgemeine Staatslehre*, 6–8 (1984); Mosler (note 37), at 2, 12.

⁴² Ryffel (note 5), at 402, aptly calls this evolution a change from »vorgegebener zu aufgegebenener Normativität«.

⁴³ This necessity has been stressed in particular with reference to Africa, see Haile (note 13), at 585; Howard (note 29), at 482, 487, and in general by Donnelly (note 8), at 405–406, 415.

The picture changes considerably if one takes into account the CESC. By virtue of this instrument, governmental authorities are required not only to take care of vital needs of the individual, but also to ensure a broad array of rights of a highly sophisticated nature. The State is addressed here as the great provider of services. In order to live up to its commitments, it must set up a complex bureaucratic structure which is capable of effectively devising and carrying out policies suited to achieve the full realization of the corresponding rights. In substantive terms, furthermore, this top-down approach involves massive governmental intervention into all sectors of social life. Many States are simply unable to take action on such a broad scale⁴⁴. But the most objectionable feature of this web of obligations is its philosophical assumption that enjoyment of human rights constitutes a task to be discharged mainly by a hierarchy of bureaucrats and not by society in general⁴⁵. Societies may wish thus to be directed from above. But generally strategies to promote social welfare should be left to the discretion of each State concerned, so that also truly democratic patterns may evolve⁴⁶.

3. *The State – Violator and Guarantor of Human Rights*: It is at this juncture that every discussion of the way in which human rights are safeguarded is faced with the paradoxical finding that although the State with its agencies is viewed as the potential violator of human rights, the defence of human rights, too, rests largely, although not exclusively, on the State⁴⁷. In a modern State, only government agencies are authorized to wield public power. As has already been pointed out, it is against them that the prohibitions enshrined in the relevant international instruments are directed. At the same time, they again are expected to ensure the effective implementation of those prohibitions⁴⁸. The necessity to rely on the State

⁴⁴ Unfulfilled expectations count among the most dangerous factors of political instability in present-day Africa, see Haile, at 595–598.

⁴⁵ In spite of their technical perfection, the explanations by D. M. Trubek, *Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs*, in: *Human Rights in International Law* (note 1), 205–271, vol.1 (1984), are almost frightening in their illusory belief that welfare and social justice can be imposed on societies from outside.

⁴⁶ See also Tomuschat (note 3), at 602.

⁴⁷ Communist doctrine, regarding the State almost as a sacrosanct entity, takes care to point out that it can never be the State as such which fails, but only one or the other agency (“The King can do no wrong”), see Szabó (note 6), at 180–181; *id.*, *Historical Foundations of Human Rights and Subsequent Developments*, in: *The International Dimensions of Human Rights* (note 6), 11–40, at 25, vol.1 (1982).

⁴⁸ The dialectic role of the State is also emphasized by Jhabvala (note 1), at 168–169; Saladin (note 40), at 200.

for the defence of those rights which it itself is prone to violate leads already on a theoretical level to the simple conclusion that in countries which uphold the rule of law as a matter of domestic policy the implementation of international standards must be a great deal easier than in countries which rely instead on a political definition of what the law should be (for instance: *sozialistische Gesetzlichkeit*, "socialist legality"). Thus, international standards have a far greater impact in an environment where they are not really needed, just supplementing what is already substantially secured by virtue of corresponding domestic standards, than in authoritarian or totalitarian States where governments seek to keep the law under tight control. Just as such governments do not permit any private interpretation or construction of the law, they also attempt to determine the meaning of international human rights standards according to their own political discretion⁴⁹. By additionally withholding any real independence from the judicial bodies which are duty-bound to follow general political directives, they frequently succeed in rendering international standards perfectly innocuous and inoperative within the domestic context.

It is for these reasons that additional devices and mechanisms outside the State machinery for the enforcement of international human rights standards are so urgently required. In historically fortunate circumstances, a State may well be able faithfully to combine its two roles, providing, in its function as guarantor of human rights, effective redress against all breaches which its own agencies have committed. However, once political leaders have done away with separation of powers and are able to impose their will on parliamentary as well as on judicial bodies, only token institutions remain which bear names familiar to our ears from other political contexts but which, in actual terms, have no resemblance whatsoever with the usual connotations. To prevent such concentration of power from occurring,

⁴⁹ It is not by accident that with the possible exception of Hungary none of the communist countries has made the CCPR part and parcel of its domestic law. It follows from this method of implementation that the CCPR does not directly affect the lives of citizens and cannot be invoked by them in the courts. Therefore, although the traditional maxim allows States to choose the method of implementation according to their discretion, it is obvious that such choices have a decisive impact on the effectiveness of the CCPR, see G. de Lacharrière, *Le point de vue du juriste: La production et l'application du droit international dans un monde multiculturel*, in: *The Future of International Law* (note 4), 67-81, at 74; Tomuschat (note 1), at 17-20 paras.34-42; for a defence of the Eastern approach see M. Mohr, *Questions of Procedure under International Law in the Implementation of Human Rights Instruments*, 10/2 GDR Committee for Human Rights Bulletin, 22-37, at 24 (1984).

freedom of expression is the most powerful device⁵⁰. In particular, freedom of the press constitutes a bulwark which is indispensable for an objective and exhaustive review of governmental action. Experience has shown that indeed real freedom does not exist where freedom of the press – which means freedom of criticism – is not recognized in law as well as in fact.

II. The Substantive Law

Until now, the focus has been on “human rights” in general. It would appear to be necessary, however, to take a brief look at the substantive scope of human rights as they are laid down at the present time in international instruments or as they are being debated in suggestions for the establishment of new rights.

1. *The Scope of the Law in Force in General:* The hard core of international human rights at the universal level is today constituted by the two International Covenants of 1966 as well as by the international instruments banning specific forms of discrimination: the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1969) and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981). As yet, the International Convention on the Suppression and Punishment of the Crime of *Apartheid* cannot be deemed to belong to that inner circle. Although it is generally agreed that *apartheid* infringes basic tenets of equality of all human beings⁵¹, the Convention clearly exceeds the limits of what is reasonably justifiable by establishing criminal offences whose contours are so vaguely defined that their application would be open to any kind of political manipulation⁵².

All the instruments combating discrimination have kept their original legitimacy. Still, there exist marked differences as to their actual acceptance by the community of States. While the International Convention on the

⁵⁰ We fully agree with J. Humphrey, *Political and Related Rights*, in: *Human Rights in International Law* (note 1) vol.1, 171–203, at 182; for the Federal Republic of Germany see the judgment of the Federal Constitutional Court of 15 January 1958, *Lüth*, 7 Entscheidungen des Bundesverfassungsgerichts 198, at 208.

⁵¹ International Court of Justice, *Advisory Opinion of 21 June 1971, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ Reports, 16–58, at 57 para.131.

⁵² It is for this reason that until now no single Western State has ratified this Convention.

Elimination of All Forms of Racial Discrimination occupies the first position among all human rights treaties concluded under the auspices of the United Nations⁵³, the Convention on the Elimination of All Forms of Discrimination against Women lags far behind with only 65 ratifications⁵⁴. As far as the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief is concerned, the real problem seems to be the wide gap which exists between the lofty goals of that declaration and a reality which is frequently marred by structural inconsistencies, many governments conducting an almost merciless fight against religious and other ideological groups whom they consider to be inimical to their interests. Nonetheless, the philosophical foundations of the international campaign against discrimination still hold true. Rarely does a government acknowledge openly that its policy is to mete out unequal treatment to human beings just because of their colour, race, sex or religious convictions. It should be repeated, however, that equality between men and women seems to have lost support among conservative Arab nations which apparently feel that the legal status of women should be different from the rights enjoyed by men.

2. *The International Covenant on Civil and Political Rights* embodies the most traditional substance of all the treaties established at the universal level. Many of its provisions were foreshadowed by the famous Virginia Bill of Rights (1776) and by the French «*Déclaration des droits de l'homme et du citoyen*» (1789). It would be entirely false, however, to assume that those "old" guarantees are any less important today than they were two hundred years ago or that they have been set aside by more recent instruments containing rights of a "modern" character, particularly suited to the needs of our time. A perusal of the CPPR amply demonstrates that the needs which it seeks to accommodate are as vital as they were at the end of the 18th century or in 1966 at the time of its adoption by the General Assembly of the United Nations. The CCPR starts out with the guarantee of the "inherent right to life" (Art.6)⁵⁵. Nobody could seriously maintain that there exist specific forms of civilization where life is legitimately denied protection. The CCPR then goes on to establish a prohibition of torture and of cruel, inhuman or degrading treatment or punishment (Art.7). Again, the same question arises. Do the critics of the concept of

⁵³ 126 contracting parties as at 31 December 1984.

⁵⁴ January 1985, see UN Information Service, Press Release, UNIS/WS/619 (1985).

⁵⁵ An article-by-article analysis is also undertaken by Donnelly (note 8), at 415-416, with reference to the Universal Declaration.

universality really challenge that prohibition? Obviously, the validity of the basic proposition does not by itself solve all the problems of its application. Corporal punishment, for instance, may not be considered to be degrading in a specific social context, whereas deprivation of freedom which in European eyes appears more neutral, may be felt to constitute a truly humiliating social sanction⁵⁶. But this is not the point in issue, namely the alleged cultural bias of the CCPR. Going through the provisions of the CCPR one by one, always asking the same type of questions, one can hardly imagine where precisely Western predominance should have materialized. The fact is that the objections levelled against universal human rights standards have never been concretized in such a way as to result in an accurate identification of the challenged guarantees⁵⁷.

In the view of the present writer, the CCPR has aged only in some very limited respects. First of all, the procedural guarantees of Arts.9 and 14 are framed in such detail and are so extensive that a considerable number of poorer countries are simply unable to live up to their commitments in these respects⁵⁸. The guarantee of an enforceable right to compensation set forth in that connection (Arts.9 [5]; 14 [6]) presupposes such a high level of sophistication of the legal system concerned that most countries would appear to fall short of the required standard⁵⁹. Too many details are also the main characteristic of Art.10 (2) and (3). The provisions contained therein on the treatment of juvenile offenders reflect views which apparently prevailed among scholars of criminology in the 1960s; the many reservations which States have made on that point⁶⁰ show that it is

⁵⁶ This issue was discussed in the Human Rights Committee in connection with the examination of the Gambian report, see UN Docs. CCPR/C/SR.501, at para.39; CCPR/C/SR.502, at para.42; CCPR/C/SR.506, at paras. 8, 49, 56 (1984).

⁵⁷ The sole provision frequently referred to is Art.23 (3) CCPR which requires for a marriage "the free and full consent of the intending spouses", see *Donnelly* (note 8), at 416; *Prakash Sinha*, *Human Rights Philosophically* (note 3), at 144; *id.*, *Freeing Human Rights from Natural Rights*, 70 ARSP 342-383, at 382 (1984).

⁵⁸ *Jhabvala* (note 1), at 161-165. Nevertheless, this requirement of governmental initiative instead of mere abstention does not away with the dividing line between civil and political rights, on the one hand, and social and economic rights, on the other. Institutions mandated to ensure law and order constitute the very foundations of organized statehood, see *Tomuschat* (note 1), at 14 para.28.

⁵⁹ Even reports from industrialized countries under Art.40 CCPR are mostly rather vague about the legal requirements for obtaining financial redress.

⁶⁰ UN Doc. CCPR/C/2 (1977): Denmark, Finland, Norway, Sweden, United Kingdom; CCPR/C/2/Add.2 (1979): Austria, Netherlands, New Zealand, Trinidad and Tobago; CCPR/C/2/Add.3 (1979): Iceland; CCPR/C/2/Add.4 (1980): Australia; CCPR/C/2/Add.7 (1984): Belgium, Luxembourg.

precisely such modernistic views that are in danger of becoming quickly obsolete.

Finally, there are Arts.18 and 19 which critics of universal standards sometimes have in mind without, however, openly denouncing freedom of opinion and freedom of expression⁶¹. Indeed, these two articles may in some respects be regarded as embodying the very core of the substance of the CCPR. They reveal that the CCPR rests on the philosophical assumption of man living his existence as a rational being, who is the master of his own fate⁶². It is implicit in this recognition that man should be free to emancipate himself from traditional ties within his "natural" human environment, if he chooses to do so. Already in Art.1, where peoples are recognized as holders of the right of self-determination, an appeal is made to the free decision of man to shape his own destiny. This same idea runs like a distinct thread through the remainder of the articles. Rationality is directly linked to the dignity of man and to the principle of equality. Who else than the individual himself should determine his own fate? Consequently, to challenge freedom of opinion and expression would amount to taking humanity back into the night of history from which it has, however, quite definitely emerged. There can be no return to a past where a natural equilibrium existed between all the factors which had a bearing on man's existence. And the CCPR is the simple reflection of that state of affairs which requires mankind to take rational steps with a view to ensuring its survival. Rationality may have its price, but the CCPR is not the cause of that burden, but rather the logical response to an evolution which demands rational answers and strategies with the participation of everyone.

On the other hand, Arts.18 and 19 of the CCPR also lay the foundations of a society in which no constraints can be exercised on groups to change their self-chosen patterns of life. Religion, though it has lost much of its former impact in a world which is becoming progressively secularized, is still the ideological force which permeates the life of human communities in the most pervasive manner. By setting forth freedom of religion, which includes the right "to manifest" it "in worship, observance, practice and teaching", the CCPR debar States from streamlining society according to whatsoever ideological objectives. Thus, the CCPR constitutes at the same

⁶¹ But it amounts to a denial of freedom of speech if, as in the communist countries, views critical of the existing political régime may not be expressed; see Szabó (note 6), at 174.

⁶² In particular, the majority of African writers insist on freedom of speech belonging to the traditional values of African societies, see M'Baye (note 29), at 589; Okere (note 30), at 146-147. For further references see Howard (note 29), at 483.

time a strong defence of traditional life-styles – provided, however, that the human beings concerned themselves wish to stick to those life-styles.

3. An assessment of the *International Covenant on Economic, Social and Cultural Rights* leads to conclusions which are much more open to doubt. While most of the rights under the CCPR are safeguarded just by the State's remaining passive and respecting the autonomy of its citizens, the CESCR imposes a heavy burden on the governmental machinery of every Contracting Party. None of the rights granted under the CESCR is of a self-realizing nature. Starting with Art.6, which sets forth the right to work, States are enjoined to take action for the fulfilment of the goals which the CESCR establishes under the cover of "rights"⁶³. In order to live up to their commitments, States are obligated to interfere in all sectors of the life of a society. For that reason, the CESCR almost necessarily entails consequences which are far more disruptive of traditional life-styles than the practical consequences of the application of the CCPR. The question arises, on the other hand, whether flagrant injustices affecting or even crippling a society can be remedied only by an external element such as the CESCR. Social structures are infinitely more complex than the relationship between the State and the citizen. Almost invariably, their reform requires solutions specifically attuned to the situation in the country concerned. In such circumstances, models of world-wide scope become almost inconceivable.

In addition, it has become only too obvious over the last two decades that the CESCR reflects the economic optimism of the 1960s when it was thought that the well-being of every human being on earth could be a realistic political aim. Today's ambitions are much more modest. It would

⁶³ Shestack (note 8), at 73; see also H. Guradze, *Die Menschenrechtskonventionen der Vereinten Nationen vom 16. Dezember 1966*, 15 *Jahrbuch für Internationales Recht*, 242–273, at 252 (1971): »Leitsätze der Sozialpolitik«. But it is certainly correct to point out that at least some of the rights contained in the CESCR are suited for immediate applicability, see U. Beyerlin, *Die Koalitionsfreiheit der Arbeitnehmer in den Menschenrechtsinstrumenten der Vereinten Nationen*, in: *Die Koalitionsfreiheit des Arbeitnehmers / The Freedom of the Worker to Organize*, 1153–1181, at 1162, vol.2 (*Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol.75) (1980); Kartashkin, *Economic, Social and Cultural Rights*, in: *The International Dimensions of Human Rights*, 111–133 (note 6) vol.1, at 114; E. W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 *Netherlands Yearbook of International Law*, 69–105, at 80 (1978). On the other hand, some undeniable fluidity does not support the conclusion that the distinction between civil and social rights is "rather a question of gradation", as suggested by Th. van Boven, *Distinguishing Criteria of Human Rights*, in: *The International Dimensions of Human Rights* (note 6) vol.1, 43–59, at 53.

be considered to be an achievement if just hungry people everywhere in the world could be saved from starvation⁶⁴. The discrepancy between legal vision and hard realities attains almost shocking dimensions when one reads in Art.11 (1) of the CDESCR that everyone has a right "to the continuous improvement of living conditions". More than a light touch of utopia is also inherent in Art.7 where it is stated that everyone's right to the enjoyment of just and favourable conditions of work includes "rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays"⁶⁵. Quite obviously, in framing these provisions the drafters were guided by the model of the industrial worker in a "Northern" society. With the collapse of the underlying economic assumptions in a world progressively marked by serious crisis symptoms, the CDESCR itself now seems to have lost some of its cornerstones. A confirmation of this critical evaluation results from the difficulties encountered in establishing the control machinery for the CDESCR. Not even now, more than eight years after the entry into force of the CDESCR, has the review procedure provided for in Art.16 really got off the ground. It would appear to be symptomatic that States have recently shown a marked lack of interest in even submitting their candidatures for the working party of the Economic and Social Council entrusted with examining the relevant reports⁶⁶. In conclusion, it may be said that the CDESCR has undergone a noticeable process of aging during its short existence of less than twenty years.

4. *The Balance between the Two Sets of Rights:* Up to the present time, discussions about the diverging attitudes of different countries towards traditional liberal rights and "modern" social welfare rights more often than not stick to clichés instead of coping with realities. According to the most prominent of those erroneous perceptions is the contention that Western States attach greater or even exclusive value to civil and political rights, whereas communist countries emphasize social and economic

⁶⁴ For a recent discussion of the basic needs approach see Trubek (note 45), at 228 *et seq.*

⁶⁵ The unrealistic character of this provision is also highlighted by St. Hoffmann, *Reaching for the Most Difficult: Human Rights as a Foreign Policy Goal*, 112/4 *Daedalus* 19-49, at 21 (1983).

⁶⁶ Reported and commented upon by R. Echterhölter, 30 *Vereinte Nationen*, 140-141, at 141 (1982). By virtue of the recent ECOSOC resolution 1985/17 of 28 May 1985, a "Committee on Economic, Social and Cultural Rights" shall be established in 1986. Although formally the resolution is confined to "renaming" the present working group, the Committee's structure will be entirely different, being made up of experts serving in their individual capacity.

rights, without caring very much for liberal rights which seek to provide protection against the State⁶⁷. This description may well fit to the prevailing ideology in Eastern Europe. However, Western Europe has generally become an area of social democracy where governments not only proclaim social responsibility, but act accordingly. Of course, there are some shades and nuances, but on the whole responsibility of the State for the weak and for the needy can be considered an established constitutional principle everywhere⁶⁸. *De facto* at least, the United States also is moving in this direction⁶⁹. To be sure, there is no denying the fact that Western Europe is presently suffering from high unemployment. But to create jobs demands more than just a governmental order, in particular for economies which are intricately enmeshed in the global network of international trade. As a compensation, unemployment insurance payments, which in some countries reach considerable levels, alleviate the plight of unsuccessful employment-seekers. Nobody is left outside the umbrella of social protection. Consequently, it may be stated quite firmly that Western States today fully subscribe to the idea that civil as well as social welfare rights should both be realized in a balanced manner. On the other hand, they clearly reject any attempt unilaterally to promote social welfare rights, thereby pushing the rights of the "first generation" to the background. If resolution 32/130, adopted by the UN General Assembly in December 1977⁷⁰, were to be understood in that biased sense⁷¹, it would therefore meet with very definite reservations⁷².

5. *Human Rights of the Third Generation*: Do human rights need some sort of rounding off by rights of a new nature which, according to a term coined by Karel Vasak⁷³, the scholarly world has become accustomed to

⁶⁷ Agrawala (note 3), at 377; Szabó (note 6), at 177.

⁶⁸ See, for instance, our contribution in: H. Fenn / B. von Maydell / J. Pietzcker / C. Tomuschat, *Recht auf Arbeit*, 45-61 (1984).

⁶⁹ See Henkin (note 1), at 47; M. I. Ginsberg/L. Lesser, *Current Developments in Economic and Social Rights: A United States Perspective*, 2 HRLJ 237-256 (1981).

⁷⁰ In spite of the affirmation in op. para.1 (a) that "all human rights and fundamental freedoms are indivisible and interdependent", op. para.1 (e) introduces a different emphasis.

⁷¹ See also UN General Assembly resolutions 37/199 and 37/200 of 18 December 1982, the latter of which embodies the Western standpoint, shared by the majority of Third World countries, that there should be no priorities.

⁷² Resolution 32/130 has been notably criticized by Th. van Boven, *United Nations Policies and Strategies: Global Perspectives?*, in: Ramcharan (ed.), *Human Rights: Thirty Years after the Universal Declaration*, 83-92, at 89-90 (1979); H. Golsong, *Evolution de la conception des droits collectifs dans la politique internationale*, in: *Les droits de l'homme* (note 5), 137-147, at 143; Howard (note 3), at 163.

⁷³ K. Vasak, *A 30-year struggle*, UNESCO Courier 29 (November 1977).

calling rights of the third generation or solidarity rights⁷⁴? In this connection, mention is made of a right to peace⁷⁵ or of a right to a healthy environment. Over the last few years, the so-called "right to development"⁷⁶ has gained a certain prominence. Although everything is unclear about it⁷⁷, Third World countries see this right as an embodiment of all their aspirations for an international community which is more just and equitable than the egoistic universe of the past whose guiding principle was co-existence but not solidarity⁷⁸. Along the same lines, the constant request for the establishment of a New International Economic Order is more and more linked to a broader concept of human rights⁷⁹.

Nobody can deny that human rights need a stable societal framework in order to be capable of being enjoyed by everyone in an effective manner. It

⁷⁴ For a general discussion see K. Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NILR 307-322 (1982); *id.*, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AJIL 606-621 (1984); L. Condorelli, *The New International Information Order and the Law of Nations: Prospects and Problems*, 5 *The Italian Yearbook of International Law*, 123-138, at 130-136 (1980-1981); K. Drzewicki, *The Rights of Solidarity - The Third Revolution of Human Rights*, 53 *Nordisk Tidsskrift for International Ret*, 26-46 (1984).

⁷⁵ In the meantime, this right has been formally proclaimed by the UN General Assembly in resolution 39/11 of 12 November 1984; see comment by C. Tomuschat, *Recht auf Frieden*, 40 *Europa-Archiv*, 271-278 (1985).

⁷⁶ Recognized by resolution 36/133 of the UN General Assembly of 14 December 1981 as an "inalienable human right".

⁷⁷ The Working Group established to define the scope and meaning of the right to development still has not reached agreement; its latest report is contained in UN Doc. E/CN.4/1984/13.

⁷⁸ Comments by B. Graefrath, *The Right to Development as a Human Right in a World-Wide Debate*, 8/1 GDR Committee for Human Rights Bulletin, 3-20 (1982); H. Gros Espiell, *The Right of Development as a Human Right*, 16 *Texas International Law Journal*, 189-205 (1981); J.-J. Israel, *Le droit au développement*, 87 *RGDIP* 5-41 (1983); C. Tomuschat, *Das Recht auf Entwicklung*, 25 *GYIL* 85-112 (1982); Upendra Baxi, *The New International Economic Order, Basic Needs and Rights: Notes towards Development of the Right to Development*, 23 *IJIL* 225-245 (1983); K. de Vey Mestdagh, *The Right to Development*, 28 *NILR* 30-53 (1981); as well as two volumes collecting the papers and proceedings of two international colloquia: R. J. Dupuy (ed.), *The Right to Development at the International Level. Workshop, The Hague 16-18 October 1979* (1980); International Commission of Jurists (ed.), *Development, Human Rights and the Rule of Law, Report of a Conference held in The Hague on 27 April-1 May 1981* (1981).

⁷⁹ This is, for instance, a common feature in both resolutions adopted by the UN General Assembly in 1982 (18 Dec.) on alternative methods for improving the effective enjoyment of human rights, although they proceed from diverging ideological premises, see resolution 37/199, op. para.5, resolution 37/200, op. para.5. See also the study on the New International Economic Order and the Promotion of Human Rights, UN Docs. E/CN.4/Sub.2/1984/24 and Add.1/Rev.1 and Add.2.

is clear also that war is the very denial of human rights. Where the lives of millions are no more than an object of military strategy, everything becomes meaningless. In this respect, the responsibility of industrialized countries is a particularly heavy one. A war between NATO States and the States of the communist world could not only lead to the annihilation of their respective populations, but probably to the extinction of mankind as a whole. Quite rightly, the Colombian writer Gabriel García Márquez on being awarded the Nobel prize (1982) said: «Los países más prósperos han logrado acumular suficiente poder de destrucción como para aniquilar cien veces no sólo a todos los seres humanos que han existido hasta hoy, sino la totalidad de los seres vivos que han pasado por esta planeta de infortunios . . . el desastre colosal . . . es ahora nada más que una simple posibilidad científica»⁸⁰. Along similar lines, a recent article in the *Indian Journal of International Law* has suggested that the traditional scope of human rights be enlarged to include all the threats posed by science to the survival of mankind⁸¹.

We very much share the preoccupations underlying this proposal, which would appear to be symptomatic of a continuously expanding state of mind. Nonetheless, it remains extremely doubtful what can be gained by posing these issues as human rights issues. Some writers at least seem to have lost sight of the basic fact that politics can never be thought of without its ultimate focal point, the individual human being. It is the sacred trust of every government to ensure the well-being of its citizens by establishing and defending law and order, by granting assistance to the needy and by operating community services beneficial to everyone. In the external dimension, it is again the task of a government to provide protection to every member of the national community against any possible threats from outside. Consequently, there can be no doubt that both domestic and foreign policy have much to do with the human rights situation of the individual, even if that connection is not spelled out explicitly.

On the other hand, the traditional approach to human rights is closely linked to specific methods. The typical right of the "first generation", i.e., of civil liberties, is a right which the individual himself may invoke *vis-à-vis* all public authorities of his country. This specific suitability for individual enforcement visibly reflects the inherent qualities of traditional human rights. They are in a true sense legal assets of the individual who

⁸⁰ Quotation from *El Tiempo* (Bogotá), 9 December 1982.

⁸¹ Upendra Baxi, *Teaching and Research in Human Rights, A Re-Exploration*, 22 *IJIL* 353-359 (1982).

disposes of them according to his free discretion. The rights of the "second generation", i.e., economic, social and cultural rights, are much more fluid both on the substantive and on the procedural plane. Although the right to work, for instance, is still framed as an individual entitlement, it lacks direct enforceability, the methods for its implementation being committed to the political determination of the competent government agencies. With regard to the "rights" of the third generation, an individual entitlement becomes even unthinkable. There can simply be no specific position of a particular individual in respect of peace or war. To ensure peaceful conditions is a fundamental task of every government. But the existence of either peace or war affects a people as a whole and does not aim in a specific manner at individual members of the national community. Peace, therefore, can be said to constitute the general foundation of human rights. The entire system of the United Nations has been created with a view to ensuring peace. It is the Security Council which, according to Art. 24 of the UN Charter, bears "primary responsibility for the maintenance of international peace and security". Also the General Assembly "may consider the general principles of co-operation in the maintenance of international peace and security" (Art. 11 (1) UN Charter). In other words, there exists already a vast array of institutions whose *raison d'être* it is to ensure peace and security. One can hardly see how these mechanisms could be strengthened by additional procedures to be established under the label of human rights. The human rights lawyer in particular should be very sober. Problems are not resolved simply by giving them other names. Also, the international environment will hardly be any cleaner once a right to a healthy environment has been recognized. Finally, the right to development is in danger of becoming an umbrella right whose many components comprise just anything which dreaming about a happy new world might make appear desirable⁸².

The above criticism should not be misunderstood. By no means is it intended to maintain that peace and development do not constitute goals worth striving for. Just the contrary is true. But peace and development can only be the outcome of long-lasting and patient efforts carried out through appropriate mechanisms. Sometimes there prevails a naive belief that it is enough just to "denounce" specific evils in order to make them disappear. Not even in the field of classical human rights does this method prove appropriate. As far as dangers for world peace resulting from the

⁸² See also critical observations by Bozeman (note 13), at 99-100; Golsong (note 72), at 143-144.

arms race are concerned, however, such a simplistic method is simply useless. What is needed is a negotiating round which earnestly and sincerely seeks to realize mutually balanced and verifiable disarmament. Third World countries should certainly bring to bear much more pressure on the super-powers in this connection. I fully endorse what has been said by Gabriel García Márquez. But all this is being debated in other *fora* and would not be advanced by including it in a specific human rights context. Therefore, apart from the insight that peace, environment and development as well as the existing international economic order have a definite bearing on the enjoyment of human rights, no further progress can be expected for the promotion of such rights by the present discussion on rights of the third generation⁸³.

III. Institutions and Procedures

At the outset of this last section it may be repeated that human rights should deploy their effects primarily at the domestic level. All international procedures, therefore, need to be considered in the light of the question as to whether and to what extent they are suitable for enhancing the position of the individual *vis-à-vis* the governmental authorities of his country.

1. *The Westphalian System of State Sovereignty as an Inherent Limitation of Implementation:* International implementation of human rights has some inherent limitations which flow from the existing structure of the international community. Its basic principle is that of sovereign equality of States (Art.2 [1] of the UN Charter). In principle, therefore, States determine themselves the ways and means for giving effect to human rights⁸⁴. International institutions as well as third States may have (limited) powers to deal with violations of human rights in a given country. But they may not intervene directly by force to remedy a situation contrary to generally recognized standards. Even the powers conferred upon the UN Security Council are confined to situations threatening "international peace and security" (Art.39 of the UN Charter), although in the recent past the Council has shown a marked tendency to emancipate itself from this rigid strait jacket by simply declaring that a specific situation does put in jeop-

⁸³ Neff (note 39), at 347, believes that the provisions of the African Charter on Human and Peoples' Rights "are so vague and sweeping as to be hardly more than mere rhetoric".

⁸⁴ In principle, Szabó, *The International Dimensions of Human Rights* (note 6) vol.1, at 35, is right in pointing to the principle of State sovereignty; see also Falk (note 14), at 67 *et seq.*

ardy international peace and security⁸⁵. In spite of these gradual changes, the Westphalian system of State sovereignty remains basically unchanged. The international community may concern itself with grave situations of persistent violations of human rights; but it remains an outside element which is denied the competence to take direct action at the national level.

2. *Political Discussions in International Bodies*⁸⁶: After much hesitation, it has become generally accepted that the human rights situation of a given country may be discussed by the political bodies of the United Nations, in particular by the General Assembly and the Human Rights Commission. Whereas for many years such discussions remained essentially confined to three countries, namely South Africa, Israel and Chile, who were classified as the sole international scapegoats, responsible for any evils in the world, recent years have shown a marked trend towards a much higher degree of objectiveness. The formula contained in ECOSOC resolution 1503 (LVIII), according to which international concern is warranted in cases where there exists a "consistent pattern of gross and reliably attested violations of human rights"⁸⁷, has been taken more seriously to include countries from all the regions of the world where human rights have suffered major setbacks. Thus, additionally, at the last session of the Human Rights Commission in 1984 the situations in Afghanistan, Equatorial Guinea, El Salvador, Guatemala and Iran were discussed⁸⁸. Furthermore, within the specific framework of ECOSOC resolution 1503 confidential discussions were held on an even wider circle of countries, but in contradis-

⁸⁵ Only recently, the Security Council has declared the constitutional reforms in South Africa to be "null and void", resolution 554 (1984), of 17 August 1984.

⁸⁶ For a comprehensive presentation of UN procedures and institutions see K. Das, *United Nations Institutions and Procedures Founded on Conventions on Human Rights and Fundamental Freedoms*, in: *The International Dimensions of Human Rights* (note 6), vol.1, 303-362; E. Schwelb/ Ph. Alston, *The Principal Institutions and Other Bodies Founded under the Charter*, *ibid.*, 231-301; K. Vasak, *The Distinguishing Criteria of Institutions*, *ibid.*, 215-228; L. B. Sohn, *Human Rights: Their Implementation and Supervision by the United Nations*, in: *Human Rights in International Law* (note 1), vol.2, 369-401.

⁸⁷ Socialist writers keep insisting on an additional element, namely, that such violations threaten international peace and security, see, for instance, L. Kański, *UNESCO Symposium: "The Final Act of Helsinki in the Light of International UN Pacts on Human Rights"*, 19 *Polish Western Affairs*, 147-149, at 148 (1978); Szabó (note 6), at 184; somewhat more flexible is Kartashkin (note 6), at 369, who also recognizes the criterion of "gross negation of the aims and principles of the UN Charter".

⁸⁸ Resolutions 1984/55, 1984/51, 1984/52, 1984/53, 1984/54 respectively.

inction to former years the report does not indicate – with the exception of Haiti⁸⁹ – the names of the States concerned.

In a similar vein, the parliamentary bodies of Western Europe have also embarked on scrutinizing the human rights situations not only in Western Europe, but all over the world. It has become for them almost a routine activity to make appeals to foreign governments that they should refrain from certain objectionable practices. A particularly ambitious concept has been evolved by the European Parliament (of the European Communities). In 1983, it began reviewing the human rights performance of all the countries of the world, publicizing its views in a voluminous report⁹⁰ apparently designed to emulate the annual volumes of the Country Reports on Human Rights Practices, published by the US Department of State. Many questions arise in connection with such reports. What is their real purpose? Can they make an effective contribution to the enhancement of human rights? Can such concern be taken seriously in all circumstances, or should it not be accompanied, as a test of its true altruistic significance, by massive humanitarian assistance in the event that hunger and famine are found to ravage a specific country? It would appear that there does exist a specific difference between discussions *in-fora* to which the accused State does not belong and deliberations within a system where the States concerned have at least the opportunity, if they so choose, to organize their defence. One cannot easily restrain certain misgivings in considering how little reliability can be attributed to the actual methods of fact-finding, particularly if the governments concerned are not granted a right to argue their case. On the other hand, it may well be that the formerly strict rules on intervention and State responsibility, which in their traditional configuration do not admit of any distinction between the different organs of a State⁹¹, may become more flexible by leaving more room to parliaments whose primary rule it is never to accept any taboos on discussion.

The principle itself of such deliberations on the situation of human rights in a specific country should be wholeheartedly welcomed. Legally, the practices which have been referred to confirm that the general condition of human rights does not belong any more to matters within the domestic

⁸⁹ Decision 1984/109.

⁹⁰ Human Rights in the World, Doc.1-83/83 (1983), also reproduced in: 4 HRLJ 17-123 (1983), adopted by resolution of 17 May 1983, C 161, Official Journal of the European Communities, 58 (20 June 1983), also reproduced in: 4 HRLJ 1 (1983).

⁹¹ Draft Articles of the International Law Commission on State Responsibility, II/2 YILC 30 (1980), art.6.

jurisdiction of States⁹². On the other hand, political proceedings do have their inherent limitations. Countries which have been attacked quite naturally tend to defend themselves as best they can, in general denying all the charges brought against them. Public denunciation of human rights is even likely to become counter-productive. In their anger, governments may proceed to persecuting persons invoking the relevant international resolutions as foreign agents destabilizing the nation. In addition, experience has demonstrated that at the level of the United Nations a great power will rarely find itself in the position of the accused. Hitherto, all formal moves have been directed against small or middle-sized States. Thus, a fundamental principle of procedural equality does not seem to be safeguarded⁹³. In conclusion, it can be stated that political discussions are a rather imperfect tool for the protection of human rights.

In spite of this negative conclusion, it should be stressed that international concern for human rights has made the observance of such rights the yardstick by which the legitimacy of a government is measured⁹⁴. To be sure, with the well-known exception of South Africa, the right of an effective government to represent its people and to act as its spokesman is not normally challenged. But measured in political terms, a government which violates human rights in a systematic fashion has a very feeble standing⁹⁵. One only need point to the tremendous increase in political and

⁹² Of course, the primary responsibility of each State for its specific field of jurisdiction persists. Without prejudice to specific treaty commitments, only gross and systematic violations become a matter of international concern, see now the comprehensive study by Ch. E. Ritterband, *Universeller Menschenrechtsschutz und völkerrechtliches Interventionsverbot*, *passim*, in particular at 361–374 (1982), who advocates a differential approach, which may be somewhat lacking in L. Henkin, *Human Rights and Domestic Jurisdiction*, in: T. Buergenthal (ed.), *Human Rights, International Law and the Helsinki Accord*, 21–40, at 27 (1977). Excessive skepticism is manifested by H. Rumpf, *Der internationale Schutz der Menschenrechte und das Interventionsverbot*, 15–38 (1981), who denies almost any objective meaning to international human rights. For a balanced view see also R. L. Bindschedler, *Der Schutz der Menschenrechte und das Verbot der Einmischung*, in: *Festschrift Schlochauer* (note 33), 179–192.

⁹³ Stigmatized by Bindschedler, at 190; W. K. Geck, *Internationaler Schutz von Freiheitsrechten und nationale Souveränität*, 35 *Juristenzeitung*, 73–77, at 75 (1980).

⁹⁴ Rightly observed by N. G. Onuf / V. Spike Peterson, *Human Rights from an International Régimes Perspective*, 37 *Journal of International Affairs*, 329–342, at 341 (1984); the doubts expressed by Falk (note 41), at 70, and Ruggie (note 26), at 95–100, are not really borne out by the empirical experiences of international diplomatic life.

⁹⁵ The torture charges brought against the Greek Junta and corroborated by the findings of the European Commission of Human Rights contributed to a large extent to the fall of the dictatorship in 1974.

moral authority of the Government of Argentina once democracy and respect for the rule of law had been restored.

3. *Reporting procedures* constitute today a centre-piece in many conventions for the protection of human rights. At the universal level, the examination of reports even seems to have become the main device. For communist countries, in particular, this specific form of review of their human rights performance marks the outer limits of what they are, for the time being at least, prepared to accept⁹⁶. Thus, reporting procedures can be said presently to reflect the maximum standard of what is agreeable on a world-wide scale.

There is no need to describe in great detail the merits and the weaknesses of the reporting procedure⁹⁷. On the one hand, unlike a complaints procedure, the examination of a State report provides the opportunity for an overall assessment of the human rights situation in the country concerned. As far as the CCPR is concerned, even fundamental issues of the existing governmental structure – democracy, pluralism, separation of powers etc. – may be discussed. On the other hand, a meaningful dialogue depends to a large extent on the voluntary co-operation of the country concerned. For instance, the first report submitted to the Human Rights Committee under Art. 40 of the CCPR consisted of just one page⁹⁸. Even if it was withdrawn after a short while and replaced with a much better one⁹⁹, that first experience tends to show how negligently or how cleverly a government can

⁹⁶ See B. Graefrath, Trends Emerging in the Practice of the Human Rights Committee, 6/1 GDR Committee for Human Rights Bulletin, 3–23, at 15–18 (1980); M. Mohr, Questions of Procedure under International Law in the Implementation of Human Rights Instruments, 9/2 GDR Committee for Human Rights Bulletin, 61–71, at 64–65 (1983); *id.*, Questions of Procedure under International Law in the Implementation of Human Rights Instruments, 10/2 GDR Committee for Human Rights Bulletin, 22–37 (1984). For a pertinent comment on this state of affairs see W. Grewe, *Epochen der Völkerrechtsgeschichte*, 766 (1984).

⁹⁷ The reporting system under the International Convention on the Elimination of All Forms of Racial Discrimination has been described by T. Buergenthal, Implementing the UN Racial Convention, 12 *Texas International Law Journal*, 187–221, at 190–221 (1977); for a similar study concerning the CCPR, see D. Fisher, Reporting under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee, 76 *AJIL* 142–153 (1982); F. Jhabvala, The Practice of the Covenant's Human Rights Committee, 1976–82: Review of State Party Reports, 6 *HRQ* 81–106 (1984); M. Nowak, The Effectiveness of the International Covenant on Civil and Political Rights – Stocktaking after the first eleven sessions of the UN Human Rights Committee, 1 *HRLJ* 136–170, at 146–151, 165–167 (1980).

⁹⁸ UN Doc. CCPR/C/1/Add.1, 7 March 1977.

⁹⁹ UN Doc. CCPR/C/1/Add.1/Rev.1, 1 July 1977.

handle its reporting obligation. Generally, it can be said that most reports draw a rosy picture which does not contain any mention of "factors and difficulties, if any, affecting the implementation" of the CCPR (Art.40 [2] of the CCPR). In some instances, the reader who would use the official report as his sole source of informations would even be totally misled, since information is provided which bears no resemblance whatsoever with the real situation in the country concerned. Notwithstanding searching questions being put by members of the Human Rights Committee during the examination of such a report, it is but too easy to avoid giving straightforward answers. It might be useful, in this connection, to read the report of the Democratic People's Republic of Korea¹⁰⁰ and the summary records covering the consideration of that report¹⁰¹ in order to understand how difficult it is to come to grips with facts and not to remain in a mollifying nirvana of sheer verbalism¹⁰².

The real significance of the examination of a country report could be considerably increased by officially associating groups from the country concerned to the relevant proceedings. Within the system of the International Labour Organisation, for instance, trade unions have been given such a role. They may submit comments which the competent Committee of experts is authorized to take into account in formulating its observations. Obviously, in the general context of human rights it is much more difficult or downright impossible to confer a privileged right of participation on any particular private organization. It should then be required, however, that governments publicize the report which they submit to the examining body in an easily accessible manner¹⁰³ so that the citizens concerned know how their own authorities view and describe the national human rights situation, affording them thereby the opportunity to make appropriate comments. In addition, every government should be prepared to report to its citizens how its report was received by the examining body and what criticisms and suggestions for improvement were made. Unfortunately, in many instances the examination of the reports does not find an

¹⁰⁰ UN Docs. CCPR/C/22/Add.3 (1983) and Add.5 (1984).

¹⁰¹ UN Docs. CCPR/C/SR.509, 510, 516 (1984).

¹⁰² See also W. M. Reisman, *Reporting the Facts as They Are Not Known: Media Responsibility and Concealed Human Rights Violations*, 78 AJIL 650-652, at 652 (1984).

¹⁰³ The Government of the Federal Republic of Germany publicized its report in an edition distributed widely by its Press and Information Office. The Government of the German Democratic Republic publicized its reports via the 10/1 GDR Committee for Human Rights Bulletin, 39-68 (1984), but the publication does not seem to have a wide popular distribution, addressing itself rather to insiders:

echo transcending the relevant conference room in Geneva or New York, even though human rights is a matter directly affecting each and every member of the public at large¹⁰⁴. If indeed the examination of a report is just seen as a sort of fever crisis which has to be endured for a few hours once every five years, the whole exercise remains more or less useless. It is only too obvious, indeed, that some governments are quite successful in hiding from their own people that proceedings have taken place which, on the contrary, everyone should have had the opportunity to learn about. Thus, without any revolutionary changes there is much room for improvement with regard to procedural details whose factual impact could be considerable.

4. *Complaints procedures* at the universal level are mostly not concluded by a determination which would be binding on the government concerned. This juridical weakness does not automatically mean that the impact of opinions delivered by the competent international bodies is negligible. The Human Rights Committee, in particular, has found in its practice under the Optional Protocol¹⁰⁵ that governments which seek to establish a good relationship of loyal co-operation with it very carefully heed the views delivered under Art.5 (4) of the Optional Protocol¹⁰⁶. On the other hand, governments which rather view the complaints procedure as a nuisance keep insisting on the non-binding character of such views, even if substantially they are unable to reject findings of a violation as not corresponding to the true state of affairs. Uruguay has until recently been the most prominent of those countries which have refused to comply with suggestions for reparation made by the Human Rights Committee in cases where a breach of the Covenant had been found to exist. It is hard to imagine,

¹⁰⁴ There seems to have been, within the countries concerned, no press coverage at all of the examination by the Human Rights Committee of the report of the GDR in July 1984 and of the USSR in November 1984.

¹⁰⁵ For a general description of that practice, see Nowak (note 97), at 152-162; C. Tomuschat, *Evolving Procedural Rules: The UN Human Rights Committee's First Two Years of Dealing with Individual Communications*, 1 HRLJ 249-257 (1980); *id.*, *Der Ausschuss für Menschenrechte - Recht und Praxis*, 29 Vereinte Nationen, 141-149 (1981); T. Zwart, *Het Mensenrechtencomité van de Verenigde Naties: Jurisprudentie inzake bevoegdheid en ontvankelijkheid*, 8 NJCM Bulletin - Nederlands Tijdschrift voor de Mensenrechten, 449-470 (1983). A section concerning admissibility will also appear in the [Eighth] Report of the Human Rights Committee, 39 UN GAOR, Supp. (No.40), Chapter IV, UN Doc. A/39/40 (1984).

¹⁰⁶ Annexes XXXI to XXXIII to [Seventh] Report of the Human Rights Committee, 38 UN GAOR, Supp. (No.40) 249-256, UN Doc. A/38/40 (1983): Responses of States Parties to Views of the Human Rights Committee under Art.5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights. See also Grewe (note 96), at 769.

however, that the response would be any more forthcoming if the conclusions of the Human Rights Committee were formally binding. The lack of real "punch" is just an illustration of the rudimentary character of the international enforcement machinery. Implementation of human rights rests largely on an appeal to the law-breaker himself to return to the path of law compliance.

A great step forward would be accomplished if States in their bilateral relationships with a country which consistently and gravely violates human rights took appropriate action to ensure that redress be provided. In spite of some controversy in scholarly writings¹⁰⁷, it would appear that for such a purpose not only measures of retorsion, but even outright reprisals are lawful. Past experience, however, does not give much ground for hope. Rightly or wrongly, States mostly take the view that their foreign policy cannot be guided exclusively by human rights concerns. In fact, this is a delicate matter. A deliberate strategy "to impose sanctions", even if it is not abused for other political purposes¹⁰⁸, may lead to a general climate of confrontation which is likely considerably to worsen the situation of the people concerned¹⁰⁹. Any dogmatism should therefore be avoided. The

¹⁰⁷ See, on the one hand, Henkin (note 92), at 29-33; *id.*, Introduction, in: The International Bill of Rights (note 33), 1-31, at 14-17 (1981); St. M. Schwebel, The Compliance Process and the Future of International Law, 75 ASIL Proceedings, 178-185, at 184-185 (1983); B. Simma, Fragen der zwischenstaatlichen Durchsetzung vertraglich vereinbarter Menschenrechte, in: Festschrift Schlochauer (note 33), 635-648; Tran van Minh, Sanctions juridiques et politiques des violations des droits de l'homme, in: A. Fenet, Droits de l'homme - Droits des peuples, 67-128, at 123-128 (1982); on the other hand, advocating a more cautious approach, J. A. Frowein, Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung, in: Festschrift Mosler (note 3), 241-262, at 256, 258-259; Rumpf (note 92), at 36-38; a totally negative attitude is taken by M. Mohr, 9/2 GDR Committee for Human Rights Bulletin, 61-71, at 69 (1983). The judgment of the International Court of Justice in the *Barcelona Traction* case, of 5 February 1970, ICJ Reports 3, at 32 paras. 33, 34 (1970), which affirms the concept of obligations *erga omnes*, is not devoid of some ambiguity. It can be safely assumed, however, that the major consequence of the recognition of international crimes as a special category of international wrongful acts, as suggested by the ILC in Art. 19 of its Draft Articles on State Responsibility (note 91) would almost necessarily be the admissibility of reprisals by third States not directly affected. But there may be a certain distance between a "consistent pattern of gross violations of human rights" and an international crime as contemplated in Art. 19 (3) (c) of the Draft Articles.

¹⁰⁸ Indeed, the question of *quis iudicabit?* will often pose almost insurmountable difficulties, in particular if the proper understanding of political rights is at stake.

¹⁰⁹ These difficulties, strongly emphasized by Frowein (note 107), are also stressed by P. H. Kooijmans, Enkele opmerkingen over de volkenrechtelijke toelgbaarheid van eenzijdige sanctiemaatregelen, 37 Internationale Spectator, 771-777, at 774-777 (1983).

interests of the individuals requiring protection must be the supreme guiding principle in any strategy designed to improve their fate.

5. *Progress through Better Mechanisms of Implementation:* Progress in the field of international protection of human rights is still possible. But it can hardly be envisaged as the result of an ongoing process of standard-setting. To be sure, human rights, in order to be effective, should be as precise and concrete as possible. However, the task of clarifying the contours of the relevant international treaties cannot be performed mainly through the conclusion of new international agreements or the adoption of declarations. Some useful headway was made, for instance, by the adoption of the Declaration against Torture (1975)¹¹⁰ and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)¹¹¹. But to push forward the standard-setting process at the international level is no panacea. National legislation quite legitimately needs room for flexible solutions which are adapted to the specificities of the domestic legal order. If one should try to lay down over-elaborate rules on the international plane, the gap between the relevant international standards and national accomplishments would widen again. International human rights standards might then indeed be felt to constitute an alien element disruptive of national customs and practice. Again, therefore, no general and easy answers are possible. Law-creating agencies like the Human Rights Commission and its Sub-Commission should be aware of the fact, in any event, that to go on to draft rules for each and every aspect of social relationships does not automatically bring about progress.

It would appear, however, that there is much room for progress in procedural matters. As has been pointed out, the major deficiency of the procedures existing on a world-wide scale is that they too easily allow words to be taken as facts. Therefore, to grant fact-finding powers to international bodies could enable the international community to pierce the veil of verbalism and at least to clarify the true factual picture¹¹². On the regional level, the record of the Inter-American Commission on Human Rights is quite exemplary in that respect. On many occasions, members of the Commission have travelled to countries allegedly in breach of their obligations under the relevant American instruments, inquiring

¹¹⁰ UN General Assembly resolution 3452 (XXX), of 9 December 1975.

¹¹¹ UN General Assembly resolution 36/55, of 25 November 1981.

¹¹² For a detailed discussion of the potentialities involved see B. G. Ramcharan (ed.), *International Law and Fact-Finding in the Field of Human Rights* (1982).

into the situation by hearing witnesses, conducting talks with members of the government concerned and of the opposition etc. In Argentina, after a visit of the Inter-American Commission, the formerly wide-spread abuses of abducting and later killing presumed terrorists ceased almost immediately¹¹³. Also in the European context, missions of inquiry have helped to identify the relevant issues in an unequivocal and unchallengeable manner.

The United Nations has made a somewhat erratic use of fact-finding for the implementation of human rights. For many years, the Special Committee against *Apartheid* has attempted to expose the policies of the South African Government as far as possible. In 1968, the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories was established¹¹⁴. Since the fall of the Allende Government, the General Assembly has constantly focused on the human rights situation in Chile. Finally, over recent years certain countries with serious problems – for instance Guatemala, El Salvador, Poland – have received special attention both by the General Assembly and by the Human Rights Commission. Special rapporteurs were appointed to inquire into the factual situation in those countries. However, it has never been stated as a general proposition that any country against whom serious charges are being made should be subjected to an international inquiry to be held by a United Nations body. Consequently, the target countries must almost certainly feel that they are being singled out and that such inquiries are not inspired by objective and impartial rules.

Any effort to establish general criteria for fact-finding missions is therefore to be welcomed as a step in the right direction. A case in point is the recent Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, elaborated by a working group of the Human Rights Commission and adopted by the General Assembly by consensus on 10 December 1984¹¹⁵. It sets forth (Art.20 [3]) that visits may be made to places of detention “in agreement with the State Party concerned”. To this end, a body of experts (“Committee against Torture”) is to be set up. Even if the powers of that body are mainly confined to giving to the government concerned a confidential account of the facts

¹¹³ This experience is documented in: T. Buergenthal/R. Norris/D. Shelton, *Protecting Human Rights in the Americas. Selected Problems*, 149–165 (1982).

¹¹⁴ UN General Assembly resolution 2443 (XXIII), of 19 December 1968.

¹¹⁵ UN General Assembly resolution 39/46, of 10 December 1984; for a comment on the draft prepared by the working group of the Human Rights Commission see I. Maier, *Wirksamere Ächtung der Folter erstrebt*, 32 *Vereinte Nationen*, 77–82 (1984).

which it has been able to verify, and to supplementing that account by any appropriate comments or suggestions, the text providing only for "a summary account of the results of the proceedings" in the annual report (Art.20 [4], [5]), the impact of such missions to be carried out once serious allegations of practices of torture have been brought forward could be considerable. It remains, however, that visits on the spot require the formal consent of the government whose prisons or other centres of detention the Committee would wish to investigate. One need not be a prophet in order to forecast that, even after ratification, that consent will not be forthcoming in numerous instances.

In general, it would appear that much headway could be made by permitting international bodies to inquire into allegations of practices infringing human rights in a systematic fashion, according to the formula coined by ECOSOC resolution 1503 (XLVIII). Reporting procedures and even complaints procedures, to the extent that the examining body is confined to basing its evaluation exclusively on written material submitted to it, all too easily lose contact with the real situation, thus becoming an abstract exercise which is even capable of serving as a fig-leaf for governments. Indeed, it should be recalled again that according to some critics ratification of the two Covenants of 1966 is agreed to even by governments basically rejecting the philosophy enshrined in those instruments mainly because the relevant control mechanisms, even if they may cause some kind of disturbance, lack teeth and are therefore essentially harmless¹¹⁶. Procedures for fact-finding would set the record straight. On the other hand, they still permit governments a large measure of political discretion, since the conclusions reached by the relevant bodies merely constitute suggestions or recommendations denied a truly binding character.

The experiences already referred to tend to show, furthermore, that fact-finding mechanisms should generally be organized within a regional framework. Two major reasons point in that direction. The first reason has to do with the idea of self-respect and self-responsibility. Europeans are neither capable of, nor should they be seen as, patronizing the world. Just as Western Europe has shaped its own system for the protection of human rights, the other regions of the globe, to the extent that they have not yet

¹¹⁶ See Grewe (note 96), at 766; M. Kriele, *Die Menschenrechte zwischen Ost und West*, 22, 46-52 (1977); *id.*, *Menschenrechte und Friedenspolitik*, in: *Einigkeit und Recht und Freiheit. Festschrift für Karl Carstens*, 661-685, at 672-673, vol.2 (1984); K. Marek, *Sur la notion de progrès en droit international*, 38 *Annuaire Suisse de Droit International*, 28-43, at 31 (1982).

done so, should establish their own mechanisms and ensure themselves the implementation of the lofty principles which political rhetoric invokes so easily. This is obviously a long and time-consuming process. In Africa, the next step would be the establishment of the African Commission on Human and Peoples' Rights after the coming into force of the African Charter on Human and Peoples' Rights. In Asia, a continent presently torn by deep internal dissensions, in spite of some initiatives launched already some years ago, a regional instrument still remains to be drafted and could presently only be conceived of as the product of the joint efforts of a sub-region¹¹⁷.

The second reason is more prosaic. The costs of a system of fact-finding could be tremendous. To establish procedures on a world-wide scale would be too burdensome in financial terms, especially at a time when economic difficulties make an economic use of available resources more imperative than ever, in spite of the fact that the monies spent for the implementation of human rights are ridiculously small, compared with the sums wasted for military purposes.

IV. Conclusions

The preceding developments do not permit of any general conclusion. However, they may have made it clear that human rights is not simply a subject-matter for the specialist. The study of human rights cannot remain confined to some technical aspects of international law, best taken care of by the legal section of the ministerial departments for foreign affairs. Human rights has to do with the basic values on which State and society are founded. By their very nature, they tend to do away with traditional conceptions about a clear-cut separation between the international and the domestic legal order, thus opening up new avenues which may bring about a sort of amalgamation between the different legal fields. This also explains the highly political nature of human rights. Although designed to secure peace and good neighbourliness among nations and within States, they may also create unrest and may even be invoked as the justification for

¹¹⁷ A Non-Governmental Organization from the ASEAN States, the Regional Council on Human Rights in Asia, has recently (9 December 1983) adopted a Declaration of the Basic Duties of ASEAN Peoples and Governments, which under the Heading of Basic Principles (Art. I) lists numerous human rights framed as duties of every government.

resistance against an oppressive government¹¹⁸. Seen from a German perspective, this is by no means disturbing. The international human rights movement as we know it today originated as a reaction against the atrocities committed by the wielders of power in the Third Reich. Logically, therefore, it can only be hoped that in other parts of the globe human rights may constitute an effective defence preventing similar events from re-occurring.

¹¹⁸ See Universal Declaration of Human Rights, Preamble, para.3, and C. Tomuschat, *Le droit à la résistance et les droits de l'homme*, in: UNESCO (ed.), *Violations des droits de l'homme: quel recours, quelle résistance?*, 13-14 (1983).