Universidade de Aveiro Secção Autónoma de Ciências Sociais, Jurídicas e Políticas
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Ana Raquel Coutinho
Rosa Vaz-Pinto

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International Society, Standard of Civilisation, and the Abolition of the Death Penalty: the United Nations and China

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Tese apresentada à Universidade de Aveiro para cumprimento dos requisitos necessários à obtenção do grau de Doutor em Ciências Políticas, realizada sob a orientação científica do Dr. Robert F. Dernberger, Professor Emeritus da Universidade de Michigan e do Dr. António Vasconcelos de Saldanha, Professor Associado do Instituto Superior de Ciências Sociais e Políticas da Universidade Técnica de Lisboa.

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This venture would not have been possible at all without the motivation and encouragement of my husband Duarte.

This doctoral thesis is dedicated to him.

In memoriam
Dr. Sérgio Vieira de Mello (1948-2003)

o júri

presidente

Prof. Doutor Fernando Joaquim Fernandes Tavares Rocha
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palavras-chave

Escola Inglesa, sociedade internacional, standard de civilização, direitos humanos, pena de morte, Nações Unidas e China.

resumo

As Nações Unidas conseguiram criar uma 'janela de oportunidade' em relação à abolição internacional da pena de morte. Este esforço está inserido no 'resgate do indvíduo' em matéria de direitos humanos e responsibilidade dos estados que se verificou a partir de 1945. Para além disso, a questão dos direitos humanos ocupa um lugar central na procura de um novo standard de civilização. Todavia, esta procura não tem sido consensual e reflecte o estádio embrionário da sociedade de estados que tenta harmonizar a uma escala universal os seus elementos de sociedade, sistémicos, e comunitários. A institutionalização da abolição da pena de morte não está ainda conseguida e, bem pelo contrário, é um processo que se encontra no início. A maior barreira para as Nações Unidas é a de promover a norma abolicionista no domínio das abordagens pluralistas de grandes potências como a China, o país que lidera o número de sentenças capitais e execuções em todo o mundo. O pluralismo metodológico da Escola Inglesa permite-nos compreender os diversos componentes deste debate, *i. e.*, a abolição da pena de morte é *per se* um elemento comunitário desenvolvido numa moldura de sociedade e que enfrenta constrangimentos pluralistas.

keywords

English School, international society, standard of civilisation, human rights, death penalty, United Nations and China.

abstract

The United Nations has been successful in establishing an international abolitionist 'window of opportunity' regarding the death penalty. This 'window' is included in the wider framework of human rights and state accountability that was made possible after the 'rescue of the individual' in the post-1945 world. Human rights are at the core of the search for a new standard of civilisation, a search that has been far from consensual. It reflects the embryonic stage of a truly global society of states that is trying to harmonise its systemic, societal and community elements on a universal scale. The institutionalisation of the abolition of the death penalty is still at the beginning and lacks international consensus. The greatest hurdle is to promote socialisation of the abolitionist norm into retentionist countries such as China, the leading country in death sentences and executions worldwide. The methodological pluralism of the 'English School' enables us to understand what is at work in the death penalty debate, namely that its abolition is a community building block that is being nurtured in a societal framework and faced with pluralist constraints.

TABLE OF CONTENTS

LIST OF TABLES

INTRODUCTION

The starting point of our doctoral thesis is Hedley Bull's idea of an anarchical society co-existing with community and system elements. International politics has community, system and society constituents working at the same time and even if one predominates, the others do not cease to exist. These three elements have been associated with traditions of international relations' theory. The first tradition (Machiavellian or Realist), linked to the systemic element, considers that an international community does not exist. We can only find an international anarchy in which states pursue their own national interest in an environment dominated by conflict and war. Here, states form an international system or system of states. In contrast, the second tradition (Kantian or Revolutionist) associated with the community element focuses on the importance of an international community not only of states but also of individuals who are their basis. States exist because of (and for) individuals and not the other way around. The goal to pursue is a world society even if, for the time being, this society only exists in the minds of men.

The third tradition (Grotian or Rationalist), more associated with the idea of society, describes the international environment as anarchic but goes beyond the conflict element and includes co-operation. The 'English School', due to its emphasis on the search for a better understanding of the concept of international society, has been linked to this tradition. Nevertheless, the English School approach goes beyond the focus on society and offers us a methodological pluralism in which system, society and community are building blocks making it a research tool to better grasp international relations. What is more, it also presents a powerful 'escape' from the dichotomy between Liberalism and Realism best described by E. H. Carr. Nonetheless, a word of caution is necessary. We are mainly concerned with the idea of an anarchical society and the English School's methodological pluralism. We are not trying to examine its whole body of knowledge, if only because the English school includes many thinkers and different fields of interest, thereby rendering such a task Herculean and outside the scope of our doctoral dissertation.

It is this theoretical framework that we consider more apt to understand international relations, and this is the goal of our first chapter. Regarding theory, we rely on the methodological pluralism of the English School because we consider it to be the best guide to our analysis. This study aims to shed some light or provide some evidence on the issue of capital punishment in international society. We would like to emphasise, therefore, that our concept of theory does not correspond to the one used, for example, in Economics or Physics. In this sense, it is not a 'scientific' theory with a hypothesis which is testable for right or wrong. In addition, we consider that the concepts of international society, world society and system of states are essential for understanding international relations as well as the genesis and evolution of international society. The ground-breaking study of the expansion of European international society, along with its values and the standard of civilisation, enabled us to understand this expansion as something more than just a struggle for power. The expansion had a normative element that we consider essential, since Europeans judged not only how other countries conducted their foreign relations but also how they governed themselves in what became known as the standard of civilisation. This concept is linked to what is regarded as legitimate in international relations, thereby distinguishing those who belong to international society from those that do not. The sovereign states of the European international society initiated an expansion that gave such society a global nature. This expansion was carried out in two phases. In the first one that began with the Portuguese discoveries in the 15th century and lasted until the partition of Africa in 1884-1885, Europeans became masters of the world. In the second phase that overlaps with the first one, the areas dominated by the Europeans became independent and, indeed, member states of the international society.

In the second chapter, we will be looking at the expansion of Europe into the rest of the world and the role played by international law in this enterprise. In order to better understand the challenges posed to non-western countries, we have chosen to look at how China and Japan faced the standard of civilisation and extraterritoriality. The expansion of the European international society was not a collective and coordinated enterprise. It was rather through its institutions, namely

international law, diplomacy, the managerial role of the great powers, war and the balance of power, that some sort of consensus gradually emerged. The tone was set in what was perceived as European civilisational superiority. Therefore, the criterion for admission into this society of states was based on civilisational requisites. The relation between the evolution of the international society and international law was complex and interactive and it is reflected in the change of the dominant school of thought. The formulation of the standard of civilisation and the supremacy of positivism were clear signs of an increasing process of European dominance. At the same time, this change of heart led to the emphasis on the *unique* rather than the *universal* that had characterised earlier Europe. This time, the perception of the *other* was not grounded on equality and instead the other was perceived as different and therefore inferior. This civilisational challenge originated different responses from non-western countries. Japan chose to fulfil the standard of civilisation and therefore transformed its domestic arrangements accordingly and adopted international law. These were considered to be the best strategies to end western extraterritoriality in its territory. Japan did not limit itself to fulfil the standard of civilisation and indeed became a great power. China, however, pursued a different policy and instead of fulfilling the standard of civilisation, opted for a very assertive diplomacy in order to regain its territorial integrity and sovereignty. These different ways of coping with the civilisational challenge posed by western powers is evident in the peace treaties that ended the First World War.

The standard of civilisation as conceived by Europeans lost ground and was successfully challenged as international society became truly global. No longer was it possible for Europe to speak of a standard of civilisation after the Holocaust. The revolt against the West and the call for racial equality were victorious in adapting the role of the state but retained, indeed, reinforced the institution of state sovereignty. If the standard of civilisation as was conceived during the expansion of the European society of states was no longer valid, the idea of *a standard* in the sense of a yardstick of what is legitimate in international society remains. The search for a new standard of civilisation is at the heart of the debate regarding international human rights and democracy. The discussion that is taking place as

to whether democracy is the next step in the evolution of the form of state authority and respect for human rights as the new standard for which to identify a member as being worthy of admission in international society, is far from consensual. It also highlights an important aspect of international relations regarding the formulation of norms and to what extent these are proposed or imposed and compliance is cognitive or merely instrumental. This brings us to the issue of homogeneity, which we understand as the similarity of the domestic organisation of societies going beyond the inter-state level and touching upon the need to conform internally to an international standard.

In the third chapter, we will examine the transition of a European and then western, into a truly global international society. The existence and credibility of an international society is, of course, firmly linked to the concept of legitimacy and to the process of socialisation that have taken place since 1945. In order to demonstrate the existence of international society, we have chosen to look at the Charter of the United Nations and the evolution of the United Nations itself, the General Assembly resolution 2625 (XXV) of 1970, also known as the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", and the concept of *jus cogens*. In all these three elements, we have to take into consideration the relation and tension between the 'old' and the 'new.' This tension and its respective claims for order and justice can be best observed in international law. It has been described as having "two souls": traditional and modern. The traditional/Westphalian model is based on three principles: non-interference in the external and internal affairs of other countries, sovereignty and good faith. The modern "United Nations Charter model" is represented by the principles of co-operation, prohibition of the threat or use of force, self-determination, peaceful settlement of disputes and respect for human rights.

The existence of these two souls in international law can be perceived in the membership of international society. Here, the traditional sovereign state, which is the protagonist of international politics, shares the stage with 'modern' international organisations such as the United Nations and individuals. At the centre of the relationship between these three members of international society,

we find the reinvention and adaptation of state sovereignty where both individuals and international organisations push towards the more societal or communitarian side of the spectrum. In our view, this reinvention of state sovereignty is best captured by human rights revealing the embryonic stage of global international society. It is true that during the Cold War, human rights were used as one of the weapons within the superpower struggle, but even then they did not cease to exert influence. We consider that the idea that human rights must be respected and upheld is no longer controversial, and in fact a general principle has emerged gradually prohibiting gross and large-scale violations of human rights, no more essentially within the domestic jurisdiction of states. In our view, the United Nations has been the engine behind the establishment of an international bill, promoting and protecting fundamental freedoms and human rights.

This is the aim of our fourth chapter, where we will explore the United Nations' activities in the development of international human rights' standards. We will examine how the United Nations was able to overcome its initial inertia and to move from considering human rights as a *means* to safeguard international peace into an *end* in its own terms which has to be protected and promoted. The transposition of moral human rights into legal rights at an international level, *i. e.,* rights defined and protected by positive legal instruments, has been carried out within the United Nations in three areas of action: standard-setting, implementation and monitoring, and punishment of violations of human rights. These three aspects have evolved parallel to the development of the international human rights' framework. The first phase corresponds to the definition of human rights in the International Bill of Human Rights. This International Bill encompasses the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966 and also the First and Second Optional Protocols to the International Covenant on Civil and Political Rights. The first Optional Protocol deals with individual petition and came into being with the Covenant in 1966, whilst the Second Optional Protocol aims at the abolition of the death penalty and was produced in 1989. The second phase deals with the protection of human rights either through the implementation of these human rights treaties or the fact-finding

task regarding communications of violations of human rights. The task of supervising is done by the monitoring treaty bodies such as the Human Rights' Committee and the fact-finding task has been carried out within the Economic and Social Council, namely by the Commission and the Sub-Commission on Human Rights. The third phase focuses on the punishment of violations of human rights along with individual international criminal responsibility. International criminal law, despite the Nuremberg and Tokyo precedents, only took off in the 1990s with the *Ad Hoc* Tribunals of the former Yugoslavia and Rwanda, as well as with the coming into force of the Rome Statute of the International Criminal Court. These three functions form a building that has been carefully constructed throughout the existence of the United Nations.

The 'rescue of the individual' complemented by the revolutionary notion that individuals can redress a wrong through international society against their own state, also made its impact on international relations' theory, as we will consider in the fifth chapter. We will analyse how the three traditions have looked at human rights and the weight given to them in international relations and foreign policy. Here the conflict between the 'old' and its claims for order and the 'new' and its demand for justice is best illustrated by massive and systematic violations of human rights which, in extreme cases, can lead to humanitarian intervention. In international relations' theory, we observe diverse human rights' discourses: viewed with suspicion and caution because they are a threat to inter-state order, seen as enhancing the domestic and international legitimacy of the state, or envisaged as the primary goal of a world community. We find diverse discourses on the role that human rights play internationally, whether they are located at a system (Realist), society (Grotian) or community (Revolutionist) level. These varied and antagonistic understandings of the weight of human rights in international relations reveal the co-existence of system, society and community patterns. In our view, norms are as important as power politics and they are both part of the national interest. International human rights are more than just adjustments of diverging interests as international politics are not merely a struggle for power but also a contest over legitimacy expressed in the need to convert power into authority.

In the sixth chapter, we will explore the question of the right to life from the perspective of the death penalty. We will focus on the *legitimate* authorisation of the right to take a life, when it is carried out by the state and with due process of law, leaving aside extra-legal executions even if they are sometimes promoted and in connivance with state authorities. The death penalty can be seen on two levels. The first one concerns the domestic relation between the individual and the state, this being the ultimate measure that a state can take within its powers. In other words, what are the limits of state sovereignty and its relation to the *sovereignty* of the individual? By looking at law and its criminal system, we are also looking at the weight of the individual when confronted with society. This is transposed to the second level, namely the international, and is at the core of the challenges to sovereignty within the wider framework of human rights. It is a community building block co-existing with the systemic and societal features of international relations. On this level, the United Nations has taken a leading role complemented by its European and Inter-American counterparts.

The evolutionary characteristic of human rights is seen in the evolution of the question of the death penalty itself. Until the 20th century, and despite some limits to its use, the legitimacy of capital punishment was a given. The process of questioning the use of the death penalty was carried out in several states, and at the international level within the United Nations' framework. The latter began as a neutral observer regarding capital punishment as an instrument of criminal law and changed into a supporter of its abolition within a human rights' framework in a process that we have divided into three phases: the establishment of capital punishment as *the* exception to the right to life, specific standard-setting and the adoption of the goal of progressive abolition, and the post-Cold War advancement of both abolitionist and retentionist concerted strategies at the United Nations. The first phase, from 1948 to the end of the 1950s, dealt with the discussions of article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights. In the second period, we find an increase in the attention paid to the question of the death penalty, as well as of the United Nations' bodies involved in this process. It began in the 1960s with the first report concerning the death penalty made by Marc Ancel and ended with the adoption of

the Second Optional Protocol in 1989. During this period, capital punishment gradually became a routine issue, and we find a change in the approach followed by the United Nations. No longer was capital punishment considered solely as a criminal domestic matter and, instead, its abolition was a goal to be promoted and pursued. This United Nations' change of heart, and its support for the progressive abolition of the death penalty, culminated in the specific standard setting concerning the abolition of the death penalty. In this organisation, the importance attached to the issue of abolishing the death penalty can be observed from the fact that it was included in the International Bill of Rights. Likewise, this goal was pursued in a very careful and gradual approach, as can be seen from the fact that it is an optional protocol. Additionally, we find a two-track strategy where the goal of progressive abolition is complemented by the emphasis on procedural safeguards to those who are sentenced to death, as well as the promotion of categories of persons to whom capital punishment should not be applied in the first place, *e. g.*, mentally handicapped, persons below 18 years of age or pregnant women. These safeguards were adopted by the Economic and Social Council in 1984, 1989, and 1996. The third phase of the establishment of a United Nations' death penalty framework is characterised by the progression of the number of abolitionist countries in the post-Cold War world and the development of a coherent approach which has resulted in the sponsoring of resolutions on the question of the death penalty at the Commission on Human Rights and General Assembly. These initiatives have been met with resistance by retentionist countries which have managed to successfully block the adoption of resolutions at the General Assembly. At the same time, most countries that retain capital punishment have agreed upon a concerted strategy regarding the resolutions adopted by the Commission on Human Rights.

The aim of the seventh chapter is to analyse to what extent the standards developed by the United Nations' two-track capital punishment strategy have been transposed into customary international law. We will examine both the abolition of the death penalty and the exemptions from capital punishment, as well as how they stand in international law, specifically regarding peremptory norms. From a historical perspective, we find a movement towards the progressive abolition of the

death penalty. Notwithstanding, the United Nations' abolitionist 'window of opportunity' has been met with fierce resistance and is still a controversial issue as the permanent members of the Security Council of the United Nations clearly show. Furthermore, the standpoint of the question of the death penalty in terms of international law is also linked to the wider issue of human rights treaties and the kind of obligations that they raise. Likewise, capital punishment as the exception to the right to life is also shaped by the matter of the compatibility between reservations and non-derogable rights. This is also associated with the ongoing debate between states and human rights treaty monitoring bodies as to who has the competence to determine if a certain reservation is compatible with the corresponding human rights treaty.

In our view, the evolution of the issue of the death penalty is an example of the role that norms play in international relations. The United Nations has sponsored the approach that the abolition of the death penalty is in accordance with the aspirational standards set out both in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. We consider that the United Nations has been influential in 'internationalising' the issue of abolition. It is part of the setting of a new standard of civilisation linked to state accountability in respecting and protecting human rights of its own citizens. In this regard, we consider that norms are the result of a two-way process of adaptation to change where states and society are co-constituted. In this process, states identities and interests are not assumed as a given but rather result from interaction between agents and structures, *i. e.*, they are socially constructed. Whilst states are the primary agents of international relations, international institutions such as the United Nations also have a constructive function, and it is important to look at both the international and domestic levels.

The success of the abolition of the death penalty is linked to its norm institutionalisation within the United Nations. In the eighth chapter, we will analyse the debate between abolitionist and retentionist countries especially at the Commission and Sub-Commission on Human Rights. On the one hand, retentionists argue that capital punishment is a sovereign issue within criminal law, whilst on the other hand abolitionists say that its abolition has evolved into an

international human right in its own terms. Retentionist states have dissociated themselves from the resolutions on the question of the death penalty adopted by the Commission and Sub-Commission on Human Rights and have blocked the adoption of similar resolutions at the Third Committee of the General Assembly. The challenge posed by retentionist countries to the process of institutionalisation can be divided into two groups: those that oppose the abolition of the death penalty and those that not only oppose abolition but in addition do not comply with the safeguards and procedural guarantees of persons accused of capital offences.

In order to better understand the nature of this debate, we have chosen to examine the Chinese responses within the United Nations human rights' framework. China is *the* 'hard-case' regarding capital punishment for any country, since it is the leading country worldwide regarding executions and sentences. The death penalty in China is treated almost like a state secret, making the task of ascertaining credible statistics (*i. e.* statistics that reflect reality) very difficult. In spite of this, we consider that it is important to address such an issue even because the sensitivity shown by Chinese authorities reveals the weight and importance attached to the issue of capital punishment. China is not only one of the permanent five of the Security Council and, therefore, a great power, but also the most powerful of the developing countries. This Janus-faced identity is present in its foreign policy which appeals to the best of both worlds. On the one hand, it uses the opportunities offered by its internal market as a goal of foreign policy and on the other hand this is sometimes made at the expense of the promotion and protection of international standards of human rights. The link between these two facets was evident in the aftermath of the 1989 events in Tiananmen where, amongst other policies, the 'China economic card' was used in a conscious way.

In the ninth chapter, we will look into the relationship between China and the United Nations and to what extent the United Nations is, *per se*, important to China, particularly its human rights' framework. We have considered that in the history of this relationship two themes stand out: international recognition and human rights. The former was only resolved in 1971 when the People's Republic of China took its rightful place in the workings of the United Nations and reinforced both its legitimacy as well as the credibility of this organisation. In addition, to fully

understand this issue we have to look at China's standing vis-à-vis the superpowers. As to human rights, China benefited from a state of grace and was, in fact, considered a 'human rights exception.' Furthermore, human rights were not a major foreign policy concern for China which was going through the turmoil of the Cultural Revolution. Its first statements regarding human rights gave pride of place to violation of collective rights such as imperialism, colonialism and racism, focused on the rights of peoples and attainment of national independence and sovereignty, as well as the achievement of a just international economic order.

The Chinese state of grace ended in 1989 and from then onwards, China has been on the spotlight due to the issue of violations of rights in its own territory. We will study how China has coped with human rights as a matter of foreign policy and how it deals with international human rights' treaties. On general terms, it recognised international human rights *per se* and engaged in human rights' discussions with other countries rather than denying the existence of such standards. Its 'wait and see' attitude regarding the International Bill of Human Rights was gradually overcome and China recognised the importance of the Universal Declaration of Human Rights, ratified the International Covenant on Economic, Social and Cultural Rights in 2001 and signed the International Covenant on Civil and Political Rights in 1998. We will also explore the Chinese approach to the death penalty standards established by the International Bill of Human Rights as well as the relevant provisions regarding this matter that are present in the Geneva Conventions and the Convention on the Rights of the Child.

In the last chapter, we will examine the Chinese interaction with the second track of the United Nations' death penalty framework. We will be looking into Chinese compliance with the safeguards and guarantees provided by the Economic and Social Council in the 1984, 1989 and 1996, to persons accused of capital offences. These standards were made with China's agreement and therefore provide us with a yardstick by which to measure Chinese compliance. In order for us to understand the Chinese practice of the death penalty, it is also important to look at the evolution of capital offences in both Criminal and Criminal Procedure Law Codes which were enacted for the first time in 1979 and revised in 1997. Capital punishment is inextricably linked with the criminal system and the

conception of rights that underpins it. We will also explore the position that rights occupy in the Constitution of the People's Republic of China. The death penalty, like human rights in general, was not a foreign policy issue for China until the 80s. Since then, due to domestic and international factors, it has had a more prominent role accompanying the increase of the international debate. Thus, we will be looking at the Chinese participation and reactions to the retentionist strategy regarding the question of the death penalty both at the Commission on Human Rights and General Assembly.

In addition, we will explore the role that capital punishment plays in the several approaches that characterised the Chinese reaction to international criticism of its human rights practices. The first one entailed the actual presentation of a Chinese human rights' discourse, arguing for its practices as culturally appropriate implementation of international human rights' standards and gave absolute preference for the right of development of the whole Chinese people. The arguments of cultural relativism were presented in the publication of White Papers and complemented by the establishment of official research centres such as the China Society for Human Rights' Studies. Moreover, it adopted an aggressive posture criticising western countries for either double-standards in foreign policy or for the failure to live up to human rights expectations at home. We will look into the role that the death penalty plays in this human rights' policy, as in the proposed alternative approach known as the 'Asian Values'. Regarding the latter, we will ascertain if there is a specific regional discourse regarding the death penalty. We will look into the Bangkok Declaration of 1993 and explore the cultural relativist and civilisational claims made by the Asian countries and their emphasis on sovereignty and non-interference. Likewise, we will try to understand the place that 'civilisation' occupies in the Chinese approach to the question of the death penalty and how it deals with the attempt made by abolitionist countries to include its abolition within a new standard of civilisation.

As for the temporal boundaries of our doctoral thesis, we focus mainly on post-1945 international society up until the Commission on Human Rights' session in April 2004. Nevertheless, sometimes these boundaries are extended either to the preceding or subsequent periods. The former is evident in the first chapters

since they deal with the genesis, evolution and expansion of the international society. The latter is more present in some death penalty surveys and updates, regarding juvenile capital punishment, and ratifications of international human rights' treaties. Notwithstanding, these merely reiterate the arguments set forth in the period under study. From a bibliographical perspective, we have treated each chapter as an individual bloc. This is to say that the first bibliographical references start anew each chapter. If, on the one hand, it duplicates references and effort, on the other hand, it does make it easier to read each chapter, avoiding going back and forth looking for the first reference to the book or document in question.

Our main source of research were United Nations' documents and, in this regard, we have also benefited immensely from the United Nations' effort in placing most of its documents online, as is the case of all resolutions adopted by the General Assembly and Security Council. As for human rights and the death penalty, most documents are retrievable from the Office of the High Commissioner for Human Rights and this is especially true of the period after 1993. This has meant easier access to relevant information, which was complemented by the research of United Nations' documents from the United Nations' Office Library in Geneva. The fact that we deal with United Nations' documents also brings with it the advantage of overcoming the language barrier. This is to say that United Nations' documents presented by or including China's approaches and positions regarding human rights in general and the death penalty in particular, are either originally written in English or the translation of Chinese into English is one that is accepted and conforms to the initial document. This makes the task of ascertaining the Chinese approach to the United Nations' capital punishment framework easier and bases it on more solid ground. In addition, as a result of the Chinese human rights foreign policy, we find many crucial documents, such as the White Papers, already written in English, which have the aim of fulfilling the goal of presenting a genuine Chinese discourse to international society. Lastly, all references made to China after 1949 should be understood, unless otherwise indicated, as to the People's Republic of China.

CHAPTER I

THE EVOLUTION AND EXPANSION OF INTERNATIONAL SOCIETY

1. Community, Society, System and their International Dimension

"The criterion of solidarity is the decisive test in the classification of social groups, and if this bond is lacking, or is not strong enough to create the necessary cohesive force, the collective entity fulfils another function- the adjustment of diverging interests. This is the essential feature of a society. Whereas the members of a community are united in spite of their individual existence, the members of a society are isolated in spite of their association."[1]

We begin this chapter with the classical definition of a community, *Gemeinschaft*, and a society, *Gesellschaft*, by Ferdinand Tönnies which has influenced so many scholars of international relations and international law.[2] The relation between these two concepts, community and society, constitutes the theoretical skeleton of our work. A community presupposes unity, common interests and values, and especially solidarity, without which the community would perish, whilst in a society, the main goal is to make some co-operation possible between its members, while striving primarily to achieve their national interests and objectives. When we transfer the ideas of community and society to the international, we find a dualism or a dichotomy.[3]

From a historical perspective, this dualism was defined by the existence of two layers, one exclusively Christian and positive and the other consisting of relations between Christians and non-Christians with a universal scope, applicable

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[1] *Cit in* Georg Schwarzenberger, "The rule of law and the disintegration of the international society", in *American Journal of International Law*, Vol. 33, nº 1, 1939, pp. 56-77, at p. 60.

[2] *Idem, ibidem*; António Vasconcelos de Saldanha, *De Iustum Imperium: Dos Tratados como Fundamento do Império dos Portugueses, Estudo da História do Direito Internacional e do Direito Português,* Instituto Português do Oriente, Macau, 1997, p. 129; Adriano Moreira, *Teoria das Relações Internacionais*, Livraria Almedina, Coimbra, 1996, p. 24; and Marcello Caetano, *Manual de Ciência Política e Direito Constitucional*, Tomo I, Livraria Almedina, Coimbra, 6th Ed. 1989 (1st Ed. 1972), p. 2.

[3] Antonio Truyol y Serra, *Los Descubrimientos Portugueses del Siglo XV y los Albores de la Sociedad Mundial*, Universidade de Lisboa, Lisboa, 1961, p. 23.

to all human beings whether deriving from natural or rational foundations.[4] The evolution of the first layer showed the development of the bounds of community within Christian borders. This growing sense of community, a community which became real in the mid-19th century, when it consciously pursued common goals, produced a specific type of international law, an *intra-ordinal law*. This international law was positive and idiosyncratic, specific to a community. The second layer was founded upon the natural sociability and interdependence of man which enabled a co-existence between different political entities and cultures. This co-existence produced an international law that reflected this aspect of society, fragile and flexible, in which its members dealt with each other in a specific juridical language, an *inter-ordinal law*. [5]

The relation between different systems changed fundamentally with the rise of one of the systems, Europe, which prevailed over the others. Both types of international law co-existed until the rise and dominance of Europe.[6] Furthermore, at the time of the European expansion, the world comprised several systems that related to each other, and although we can find some elements of community bonds within them, the same is not true of the international. There was no consciousness of a world community until this process was carried out by Europe with, at first, a religious and then civilisational goal,[7] and in which the European system, an association of states sharing common rules and institutions that was distinctive from the others, was transformed into a family of nations. This chapter will analyse the evolution and expansion of the European international system and its transformation into a society of states, and a more detailed analysis of the impact of this process in international law will be made in the second chapter.

International relations' theory has dealt with the relation between society and community through different approaches. We will follow Martin Wight's division between the three patterns of thought: the Machiavellians or Realists, the

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[4] See António Vasconcelos de Saldanha, op. cit., pp. 119-125 and Georg Schwarzenberger, op. cit., pp. 59-61.

[5] The concept of *intra-ordinal* and *inter-ordinal* laws belongs to J. M. Mössner *cit in* António Vasconcelos de Saldanha, op. cit., pp. 139-140.

[6] *Ibidem*, p. 112.

[7] Antonio Truyol y Serra, *La Sociedad Internacional*, Alianza Editorial, Madrid, 1983, pp. 27 and 56.

Grotians or Rationalists and the Kantians or Revolutionists. [8] We are aware of the fact that categorisation is always very difficult and it embodies many dangers but we accept it as a starting point. We may find political thinkers that do not fit into one single category and sometimes become "(...) threads interwoven in the tapestry of Western civilisation." [9] The first tradition considers that an international community does not exist. One can only find an international anarchy in which states pursue their own national interest in an environment dominated by conflict and war. Within this approach, we may find for instance Thomas Hobbes and Machiavelli. In contrast, the Kantians consider the importance of an international community, but not only of states, but also of the individuals who are the basis of these states. The goal to pursue is a world society and this approach towards international community is something to work for, in the sense that although it does not exist, it has the potential to exist in the future. Immanuel Kant, Karl Marx and Lenin shared, amongst others, this optimistic view.

The Grotian approach is a more balanced one, containing elements of both the Kantians and the Machiavellians. It describes the international environment as anarchic but it goes beyond the conflict element, considering that it is best described as international intercourse in which states conduct their relations not only in terms of conflict but also in terms of co-operation. Within this tradition we may find Hugo Grotius. The rationalist approach to international relations is strongly linked to our theoretical framework, namely the English School. This is due to the latter's emphasis on the search for a better understanding of the concept of international society and this is very much associated with Hedley Bull's anarchical society.[10] It enables us to grasp the main ideas of what is an international society and how it has evolved throughout the history of thought "(...)

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[8] Martin Wight, *International Theory, The Three Traditions*, Edited by Gabriele Wight and Brian Porter, Leicester University Press and The Royal Institute of International Affairs, London, 1996 (1st Ed. 1991), pp. 7-24. Theories such as Marxism, Critical theory, Post-Modernism (including discourse analysis, genealogy, deconstructionism and textuality), Feminism, Green Politics, are not discussed not because we consider them unimportant but because an account of all theories would imply a PhD of its own. For a thorough account of these theories see Scott Burchill and Andrew Linklater *et al*, *Theories of International Relations*, Macmillan Press, Basingstoke and London, 1996 and John Baylis and Steve Smith (eds.), *The Globalization of World Politics, An Introduction to International Relations,* Oxford University Press, Oxford, 1997.

[9] Martin Wight, op. cit., p. 260.

[10] Stanley Hoffmann, "Foreword: revisiting 'The Anarchical Society", in Hedley Bull, *The Anarchical Society, A Study of Order in World Politics*, Macmillan, London, 2nd Ed. 1995 (1st Ed. 1977), pp. vii-xii, at p. vii.

not as a determining structure or system but as a network of norms and rules governing a society of states."[11] The main actors are the states, but although there is no superior level of decision-making, these states form a society. They do so, through institutions such as diplomacy, international law, the balance of power, war and the role of the great powers. In this sense, these states formulate rules and establish agreements that serve their common interests resulting in moral and legal restraints in terms of foreign policy. Albeit forming an international society, this one remains anarchical, not in the sense of chaos and violence but rather in the absence of government.[12] Nevertheless, the emphasis on society is one of the elements that the English School considers important to understand international politics and this methodological pluralism will be analysed later on in this chapter.

Let us now return to the initial concepts of society and community transposed to the international. We begin by describing the idea of an international system or system of states, which "(...) is formed when two or more states have sufficient contact between them, and have sufficient impact on one another's decisions, to cause them to behave-at least in some measure-as part of a whole."[13] The independent political communities that we are discussing have taken many forms throughout history, from city-states to empires and to modern nation-states. In a system of states, countries have sufficient contact with each other and also impact on their foreign policy, so they take account of the others when making a decision. Noteworthy when we are analysing empires is the concept of the marcher-states, which are usually communities on the border areas that because they are under constant threat, develop a strong sense of cohesion and unity, either in terms of government or of military strength. What really characterises these states is that they admire the civilisation and culture that comes from the centre, and when the centre becomes less powerful, they tend to dominate it. But by doing so, they inherit and preserve the system and the cultural

[11] Martin Hollis and Steve Smith, *Explaining and Understanding International Relations*, Clarendon Press, Oxford, 1991, p. 95.
[12] For a critical view about the meaning and implications of the concept of anarchy see Helen Milner, "Anarchy in international relations theory", in David A. Baldwin (ed.), *Neorealism and Neoliberalism, The Contemporary Debate*, Columbia University Press, New York, 1993, pp. 143-169.
[13] Hedley Bull, *The Anarchical Society, A Study of Order in World Politics*, Macmillan, London, 2nd Ed. 1995 (1st Ed. 1977), p. 9.

standards.[14] This relation between the centre and the periphery, the civilised and the barbarian has been and continues to be a constant throughout history.

The interactions between the members of a system may take the form of co-operation, conflict, neutrality and indifference regarding one another. But when states decide to pursue common interests and values then we may speak of a society of states or international society. Therefore, states "form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another and share the working of common institutions."[15] In this sense, instead of talking about international relations we should discuss interstate relations.[16] They co-operate in forms of procedures of international law, machinery of diplomacy, structures of general international organisations, customs and conventions of war. Furthermore, the rising of a European common culture or civilisation enabled its members to have a better understanding of each other thus making it easier for the definition of common rules and institutions and also furthering interests that they might have in common.

In terms of evolution, we may say that an international society is built upon an international system but we may find examples of international systems that did not become an international society. So, we can find countries that have contact with each other, but aren't conscious of common goals and do not act in a concerted way. First of all, we should start by defining the protagonist of this international relations' approach, the states. These are considered as "independent political communities each of which possesses a government and asserts sovereignty in relation to a particular portion of the Earth's surface and a particular segment of the human population."[17] This conception of the state is extremely connected to the Westphalian system of sovereign states. States are the protagonists of this European society even when sovereignty changed from a hereditary and dynastic character to a popular and nationalist form.[18] From this

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[14] Adam Watson, *The Evolution of International Society, A Comparative Historical Analysis*, Routledge, London and New York, 1992, p. 128.
[15] Hedley Bull, op. cit., p. 13.
[16] Fred Halliday, *Rethinking International Relations*, Macmillan, London, 1994, p. 6 and Antonio Truyol y Serra, op. cit., p. 19. See also John Keane, *Civil Society, Old Images, New Visions*, Polity Press, Cambridge and Oxford, 1998, pp. 84-85.
[17] Hedley Bull, op. cit., p. 8.
[18] Robert Jackson, "The political theory of international society", in Ken Booth and Steve Smith (eds.),

notion derive two very important concepts: internal and external sovereignty. By internal sovereignty, we mean the supremacy over all other political entities, besides the state, within that territory and population. Secondly, by external sovereignty, we mean that there is independence from outside authorities in the international arena.[19]

Moreover, another crucial element of the international society is the importance of international order, which Hedley Bull defines as "(...) a pattern of activity that sustains the elementary or primary goals of the society of states, or international society."[20] These goals are the preservation of the system and society itself, the maintenance of independence or external sovereignty of individual states and the goal of peace. This is not to imply the establishing of a universal and perpetual peace, but rather absence of war among members of the international society as the normal condition of their relationship. Lastly, the elementary goals of international society are also connected with the primary goals of all social life: limitation of violence, keeping promises and agreements, and stability of possession of property. These goals when transposed to the international society, find expression in the concept of just war and its limitations on violence, the principle of the sanctity of treaties, *pacta sunt servanda*, and the mutual recognition of sovereignty.

International order is a very important element of an international society but it is not an absolute value and it has to be seen as fulfilling a positive role in terms of the stability that it enables states to enjoy. Throughout the history of the international society, we find many examples of when this principle clashed with international law and also with the principle of justice.[21] In this sense, smaller or overseas states were sacrificed at the Concert of Vienna of 1815 that reshaped the Westphalian treaties of 1648 celebrated in Münster and Osnabrück. The famous Scramble for Africa was an example where, despite the expansionist foreign policies pursued by the European great powers, a compromise was

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International Relations Theory Today, Polity Press, Cambridge and Oxford, 1996 (1st Ed. 1995), pp. 110-128, at p. 110.

[19] Hedley Bull, op. cit., p. 8.

[20] *Idem, ibidem.*

[21] James Mayall, *Nationalism and International Society*, Cambridge University Press, Cambridge, 1993 (1st Ed. 1990), p. 22.

reached so that order was maintained. The tension between order and justice has always been present and remains without an easy solution. Also, when we analyse international relations we may observe an inevitable tension between order and independence or autonomy, in the sense that the first makes constraints and voluntary commitments acceptable whilst the second tries to enlarge the state's margin of manoeuvre from the other states. This is evident when we look at the European society of states and its institutions and the need to maintain a balance of power to limit hegemonic tendencies from one of the great powers.

The idea of an international society can already be found in the Ancient Greek city-states and in Renaissance Italy in which we see a layer of horizontal relations between political entities and not the classical and common imperial relations. In Ancient Greece, there was a common ancestry, language, religion, a way of life and two great powers, Sparta and Athens. This Hellenic international society also had a strong notion of the barbarian, people who did not speak Greek. In Renaissance Italy, we find the origin of the modern resident ambassadors that helped to develop a sense of shared common interests. Notwithstanding, these international societies did not have the concept of equal sovereignty and the idea of a balanced concert in order to manage the agreed interests and values.

The European society of states evolved and displaced the *Respublica Christiana* of medieval Europe. This was a time of great dynamics and innovation and not essentially feudal, hierocratic and authoritarian. This is the period that saw the birth of the Swiss confederation in 1291 and the Scottish declaration of Arbroath of 1321. Moreover, there was an underlying continuity in the evolution of the territory of the states, and the beginning of the separation of the authority of the church from state affairs with the 1202 *Decretal Per Venerabilum* of Pope Innocent III. In this document it was stated that the King of France did not recognise a superior at all in temporal matters. Moreover, the growing importance of international law and the concept of just war initially studied by St Augustine and St Thomas Aquinas was later systematised by Hugo Grotius.

It is within this atmosphere of change that we see the revival of the Aristotelian political language and thought that was used to classify and assess new forms of government. The period from the Great Schism to the end of the

Thirty Years' War was a time of transition from Medieval Europe to the birth of the European international society. Within this period, we observe the fall of Constantinople and, at the same time, the beginning of the discoveries by the Portuguese and the Castilians. The authority of the Papacy declined not only due to the Reform movement that was initiated by Martin Luther but also due to the Great Schism, the scandals of corruption and its involvement in the Thirty Years' War. During this period, the coming into existence of the press was fundamental for the replacement of Latin by the vernacular languages that enabled the emerging states to consolidate their identity and independence from the church. The space left vacant by the church, was occupied by a secular state that gained control of areas of government and law. [22]

The European international society was built upon the treaties of Westphalia of 1648 and began to deepen its common institutions and values. This was a process carried out not only within and among European states but also outside of Europe. We take 1648 as the starting point for the study of the European international society, despite taking into account that sovereign practices already existed and some medieval practices continued;[23] and that even the concept of sovereignty has evolved and continues to be challenged.[24] With the treaties of Osnabrück and Münster, three main principles were formulated in an explicit way that became core concepts of the European international society. The first one is the idea that the king is emperor in his own realm, *rex est imperator in regno suo*, which can be translated into state sovereignty. Secondly, the idea that the ruler determines the religion of his realm, *cujus regio, ejus religio*, which can be referred to as the secularisation of the state and independence from the church and, lastly, the agreement that religion was no longer a just cause for war. This did not mean a renouncement of war but, solely, that after thirty years of intense

[22] Antony Black, *Political Thought in Europe 1250~1450*, Cambridge University Press, Cambridge, 1993 (1st Ed. 1992), pp. 188-189.
[23] Antonio Truyol y Serra, op. cit., p. 30.
[24] Stephen D. Krasner, "Westphalia and all that", in Judith Goldstein and Robert Keohane (eds.), *Ideas and Foreign Policy, Beliefs, Institutions, and Political Change*, Cornell University Press, Ithaca and London, 1995 (1st Ed. 1993), pp. 235-264.

devastation, especially of central Europe, religion was no longer valid grounds for war.[25]

Moreover, there was a need for the exchange of recognition of sovereignty as a basic rule of coexistence and as the constitutive principle of the system.[26] Furthermore, rulers agreed on the principle of non-intervention in each other's domestic affairs, the rule of equality between states, the notion of neutrality and the fact that treaties were binding upon its successors and expected to be carried out. Also very important was the notion of consent as the basis of obligation to comply with international laws and the development of diplomacy. There was also a centralisation of the power of the monarch alongside the birth of the process of nation building that centuries after would evolve into popular nationalism with the nation-states. Moreover, we see the beginning of the principle of the balance of power that emerges in this period, which is consciously pursued after the Treaty of Utrecht.

The consolidation and expansion of the European international society was carried out through institutions. These are a set of habits and practices that allow you to fulfil common goals.[27] These institutions have three main functions. Firstly, they are the symbols of the existence of the international society, something that is more than just the sum of its members. Secondly, they moderate and restrain powers that tend towards hegemonic behaviour and, thirdly, they are useful working tools in defining the political goals of an international society. Within this framework of co-operation, Hedley Bull distinguished five institutions: the balance of power, international law, war, diplomacy and the role of the great powers. All these institutions are closely linked with one another.

Emmerich de Vattel, the famous Swiss jurist, defined the concept of a balance of power as "(...) an arrangement of affairs so that no State shall be in a position to have absolute mastery and dominate over the others." [28] This is the classic definition of this institution that emerged in Renaissance Italy and spread across Europe together with the expansion of resident embassies.[29] It developed

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[25] James Mayall, op. cit., p. 23.
[26] *Ibidem*, p. 19.
[27] Hedley Bull, op. cit., p. 71.
[28] *Cit in* Adam Watson, op. cit., p. 207.
[29] Henry Kissinger also considers the existence of a balance of power in Ancient Greece but arrives at the

during the 17th century but only after the Treaty of Utrecht of 1713 was it a conscious goal of the system as a whole. This meant that members of the balance of power had two responsibilities. Not only did they have to act in order to prevent hegemonic behaviour but they also had to make a commitment not to disrupt the balance itself. It was King William III of Britain who was the main designer of the balance of power against the hegemonic Louis XIV. These rulers confronted each other over the Spanish Succession that ended France's ambitions to control the Spanish throne via the Duke of Anjou, Louis XIV's grandson. The balance of power as a guiding principle for order was enshrined in the preamble of the Treaty of Utrecht and it was Britain first by default and then consciously, that maintained the balance of European equilibrium.[30]

The balance of power has a positive role in the sense that it enables the other four institutions to fulfil their goals. If a hegemonic state prevails, the concept of common interests disappears. Hedley Bull analysed a general balance of power that had the function of preventing the system from becoming an empire through conquest. He also distinguished this general balance of power from local ones that are envisaged in order to permit the independence of states in particular areas from being dominated by a locally preponderant power. The positive function of preserving order goes further than the simplistic analysis of the balance of power as a pursuit of power and a consequence of facts upon leaders. When the balance of power is looked upon as a conscious goal, it fulfils the expectations of equilibrium. [31] In contrast, from a liberal point of view the principle of the balance of power is considered an instrument of the great powers to exploit the smaller ones and to disregard international law. But for the English School, the balance of power had the objective of maintaining order and that sometimes meant the resorting to war, in that the ultimate goal was not peace but the system itself.

International law was very important for the evolution and expansion of the European international society. It freed itself from the realm of philosophy and theology and was recognised as a distinct body of rules arising from the co-

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same conclusion of Hedley Bull that it was only with the European system that it was performed in a conscious and structured way, in *Diplomacy*, Simon and Schuster, New York and London, 1994, p. 21.

[30] *Ibidem*, p. 74.

[31] Kenneth N. Waltz, *Man, the State and War*, Columbia University Press, New York, 2nd Ed. 1959, (1st Ed. 1954), pp. 209-210.

operation between modern states. It developed three main functions the first being the identification as the supreme normative principle, the idea of a society of sovereign states; this is called the fundamental or constitutional principle; secondly, it listed the basic rules of coexistence among states such as non-intervention, mutual recognition of sovereignty, and the rule *pacta sunt servanda*; thirdly, it helped to develop some rules of coexistence based on the rules of co-operation.[32] During the expansion of the European international society, it played an important role regarding the explicit formulation of the standard of civilisation and questions of extraterritoriality. It also enabled the states to communicate with each other using the same concepts and the same language.

Diplomatic practices have been present throughout history, but they rose to new heights in the 15th century with the emergence of permanent embassies in Italy.[33] This institution expanded and grew in importance in that the legal recognition of the extraterritoriality of the foreign services by Louis XIV was crucial as was the emergence of the diplomatic corps in the 18th century. Non-European states such as China, the Ottomans, Korea, Japan and Siam were incorporated into the European diplomatic mechanism in the late 19th century. This institution is strongly linked with international law, since it implies the acceptance of complex rules and conventions and it is made possible by the concept of non-interference in the affairs of other states by diplomats who in return have diplomatic immunity.

The diplomatic mechanisms developed in a very gradual way and accompanied the evolution of the international society. There was a greater need for negotiating that led to permanent embassies at least regarding the great powers and these diplomats became professionals with the goal of providing their ruler with an accurate description of the foreign country. Diplomacy enabled members of the international society to have better communications not only between the rulers and the diplomats but also among the powers. This allowed for the gathering of correct information that enabled better negotiations of agreements. In the beginning of the 19th century, the military attaché began to be formalised within the diplomatic machinery. Furthermore, it helped to preserve the

[32] Hedley Bull, op. cit., pp. 134-135.
[33] Justin Rosenberg, *The Empire of Civil Society- A Critique of the Realist Theory of International Relations*, Verso, London and New York, 1994, p. 66.

goal of order by minimising potential misunderstandings and friction. We may consider diplomacy as a symbol of the existence of an international society since its existence is due to the observance of common rules and goals to which states pay some allegiance.

The fourth institution is war, in the sense of a settled pattern of behaviour, shaped in terms of promoting common goals. We may define war as organised violence carried out by political units against each other.[34] States have sought to preserve for themselves the monopoly of the legitimate use of violence not only internally, which is one of the conditions of a sovereign state, but also in interstate relations. It has functioned both as a manifestation of disorder and as an instrument of state policy. The former we may find when we look into the violent hegemonic behaviour of many rulers such as Louis XIV or Napoleon. In these cases, there is the intention to subvert the equilibrium of the balance of power. The latter is exemplified by the war conducted against these two kings in the sense that it was the last resort to maintain the balance of power. Moreover, by preserving the balance of power it has helped to preserve the goal of order. In this regard, the perception of war has had an effect on how institutions of the international society evolve. War is perceived as a threat that must be contained and also as an instrumentality, which can be used to achieve other purposes. The perception of war as a threat has led to the establishment by international law of limits, such as the concept of just war. Moreover, it has sought to restrict the geographical scope of wars that have broken out through the laws of neutrality. The attempts to curb unlimited war can be seen as well at Westphalia when states renounced religion as a cause to resort to war, in the League of Nations' Covenant, in the Kellogg-Briand Pact and in the United Nations' Charter.

War as an institution fulfils a positive role due to the fact that it can be an instrument to enforce international law, whenever there is a case for self-defence and when it is carried out, by third states, on behalf of the victims. More doubtfully, the international society has sometimes regarded war as having a positive function when it aims at bringing about just change and not as an instrument of the great powers. The main argument behind this idea is the fact that international order is

[34] Hedley Bull, op. cit., p. 178.

notoriously lacking in mechanisms for peaceful change and that it is very difficult to achieve consensus on a universal notion of justice.[35] The last institution is the role of the great powers "(...) which are recognised by others to have, and conceived by their own leaders and peoples to have, certain special rights and duties."[36] This idea presupposes the concept of an international society, not an international system. It assumes that special rights and duties regarding shared rules and institutions as belonging to the great powers. This is the outcome of the inequality of states regarding their capabilities and power.[37] The recognition is two folded, in the sense that it involves the great powers acknowledging this responsibility and the remaining members of international society agreeing to this special role.

Great powers can and sometimes do sustain international order, by having a role in preserving the general balance of power, controlling crises and wars in relation with one another, by unilaterally exploiting their local preponderance and agreeing to respect one another's spheres of influence, or even by joint action. Regarding the unilateral exercise of their preponderance, it may take the form of dominance, hegemony and primacy. We may find historical evidence of spheres of influence in the Papal Bulls assigning to Portugal and Castile the exclusive rights of conquest, the Iberian agreements of Alcáçovas and Tordesilhas, the Monroe doctrine of 1823 and the Cold War world. Nevertheless, international order sustained by the great powers does not always fulfil the need of justice for all states. The main question is if perfect justice is possible or if an accepted role of the great powers as custodians and guarantors of international order is the best solution. A great power can only fulfil its managerial expectations in a stable way if it is accepted by a large number of the members of international society, so that it commands legitimacy.

On balance, we may characterise the European international society as having evolved from the *Respublica Christiana*, in which its members are sovereign states linked to the rise of Europe after 1648. It was an association of sovereign states that had a high degree of cultural homogeneity and agreed upon

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[35] *Ibidem*, p. 183.
[36] *Ibidem*, p. 196.
[37] Herman Mosler, "The international society as a legal community", in *Collected Courses/The Hague Academy of International Law*, Vol. 140, 1974/IV, pp. 1-320, at pp. 25-27.

the need for international order. It expanded its boundaries up to a point in which separate political entities came together through the leadership of the European international society. The expansion of the international society led to a global international society and it had two main phases. The first one started with the Portuguese discoveries in the 15th century, and lasted until the partition of Africa in 1884-1885. In this phase, the Europeans expanded, incorporated and dominated almost the rest of the world. In the second phase that overlaps with the first one, the areas dominated by the Europeans became independent and also member states of the international society. During this phase, we have to distinguish the pioneering efforts of the American Revolution and of Japan from the later African and Asian revolutions of the post-1945 world. The main characteristic of this European international society is its evolutionary body of rules and that "it is a truism, easily forgotten, that the West, in its modern phase, has not stood still."[38]

[38] Paul A. Cohen, *Discovering History in China, American Historical Writing on the Recent Chinese Past*, Columbia University Press, New York, 1984, p. 12.

2. The Expansion of the European International Society

"Homens intrépidos, dispostos a morrer por Deus e pelo seu rei, mas não ansiosos por o fazer. Acima de tudo, homens absolutamente seguros dos seus objectivos e dos seus direitos, convencidos de que a própria noção de direito era propriedade sua."[39]

The expansion of Europe clearly demonstrated the existence of a parallel evolution between a European society and the existence of a multi-systemic world in which coexistence did not imply the sacrifice of the characteristics that made each system unique and individual.[40] This multi-systemic world only lost its operational conditions when one of the parts, the Europeans, in the 19th century became so dominant that it eventually disrupted this balance and imposed its values and civilisational standards on the others. The development of this intersystemic world with an international law of its own is closely connected to the relations, especially between Christianity and Islam around the Mediterranean basin. It functioned as a bridge between different cultures and religions.[41] In fact, Europe inherited not only a tradition of war against Islam, but also a tradition of intense contacts and relations.[42] Roberto Ago demonstrated the vitality of the Mediterranean basin in the 9th century carried out by three protagonists, Orthodox-Byzantium, Arabic-Islamic and Western Christianity and challenged the idea of a Medieval world characterised by three different communities that led separate lives.[43] For this author, in the Medieval Mediterranean area one pluralist international community existed at the beginning of the 9th century instead of a plurality of different communities.[44] Although we do not share this opinion as to the

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[39] João da Veiga Coutinho, *Uma Espécie de Ausência, Viver na Sombra da História*, Cotovia/Fundação Oriente, Lisboa, 2000, p. 118. "Intrepid men, willing to die for God and their King, but not anxious to do so. Above all, men absolutely sure of their goals and rights, convinced that the very notion of law was theirs." (translation is ours).

[40] António Vasconcelos de Saldanha, op. cit., p. 103.

[41] Antonio Truyol y Serra, *Los Descubrimientos Portugueses del Siglo XV y los Albores de la Sociedad Mundial*, Universidade de Lisboa, Lisboa, 1961, p. 10.

[42] *Idem*, *La Sociedad Internacional*, Alianza Editorial, Madrid, 1983, p. 37.

[43] Roberto Ago, "El pluralism de la comunidad internacional en la epoca de su nacimiento", in *Estudios de Derecho Internacional, Homenaje al Professor Miaja de Muela*, I, Editorial Tecnos, Madrid, 1979, pp. 71-97, at pp. 94-96.

[44] *Ibidem*, p. 97.

existence of such a community, we do agree with the fact that it is impossible to look at international law without taking into consideration the contributions from Byzantium and Islam. For instance, the settlement of foreign communities in Constantinople and Alexandria led to the formation of a series of norms and juridical rules in order to preserve these colonies and may be considered the starting point for what came to be known as the capitulations regime. Moreover, it also points out the dynamism and flexibility of borders among these three entities, in other words, frontiers and not boundaries, the latter being understood as a political-juridical concept intimately linked with the rise of the sovereign state and the need to establish limits to the exercise of state authority.[45]

At the beginning of the European expansion we find several systems, namely five: the Arabic-Islamic, the Indian, the Chinese, the South Americans and Latin and Greek Christianity.[46] These systems contained very specific elements that made them unique and not universal, although their aim was to be so. When we look at the role of the Roman and Chinese empires, even these political entities were not able to impose their will on the world, and instead were confined to their regions of influence, with this more a consequence of historic and cultural reasons rather than geographic.[47] This intersystemic approach clashes with the idea of a universal family of nations which existed before the 19th century.[48] This school of thought considers that such a family of nations existed well before the predominance of Europe in world affairs and is founded upon the natural law community. According to this school, the relations between political entities were not discriminatory and worked irrespectively of internal political, religious and social arrangements. Within this framework, the protagonists were the existing governments, also considered to be *de jure*.[49] This of course, contrasts heavily with the 1800s concept of constitutive recognition *via* a standard of civilisation.

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[45] Antonio Truyol y Serra, "Las fronteras y las marcas, factores geografico-politicos de las relaciones internacionales", in *Revista Española de Derecho Internacional*, Vol. X, nº1/2, pp. 105-123, at p.111.

[46] Antonio Vasconcelos de Saldanha, op. cit., p. 101.

[47] Antonio Truyol y Serra, *Los Descubrimientos Portugueses del Siglo XV y los Albores de la Sociedad Mundial*, Universidade de Lisboa, Lisboa, 1961, pp. 4-5.

[48] C. H. Alexandrowicz, "The Afro-Asian world and the law of nations (historical aspects), in *Collected Courses/The Hague Academy of International Law*, Vol. 123, 1968/I, pp. 117-214 and "Doctrinal aspects of the universality of the law of nations", *in The British Year Book of International Law*, Vol. 37, 1961, pp. 506-516.

[49] *Idem*, "The Afro-Asian world and the law of nations (historical aspects), in *Collected Courses/The Hague Academy of International Law*, Vol. 123, 1968/I, pp. 126-127.

Notwithstanding the merit of this approach that points out the richness of dealings between Europeans and non-Europeans, especially Asians, we do not agree that these different political entities formed a community that aimed at pursuing common goals and values. One of the classical examples given to illustrate the idea of the universal family of nations is the 1536 alliance between the Ottomans and the French, specifically, the letter written by Francis I of France to Pope Paul III. First of all, we have to bear in mind that the translations that were carried out did not faithfully obey the original version, in which instead of speaking of the universality of the family of nations we find the expression of natural association of mankind. [50] Secondly, from the Ottoman point of view, this alliance was seen as a unilateral concession which was not even confirmed by Sultan Suleiman. This is inextricably linked with the notions of *Dar al-Islam*, territory of Islam and peace, and *Dar al-Harb*, territory of the enemy and war, in which equality between the two is inadmissible.[51] Thirdly, this alliance generated a controversy within Europe as to whether it was or not an *impium foedus*, *i. e.*, an impious alliance that aimed at destroying Christian powers. This is something that we can link to the idea referred to above, that the relations with Islam were not just characterised by struggle and war. To fully understand this dialectic between these two religions, it is also necessary to take into consideration that Western Christianity was not a monolithic bloc. We find many examples of situations in which treaties were concluded between Christian and Islamic rulers, for instance, the 1369 alliance between the King of Portugal and the ruler of Granada against the King of Castile. The best example is perhaps given by the 24 treaties concluded between Aragon and various Islamic rulers from Granada to Egypt.[52]

If the condition of not being an aggressive alliance against a Christian power and, therefore, breaking the solidarity element of the European community was met, there were no major obstacles to the conclusion of relations with foreigners, more evident in commercial relations in times of peace but also extending to military alliances. To this worldview, the Christian element of a

[50] The problems and implications arising from these translations are dealt with by António Vasconcelos de Saldanha, op. cit., pp. 123-124.
[51] S. Mahmassani, "International law in light of Islamic doctrine", in *Collected Courses/The Hague Academy of International Law*, Vol. 117, 1966/I, pp. 201-328, at pp. 250-251.
[52] This was the conclusion of Luís Garcia Arias, *cit in* António Vasconcelos de Saldanha, op. cit., p. 134.

universal natural society is crucial and was the major driving force of relations with the outside world. To look at Muslim power only as a "Saracen tyranny" or having the idea that "there need be no scruples about conquering them and setting up true Christian rule in their stead" is to simplify a complex reality. To think of Europe disdaining and setting aside these principles when dealing with foreigners is to conduct a superficial analysis.[53] There is much more in the relations between Europeans and Muslims than the Manichean view of total peace or crusades.

The striking feature of this expansion was its continuous process of challenge and accommodation between Europeans and non-Europeans. One might think that, due to the impressiveness of this process, it was a highly organised and coherent project. On the contrary, the expansion of Europe was carried out mainly by five great powers, Portugal, the Netherlands, France, Britain and Spain, which competed between themselves for the new dominions. It began with the Portuguese and Castilian discoveries of the 15th century and spread to other countries in Europe. Within the leaders of this expansion, we find different approaches regarding the best way to deal with the new lands and products. So, during this period, we may find companies like the Dutch *Verenigde Oostindische Compagnie* (VOC), and the English East India Company, but also state sponsored projects and even private entrepreneurs.[54] Moreover, the tremendous rivalry between the European powers was the main cause for armed struggles both in the colonies and in Europe.

There were many reasons for this expansion, namely trade, new territories, material advantages, hope for new treaties and alliances, the quest of defeating the Ottomans and also the will to 'export' religion and finding the mythical Christian kingdom of Prester John. All these motives formed a complex web that played a part in the expansion of the great powers. Furthermore, we find support for this enterprise in all areas of society. It motivated the Church, was led by kings and knights and appealed to merchants. The Church saw an opportunity of spreading Christian faith; kings saw it as a way of strengthening the rising centralisation of

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[53] See Michael Donelan, "Spain and the Indies", in Hedley Bull and Adam Watson (eds.), *The Expansion of the International Society*, Clarendon Press, Oxford, 1985, pp. 75-85, at p. 77.

[54] For an elucidative outline of the differences between Portugal, the Netherlands and Britain regarding expansion overseas see Sanjay Subrahmanyam, *The Portuguese Empire in Asia 1500-1700, A Political and Economic History*, Longman, Essex and New York, 1993, pp. 212-215.

the Crown and seizing new territories. Moreover, prestige played a very important role both in the motives of monarchs and also of noblemen who saw a window for enhancing their social status and privileges. For the merchants, this enterprise meant new markets and products as well as the possibility of achieving greater wealth enabling them to climb the social ladder.

The expansion of European international society was in three main directions. First and foremost, to the south and west in order to re-conquer Christian land from the Muslims. This expansion that began by regaining land from the Muslims continued overseas and became the great maritime expansion of Western Europe. Secondly, the European international society also headed south-eastwards to the lands that had once been Christian but not Latin. This expansion was mainly directed at the Holy Land, Syria, Egypt and the Byzantine Empire and it had one main contestant, the Ottoman Empire. This empire managed to deal a fatal blow in 1453 when it conquered Constantinople and it would take centuries before the Europeans had, once again, influence in this area. Lastly, it went eastwards from Scandinavia, German lands and Poland to non-Christian areas near the south and east of the Baltic. This was possible only until the rise of Russia, which enforced its Christian orthodox faith. All these directions expanded the influence of Europe in the world but the greatest and most long lasting was the expansion overseas, and this is the direction that we are referring to when we analyse and describe the expansion of European international society.

One of the main actors in this process was the Papacy either by attempting to regulate the new territories between the colonial powers, or by justifying this religious, legal and military enterprise as a way of expanding Christian faith. Nonetheless, unlike the crusades that were headed and co-ordinated by the Holy See, the European expansion was organised by the states. The Papacy was strongly connected to the first countries that led the expansion overseas, Catholic Portugal and Castile, then Spain. The Iberian expansion could not have been more different in the way it was conducted in the new territories. Portugal, the leader of the Discoveries, began by initiating a commercial intercourse that made its greatest impact in the East. In this project we can see the importance of a national policy of centralisation of power as well as the influence of a search for

legitimacy by the new dynasty, after a war against Castile. In fact, one of the reasons for the expansion project was the need to find an alternative path in order to avoid Castilian encirclement.[55] With the discovery of the sea route to India, after the successful attempt by Bartolomeu Dias to sail around the Cape of Torments (then renamed the Cape of Good Hope), the Portuguese sought to establish a trading pattern with the local populations rather than Europeanise the native populations. Although the Crown sponsored this project, we can find much evidence of the role of individuals and their impact on the expansion of the Portuguese empire,[56] and this European country became an important member of the commercial pattern.[57] Castile (and then Spain) had a different approach to the new territories, with their population aiming at imperial incorporation. It began a huge effort to convert the native populations to the Catholic faith. Furthermore, the language and law of Castile were implemented in an attempt to produce another European society with its customs, religion and civilisation.

Unlike these two Catholic countries, the Dutch began their expansion not by designating viceroys acting on behalf of the Crown but by companies of private merchants that played a major role in shaping the core values of this European international society. It did not seek to divide the new world into two spheres like its Iberian predecessors and, indeed, pursued the principle of *mare liberum*. This concept had an emphasis on the anti-hegemonic assumption that sea navigation should be free and open which clashed, for instance, with the Portuguese policy of *cartazes* in the Indian Ocean. Furthermore, it also helped to define the idea of a balance of power with its tone of anti-hegemony, since it aimed at curbing the Iberian hegemony in the new territories. Along with the Dutch came the English and the French. The English and French empires grew immensely and competed with each other on several areas like the Indian subcontinent and in America maintaining, at the same time, a balance of power with special regard to each other.

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[55] For a compelling and thorough study of the Portuguese expansion and also the motives behind it see Luís Filipe F. R. Thomaz, *De Ceuta a Timor*, Difel, Lisboa, 1994.

[56] For an excellent approach to the role of the adventurers in the Portuguese *Estado da Índia* see Sanjay Subrahmanyam, *Improvising Empire. Portuguese Trade and Settlement in the Bay of Bengal, 1500-1700*, Delhi, Oxford University Press, 1990, pp. 137-160.

[57] Adam Watson, "European international society and its expansion", in Hedley Bull and Adam Watson (eds.), op. cit., pp. 13-32, at p. 19.

Parallel to these different approaches regarding expansion overseas the European international society began to take a more coherent form. The starting point was, as we have already seen, the Westphalian agreement considered the "(...) last of the great wars of religion and the first of the wars of modern states."[58] Then followed the Treaty of Utrecht in 1713 in which the principle of the balance of power was explicitly and consciously pursued and the Vienna Congress of 1815. Although several other conferences were held, these were the ones that shaped the international society, especially Vienna in 1815. This congress began a new form of relations between the great powers, the practice of settling their affairs by means of congresses at which treaties were supplemented by agreements on general rules and institutions. At these congresses, non-Europeans were not invited and only Christian powers attended them. Moreover, they began the codification of system practices into a set of regulatory rules of war and peace that became international law.

In this century, we can observe a decisive change both in the relation of Europe with the rest of the world and in the organisation of European society. The threat of the French Revolution and the imperial war waged by Napoleon shook the foundations of this European international society that had been working within a common cultural framework. The subversive principles of 1789 were so challenging to the international order that even history had to step in and help by providing the political stability shattered by the violence of the French Revolution.[59] In the 19th century, there were collective agreements and joint-interventions and the need for a diffused and balanced hegemony of the five European great powers: Prussia, Britain, Austria (after 1867 Austria-Hungary), France and Russia.

Parallel to this development of the international society, the Industrial Revolution had a profound impact on the economic and military power of Europe. It enabled Europe to have no other rival and become increasingly aware of its superiority, not only in economic and military terms but also of its institutions and civilisational values. This military superiority was not only technological but also in

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[58] Joseph S. Nye, *Understanding International Conflicts, An Introduction to Theory and History*, Longman, New York, 1997, p. 3.

[59] See Richard J. Evans, *In Defence of History*, Granta Books, London, 1997, p. 16, and also R. J. Vincent, "Edmund Burke and the theory of international relations", in *Review of International Studies*, 1984, Vol. 10, pp. 205-218.

terms of the discipline and command of its paid armies that had come a long way from the *condottieri* of the 14th and 15th centuries. Moreover, logistics, mathematical and topographical skills were improved, as were communications, especially railways. This enabled European armies to move faster and with better points of reference. In addition, the advancements in medical knowledge meaning faster recovery from injuries and better prevention of diseases played a part in enhancing European military superiority.

All these factors enabled Europe to unite under its leadership the whole world that thus became integrated into a single network. The main difference from the previous centuries was that Europe no longer mainly concerned itself with settlements and trade but also with imposing its administration and civilisation on almost all Asia and Africa. The best way to illustrate the difference of approach to non-Europeans is through the analysis of the relations of Europe with Asian and African powers in this process of expansion. When the Portuguese reached India, they found "(...) a well-established network of states with a hierarchy of suzerain-vassal relations", perceptible through the records of the East India Companies, collections of treaties, memoirs of diplomatic envoys and classic writers.[60] For instance, Edmund Burke had a very positive perception of India with its "people for ages civilised and cultivated", and in which civilisation did not stop at Europe's borders.[61] The same could be said of Persia, for instance, and the relations that were established were complex and intense, and "(...) it took place in the framework of a mutually acceptable diplomacy, with respect for diplomatic privileges and immunities, and in an atmosphere of conscious interaction of similar principles of inter-state conduct."[62] It is what Professor Truyol y Serra describes as a kind of international law although marginal when compared with European public law but "*expressando espontaneamente un derecho naturale de comunicacion humano.*"[63] From the 16th to the 18th centuries, trade was instrumental in bringing about this relation. In the 19th century, this situation changed with the supremacy of Europe, and it is in this atmosphere that most African political entities were in

[60] C. H. Alexandrowicz, "The Afro-Asian world and the law of nations (historical aspects), in *Collected Courses/The Hague Academy of International Law*, Vol. 123, 1968/I, p. 129.
[61] See Arnold Toynbee, *A Study of History*, Oxford University Press, Oxford, 1972, p. 216.
[62] *Ibidem*, p. 207.
[63] Antonio Truyol y Serra, op. cit., pp. 20-21.

some way or another, colonised. The fact that most of them were heterogeneous and not easily classifiable facilitated the process of integration into the European expansionist projects. In other words, "in Asia, trade was at the centre of the confrontation, in Africa it was acquisition of territory."[64] Whilst in Asia the process was led by Portugal, Spain, Britain, France and The Netherlands, the main thrust in Africa came from the newcomers in the continent's affairs: Italy, Belgium and Germany.[65] This new rivalry was concerted at the Berlin Conference in which the two main principles, effective occupation and notification, were enunciated. From then onwards, the race to occupy and assert influence in Africa was mainly done through the institution of the protectorate. This century, in which the two phases of the expansion overlap, saw the first newcomers to this international society in their own right: the United States (US) and later, Japan. These states were very different and both played a crucial role regarding the development of the standard of civilisation although in different ways.

The issue of culture is a very important one in the expansion of Europe and it led to the formulation of the standards of civilisation. This concept "is an expression of the assumptions, tacit and explicit, used to distinguish those that belong to a particular society from those that do not".[66] The latter ones, who don't conform to this "standard of civilisation", are considered to be "not yet civilised" or "uncivilised". This standard was not a static concept and it changed and evolved during the expansion of the European international society and the contact with non-Europeans. Its main development and definition occurred during the 19th century and, in 1905, the standard of civilisation was an explicit legal principle and an integral part of the doctrines of international law. The emphasis is put on the common characteristic of international societies, that they were founded upon a common culture or civilisation, or at least on some of the elements of such a civilisation, whether it is a common language or a common religion.

It is true that the 19th century saw the independence of other former colonies and the birth of new states but their impact upon the criteria of

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[64] C. H. Alexandrowicz, op. cit., p. 206.
[65] *Ibidem*, p. 192.
[66] Gerrit W. Gong, *The Standard of "Civilization" in International Society*, Clarendon Press, Oxford, 1984, p. 3.

membership was not greatly felt. In contrast, the independence of the US had a tremendous appeal and was considered to be one of the four revolutions of modernity.[67] It had a strong connection to the ideas of John Locke such as the need for consent and his idea of the social contract, the *compact*.[68] Nevertheless, the rise of the US was neither a threat to the European international society or a thrust towards the opening of the membership criteria, because the US sought not change but to stay aloof from this European society. The Monroe doctrine proclaimed in 1823 established that the US, although a member of the international society with its institutions such as diplomacy and international law, excluded itself from European affairs and rivalries. The idea was to create a new world without the negative aspects of the decadent European old order. The emphasis on the moral foundations of the United States can be seen as a reaction to what was perceived as the European approach that the ends justify the means.[69]

The US had the conviction that it should avoid entanglements in European affairs. The Monroe doctrine was also proclaimed as a reaction to the possible attempt by the Holy Alliance, Prussia, Russia and Austria, to suppress the revolutions in the Spanish colonies. Therefore, the Americans excluded the Europeans from the Western hemisphere and especially from the American continent. There were also worries about the Russian activities in Alaska, and the Americans were against (at least in principle) intervention in domestic affairs. This unilateral decision of excluding Europeans from the American continent and *vice versa* meant that there were no great implications for the challenge of the European international society. Although a new member, the US put no strain on the membership criteria of the society of states, because it was Christian and white. President Polk reaffirmed the Monroe Doctrine in 1845, as President Grant had done in the 1870s, and the Monroe Doctrine only began to change with President Theodore Roosevelt, who thought that the US should pursue its foreign policy in a more active way. The 19th century also saw new independent states

[67] The other three are the English Revolution of 1688, the French Revolution of 1789 and the Soviet Revolution of 1917. See Viriato Soromenho-Marques, *A Revolução Federal, Filosofia Política e Debate Constitucional na Fundação dos Estados Unidos da América*, Edições Colibri, Lisboa, 2002, p. 80.
[68] Adriano Moreira, op. cit., p. 15.
[69] Henry Kissinger, op. cit., p. 32.

such as Liberia which, because it was Christian, was considered to be civilised and was, therefore, recognised by Britain and other European states, despite the fact that it did not have a Caucasian population. The history of this country began in 1821, when territories were bought from local chiefs and free Negroes settled there. In 1828, they were given the power to elect their own officials although subject to the approval of the governor of the society. In 1838, the colony received a charter and, in 1847, they were declared independent and recognised immediately by Britain. It is interesting to note that the Liberian Constitution in article V, section 13, allowed citizenship only to persons of colour. Liberia celebrated a treaty with the US in 1862. In 1857, it annexed the territory of the African state of Maryland. Liberia's independence was kept mainly due to the support of the US, which was especially important against the French attempts to turn it into a protectorate.

In contrast, the road to independence by Haiti was quite different and had at least a symbolic value since its declaration of independence in 1804 meant the expulsion of the white population. Haiti, former Saint Domingue, was a French colony and the revolution was due to a slave rising. Only after decades of turmoil did it become a republic in 1858. Haiti was recognised by France as an independent country in 1825 and it had two prejudices working against it: the fact that its independence was the result of a violent revolution and the fact that Haitians were not white. Nevertheless, although this revolution has symbolic value, the Haitians were not very interested in the outside world and were regarded as too barbaric and small to change the rules of the game.

The American experience influenced European political thinkers such as Alexis de Tocqueville who after a nine-month visit in 1831-1832, described the appeal of the American political system very well. Nevertheless, he did realise that the main threat to this country was its excessive individualism and an enormous passion for equality. These two combined could become a dictatorship of the majority in the sense that the differences of the minorities would not be respected. This could only be avoided if the passion for equality was tempered by the exercise of freedom.[70] Nevertheless, the entry of the US did mark the beginning of

[70] Alexis de Tocqueville, *Da Democracia na América*, Principia, Cascais, 2002 with a preface by Professor

the change from a purely European society to a Christian and then to a civilised society of states. And it also introduced the second fundamental change, the idea of self-government allied with a republican form of government. Although not a novelty, since we can find it in the Swiss Confederation and United provinces or in old examples such as Venice and Genoa, it had a new impetus and scale, since it implied abolishing the old order.[71]

Unlike the US and the independent colonies of Latin America, other countries such as China, India, Persia and the Ottoman Empire were not very successful in maintaining either their territorial integrity or independence. In the 19th century, the Ottomans became more and more entangled in European affairs but did not play a role in it. In fact, they were forced to negotiate on European terms especially after the Paris conference that ended the Crimean war. Russian and British pressure was deeply felt in Persia and additionally, in 1877, Queen Victoria was proclaimed Empress of India. China was able to maintain her independence but at the cost of territorial integrity. From 1842 onwards, the arrangements imposed by foreigners took on a collective form and became joint-operations of the members of international society. In China, one could find foreign owned shared facilities in several ports, shared river patrols, provisions for extraterritoriality and joint courts and even combined military intervention as in the case of the Boxer rebellion. China did enter this family of nations "but it was only through necessity, not free choice, that China had entered the world community."[72]

The Europeans clearly enforced certain European economic standards and commercial practices particularly when they affected Europeans. Non-Europeans were judged not merely, by how they conducted their external relations but also by how they governed themselves.[73] The last area to be brought under European government was Sub-Saharan Africa and this was done with the Berlin conference of 1884-1885, which was attended by the European countries, with the exception of Switzerland, the US and the Ottoman Empire. This conference is mainly

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João Carlos Espada. The original was published in 1835 (1st Vol.) and in 1840 (2nd Vol.).

[71] Antonio Truyol y Serra, *La Sociedad Internacional*, Alianza Editorial, Madrid, 1983, pp. 42-48.

[72] Immanuel C. Y. Hsü, *China's Entrance into the Family of Nations, The Diplomatic Phase 1858-1880*, Harvard University Press, Cambridge, Mass., 1960, p. 210.

[73] Adam Watson, *The Evolution of International Society, A Comparative Historical Analysis*, Routledge, London and New York, 1992, p. 273.

remembered for its 'scramble for Africa' although it did not in itself divide Africa, which was done through bilateral agreements. Nevertheless, it did provide a collective legitimisation of the partition process with the idea of effective occupation and the international obligations to act as trustees for welfare and advancement of dependant peoples. This precedent was followed by the League of Nations with the mandates system and the United Nations with the trusteeship system. In the second phase, initiated by the US we see a clear difference in the relation of Europe with the non-European world. States came to be recognised if they had a population and territory, a *de facto* government, the capacity to fulfil international obligations and be part of this family of nations.

The main challenger to the Western international society came not from a Christian and white country, but from a non-white Asian state, namely Japan. In fact, the rise of the US reinforced the notion of superiority of the civilisational values of Europe and, therefore, it consolidated the criteria of admission to the society of states. Japan's ascension to being a great power happened by explicitly following western practices and rules. Japan managed to become a great power exactly by using western rules and by applying them domestically. It was a striking pursuit of a national project and in a few decades, Japan managed to transform its tradition of seclusion, anti-foreign sentiment and belief in autarky into a national eagerness to adopt an imperialistic project. Japan adopted western political and economic institutions at a domestic level and followed international law. It was also attracted to the superiority of western technology and showed an immense will to learn. It was so successful in its project of modernisation that it rapidly became a great power.

Between 1895 and 1905, Japan signed the treaty of Shimonoseki after defeating China, participated with the Western powers in the joint-intervention to suppress the Boxer rebellion, signed an alliance with Britain and won the war against Russia. This victory over a great power was very important and not dissimilar to the rise of Russia after the defeat of Sweden (as well as the alliance with Britain and Holland) at the time of Peter the Great.[74] All of this, together with the scrupulous observance of international law especially in the wars against

[74] *Idem*, "Russia and the European states system", in Hedley Bull and Adam Watson (eds.), op. cit., pp. 61-74, at p. 74.

China and Russia and in the joint-intervention in China, granted Japan international respect and credibility. The international society, which started as a European society of states, became western after the independence of the US and global with the rise of Japan.

This was possible due to three factors: the exchange of diplomatic envoys on a permanent basis, the adoption of common forms of international law and the presence of non-European states at the periodic multilateral conferences of the family of nations. With these three elements, it was possible to start a cultural process in which non-European states began to co-operate and to consent either tacitly or explicitly to common rules and institutions. Moreover, the international development of political entities is parallel to the domestic changes that occurred within them and made possible a greater convergence with the Western states. The evidence of this international society is present in the rising number of countries attending multilateral conferences such as The Hague Conference of 1899. This conference was attended by European powers and by the US, China, Persia, Ottoman Empire, Mexico, Japan and Siam. In the following conference of 1907, sixteen Latin American republics joined the other attendants.

At the beginning of the 20th century, a society of states clearly existed and it included representatives from Europe, Asia and America. Additionally, improvements in communications and transport, the deepening economic involvement of countries and the rise of the number of technical organisations helped in cementing international society. The newcomers to this international society accepted its rules and institutions and sought a place in it.[75] Nevertheless, some strain was already beginning to be noticed. When in 1919, the other great powers refused to adopt a racial equality clause, Japan argued that the international legal rules were made not only by Western powers but also for them. The relation between international law and the standard of civilisation, due to its crucial importance that enables us to understand international society, will be analysed in the following chapter by focusing on two different examples of coping with the international society challenge, namely China and Japan.

[75] Hedley Bull, "The emergence of a universal international society", in Hedley Bull and Adam Watson (eds.), op. cit., pp. 117-126, at p. 124.

This tension regarding western influence in formulating international rules extended not only to the denial of the race equality but also to the attempts of abolishing extraterritorial jurisdiction and the unequal treaties celebrated under duress between the great powers and the rest of the world. Even at Versailles in 1919, President Woodrow Wilson's idea of national self-determination was only applied to the empires that had lost the First World War.[76] This had the impact of furthering France and Britain's empires through the mandates' system and a better redistribution of colonies by Italy, which annexed Abyssinia, and Japan which received Shandong. Although the administrating authorities of the mandates system agreed to be held accountable and submitted annual reports to the Permanent Mandates Commission, according to article 22 of the Covenant of the League of Nations, the expectations of the non-European world were not met. Even the wording of article 22 spoke of a fulfilment of an obligation to hold mandates as a "sacred trust of civilisation".[77]

The fulfilment of non-western expectations began to take place after 1945 in a process that has been very well described as "the revolt against the West."[78] The United Nations (UN) and its trusteeship system based on the concept of racial equality helped the process of decolonisation that was already underway. Additionally, the bipolar system that emerged after 1945, in which the US and the Soviet Union (SU) competed for world dominance, had no wish to maintain colonialism.[79] Moreover, the impact of the 1917 Revolution and the role of the SU were tremendous and fuelled some of the liberation movements. At the same time, the UN helped to bring about change in the sense that it provided the forum for that change in the legal and moral environment of international relations. The idea that colonialism was not a fact of nature and could be changed took on a more coherent form, leading to the independence of former colonies. Furthermore, it was in the General Assembly that most of the newly independent countries made their voices heard, as in the case of Resolution 1514 of 1960 in which the need to

[76] See Susan L. Carruthers, "International history 1900-1945", in John Baylis and Steve Smith (eds.), op. cit., pp. 49-69, at p. 54.
[77] Wm. Roger Louis, "The era of the mandates system and the non-European world", in Hedley Bull and Adam Watson (eds.), op. cit., pp. 201-228, at p. 202.
[78] Hedley Bull, "The revolt against the West", in Hedley Bull and Adam Watson (eds.), op. cit., pp. 217-228.
[79] Robert H. Jackson, "The weight of ideas in decolonization: normative change in international relations", in Judith Goldstein and Robert Keohane (eds.), op. cit., pp. 111-138.

a *de facto* government of a territory was no longer an impediment to the independence process. Moreover, the imperial powers were losing their strength and, at the same time, they were not prepared to accept the political costs of maintaining their colonies. Nevertheless, the last empire to start the decolonisation process was Portugal in the aftermath of the revolution of 1974.

On balance, the expansion of Europe to the rest of the world was not a collective and coordinated enterprise and through its institutions, some sort of consensus gradually emerged resulting from a framework of a common culture. The rules and standards were a simultaneous process along with the expansion of the European international society. This society of states was originally a European club of states that considered its civilisation superior and, therefore, laid the criteria of admission in civilisational terms. Once again, the example that may be given is China in the sense that it is absurd that after centuries of existence it could only be considered independent after passing an exam laid out by Europeans in the 1800s.[80] Whilst the international society expanded its geographical scope, the basis for consensus contracted. Throughout the Cold War and, even now, in a post-Cold War world, the majority of states that are members of this international society are not satisfied with the prevailing order. The global international society of today is without the moral and cultural cohesion that underlay the European international society. On the one hand, in the post-1945 world, the recognition of the European conception of an international society of juridically independent states was carried out by non-western countries. On the other hand, consent given to its basic rules and institutions has not been an easy and uncontroversial path and we consider that a global international society does exist but that its existence is fragile.

[80] Hedley Bull, "The emergence of a universal international society", in Hedley Bull and Adam Watson (eds.), op. cit., p. 123.

3. The Three Traditions and Homogeneity

a. The Methodological Pluralism of the English School

"Because international society is no more than one of the basic elements at work in modern international politics, and is always in competition with the elements of a state of war and of transnational solidarity or conflict, it is always erroneous to interpret international events as if international society were the sole or the dominant element."[81]

The English school has been associated with the anarchical feature of international society, a society in which states through institutions such as the role of the great powers, diplomacy, international law, the balance of power and war, share interests and common rules.[82] In this sense, it has been described as a *via media* or a middle road between the Machiavellians and the Revolutionists: "it does not see international society as ready to supersede domestic society, but it notes that international society actually exercises constraints upon its members."[83] This is evident in the very notion of 'anarchical society' in that the anarchy element appeals to realism and the social to the revolutionist.[84] It argues that there is more in international relations than the realist suggests but less than the cosmopolitan desires."[85]

In fact, due to the focus on anarchy and the balance of power, it has been considered to be more of a "soft" or "normative" form of realism rather than a

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[81] Hedley Bull, *The Anarchical Society, A Study of Order in World Politics*, Macmillan, London, 2nd Ed. 1995 (1st Ed. 1977), p. 49.
[82] Due to the focus on identifying and in investigating these institutions, the English School has also been named British Institutionalists, see Hidemi Suganami, "British institutionalists, or the English School, 20 years on", in *International Relations*, Vol. 17, nº 3, September/2003, pp. 253-271.
[83] Martin Wight, "Western values in international relations", in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations, Essays in the Theory of International Politics*, George Allen and Unwin, London, 1966, pp. 89-131, at p. 91 and *International Theory, The Three Traditions*, Edited by Gabriele Wight and Brian Porter, Leicester University Press and The Royal Institute of International Affairs, London, 1996 (1st Ed. 1991), pp. 14-15.
[84] See Hedley Bull, "Society and anarchy in international relations", in Herbert Butterfield and Martin Wight (eds.), op. cit., pp. 35-50.
[85] Andrew Linklater, "Rationalism", in Scott Burchill and Andrew Linklater *et al*, op. cit., pp. 93-118, at p. 95.

tradition on its own.[86] In our view, this is a perfunctory analysis since it clearly departs from realist assumptions.[87] For the English School, the realist attempt to transform international relations into a 'science' with its causal explanation of events or of sequences of events ran counter the need to grasp the meaning of the whole.[88] For instance, the state-centric perspective was criticised by Martin Wight because he considered that the intellectual and moral poverty of international theory was a consequence of the "intellectual prejudice imposed by the sovereign state.[89] In this respect, other approaches to the way states inter-act in international relations, such as world society, were left out because the maintenance of the states' system was understood as the condition for the maintenance of the state itself,[90] and as a result there was not a body of thought to rival political theory.[91] In this regard, rather than presenting a defence of realism, Martin Wight actually began to challenge the realist picture of the state by focusing on international society.[92] Hedley Bull clearly rejected that international anarchy meant the absence of society and *vice versa.* He insisted that the Hobbesian state of nature in international relations, which is a state of war, was not accurate in

[86] See Jim George who considers that at the fundamental discourse level there is no difference between British and American realism in *Discourses of Global Politics: A Critical (Re)Introduction to International Relations*, Lynne Rienner Publishers, Boulder, Colorado, 1994, p. 80; Fred Halliday who considers the English School to be British Realism in *Rethinking International Relations*, Macmillan, London, 1994, p. 98; Chris Brown asserts that the English School is not easily distinguished from realism and it can claim to be closer to traditional rather than structural realism, "World society and the English School: an 'international society' perspective on world society", in *European Journal of International Relations*, Vol. 7, nº 4, December/2001, pp. 423-441.

[87] For a thorough deconstruction of the inclusion of the English School within Realism see João Marques de Almeida, "Challenging Realism by returning to history: the British Committee's contribution to IR 40 years on", in *International Relations*, Vol. 17, nº 3, pp. 273-302.

[88] Stanley Hoffmann, "International society", in J. D. B. Miller and R. J. Vincent (eds.), *Order and Violence: Hedley Bull and International Relations*, Clarendon Press, Oxford, 1990, pp. 13-37, at pp. 16-19.

[89] The other cause was that international politics was less susceptible of a progressivist interpretation, see Martin Wight, "Why is there no international theory?", in Herbert Butterfield and Martin Wight (eds.), op. cit., pp. 17-34, at p. 20.

[90] *Ibidem*, pp. 22-23: "They have seen the maintenance of the states-system as the condition for the continuance of the existing state- a small-scale field of political theory. They have not been attracted by the possibility of maximizing the field of political theory through establishing a world state." In addition, "the almost uniform assumption among international theorists up to 1914 that the structure of international society is unalterable and the division of the world into sovereign states is necessary and natural. Nor is it unfair to see the League and the UN as the expression of a belief that it may be possible to secure the benefits of a world state without the inconveniences of instituting and maintaining it."

[91] Steve Smith, "The self-images of a discipline: a genealogy of international relations theory", in Ken Booth and Steve Smith (eds.), op. cit., pp. 1-37, at p. 7.

[92] João Marques de Almeida, op. cit., p. 282.

describing the international life.[93] The domestic analogy requiring the emergence of a state as the answer to overcome the warlike state of nature was not applicable in international relations. The emergence of a society was not conditional upon the existence of a central state power and as can be observed in domestic societies, the coercive power of the state is not the only reason why citizens obey rules. Instead, Hedley Bull asserted another approach which was both descriptive and prescriptive. The former could be seen from the fact that the conduct of sovereign states was modified by their consciously uniting for certain purposes. The salient feature is co-operation among sovereign states in a society without government. The latter could be observed in the respect for the legal and moral rules upon which the working of the international society depends.[94] In other words, there are duties and rights attached to membership of international society.[95] He pointed out international actions that are contrary to recognised principles of law and morality but that are accompanied by pretexts stated in terms of those principles, attesting the force in international relations of notions of right and wrong, just as actions which conform to them.[96] Likewise, even if a state decides to break a certain rule it is bound to explain and justify itself to other states that are also bound by a common set of rules.

War *per se* does not indicate the absence of international society and can in fact be part of its functioning, *e. g.*, to prevent a hegemonic bid that disturbs the balance of power. Moreover, the distinction between great and small powers is helpful since their managerial role is important to show that beyond the self-help world there is an interest in maintaining international society. Likewise, power is

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[93] Hedley Bull, op. cit., p. 37.

[94] *Cf.* regimes as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area aiming at co-ordination of state-behaviour to achieve desired outcomes in particular issue areas. These result from egoistic self-interest, political power, norms and principles, usage and custom and knowledge, see Stephen D. Krasner, "Structural causes and regime consequences: regimes as intervening variables", in Stephen D. Krasner (ed.), *International Regimes*, Cornell University Press, Ithaca and London, 1984 (1st Ed. 1983), pp. 1-21. The main differences between regimes and international society is that the former presents international relations as a system rather than a society, and focuses on particular issues that result from the coincidence of interests among states and other international actors. In addition, regimes focus on specific international activities which may be temporary and by themselves do not form or present an international society or the primary norms by which this society is structured; see David Armstrong, *Revolution and World Order, the Revolutionary State in International Society*, Clarendon Press, Oxford, 1993, pp. 308-309.

[95] Hedley Bull, op. cit., p. 38.

[96] *Ibidem*, p. 42.

not just 'quantity' but also 'quality', in the sense that quantitative differences as well as qualitative such as beliefs and opinions have an impact on the effectiveness of state power.[97] The English School clearly departs from the realist conception of the balance of power because it sees the balance of power as something that is consciously pursued and not just a mechanical self-adjustment device. In fact the conscious pursuit of the balance of power negates the idea that states are only power politics orientated. Holding the balance gives you a special duty and not a special advantage.

The anarchical society developed by Hedley Bull "whose work was too "Grotian" for the Machiavellians and the Hobbesians but at the same time it was also too state-centric for the Cosmopolitans and the Kantians"[98] does not exhaust the theoretical frontiers of the English School. It is interesting to note that the label 'English School' was advanced within an appeal for its closure[99] and that its membership and origins have not always been a consensual theme.[100] Nevertheless, both the number of scholars and themes that have been explored

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[97] Martin Wight, *Power Politics*, edited by Hedley Bull and Carsten Holbraad, Penguin Books and Royal Institute of International Affairs, 1986 (1st Ed. 1979), p. 81: "It is not possible to understand international politics simply in terms of mechanics. Powers have qualitative differences as well as quantitative, and their attraction and influence is not exactly correlated to mass and weight. For men possess not only territories, raw materials and weapons, but also beliefs and opinions. It is true that beliefs do not prevail in international politics unless they are associated with power (though all beliefs, whether Christianity or Communism or National Socialism, have gone through an important period before they captured state power). But it is equally true that power varies very much in effectiveness according to the strength of the beliefs that inspire its use."

[98] Stanley Hoffman, "Foreword: revisiting 'The Anarchical Society", in Hedley Bull, *The Anarchical Society, A Study of Order in World Politics*, Macmillan, London, 2nd Ed. 1995 (1st Ed. 1977), p. viii.

[99] Roy E. Jones, "The English School of international relations: a case for closure", in *Review of International Studies*, Vol. 7, 1981, pp. 1-13.

[100] Tim Dunne in a landmark study explored the foundations of the English School within the work of the British Committee on the Theory of International Politics. He considered that E. H. Carr was a member of the English School, albeit a semi-detached one, unlike C. A. W. Manning, in *Inventing International Society: a History of the English School*, Macmillan in association with St. Antony's College, Basingstoke and Oxford, 1998. As with any historical account which always implies a degree of selectiveness this 'history' of the English School was contested mainly by Tonny Brems Knudsen who considered that both the British Committee and the International Relations Department of the London School of Economics and Politics played a crucial role. Moreover, he also disagreed with the criteria for membership, "Symposium, theory of society or society of theorists? With Tim Dunne in the English School", in *Cooperation and Conflict*, Vol. 35, nº 2, 2000, pp. 193-203 and "No last word: symposium on Dunne, beyond the watchtower? A further note on the origins of the English school and its theoretical potential", in *Cooperation and Conflict*, Vol. 36, nº 3, 2001, pp. 331-333. For another critique see Hidemi Suganami, "A new narrative, a new subject? Tim Dunne on the 'English School'", in *Cooperation and Conflict*, Vol. 35, nº 2, 2000, pp. 217-226. These arguments were rebutted by Tim Dunne in "All along the watchtower, a reply to the critics of *Inventing International Society*", in *Cooperation and Conflict*, Vol. 35, nº 2, 2000, pp. 227-238.

by the English School has given it "a globally recognised brand name"[101] going beyond the arguments about the boundaries and who should be in or out.

In our view, the greatest contribution of the English School is its methodological pluralism, *i. e.,* the analysis of the three traditions in an integrative way.[102] It was precisely this characteristic that originated a second wave of criticism that focused on the coherence (or incoherence) of the English School approach due to its diversity of opinions.[103] Despite the fact that the English School has become identified with international society, it recognised that the other two elements, namely international system and world society (whether heading towards a world state or not) co-exist and interplay.[104] These three building blocks correspond to the three traditions that we have already outlined and are understood not as a tripartite distinction which is rigid, but interrelated and comprising the subject matter of what is called international relations.[105] Although attention may be focused on one of these elements, namely the element of international society, since at no stage can it be said that the conception of the common interests and rules of states and common institutions worked by them, has ceased to exert an influence, it must never be forgotten that this element is lodged in the context of the other two.[106] The English School adopts a pluralist/multiple methodological approach rather than seeing these elements as a competing paradigms/monist approach and this is the main reason for not equating it with Rationalism.[107] This methodological starting point underpins the distinctiveness of the English School approach to the study of international relations which introduces a third element not only as a *via media* between realism

[101] Barry Buzan, "The English School: an underexploited resource in IR", in *Review of International Studies*, Vol. 27, 2001, pp. 471-488, at p. 471.
[102] Barry Buzan and Richard Little, "The 'English patient' strikes back: a response to Hall's mis-diagnosis", in *International Affairs*, Vol. 77, nº 3, 2001, pp. 943-946.
[103] Ian Hall, "Review article- Still the English patient? Closures and inventions in the English School", in *International Affairs*, Vol. 77, nº 3, 2001, pp. 931-942.
[104] See Hedley Bull, *The Anarchical Society, A Study of Order in World Politics*, Macmillan, London, 2nd Ed. 1995 (1st Ed. 1977), pp. 22-50 (chapter 2).
[105] Martin Wight, *International Theory, The Three Traditions*, Edited by Gabriele Wight and Brian Porter, Leicester University Press and The Royal Institute of International Affairs, London, 1996 (1st Ed. 1991), pp. 259-268.
[106] Hedley Bull, op. cit., p. 40.
[107] *Cf.* Hidemi Suganami, op. cit., pp. 217-226.

and liberalism/utopianism but also as a keystone to an interdependent set of concepts.[108]

Within the English School, importance is also attached to a normative understanding of the ontology of the international society. A system is devoid of any normative content whilst international society has a state-based ontology of international society, in fact the "moral basis of international society is built into its historical development and contemporary structure."[109] The world society focuses on shared norms and values at an individual level which constitute a network of mutual claims, rights, duties, and obligations that pull people together in ways that are qualitatively different from the impersonal forces which create a system. This world society and its "notion of community on a world scale implies a cosmopolitan belief in the oneness of humanity, a belief that might find expression in the structures of a world government, or might be incorporated in an account of obligations compatible with a range of institutional schemes short of world government."[110] In our view, it is the relation between international society and world society that is particularly helpful to understand the role of human rights in international relations. Historically, universalist assumptions of natural law have helped to mitigate the exclusiveness of the idea of a Christian international society.[111] The secularisation of international society has left an unresolved normative challenge that has still to be met.[112] The development of international human rights as a world society element within the international society framework has contributed to the resurfacing of this normative challenge as we shall see later

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[108]Barry Buzan, "The English School: an underexploited resource in IR", in *Review of International Studies*, Vol. 27, 2001, pp. 471-488, at p. 476 and Richard Little, "The English School's contribution to the study of international relations", in *European Journal of International Relations*, Vol. 6, nº 3, September/2000, pp. 395-422, at pp. 397-398. According to Tim Dunne, Martin Wight developed the three traditions as a refusal to accept the dichotomies of realism and idealism, particularism and universalism and power and morality that were developed by E. H. Carr, "All along the watchtower, a reply to the critics of *Inventing International Society*", in *Cooperation and Conflict*, Vol. 35, nº 2, 2000, p. 230.

[109] James Mayall, "International society and international theory", in Michael Donelan (ed.), *The Reasons of States, A Study in International Political Theory*, George Allen & Unwin, London, 1978, pp. 122-141, at p. 124.

[110] Chris Brown, "International theory and international society: the viability of the middle way?", in *Review of International Studies*, Vol. 21, 1995, pp. 183-196, at p. 185.

[111] Hedley Bull, op. cit., p. 32.

[112] Charles A. Jones considers that the Christian heritage is more present in the work of the first thinkers of the British School such as Herbert Butterfield and was then secularised within the discipline of international relations especially after the so-called second great debate between traditionalists and behaviouralists, "Christian realism and the foundations of the English School", in *International Relations*, Vol. 17, nº 3, September/2003, pp. 371-387.

on.[113] Likewise, the co-existence of community and society elements also helps us to understand the European Union situation, where there are supranational institutions and practices attenuating the moral significance of the traditional citizen/non-citizen distinction.[114]

In addition, the English School has been helpful in identifying the institutional structure of contemporary international society and by providing its historical evolution[115] as well as presenting a valid account of the expansion of Europe to the rest of the world.[116] The new entrants have accepted the framework of rules and institutions, though they have reshaped existing ones to eliminate discrimination against them. The leading elements of contemporary societies have accepted a cosmopolitan culture of modernity upon which rests international legal, diplomatic and administrative institutions.[117] In doing so, it has pointed out the need to study the role of culture and cultural differences in order to be able to achieve compatibility between order and justice in international politics. And unlike realism, it does emphasise the importance of moral principles and the creation of consent. In addition, it also focuses on the need to understand the society of states with an awareness of its previous evolution. Only within this comparative framework, is it possible to have an understanding of the present and it, therefore, avoids the fashions of 'presentism' in coming up with present perfect solutions.[118] We agree that "the pattern of an international society, its social contract, sort of speak, is not drawn afresh for each society. It is to a large extent inherited from previous societies."[119]

Nevertheless, like all bodies of knowledge, the English School also demonstrates some weaknesses. It has remained strongly connected to its origins

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[113] Chris Brown considers that "the notion that the state actually *creates* problems simply will not do" in his article, "World society and the English School: an 'international society' perspective on world society", in *European Journal of International Relations*, Vol. 7, nº 4, December/2001, p. 431.
[114] See Andrew Linklater, "Citizenship and sovereignty in the post-Westphalian state", in *European Journal of International Relations*, Vol. 2, pp. 77-103, at pp. 98-99.
[115] Hidemi Suganami, "British Institutionalists, or the English School, 20 years on", in *International Relations*, Vol. 17, nº 3, September/2003, p. 257.
[116] Fred Halliday, op. cit., p. 98.
[117] Hedley Bull and Adam Watson, "Conclusion", in Hedley Bull and Adam Watson (eds.), *The Expansion of the International Society*, Clarendon Press, Oxford, 1985, pp. 425-435, at pp. 430-435.
[118] Fred Halliday, op. cit., p. 26.
[119] Adam Watson, *The Evolution of International Society, A Comparative Historical Analysis*, Routledge, London and New York, 1992, p. 318 and James Mayall, *Nationalism and International Society*, Cambridge University Press, Cambridge, 1993 (1st Ed. 1990), p. 6.

in diplomatic history and this is very evident in the reluctance to take account of the rising role of economic and social factors.[120] The expansion of the international society is intimately linked with the rise of capitalism and its economic expansion, and it is not possible to understand the scope of European superiority without taking into account the Industrial Revolution. Moreover, its starting point from political philosophy and its conceptual schema meant that instead of trying to assess and study the evolution of international relations and its changing priorities it was mainly concerned with recurring themes.[121] Moreover, we can observe an uneasy relation with the Kantian pattern of thought, like crusaders or fanatics dividing the world into "(...) those who are of true faith and the heretic, the liberators and the oppressed."[122] In our view, this is an unfair characterisation and there are many more Kantian elements in Hedley Bull's work than might be thought.[123] This is particularly true of his concerns with the compatibility between order and justice, especially regarding human rights, and the issue of international redistributive justice.[124]

Furthermore, the two core concepts, state and society, are not given adequate or even explicit, conceptual elaboration.[125] The holistic concern leads to neglect of the diversity of states as well as to a vagueness of what constitutes a state beyond sovereignty.[126] The idea of a society based on rules, interests, values and institutions needs more elaboration from two perspectives. First, the concept of society itself has changed so much throughout history and, secondly, there is a need to elaborate more the concept of society from the perspective of its

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[120] Richard Little, op. cit., pp. 414-415 and see also Roy E. Jones, op. cit., pp. 1-13.
[121] Fred Halliday, op. cit., p. 26.
[122] Hedley Bull, op. cit., p. 24.
[123] The idea of an universalisation of republican principles of government with its emphasis on the rule of law and the concept that the existence of a society of states depends upon international acceptance and protection of domestic notions of civility does bond the two patterns of thought, see Andrew Linklater, op. cit., pp. 109-111.
[124] The classical reference regarding the issue of justice in international relations is Charles Beitz who focused on principles of international distributive justice that establish a fair division of natural resources, income and wealth among persons situated in diverse national societies in Charles R. Beitz, *Political Theory and International Relations*, Princeton University Press, Princeton, 1999 (1st Ed. 1979), esp. Part III, pp. 125-176. The tension between non-interference and international justice is also very well developed in "Justice and international relations", in *International Ethics*, edited by Charles R. Beitz, Marshall Cohen, Thomas Scanlon and A. John Simmons, Philosophy and Public Affairs Reader, Princeton University Press, Princeton, 1990 (1st Ed. 1985), pp. 282-311.
[125] Fred Halliday, op. cit., p. 27.
[126] Roy E. Jones, op. cit., pp. 1-13.

origins within the state. We need to know more about how societies emerge and how consensus is formed but, in raising this question, we also realise that we have to study the role of force and inequality. In many societies, these two concepts play a determinant role and when we look at inter-state relations, we can also pose another question. The question is to what extent are societies formed not because of shared values but due to the role of great powers to enforce and maintain their idea of what a society should be. There is so much evidence for the crucial role of coercion and force in maintaining a society, although international relations' theory remains aloof from them. It is, however, the case that a discipline's silences are often its loudest voices. [127] For instance, the American Civil War is one of the best situations that illustrate the use of force in order to form a society. Between 1861 and 1865, what was at stake was not just the issue of a different way of life between the abolitionist north and the southern states but a deeper division regarding the federalist philosophy present in the American Constitution. The main issue was to decide who was sovereign, the states or the Union. For President Lincoln, the Union was the sovereign structure that allowed the states to grow whilst, for the confederate states, they were the ones who had decided among themselves to establish a Union and, therefore, historically, sovereignty belonged first to the states. It was this difference of interpretation regarding the federal project that was the main cause of a civil war that was very violent but that enabled the Federal state, and the US that we know today, to survive and consolidate. Internal struggles like the failed Katanga secession from the Congo Republic or Biafra's attempt to escape Nigerian central authority do remind us that the state does not have the monopoly on the use of force but on the *legitimate* use of force.

Norms and rules are important, coercive or not, and they are an essential part of the working of any society. This feature of domestic societies is also present in the expansion of international society, which was also made by employing force. This is clear whether we look into the spread of Christianity or the expansion of the European international society. And this leads us to another question, to what degree are norms really accepted or imposed, and whether

[127] Steve Smith, op. cit., p. 2.

acceptance of norms is cognitive or just instrumental. This is pertinent when we look at the expansion of the international society and the fact that the diffusion of the European norms rested upon European values. They were universal in the geographical sense but they were a product of a European evolution and construction rather than a universal consensus of cultural values.

This is another criticism made of the English School, namely its Eurocentric perspective or rather "west-centricity". Despite the concern for the expansion of international society, there is still a relative lack of knowledge about non-western civilisations. Likewise, the achievements of the West are used as a universal yardstick to assess the degree of development of other societies.[128] In other words, the English School has become a "problem-solving theory" instead of critically self-reflecting that "theory is always for someone and for some purpose".[129] Therefore, instead of trying to reflect critically upon the *status quo* it has become part of it, aiming at explaining but missing the understanding.[130] Although we agree that there is no such thing as context-free knowledge, the importance of incorporating non-European values into the current international society is strongly present in Hedley Bull's prospects for a universal international society. He focused on the legitimacy and authority of the shared norms and values that sustain international society and recognised that although there had been an expansion of the international society, in terms of members, there was also a contraction of the common interests that characterised the European international society.

For Hedley Bull, it was possible for an international society to exist without a common culture, so long as there was a solid network of common interests.[131] At the same time, recognising the problem of the cultural specificity of the cosmopolitan culture, Hedley Bull asserted that there was a need to absorb non-

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[128] Hidemi Suganami, op. cit., pp. 263-265.

[129] This was a critique made by Robert W. Cox to the realist international relations approach , in "Social forces, states and world orders: beyond international relations theory", in Robert O. Keohane (ed.), *Neorealism and Its Critics*, Columbia University Press, New York, 1986, pp. 204-254.

[130] See Steve Smith who considers two types of theories, ones which seek to offer explanatory accounts of international politics and others which see theory as constitutive of that reality and therefore are aware of the need to critically analyse it, op. cit., pp. 26-27 and Martin Hollis and Steve Smith, *Explaining and Understanding International Relations*, Oxford University Press, Oxford, 1990.

[131] See Hedley Bull, *Justice in International Relations, the Hagey Lectures, 12-13 October 1983*, University of Waterloo Press, Waterloo, 1984.

western elements if it was to be genuinely universal.[132] He pointed out two necessary conditions for the continuation of this international society as the means of providing world order. First of all, in order to maintain the consensus that enables countries to co-operate, there is a need to take into account the demands of third world countries. It is also fundamental that the great powers are interested in collaborating in this project. Secondly, this consensus has to tie up with the prospects of the cosmopolitan culture that, at present, underlies its working. There has to be an international political culture, besides the diplomatic culture, that is favourable to the establishment of the international society project.[133] Although he wrote within a Cold War frame of mind, we believe that in the post-Cold War world, his concern for the fact that international relations stubbornly fails to fully address inequality, is very much valid.

We believe that in order to understand fully the dynamics of international society we have to look beyond the international level and also analyse the domestic environment and how they interact. We think that it is important to view the state as an administrative-coercive entity, in addition to the legal-political one, normally used in international relations, as well as the concept of homogeneity. There is also concern for the internal political and social arrangements and not only with international values and practices the better to grasp this relation between national and international levels.

[132] Hedley Bull, *The Anarchical Society, A Study of Order in World Politics*, Macmillan, London, 2nd Ed. 1995 (1st Ed. 1977), p. 305.

[133] *Ibidem*, pp. 304-305. Hedley Bull clearly distinguished between diplomatic culture (the common stock of ideas and values possessed by the official representatives of the states) and international political culture (the intellectual and moral culture that determines the attitudes towards the states system of the societies that compose it).

b. Homogeneity and the State

"a set of norms shared by different societies and which are promoted by inter-state competition (...) based on the assumption of inter-societal and inter-state homology."[134]

Homogeneity implies a similarity of domestic values and organisation of the internal structures of societies and a two-dimensional approach: domestic and international. The notion of homogeneity has been present throughout history and in political thinkers so antagonistic as Karl Marx and Woodrow Wilson. For both, the link between the domestic and the international was vital for the success of their project. Karl Marx believed that in order to achieve a lasting peace it was necessary to abolish capitalism and class struggle paving the way for international peace. Woodrow Wilson thought that peace could be established by a League of Nations, but he considered it essential that these nations were democracies where the control of foreign policy was no longer left to the 'old diplomacy'. The main weakness of this argument was "(...) the failure to consider power and its pursuit as an enduring reality rather than as an anachronistic feature of the old order."[135] The Holy Alliance of the 19th century between Russia, Prussia and Austria also thought that to maintain the international conservative order, it was necessary to suppress revolutionary claims for more freedom and representative governments. For the Holy Alliance, the international order was only possible if the dynastic and hereditary principle was consolidated and, therefore, stability maintained. In contrast, Mazzini saw in the universal triumph of nationalism the answer for peace by way of a Holy Alliance of peoples.[136]

The stress on common values and norms is also evident in other political thinkers such as Voltaire, Vattel and Heeren who described the growing unity of the idea of Europe. Voltaire described a Christian Europe, with the peculiarity of 'give or take Russia' as a sort of 'Great Commonwealth' with the same religion, principles of public and political law. Vattel spoke of a single body, and that Europe

[134] Fred Halliday, op. cit., p. 94.
[135] James Mayall, op. cit., p. 44.
[136] Hedley Bull, op. cit., p. 236.

was no longer a "confused heap of detached parts, each of which had but little concern for the lot of the others."[137] H. A. L. Heeren, the famous Hanoverian analyst of states, discussed a states' system in which both inter-state and domestic levels were connected. This union of several contiguous states had a resemblance of manners, religion and degree of social improvement and was cemented together by reciprocity of interests.[138]

But the political thinker that best captured and explained why deviations from 'internal norms' are so threatening to international relations was Edmund Burke.[139] The French Revolution was a challenge to international order and domestic stability and not just a French affair. For Edmund Burke, the state was a partnership and "as the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are dead, and those who are to be born."[140] Edmund Burke, although a conservative, was not against change *per se*. He commented in favour of the American Revolution but revolutionary France, with all its ferocity against tradition, was a different kind of danger to what he describes as "resemblance and similitude" among members of a society.[141] In his view, the French Revolution was not a civil war but an international one exactly due to its aims and goals, the subversion of internal and European order. He was a firm defender that in order to have peace domestically and internationally, there must

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[137] Adam Watson, op. cit., pp. 206-210.
[138] *Idem, ibidem.*
[139] Edmund Burke, *Reflections on the Revolution in France including Letter to a Member of the National Assembly of 1791*, Edition with an Introduction and notes by L. G. Mitchell, Collection of Oxford World's Classics, Oxford University Press, Oxford, 1999 (the original is from 1790 and this is the ninth edition of 1791). See also R. J. Vincent, "Edmund Burke and the theory of international relations", in *Review of International Studies*, 1984, Vol. 10, pp. 205-218.
[140] Edmund Burke, op. cit., p. 96.
[141] See also Michael Freeman who captured brilliantly the threat to the conservative world of Edmund Burke: "The radical believes that the problems of the old order cannot be solved, its evils not cured within the framework of that order. He concludes that a fundamental new order is required and is prepared to use extreme political means to the end of bringing it about. The radical has an opponent: the generalised conservative. The conservative believes that societies should be thought of as having been built through centuries of human endeavour; that any actual society will be imperfect, containing a mixture of good and evil; that the good should be carefully conserved and the evil carefully remedied; that radicals do not recognise the good that exists and, in their impatience to cure the evil, destroy the good without replacing it with the better. To the conservative, the radical is mistaken about the old order, the revolution and the new order. He does not appreciate the first; he overestimates what the second can achieve; and he does not realise the 'speculative' or 'illusory' character of the third. To the radical, the conservative is at best complacent about the evils of the old order, at worst an apologist for oppression.", in *Edmund Burke and the Critique of Political Radicalism*, Basil Blackwell, Oxford, 1980, p. 3.

be similar forms of political and social order, in a way, homogeneity between the members of this society which exists by virtue of these common political and social norms prevailing within countries. Moreover, he was writing in 1790, well before the hegemonic ambition of Napoleon and the worst horrors of the French Revolution.[142] Burke also states that once the principles of homogeneity and vicinity are accepted, the best defence of the society's interests would be to establish a pre-emptive war against France so that it did not spread beyond its boundaries.[143] For Edmund Burke, international order and peace meant similarity of norms and behaviours both at the domestic and inter-state level.

The radicalism of 1789 is also present in the Revolution of 1917, and it was an even bigger threat because it did not aim at reforming the state but abolishing it, because it was considered an instrument of the capitalist system. One of the main features these revolutions shared with the American Revolution was the belief in progress, in the sense of starting something different and better. It was so antagonistic to what happened in the post-Cold War world in which there was a change, but not in this direction. The demise of the SU was something unforeseen and it had a tremendous impact not only on international affairs but also on international theory. The effect of its sudden demise on International Relations' scholars was compared with the consequences of the sinking of the Titanic on the naval engineering world.[144] It happened very rapidly, without significant bloodshed or interstate war, and contrary to the tendency since 1789, it did not present itself as a credible alternative to the *status quo*, but pursued incorporation into the prevailing norm.[145]

All these events seemed to reinforce the claim of Francis Fukuyama that there was no other viable model on offer than liberal democracies.[146] Although this was not the same as claiming that the spread and consolidation of this model was

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[142] See Edmund Burke, op. cit., p. 220. In fact, he foresaw the problems the military would raise: "this relation of your army to the crown will, if I am not greatly mistaken, become a serious dilemma in your politics".

[143] *Ibidem*, p. 89: "formerly your affairs were your own concern only. We felt for them as men; but we kept aloof from them, because we were not citizens of France. But when we see the model held up to ourselves, we must feel as Englishmen, and feeling, we must provide as Englishmen. Your affairs, in spite of us, are made a part of our interest; so far at least as to keep at a distance your panacea, or your plague."

[144] Peter J. Katzenstein (ed.), *The Culture of National Security, Norms and Identity in World Politics*, Columbia University Press, New York, 1996, p. xi.

[145] Fred Halliday, op. cit., p. 134.

[146] Francis Fukuyama, *The End of History and the Last Man*, Hamish Hamilton, London, 1992.

imminent or even plausible. This claim seemed quite apologetic of American foreign policy, in a time when it was clear who the 'winner' of the Cold War was. For this author, history is defined as a period in which humanity is in conflict over fundamental values and marshals its forces in the international arena for such a competition of values. There is a clear concept of the importance of progress in contemporary history although his concept of liberal democracy is selective and ahistorical. He believes that liberal democracies will prevail as the dominant solution to politics but that they are inherently unstable and liable to self-destruction. This is due to the destabilising effects of *thymos*, which he considers the human drive for recognition and respect, both with regards to relations within states and to those between them. Moreover, his idea that capitalism, which has been developing since the 16th century, will bring the whole world up to current developed labels ignores the fact that the gap between the rich and the poor is widening and the degree to which he believes that democracies are spreading is quite optimistic. Even the dates given for the establishment of liberal democracy in the US (1790) and in Britain (1848) are those of constitutional myth.[147] In these countries, the struggle for access to voting by all layers of the population came much later than in the 19th century. One only has to think of the suffragettes' struggle in order to obtain the right of women to vote to understand the very gradual and slow road of full participation in democratic societies.

But the idea that the SU lost the Cold War is important. The Cold War, in terms of Fred Halliday's concept of homogeneity, was an inter-systemic conflict in which two rival social systems fought. He goes even further than the relationship between states based on shared norms and understandings and his alternative concept of international society can help us explain and understand the collapse of the SU. The Cold War was about two different concepts of international society in which one side prevailed over the other. In this sense, homogeneity is defined in reference to the similarity of domestic values and organisation of the societies. This concept makes an explicit link between the international and the domestic structures of societies. It aims at analysing how, due to international pressure,

[147] For these critiques regarding the conceptual framework of Francis Fukuyama see Fred Halliday, "The end of the Cold War and international relations: some analytic and theoretical conclusions", in Ken Booth and Steve Smith (eds.), op. cit., pp. 38-61.

states are increasingly compelled to conform to each other in their internal arrangements. It takes competition between states as a factor as formative as the growth of more harmonious inter-societal, transnational links. Homogeneity is achieved through competition and also by reinforcing the 'normal' interaction of the stability of states.[148] The state is again a core concept, not in the social-territorial sense, but as a specific set of coercive and administrative institutions which are distinct from the broader political, social and national context in which it finds itself. One can argue that heterogeneity also promotes order and has a positive role since states may co-exist peacefully if they abide by certain rules such as the observance of the principle of non-interference in the affairs of other states. States also conduct their economic relations, maintain diplomatic relations, and agree to the diversity of domestic political organisations. Heterogeneity can even play a positive role, in the sense that it provides an alien threat and, therefore, makes the appeal for national union possible. Historically, however, heterogeneity does promote conflict.[149]

Once again, the issue of order is very pertinent since one can wonder if the state can provide the degree of order that is needed. The concept of the sovereign state has been under constant assault for quite some time. First of all, states are no longer the sole protagonists of international relations and now also have to deal with international organisations, non-governmental organisations as well as individuals. Secondly, some of the questions asked in international relations nowadays are global, whether we are talking about environmental issues, immigration problems or diseases like AIDS, and they require a global answer. Thirdly, economic globalisation and the speed of communications have breached the traditional realm of the state due to its transnational feature. Fourthly, a relevant number of states have been unable to meet the basic criteria of statehood

[148] Fred Halliday, *Rethinking International Relations*, Macmillan, London, 1994, p. 142.
[149] *Ibidem*, p. 141. Fred Halliday also argues that if we are to have a long period of intra-hegemonic peace it has to be based on three pillars: international economic prosperity, the consolidation of liberal democracies in major states and the reduction of the gap between the north and the south. If these three conditions are met, there is an opportunity of dealing with the unfinished business inherited from the Cold War: the formation of a global international society. An international society not in the sense of a club of states with common rules, but of a community of political units united by economic and other transnational ties, and characterised by a broad sharing of political and social values. But, if there is a crisis in one of these pillars, stability and homogeneity are threatened, in "The end of the Cold War and international relations: some analytic and theoretical conclusions", in Ken Booth and Steve Smith (eds.), op. cit., pp. 58-59.

due to lack of government transparency, civil wars and external interference, among other factors. In these 'quasi-states', in most cases, ex-colonies, the elites were not prepared to assume such self-government, either because they lacked credibility or because they were not able to satisfy the economic and political needs of citizens.[150] Most of these countries were powerless to avoid external interference in their domestic affairs, especially within the Cold War background. In these states, the effort of nation building was not very successful in doing what Massimo d'Azeglio at the time of Italian unification prescribed "We have made Italy, now we must make Italians."[151] Fifthly, in some Islamic countries the concept of a secular state, one of the core principles since Westphalia, has not been successfully put into practice. In some Islamic societies, it seems impossible to narrow down the weight of Islamism to the private sphere of citizens' lives since it does have a huge role in the public sphere.[152] Lastly, most third world countries are caught in what has been described as two contradictory prison-houses that were constructed by the West, the sovereign state and its colonial borders and capitalism. The sovereign state is a political and military fortress, a prison-house that is very rigid. Capitalism, in contrast, is irresistibly transnational and constantly overriding the static borders of the sovereign state.[153]

Despite all of these factors, we believe that the role of the state is, albeit with some loss of sovereignty, still central and of continuing importance.[154] It is still the key to framing national choices and its much hyped successor, globalisation, still comes short of providing a satisfactory alternative to the role of the state.[155] The state has withstood challenges and proven to be very resilient especially in

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[150] See Robert H. Jackson, "Negative sovereignty in sub-Saharan Africa", in *Review of International Studies*, vol. 12, October 1986, pp. 247-264 and "Quasi-states, dual regimes and neo-classical theory: international jurisprudence and the third world", in *International Organisation*, vol. 41, nº 4, Autumn 1987, pp. 519-549.

[151] *Cit in* Timothy Baycroft, *Nationalism in Europe 1789-1945*, Cambridge University Press, Cambridge, 1998, p. 34.

[152] João Marques de Almeida, "O Pan-Islamismo radical e a ordem internacional liberal", in *Nação e Defesa*, Winter 2001, nº 100, 2nd series, pp. 107-120.

[153] See Ali Mazrui, "Africa entrapped: between the Protestant ethic and the legacy of Westphalia, in Hedley Bull and Adam Watson (eds.), op. cit., pp. 289-308, at p. 289.

[154] See March W. Zacher, "The decaying pillars of the Westphalian temple: implications for international order and governance", in James N. Rosenau and Ernst-Otto Czempiel (eds.), *Governance without Government, Order and Change in World Politics,* Cambridge University Press, Cambridge, 1993, pp. 58-101.

[155] Stephen Hopgood, *American Foreign Environmental Policy and the Power of the State*, Oxford University Press, Oxford, 1998, p. 4.

areas regarding the welfare of its citizens. Moreover, the state still commands the loyalty of its population and the nationalist relationship is still crucial to understand the power of the state. Furthermore, the state has the monopoly of legitimate force in international society and still sets the rules of the international framework in which all the others actors work.[156] What is more, there has been an evolution in the concept of sovereignty, for instance, from a dynastic to a popular principle. Sovereignty is a concept that has not been static and one of the key elements for its resilience is the capacity of the state to adapt and reform when challenged.[157]

On balance, it is within the methodological pluralism of the English School, complemented by the concept of homogeneity, that we aim to proceed with our study. We consider that the discipline of international relations is a distinct body of knowledge whose analysis is enhanced by a pluralist method in which system, society and community co-exist. The three traditions will be analysed in greater detail in the fifth chapter, looking at how they deal with international human rights. These tools are essential for trying to understand the relation between the process of expansion of the European international society and the balance of coercion and consent involved in it. This is such an important question since it has and continues to produce consequences in international politics regarding the relations between western and non-western countries. The different response of states to western influence regarding international society norms has shaped their foreign policy and, in some cases, it has led to a greater emphasis on differences among nations rather than the enlargement of consensus.[158] It is important to analyse to what degree, beyond the acceptance of certain international norms, states are actually compelled by the international environment to conform internally and what are the consequences for not doing so. In order to study the impact of the dynamics of homogeneity, we have chosen the way states and the international society relate to international law. We have chosen international law not only due to its impact on the formation and expansion of European international society but

[156] For a summary of the arguments see Martin Hollis and Steve Smith, op. cit., p. 35.
[157] Robert H. Jackson, "The evolution of international society", in John Baylis and Steve Smith (eds.), op. cit., pp. 33-47, at pp. 44-46.
[158] Adda Bozeman, "The international order in a multicultural world", in Hedley Bull and Adam Watson (eds.), op. cit., pp. 387-406.

also due to its function of bridging the gap between international and national levels.

CHAPTER II

INTERNATIONAL LAW AND THE FAMILY OF NATIONS

1 The Rule of Law and International Society

"The expansion inevitably altered the nature and the balance of the European system. Its member states did not have a set of established rules and institutions that they attempted to impose ready-made on the rest of the world. On the contrary, they continually modify the rules and institutions of their evolving international society to take account of its wider range."[1]

International law is a good barometer in order to enable us to understand the nature and the level of commitment of states in international relations, not only as to its theory but also to its practice.[2] In other words, the crucial relation between concepts and criteria, either with inclusive or exclusive nature, and the legal practice of states focusing on the extent to which international law standards, during the expansion of the European society of states, were met or not.[3] This is even more important regarding Japan and China's response to the challenge of international society posed via the standard of civilisation. Additionally, the way great powers responded to China and Japan created a strong notion in these countries: that the West had two sets of rules. One was applicable to western powers, and the other applicable to relations with non-Christians which, unlike in the previous centuries, were not conducted on a reciprocal basis.

Moreover, it is interesting to observe that despite the impressiveness of the European domination in the 19th century, the rules and institutions that were established were not the product of a well defined strategy, but the result of interactions and formulations throughout time. The concept of the standard of

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[1] Adam Watson, *The Evolution of International Society, A Comparative Historical Analysis*, Routledge, London and New York, 1992, p. 214.

[2] Charles de Visscher, *Theory and Reality in Public International Law*, translated by P. E. Corbett, Center of International Studies/Princeton University, Princeton, 1968 Revised Edition, (1st Ed. 1957).

[3] Ian Brownlie, "The expansion of international society: the consequences for the law of nations", in Hedley Bull and Adam Watson (eds.), *The Expansion of International Society*, Clarendon Press, Oxford, 1985, pp. 357-369, at p. 357.

civilisation only became an explicit legal principle in 1905. But one fact is clearly unmistakable, the genesis of international law, in the modern sense, understood as relations between sovereign and independent states, is European and it worked in the words of Professor Truyol y Serra as the "*ordenamento juridico cimentador del todo.*"[4] International law developed through an intense and long historical process which had its basis in the Roman law framework, and its motor and expansion in Christianity.[5]

We consider two main phases of international law that are juxtaposed to the phases of the evolution and expansion of international society that we have described in the previous chapter. In the first phase, we find the development of certain core principles and the predominance of the natural law school and its classical law writers. In contrast, in the second phase this school waned and gave rise to the positivist school. In the former, we observe the parallel evolution of a *jus inter gentes*, applicable to interstate relations and markedly European, and a *jus gentium*, common to all human beings and which was the basis for the international relations between Christian and non-Christian peoples. This kind of international law was never on the same level as the one that was being developed within Europe, and its existence can be described as fragile, flexible and societal.[6] After the rise of positivism, it lost ground when political entities such as the Ottoman Empire or Persia 'entered' the family of nations.

Let us now begin by describing the first phase of international law, in which the underlying assumption is that because we are human, we inherently possess rights and, although we may disagree as to the actual content of these rights within the "various shades of Christian philosophy", we nevertheless agree that they exist.[7] Likewise, in the beginning of international law, two movements were fundamental, the Renaissance which secularised thought and the Reformation

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[4] *Cit in* António Vasconcelos de Saldanha,, *De Iustum Imperium: dos Tratados como Fundamento do Império dos Portugueses no Oriente, Estudo da História do Direito Internacional e do Direito Português*, Instituto Português do Oriente, Macau, 1997, p. 111 and Wang Tieya, "International law in China: historical and contemporary perspectives", in *Collected Courses/The Hague Academy of International Law*, Vol. 221, 1990/I, pp. 195-370, at p. 204.

[5] This is an idea of Professor Bruno Paradisi *cit in* António Vasconcelos de Saldanha, op. cit., p. 98.

[6] Georg Schwarzenberger, "The rule of law and the disintegration of international society", in *American Journal of International Law*, Vol. 33, nº 1, 1939, pp. 56-77, at pp. 60-61.

[7] C. H. Alexandrowicz, "The Afro-Asian world and the law of nations (historical aspects), in *Collected Courses/The Hague Academy of International Law*, Vol. 123, 1968/I, pp. 117-214, at p. 126.

which nationalised religion.[8] The idea of natural rights is linked to the notion of the "(...) majestic conception of the unity of the Christian community- one of the great civilising ideas that humanity owes to Christianity."[9] Notwithstanding, the first discussion of the idea of unity of mankind was pursued by the Stoics, who considered humanity as a whole and not divided into separate states. It is present in the passionate defence of the rights of the Indians by Bartolomé de las Casas in the controversy with Juan Ginés de Sepulveda; in the development of the limits of war and its justness by St Thomas Aquinas; in the outstanding defence of Poland's rights of establishing an alliance with non-Christians by Paulus Vladimiri; in the works of Francisco de Vitoria and Francisco Suarez in the 16th century that expanded the scope of natural law so as to embrace the peoples of the newly discovered world;[10] and in the works of Hugo Grotius and Samuel Pufendorf in the 17th century. All these great authors (and more are left unmentioned) have in common the concept of natural law as a foundational pillar of how they view the relations between men.[11] Nevertheless, in our view the greatest of all is Hugo Grotius.[12] In his *De Jure Belli ac Pacis* we may find the beginning of a new conception of International Relations, an expression to be used by Jeremy Bentham in 1780 for the first time.[13]

Hugo Grotius' work, especially *De Jure Belli ac Pacis*, was not consensual.[14] In our view, the striking feature of Grotius was his ability to stand

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[8] Charles de Visscher, op. cit., p. 6.

[9] *Ibidem*, p. 3.

[10] Michael Donelan, "Spain and the Indies", in Hedley Bull and Adam Watson (eds.), op. cit., pp. 75-85, at p. 84.

[11] For the nuances within natural law see Harmut Schiedermair, "The influence of Grotius' thought on the *Ius Naturale* school", in *Collected Courses/The Hague Academy of International Law*, Vol. 182, 1983-IV, pp. 399-416.

[12] Antonio Cassese, *International Law in a Divided World*, Clarendon Press, Oxford, 1992 (1st Ed. 1986), p. 36.

[13] Adriano Moreira, *Teoria das Relações Internacionais*, Livraria Almedina, Coimbra, 1996, p. 88. Hugo Grotius fame is also connected with his defence, as counsel for the Dutch East India Company, of the concept of *mare liberum*, published in 1609. This concept was fiercely contested by the Portuguese who through Fray Serafim de Freitas and his *De Justo Imperio Lusitanorum Asiatico* counter-argued that the Portuguese empire was a just one because its ultimate goal was to defeat Islam in Asia. They both praised limits upon sovereignty but on a different level, whilst the Portuguese admitted restrictions due to the supremacy of freedom of missionary activity, the Dutchman asked for freedom of commerce and free access to trade, see C. H. Alexandrowicz, op. cit., pp. 145-147, and see as well W. S. M. Knight, "Seraphim de Freitas: critic of *mare liberum*", in *The Grotius Society*, Vol. XI, 1925, pp. 1-9.

[14] H. Lauterpacht brings to our attention that Grotius was criticised by its justification of established authority, of slavery with reference to natural law, of attributing equal weight to the acquisition of sovereignty by conquest or consent and lastly, due to the absence of any reference to the affirmation of the

back from the commonplace assumptions of his time and to conceive alternatives to the current state of affairs.[15] This is to say that he died in 1645, in the middle of such a horrific and devastating conflict as the Thirty Years' War, which had seemed to affect him enormously since the deep division between Catholics and Protestants, which epitomised the breakdown of Medieval unity of Christian thought, brought to light the fact that "(...) truth was no longer the indivisible heritage given to mankind by divine revelation or by the natural light of reason."[16] Instead of considering that war was the 'normal' state of international affairs, Hugo Grotius sought to restrict and limit the effects of war as well as placing international law at the heart of this attempt. Grotius sought not to expand natural law but rather to systematise it.[17] Because it is part of human nature, it is a universally binding source of international law. He also undertook the first codification of a common law of mankind, a helpful guide in which all the rules of natural law were listed in a complete and systematic manner. The idea that the law of nations is part of the natural law, common to all, embodied the concept that it also includes rights and duties, a conviction shared by the Stoics, and that can be considered the beginning of the modern discussion of human rights in international law. Hugo Grotius' famous analogy between states and individuals went beyond the comparison and insisted that states are not like individuals but are composed of individual human beings.[18] Moreover, in a time of assertiveness of sovereign states and their national interests along with the associated legitimate monopoly of the use of force within its borders, Grotius argued that the totality of international relations should be under the rule of law, thereby going against the increasing supremacy of the reason of state and the pursuit of self-interest. In other words, he tried to pursue international law as a means of restraint upon the freedom of action of states rather than the idea of the reason of state which embodies freedom from

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sovereignty of the people, "The Grotian tradition in international law", in *British Year Book of International Law*, 1946, pp. 1-53, at pp. 1 and 14-15.

[15] Hedley Bull, "The importance of Grotius in the study of international relations", in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), *Hugo Grotius and International Relations*, Clarendon Press, Oxford, 1990, pp. 65-94, at p. 92.

[16] Harmut Schiedermair, op. cit., p. 405.

[17] *Ibidem*, p. 401.

[18] H. Lauterpacht, op. cit., p. 26.

restraint.[19] This is evident in the idea that war is not limitless, it had to be just and it was not an absolute right that assisted great powers. He insisted on the doctrine of qualified neutrality, meaning that no assistance should be given to a state which wages an unjust war. Grotius also accepted the law of nations and the law of nature and, in the absence of an authority, there existed an authority of reason derived from the necessary coexistence of a plurality of states. Man was intrinsically moved by a desire for social life and goodness, and international law was not limited to the Christian circle. Grotius also stressed the importance of the principle of *pacta sunt servanda* and he endowed "(...) international law with unprecedented dignity and authority by making it part not only of a general system of jurisprudence but also of a universal moral code."[20]

The birth of international law is inextricably linked with the concept of sovereign and equal states. This has been one of the pillars of international law until today. There was no regional or cultural limitation on recognition of personality in international relations, meaning that the recognition of a state did not depend on some civilisational criteria of statehood. Moreover, another principle that was crystallised in this epoch was the need of not interfering in another country's internal political, economic, religious or social arrangements. This is not to say, for instance, that there was not a hierarchic perception of the outside powers as is clear, for instance, in the work of Bartolus of Sassoferrato, the great 14th century jurist who was perfectly aware and tolerant of other peoples and communities. The peoples that were situated outside the limits of the Holy Empire and the Roman Church were understood and perceived in accordance with their relation with Western Christianity. Firstly, we find the Eastern Roman Empire which was Rome's ally against the Ottomans, then the Tartars with whom Europe maintained peaceful relations, thirdly India and others with whom Europe was neither at war nor peace, and lastly the Turks and the Saracens with whom a state of permanent war existed.[21] As the knowledge of the outside world improved so did the complexity of relations with non-Christian peoples.

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[19] *Ibidem*, pp. 32-33.
[20] *Ibidem*, p. 51.
[21] António Vasconcelos de Saldanha, op. cit., pp. 102-103.

The idea of sovereign equality is strongly connected with the epoch in which it became a reality, in which kings after having fought both the Papacy and the Emperor, become sovereign and refused to recognise any superior, both within and without their territory. In other words, "entities are equal because they are states: they are not states because they are equal."[22] It is also interesting to note that, at international level, the principle of equality was proclaimed before equality was admitted in the internal arrangements of the states.[23] This has since been considered one of the core principles upon which the international legal community is based. In this period, there were complex and intense dealings between Europe and non-Europeans which led to a multitude of treaties. The conclusion of these treaties solidified the principle of the sanctity of treaties in which both parties had interests and co-operated. In this period, we can observe that "the doctrine of a natural law community of mankind that knew no geographical limitations provided a weapon with which to combat conceptions of obligation that treated non-Christians or non-European peoples as devoid of rights."[24]

This is one of the characteristics of the second phase of the development of international law that begins in the mid-19th century and is defined by the ascendancy of positivism. The crumbling of the functional role of natural law is not only related to the rising positivist tendency of international law but also to the fact that this natural community was merely conceptual and theoretical. It did not match reality, in the sense of the existence of a family of nations in which consent was given by the political communities throughout the world. Moreover, the rise of assertive nationalism and the associated imperialistic projects left no room for natural law.[25] No longer was the exclusiveness of the systems balanced by the admission of natural rights and the fundamental unity of humankind. This was

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[22] Colin Warbrick, "The principle of sovereign equality", in Colin Warbrick and Vaughan Lowe (eds.), *Essays in Honour of Michael Akehurst, The United Nations and the Principles of International Law,* Routledge, London and New York, 1994, pp. 204-229, at p. 205.

[23] Emmerich de Vattel declared that "strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small republic is no less a sovereign State than the most powerful kingdom", *cit in* R. P. Anand, "Sovereign equality of states in international law", in *Collected Courses/The Hague Academy of International Law*, Vol. 197, 1986/II, pp. 9-228, at p. 53.

[24] Hedley Bull, "The emergence of a universal international society", in Hedley Bull and Adam Watson (eds.), op. cit., pp. 117-126, at pp. 119-120.

[25] Georg Schwarzenberger, op. cit., p. 69.

replaced by, in this case, the European system that achieved the status of international society.[26]

The very essence of positivist thought is to discard any data not verifiable in experience[27] and this is reflected in law through the denial of the existence of any norm superior to those willed by the state and formally expressed in positive international law. This position had three main consequences: it embodied an intransigent conception of sovereignty; it gave law a static character and enhanced its propensity for immobility.[28] For European leaders, stability was a crucial element of an international life between states, as we can very well see after the 1848 period of turbulence and the will to restore the ancient regime under the influence of Chancellor Metternich. The 19th century was also a time of progress, confidence and optimism, at least in the western countries, where there was a shared belief that the West was leading mankind and was fulfilling its civilisational mission. We can find this sense of mission in several countries, for instance, the US and the idea of a manifest destiny and Germany which also had a cultural mission which Max Weber connected to the idea of prestige.[29] We can also observe this optimism and this sense of being the 'chosen people' in History, where the 19th century was a time characterised by the supremacy of facts.[30] In order words "the positivists, anxious to stake out their claim for history as a science, contributed the weight of their influence to this cult of facts."[31] The main goal of a historian was to compile the largest number of objective facts. The 19th century was a time of exuding confidence and optimism, in which there was the hope of establishing a comprehensive body of knowledge which would settle all disputed issues once and for all.[32]

This self-confidence of a civilisational mission began to be felt in various ways and the previous principles had now a different emphasis. The sovereign equality concept was now faced with the Concert of the Great Powers and their

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[26] António Vasconcelos de Saldanha, op. cit., p. 103.
[27] Charles de Visscher, op. cit., p. 53.
[28] *Ibidem*, pp. 51 and 54.
[29] See Michael J. Smith, *Realist Thought from Weber to Kissinger*, Louisiana State University Press, Baton Rouge and London, 1986, pp. 29-30.
[30] E. H. Carr, *What is History?*, Penguin Books, London, 2nd Ed 1990, (1st Ed. 1961), p. 8.
[31] *Ibidem*, p. 9 and Richard J. Evans, *In Defence of History*, Granta Books, London, 1997, pp. 20-21.
[32] E. H. Carr, op. cit., p. 61.

principle of equal aggrandisement. In order to make the principle of the balance of power work and, therefore, to maintain peace in Europe, all the adjustments that were made through the principle of compensation were realised outside Europe. So, in a few decades the world became united under western leadership and in which we can observe a complex net of peripheral colonies, protectorates and semi-sovereign states. The best example is the "scramble for Africa". The sanctity of treaties was enshrined but not based on consent. Instead of co-operation and reciprocal duties and rights, there was the establishment of unequal treaties signed under duress, and peace treaties imposed upon the defeated, in addition to recognised territorial changes brought about by force.[33]

The principle of non-interference was maintained within the core members of this international society but outside this circle, this rule was not observed. The western international society became global when, after establishing a worldwide dominion, the newcomers to this international society accepted the rules of international law. This international society, so confident of the superiority of its civilisation, began to establish a constitutive recognition of membership into this Family of Nations. In order for a country to join this club some rules had to be abided by, and domestic arrangements had to be met. The concept of civilisation is mainly defined by the emphasis on reason and organisation and we may consider a group to be civilised when "(...) it has acquired a mature apparatus of thought and action and is characterised by the extensive use of national behaviour patterns."[34] Standards of civilisation have two functions, they identify the common characteristics and values of a civilisation and, at the same time, they are instruments of regulation of its international relations. They represent how a civilisation sees itself, the so called "sacred trust", and how it sees those outside its boundaries. This set of rules, which is characteristic of other peoples, was for the first time imposed on a global level by western powers which had not only the will but also the military capacity to do so.

Nonetheless, the link between the standard of civilisation and the establishment of a civilised international society has been a much contested idea.

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[33] R. P. Anand, op. cit., p. 57.

[34] Georg Schwarzenberger, "The standard of civilization in international law", in *Current Legal Problems*, London, 1955, pp. 212-234, at pp. 215-216.

The standard of civilisation was the symbol of the reduction of a universal family to a European club, a regression provoked by the supremacy of positivism which impaired the universality of international law. The fact that countries exogenous to the 19th century's family of nations had to pass a test in order to become members raised the issue of entry or re-entry in the international society and it is impossible to conceive of the idea of stating that before 1856, the Ottomans did not exist as such and were left in a legal vacuum.[35] We would agree with this idea although we would not go as far as to say that it offends the dogma of continuity of the family of civilised nations.[36] The Ottomans had, in fact, been a factor in the European balance of power, but we also have to take into consideration that the main goal of the Treaty of Paris of 1856 was more directed at guaranteeing the territorial integrity of the Ottoman Empire rather than a genuine effort to expand the membership of the international society.[37] This school of international law also pointed out the very important idea that it is dangerous to judge the past by *ex post facto* law. In other words, it is pernicious to look at the past with the values and attitudes of the present. Slavery, for instance, was considered a fact of life in society until the 19th century but we would not judge all previous societies, for instance the Roman Empire or Ancient Greece, as uncivilised just due to the fact that they practised slavery.

Moreover, the 1960 decision of the International Court of Justice reinforced the fact that treaties concluded among Europeans and Asians between the 16th and 18th centuries were an expression of a common agreement creating mutual rights and obligations.[38] The main issue was the dispute between Portugal and India regarding the Portuguese claim to right of passage through Indian territory to the enclaves of Dadra and Nagar-Aveli. The basis of this right was the Treaty of Poona concluded in 1779 between Portugal and the Maratha State. Although the court considered the treaty valid, it decided that it did not provide for transference of sovereignty, but rather revenue tenure, a *jagir* in Mogul language. The

[35] C. H. Alexandrowicz, "Doctrinal aspects of the universality of the law of nations", in *The British Year Book of International Law*, Vol. 37, 1961, pp. 506-516, at p. 514.
[36] *Ibidem*, p. 515.
[37] Gerrit W. Gong, *The Standard of "Civilization" in International Society*, Clarendon Press, Oxford, 1984, p. 107.
[38] C. H. Alexandrowicz, "The Afro-Asian world and the law of nations (historical aspects), in *Collected Courses/The Hague Academy of International Law*, Vol. 123, 1968/I, p. 132.

recognition of the Maratha State as a legal entity in the 18th century meant that this state had a place, in its own right, in the family of nations. This could be logically extended to other similar political entities. This leads us to the following element of this approach of international law, the question of reversion to sovereignty.[39] Since the family of nations is considered to be a continuous and uninterrupted community of states, irrespective of the change of law or doctrine, we cannot speak of new countries only because they have entered the orbit of the civilised states, like the Ottomans, or because they have lost their independence, like Poland. But in order for reversion of sovereignty to be considered there has to be identicalness between both. This was not the case of the Maratha State, in spite of the dissenting opinion of Judge Moreno Quintana, which was a limited part of the Indian state. We can only speak of entry in the international society of political entities that remained isolated from intercourse with the remaining countries, such as Japan and China.[40]

The essence of the positivist approach or according to C. H. Alexandrowicz, the orthodox Eurocentric history of international law, was best captured by James Lorimer in his book *The Institutes of the Law of Nations* published in 1883-1884 which contributed immensely to the explicit definition of the standard of civilisation. The world was divided into three concentric spheres, in which two levels of international law, one positive and the other rational, existed: civilised, barbarian and savage. In the first sphere, people benefited from full political recognition which was a result of their enjoyment of positive and rational law, the second was characterised by the existence of partial political recognition as a result of benefiting from full rational law and partial positive law and the last sphere was depicted only on a humanitarian level, benefiting from rational law but with no awareness of positive law. We can identify with rational law, the natural law that we have been describing and that epitomises the classical law of nations and the positive law refers to western law. In this approach, we find the western countries in the first sphere, countries like China in the second and, in the last one, people from the Pacific islands.[41] The main difference between savages and barbarians

[39] *Ibidem*, pp. 164-167.
[40] *Ibidem*, p. 206.
[41] In the positivist tradition of James Lorimer we also find great international lawyers such as Henry

was the fact that the former were people who had not reached civilisation and the later people who had forsaken civilisation.[42] The only way for a country to reach the first level was by learning and applying western values and conduct, in other words, by fulfilling the standard of civilisation.

This standard was Europe's response to the problems arising from Europe's expansion into the world, such as the protection of European life, property and liberty. These elements, which characterised Europe, were already part of the bulk of European practices but remained implicit until the systematic interaction with non-Europeans. During the second half of the 19th century, we can observe a codification of the requirements of the standard of civilisation as well as a gradual process by which an implicit customary practice was transformed into an articulated and explicit customary law. This was done mainly through two instruments: historical records, such as international legal texts written by leading international lawyers, as we have seen, and the treaties signed between Europe and non-Europeans during the 19th century.

The standard of civilisation as a specific legal principle had five main elements: the need to protect basic rights, a certain level of political organisation, adherence to international law, maintenance of permanent diplomatic relations and some accepted "civilised" norms.[43] Let us begin with the first element, the need to protect basic rights, such as life, liberty and property. It was assumed that a "civilised" state was capable of guaranteeing such rights to its nationals and also of foreign nationals. Secondly, there had to be a certain level of organised political bureaucracy that was effective in conducting not only the daily needs of a state but also some ability to organise self-defence. Thirdly, a "civilised" state maintained a system of courts, codes and published laws which ensured legal justice to all persons, both nationals and foreigners. Also important was the awareness and application of the recognised general principles of international law, such as the laws of war. Fourthly, a state had to be able to maintain diplomatic machinery that enabled it to fulfil its duties as a member of a wider community. Lastly, a "civilised"

Wheaton, W. E. Hall, Lord T. E. Holland and John Westlake, see Antonio Truyol y Serra, *La Sociedad Internacional*, Alianza Editorial, Madrid, 1983, p. 75.

[42] Georg Schwarzenberger, op. cit., pp. 218-219.

[43] Gerrit W. Gong, op. cit., pp. 14-17.

state had to abide by certain norms and practices acceptable to a civilised international society. For instance, slavery was considered uncivilised and, therefore, a state had to abolish it if entering the international society was a pursued goal. This last goal is clearly very subjective and difficult to define. To fulfil the standard of civilisation was not only to be recognised as independent but, most importantly, to be accepted into the family of nations.[44]

Associated with freedom of trade, travel and proselytising, came rights which were inalienable and provided a rationale in case of violation to defend them by force, if need be. There was a sense of moral responsibility for every man and it was very important to deal with non-Europeans within a coherent framework of what is right and fair. Moreover, Europe assumed its leading role, its civilisational mission as we have already described it, and it took on a level of zeal and self-confidence that many had thought was lost in Westphalia.[45] As Europe expanded, the number of countries which did not fulfil the standard of civilisation increased and Europeans had to intervene in order to guarantee these basic rights. This was the rationale for the extraterritoriality clauses that were part of the treaties celebrated with non-European powers.

Extraterritoriality has had a long history and has been a part of the relations between Europeans and non-Europeans. Its origins are connected with the regime of capitulations, in which extraterritoriality privileges and immunities were conceded to foreigners.[46] There was nothing vexatory about it and it could be a concession, unilateral or revocable or a conventional agreement. The Ottomans had agreements of this kind, for instance, with Genoa in 1453 and Venice in 1454, and with nearly all the major European countries. Concessions were given to Muslim merchants who had settled since the 8th century on the West Coast of India by the Hindu rulers.[47] What changed the nature of this relation was the

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[44] Sir Claud H. M. Waldock, "General course on public international law", in *Collected Courses/The Hague Academy of International Law*, Vol. 106, 1962/II, pp. 1-252, at pp. 146-149.

[45] Gerrit W. Gong, op. cit., p. 51.

[46] Professor Truyol y Serra gives the example of the Ottomans and Byzantium; *e. g.* the Ottomans celebrated capitulation arrangements with France in 1569 (the 1536 Treaty does not qualify as we have already seen) Britain in 1580, 1597 and 1675, the United Provinces in 1612 and 1680, Austria in 1615, Sweden in 1737, Naples in 1738, Denmark in 1756, Prussia in 1761, Russia in 1774 and 1783, Spain in 1782, and Austria in 1699 and 1718. See Antonio Truyol y Serra, op. cit., pp. 59-62.

[47] In order to better understand the idea of consent and equality involved in the relations between Europeans and non-Europeans we should also take into account the examples of the mixed jurisdiction system contained

ascendancy of Europe and the increasing power gap when compared with non-Europeans. In the case of the Ottoman Empire, what began as a relation of consent and of non-derogatory character to its sovereignty was transformed into a relation of inequality and humiliation; consent was replaced by effectiveness. The capitulations were unilaterally suppressed in 1914, only to be re-established in 1920 by the Treaty of Sevres and were finally abolished by article 28 of the Treaty of Lausanne in 1923.

The idea that empires such as the Chinese or the Ottoman were not able to ensure enough protection to foreigners implied that they were part of an inferior civilisation and "there was no escaping what became an enduring association of military defeat with a perceived inadequacy of cultural development and of civilisation in general."[48] To this perception of inevitability another crucial element was added, namely legitimacy. And this is what lies at the heart of the relation between international law and the international society in which it is integrated. In other words, it is not the existence of international law which is at stake but its capacity for commanding obedience, and "this capacity depends as much on their perceived legitimacy, as it does for domestic institutions."[49] The contradictions between theory and practice by "civilised states" increased, especially after 1919, undermining the legitimacy of international law. In other words, "the history of international law seems to indicate that within the radius of the European balance of power system this principle overrides international law in case of conflict between them."[50]

On balance, in the first formative stage of international law, fundamental principles such as sovereign equality, non-interference, sanctity of treaties and respect for international law were formulated more in an implicit way and had an inclusive application within and outside Europe. In the second phase, these principles were crystallised and pursued within a common goal but applicable in an

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in the treaties between France and Siam celebrated in the 17th century and the reciprocal capitulation agreements that were established between the Dutch and Persia in 1623 and 1631. See C. H. Alexandrowicz, op. cit., p. 151.

[48] Gerrit W. Gong, op. cit., p. 98.

[49] Helen Milner, "Anarchy in international relations theory", in David A. Baldwin (ed.), *Neorealism and Neoliberalism, The Contemporary Debate*, Columbia University Press, New York, 1993, pp. 143-169, at p. 152.

[50] Georg Schwarzenberger, "The rule of law and the disintegration of the international society", in *American Journal of International Law*, Vol. 33, 1939, p. 69.

exclusive way, since countries like Japan found out that learning was not enough. The relation between the evolution of the international society and of international law was complex and interactive and it is reflected in the change of the dominant school of thought, in which "ascendant positivist legal notions merely spelled out explicitly what had been implicit historically."[51] The formulation of the standards of civilisation and the supremacy of positivism were clear signs of an increasing process of Eurocentric concentration of political and economic power.[52] From the moment in which Europe became "global" it lost some of the ethical contents that characterised its early stages and laid down the criteria for admission to this club in civilisational terms.

[51] Gerrit W. Gong, op. cit., p. 43. *Cf.* C. H. Alexandrowicz 's emphasis on the change of doctrine to positivism as the main cause for reducing the scope of international law and therefore breaking the continuity of the community of nations, "Doctrinal aspects of the universality of the law of nations", in *The British Year Book of International Law*, Vol. 37, 1961, p. 515.

[52] Georg Schwarzenberger, "The standard of civilization in international law", in *Current Legal Problems*, London, 1955, p. 220.

2 Japan and China and the Challenges of International Law

"If the legal structure of the society of states is radically egalitarian, its political structure remains stubbornly hierarchical. In any political system there has to be an accommodation between power and law, that is, between the relations of force and those of right;"[53]

In our view, the best way to analyse the stands of China and Japan regarding international law is to look at the Peace Conference of Versailles in 1919. China and Japan arrived at this conference with a different status, and above all, with divergent goals. Their arrival was the result of their response to international society. Regarding China, we have chosen 1919 because we consider it to be the first attempt to participate and become part of the international society, unlike the previous engagements with foreign powers, and despite her disappointment as to the final outcome. China consciously pursued the goal of participating in this first attempt to achieve a league of sovereign and equal nations.[54] For Japan, after pursuing western concepts and practices of international law with notable consistency, this Peace conference represented its confirmation as a great power and, above all, equality with the other great powers. This did happen with one exception, which came to be known as the racial equality clause controversy. In spite of the fact that Japan did obtain material concessions and gains, the request to introduce a racial equality clause failed to be adopted. China and Japan faced the challenge of extraterritoriality (which is inextricably linked with the standard of civilisation), very differently. Japan not only adopted international law but also transformed its internal arrangements in order to fulfil western civilisational values. In contrast, China became part of the international society, not by fulfilling the standards of civilisation but by pursuing a very assertive diplomacy aimed at reforming the imposed regime.

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[53] James Mayall, *Nationalism and International Society*, Cambridge University Press, Cambridge, 1993 (1st Ed. 1990), p. 22.

[54] Zhang Yongjin, *China in the International System, 1918-1920, The Middle Kingdom at the Periphery*, Macmillan and St. Antony's College, Oxford and London, 1991.

a. Japan's Response to International Society

"Even Japan, which consciously and conscientiously made fulfilling the standard of civilization a national goal, found the path to accreditation as a "civilized" power long and difficult"[55]

Japan has, in the last decades, due to its impressive modernisation and economic power made an important contribution to blurring the clear definition of what it means to be western.[56] Nevertheless, looking at history, we find a similar effort in the 19th century, in what is called the Meiji Era. During this epoch, Japan managed to conciliate two contradictory forces: the centrifugal and centripetal tendencies regarding the international society. The former embodies the strengthening of the idiosyncrasies that make each state unique and allow for its affirmation in international relations, sometimes in detriment of the latter, which is characterised by man's natural sociability and knows no boundaries.[57] Japan was able to enhance its domestic cohesion and, at the same time, become a member, and an active one, of the international society in a very short period of time.[58]

In 1853, when Commodore Matthew C. Perry arrived in Japan with four ships and the intent of opening Japan to the outside world, it was already a country in which a debate was taking place. This debate was centred on one essential dilemma: what to do with the "dangers from abroad". This dilemma was not new, since Japan had been dealing with foreigners for quite some time, but what had changed was the scale and intentions of foreigners. The Portuguese were the first Europeans to arrive in Japan in 1543 and, although the relationship was essentially commercial, they also brought Christianity. The mission of bringing Japan into the Family of Christian nations was carried out by the Jesuits, following a Papal order. The most famous Jesuit was St. Francis Xavier who arrived in Japan in 1549. The monopoly of the Portuguese was breached by the Dutch who arrived in 1600 and the English in 1612. The main intention was to enter into

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[55] Gerrit W. Gong, op. cit., p. 10.
[56] Jeff Wise, "Is there a West?", in *Time*, vol. 146, nº 25, December 18th of 1995, p. 64.
[57] Antonio Truyol y Serra, op. cit., p. 20.
[58] Jean-Pierre Lehmann, *The Roots of Modern Japan*, Macmillan Press, London, 1982, p. 6.

commercial relations with the Japanese and the rivalry that characterised the relations between these three countries soon expanded to Japan. This rivalry was not only commercial but also religious, between Catholics and Protestants. The fact that foreigners were not a monolithic bloc did not pass unnoticed by the Japanese. Additionally, there were tensions between the different Catholic missions established in Japan, something which would also happen in China.[59] The main issue of contention were the different approaches in dealing with the Japanese or the Chinese, raging from the more pragmatic and flexible approach of the Jesuits to the more rigid one of the Franciscans and the Dominicans. The English left Japan in 1623, whilst the Dutch were confined to Nagasaki where they stayed until the 19th century. The Portuguese presence in Japan went through periods of high and low toleration, but expulsion was proclaimed by the edict of 1587. The first great persecution was in 1596, another expulsion edict came in 1614 and the final massacre, followed by expulsion, took place in 1639.[60] At this time, Japan was already in the Tokugawa period which instituted the *Sekuku* in 1603, or policy of seclusion. This era, also known as the Edo Period, was to endure until 1868.

In 1853, "Japan was not in ferment, but there was a prevailing sense of unease."[61] This was due to two reasons. The first was the reports received of what was happening in China and especially regarding the Opium War. Secondly, prior to the Americans there had been some attempts to establish commerce with the Japanese authorities. These attempts carried out by the British, in 1813-1814, and the Russians, in 1792 and 1804, were unsuccessful but did start a debate among the samurais and there was already some discussion of the need of national cohesion as fundamental in dealing with the foreign menace. The main objective of the Americans was to open Japan to the outside world, and sign a treaty of friendship and commerce which was, in part, a response to the grievances of the whaling industry. The reaction was one of panic when Commodore Perry returned

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[59] See João Paulo Costa, "Japão", in Luís de Albuquerque (dir.) and Francisco Contente Domingues (coord.), *Dicionário de História dos Descobrimentos Portugueses*, Vol. 1, Círculo de Leitores, Lisboa, 1994, pp. 537-541.

[60] For a very interesting account of this period through the eyes of a Jesuit see Michael Cooper, S. J., *Rodrigues, O Intérprete, Um Jesuíta no Japão e na China*, Quetzal Editores, Lisboa, 1994 (1st Ed. in 1974).

[61] W. G. Beasley, *The Rise of Modern Japan, Political, Economic and Social Change since 1850*, Weidenfeld and Nicolson, London, 2nd Ed. 1995 (1st Ed. 1990), p. 21.

the next year, with eight ships and the Japanese were prepared to concede in order to avoid war.[62] The Treaty of Kanagawa with the Americans was signed and two ports were opened, Shimoda and Hakodate. It is curious to note that the *lingua franca* of this document was Dutch. In 1858, a treaty of amity and commerce between the Americans and Japanese was signed, and consequently, Nagasaki and Kanagawa, which replaced Shimoda, Niigata and Hyogo (later Kobe), were opened for trade and Yedo and Osaka for foreign residence. Furthermore, an American diplomatic agent was appointed at Yedo and consuls or consular agents at the treaty ports. The Netherlands, Russia, Britain and France followed the Americans and signed treaties with Japan within that year. They were joined by Prussia, Portugal, Sweden, Norway, Spain, Austria-Hungary, Hawaii and Peru. These treaties represented a complex network of political arrangements and Japan lost control of tariffs, trade regulations and jurisdiction over foreign nationals due to the extraterritoriality clauses. The treaties that were enforced on Japan were no more unequal than those which were imposed on China in 1842.[63]

The initial visit of Perry marked the beginning of the first of three stages in Japan's foreign relations.[64] The first one ran until 1871-1873, with the Iwakura mission. This was a phase, in which after an internal struggle between the new Meiji project and the samurai desire for the return of the old order, Japan eagerly began to learn western concepts, ideas and the procedures of international relations. It became important to "(...) study what the West had to teach in a variety of fields, not merely those which were of direct application to war."[65] In the second stage, which lasted until 1911, Japan's foreign life was dominated by the quest for equality, with emphasis on the extraterritoriality issue. During this period Japan, put what it had learned into practice with success. The third stage went from 1911 until 1945, in which Japan's status as a great power was confirmed at Versailles, but not in the way the Japanese expected. The disappointment at

[62] Jean-Pierre Lehmann, op. cit., p. 137.
[63] Gerrit W. Gong, op. cit., p. 169.
[64] Hidemi Suganami, "Japan's entry into international society", in Hedley Bull and Adam Watson (eds.), op. cit., pp. 185-199, at p. 185.
[65] W. G. Beasley, op. cit., p. 25.

Versailles marked the beginning of a more isolated and aggressive imperialist path, which would only end in 1945.[66]

Japan managed to overcome the enormous threat posed by the western countries, and this was a result of a combination of external challenges and internal responses. As a country, Japan benefited from a stable territory, a high level of ethnic homogeneity, a single unifying language and a religion which is only practised in Japan, Shinto. These elements functioned as dynamos for national cohesion and helped to form the idiosyncratic Japanese national project. There was also the perception of Japan as an island fortress, since Japan was never militarily invaded, the closest attempt being made by Kublai Khan at the end of the 13th century. This emperor set out an enormous armada but due to a strong typhoon it was defeated, and the Japanese considered it to be the "wind of the gods", otherwise known as *kamikaze*. The fact that Japan had never been invaded is important to understand the level of prestige that the samurai and, after 1868, the army held in Japanese society. Moreover, there is a strong element of adaptability regarding new situations which results in achieving a combination of native characteristics and foreign borrowings. Japan borrowed extensively from China, and experienced technology and military innovativeness by the Portuguese and the Dutch. This made it easier for the Japanese elite to adopt western technology in the 19th century as a means of achieving the country's survival.

Furthermore, the role of the Emperor was fundamental to achieve the Meiji Restoration which we can also describe as a revolution, not due to the way it came about, since it was the result of a fairly peaceful evolution, but due to the consequences of this movement that did change the order of things.[67] The political structure of Japan was divided between the emperor, who had a divine foundation, and the feudal lord, the Shogun. This dualism, which had characterised Japanese history, changed with the perception that the Tokugawa had failed to protect Japan and, therefore, it was necessary to transform the political structure. This was done, by focusing power on the role of the emperor, which was to restore Japan's glory. This, however, was an opportunity seized by the Japanese in order to reform institutions politically along western lines. After a brief civil war, the emperor

[66] Hidemi Suganami, op. cit., pp. 191-193.
[67] Jean-Pierre Lehmann, op. cit., pp. 151-154.

embarked on a project of reconciliation of victors and losers whilst, at the same time, strengthening the country. This period saw the rise of nationalism, in order to restore Japan's glory as a great nation. Japan was the first non-western society to understand and adopt nationalism as an ideology.[68] It also recognised the West's technological superiority but the first reason to do so was fear of losing its independence, reinforced by the British fleet bombardments in 1863 and 1864 of Kagoshima and Shimonoseki. During this process, there was some social instability but no revolt with the magnitude of the Taiping in China. Japan was small enough to allow for a strong and centralised government.

The external environment was also important in the ascension of Japan, since it was considered too remote and not of a great commercial value, especially when compared to China. Moreover, the great powers also had problems of their own that distracted their attention when they began to "open" Japan. Britain had to worry with the Indian Mutiny of 1857 and the second Opium War in China in 1856-1860 in which France was also involved. Russia was absorbed by the Ottomans and the Crimean war of 1854-1856 and, more importantly, the Americans were internally occupied, due to the Civil War of 1861-1865. The Americans after proceeding with the opening of Japan in a peremptory manner soon turned away and almost lost interest.[69] This has been referred to as the "breathing space" which was given to Japan by the western powers, enabling the country to overcome the challenge, something that was denied to China.[70] We think that although it played a role in Japan's successful modernisation, it was the combination of both external and internal factors, in which the latter were crucial to seizing the opportunity the way the Japanese did.[71]

The Japanese were very keen on learning the western models and rules and a diplomatic mission was sent to the US and Europe. The main message that was brought by the Iwakura mission of 1871-1873 was that in order for Japan to be able to revise the unequal treaties, domestic reforms should precede foreign

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[68] *Ibidem*, p. 156.
[69] S. A. M. Adshead, *China in World History*, MacMillan Press, London, 1995 (2nd Ed.). p. 346.
[70] Frances W. Moulder, *Japan, China and the Modern World Economy: Toward a Reinterpretation of East Asian Development, ca. 1600 to ca. 1918*, Cambridge University Press, Cambridge, 1979, p. 96.
[71] Paul A. Cohen, *Discovering History in China, American Historical Writing on the Recent Chinese Past*, Columbia University Press, New York, 1984, pp. 123-124.

ones. In other words, before the West began the revision of the extraterritoriality clauses, Japan had to fulfil the standard of civilisation. This set the tone for the second stage of Japan's foreign policy. It took on a major task, its greatest difficulty being with western jurisprudence, since it is the result of history, values and rules of a society. The efforts to adapt the western jurisprudence to Japan were carried out by Gustave de Fontarbie, one of the most distinguished French scholars of jurisprudence.[72] The work of establishing a codification of civil and penal law was a lengthy process and the main inspiration was drawn from the liberal Napoleonic model. Torture was abolished in 1876 as a means of obtaining evidence, confession or as a punishment.[73] In 1875, a decree was passed that henceforth all criminal and civil cases were to be heard in public trials. In 1882, a penal code was adopted (submitted to revision in 1908) as well as a code of criminal procedure (revised in 1890). In spite of the initial French inspiration, the revisions of these two codes reveal a shift towards the more absolutist character of Whilhelminiam German jurisprudence. 1889 saw the promulgation of the Constitution which represented the rule of law over Japanese society. The civil code was finally adopted in 1898, after the 1879 draft code sparked a lengthy controversy over the role of the family within Japanese society. It was also revised in 1912.

Externally, abolition of extraterritoriality was the main goal of Japan and, as a result, two multilateral conferences, in 1882 and 1886, were convened in Tokyo. In the latter, Japan offered to open all its territory to foreign residence and trade in exchange for the abolition of extraterritoriality. This quest was of great importance to the Japanese, and it became a national cause with huge support from domestic opinion. The humiliation of the unequal treaties was unbearable and had to be obtained no matter what. A small step was taken in 1888 through a treaty with Mexico which excluded extraterritoriality clauses; a novelty as to treaties

[72] Gustave Emile Boissonade de Fontarbie accepted an invitation in 1873 by the Japanese government and stayed there for more than 20 years. Following the previous translations of works by Edmund Burke and a part of *The Leviathan* of Thomas Hobbes, this French scholar was determined to instruct Japan with the spirit as well as the letter of western jurisprudence, see Jean-Pierre Lehmann, op. cit., p. 255.

[73] In Japan, no matter how obvious or accurate the evidence might be, in order for the person to be condemned, there had to exist a confession. Without this confession there was no possibility of punishment. Henceforth, we can understand the widespread of torture as a means to induce admittance of guilt. See *idem, ibidem*.

celebrated by Japan. But the crucial step was taken with the treaty signed with Britain on July 6th of 1894. This treaty brought economic advantages to the British but, most importantly, it devised the abolition of the extraterritoriality clauses in five years. This was a result of the skill of Japanese diplomats but also of the impressive reforms that took place in Japan. We can also say that Japan, as a country, was not fully opened until 1899 because, despite the foreign efforts to open it, there was not much success in going beyond the restricted ports.

Parallel to these domestic reforms and successes in foreign policy, we observe a change in the relation between Japan and its neighbours, China and Korea. The war against China broke out in July 25th 1894, and ended with the Treaty of Shimonoseki in 1895. Japan began to apply all those concepts and ideas learned from the West, including the expansionist project. During this war, Japan meticulously observed international law, a characteristic that would repeat itself in the Boxer intervention and the war against Russia.[74] The Treaty of Shimonoseki dealt a fatal blow to the Sinocentric world. China was defeated, not by the powerful foreigners, but by a frequently erratic member of this world order. Japan imposed a heavy indemnity on China with Korea declared an independent state and, therefore, excluded from the Chinese world order, where it had played an important role. Japan received the Island of Taiwan and sovereignty over the Pescadores, a confirmation of a *de facto* situation for the last two decades as a result of the expedition of 1874. It also obtained the Liaotong province.

But as Japan became more assertive of its power and self-confidence, the reaction of Prussia, Russia and Germany to the seizure of the Liaotong province added a new element to Japan's nationalism: the perception of racism. This reaction, known as the Triple Intervention, blocked Japan's intent and it is a clear case of winning a war but losing the peace.[75] There was the perception, on the part of Japan, that there were double standards as to western and non-western powers, even if the latter fulfilled the standard of civilisation. This enhanced Japan's acceptance that only the fittest would survive, and shaped its response.[76] The country's meteoric rise was confirmed by the participation, alongside Europe

[74] Hidemi Suganami, op. cit., p. 192.
[75] Jean-Pierre Lehmann, op. cit., p. 298.
[76] *Ibidem*, p. 172.

and the US, in the Boxer Intervention of 1900-1901; the Anglo-Japan alliance of 1902 directed at the Russian expansionist desires in the Far East; the war and victory against Russia in 1904-1905; in 1910, the annexation of Korea as the realisation of the unfulfilled project of Toyotomi Hideyoshi and the entry in the First World War against Germany.

The third stage of Japanese foreign policy began with the 1919 peace treaty of Versailles that was the culmination of all the previous efforts, externally and domestically, for Japan arrived with the status of great power. Japan had three main goals: the possession of the German concession of Shandong in China, German colonies in the Pacific islands north of the Equator, and the racial equality proposal. But it is the last goal which caused controversy, since by including such a proposal Japan was adding a fifth element to what it meant to be a great power, besides military strength, general interests, recognition of other great powers and the self-imposed role of managers of international affairs.[77]

The great powers at Versailles, namely Italy, France, Britain and the US had different reactions to Japan's proposal: Orlando and Clemenceau were uncommitted supporters; Wilson and Lloyd George were committed opponents. For France and Italy, the proposal was in accordance with the spirit of the organisation and especially with President Wilson's famous Fourteen Points. Britain and the US were not against it from the outset but as negotiations carried on, the implications for their immigration policies, especially Britain's Dominions, became more acute. The Japanese delegation was headed by Saionji Kimmochi, but the real leader was Makino Nobuaki, and the three ambassadors in London, Paris and Rome were also part of it. The selection of the delegation reflected the pro-western approach of the newly elected government of Hara who, as well as foreign minister Uchida, were not present in Versailles. The fact that the head of government was not part of Japan's delegation weakened the Japanese position vis-à-vis the other great powers. Moreover, distance and speed of information played a role in these negotiations, since it was impossible for Tokyo to keep up with its pace. Consequently, as the conference went on the gap between the government and the delegation widened. The race equality proposal was included

[77] For a thorough discussion about what it means to be a great power see Hedley Bull, *The Anarchical Society, A Study of Order in World Politics*, Macmillan, London, 2nd Ed. 1995 (1st Ed. 1977), pp. 193-222.

in article 21: "All nationals of all members of the League of Nations should receive equal and just treatment in every respect making no distinction, either in law or in fact, on account of their race or nationality."[78] The emphasis on no distinction either in law or in fact resonates with Japanese awareness of the gap between law and reality especially after the Triple Intervention.

Britain was concerned with Japan's surprising rise to great power status, and its replacement of Russian influence in the Far East. Moreover, its immigration policy, especially the "White Australia" policy immigration restriction Act of 1901, actively pursued by the Australian Prime-Minister Billy Hughes, weighted immensely on the need not to set a precedent. The US was worried about the Japanese intentions towards China and the implications of a more flexible immigration policy on the west coast.[79] This proposal was rejected and a second attempt to include the racial equality proposal in the preamble of the covenant was also unsuccessful. After two months of negotiations, only the Shandong concessions were handed over to Japan. The German colonies were placed under the League of Nations' mandate system. Moreover, the Japanese society was rather sceptical of the effort to build a league of nations as it was perceived to infringe sovereignty, and also because it appeared to be a rather idealistic project. These opinions were manifested through the newspapers, the pressure groups and the intellectuals, all very suspicious of an organisation led by the West. Moreover, for Japan the immigration problems were starting to arise, especially after the 1913 California alien land law, a situation that could be altered with this race equality proposal. Once again, it was as if Japan was being regularly tested by the West, and that had the effect of undermining its confidence and security as a great power. Furthermore, the US annexations of the Philippines in 1898 and Hawaii in 1900 increased the fear of growing encirclement.

The issue of immigration, which would be affected by the approval of the racial equality clause, was considered by Britain and the US as interfering with their domestic affairs and this was the reason presented for rejecting it. For Britain, imperial unity was much more important than the racial equality proposal. As for

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[78] Naoko Shimazu, *Japan, Race and Equality, The Racial Equality Proposal of 1919*, Routledge, London and New York, 1998, p. 20.
[79] *Ibidem*, p. 9.

the US, immigration issues did play a role in the rejection of the Japanese proposal, but what weighted most was President Wilson's perception that this proposal could undermine the League of Nations' project. Therefore, President Wilson, in the end decided, to abandon the racial equality clause in order to save the League of Nations, and insisted on the handing over of Shandong to the Japanese.[80] This, of course, was a blow for the Chinese aspirations as we shall see later on.

In spite of the fact that Japan was a permanent member of the Council of the League of Nations, the rejection of the racial equality proposal had two main consequences. Firstly, it reinforced the idea that international affairs were dominated by western powers and these were not keen on giving a just and fair treatment to an exogenous power which fulfilled the standard of civilisation. Secondly, it attained symbolic importance as a means of justifying Japan's increasingly aggressive and imperialist foreign policy. The relation with the western powers continued to deteriorate, and the Washington conference of 1921-1922 provided an extra reason for grievance. Japan considered that it had obtained an unfair naval ratio but a more important decision was that of Britain to terminate the Anglo-Japanese alliance.[81] Likewise, in 1924, the US Immigration Act showed that immigration problems remained unresolved.[82] Japan's aggressive expansion continued into Chinese territory with the "Twenty One Demands" of 1915, the invasion of Manchuria in 1931 and the creation of a puppet state, Manchukuo. The strongest international response came from the US, with the Stimson Doctrine.[83] But Japan was unstoppable and withdrew from the League of Nations and amidst dreams of the "Greater East Asia Co-Prosperity Sphere", entered the Second World War in 1941.

On balance, Japan's fulfilment of the standard of civilisation was meteoric but its ascension to great power status within the international society was far from

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[80] *Ibidem*, pp. 29-30.

[81] The naval ratio was of 5 to Britain and the US, 3 to Japan, and 1, 75 to France and Italy.

[82] In the Immigration Act of 1924 the US introduced the system of individual national quotas and Japan received the lowest quota, namely of 100 persons per year.

[83] In a note written to China and Japan Secretary of State Henry Stimson asserted that the US "(...) does not intend to recognise any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which both China and Japan, as well as the United States, are parties", see Quincy Wright, "The Stimson note of January 7, 1932", in *American Journal of International Law*, Vol. 26, nº 2, 1932, pp. 342-348.

easy. It began with a sense of fear, in which the Meiji reforms were urgently carried out, for they were perceived as essential to survive the western threat. Japan had learnt its lesson well, as we can see not only by the impressive domestic reforms but also by the scrupulous observance of international law. For instance, during the war against Russia, two envoys were sent to the US and Europe in order to emphasise the self-defensive nature of the war. In spite of Japan's efforts, the extraterritoriality agreements were not revised until 1899, and resentment grew against the West, which was no longer viewed as a model. In Versailles, paradoxically enough, Japan was not attempting to make a universal claim. It was mainly concerned with its status as a great power. As the country's dissatisfaction with international society grew, so did the lack of compliance with international law, increasingly perceived to have double standards.

b. The Middle Kingdom at the Periphery[84]

"Yet, unlike Japan and Siam, China entered the international society, not by meticulously fulfilling that "standard" but by a revolt against the regime Europe introduced to regulate relations with the non-European world."[85]

The Middle Kingdom has exerted a strong fascination in the West long admired for its splendorous civilisation.[86] China had a tradition of being central, and this centrality was mainly characterised by the superiority of its civilisation. It is interesting to note that this perception of centrality evolved into a nationalist and then ideological direction throughout the 20th century, but it has never ceased to exert its influence.[87] This emphasis on culture and civilisation can be explained by the absence of any rival civilisation, any serious contender for a cultural challenge but also due to natural geographical barriers.[88] Throughout history, mainly after 221 B. C., the Middle Kingdom reinforced the idea that it was not just superior in terms of civilisation, it was civilisation *per se*, and its foreign relations were an extension of this idea, in other words, "(...) international society was the extension of internal society."[89] The relations between the centre and the periphery were based on the cultural superiority of the former and also on a correlative concept of proximity, in which there was a connection between space and morality, in the sense that the closer a country was to the Chinese emperor the higher its moral conduct.[90] In fact, this cultural superiority was embodied in the Chinese conception of civilisation, *wen*, which also means Chinese writing, that it is the only language.

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[84] This is part of the title of the book by Zhang Yongjin, op. cit.
[85] *Ibidem*, p. 196.
[86] Colin Mackerras, *Western Images of China*, Oxford University Press, Oxford, New York and Hong Kong, 1989, p. 6
[87] William C. Kirby, "Traditions of centrality, authority and management in modern China's foreign relations", in Thomas W. Robinson and David Shambaugh (eds.), *Chinese Foreign Policy, Theory and Practice*, Studies on Contemporary China, Clarendon Press, Oxford, 1997, pp. 13-29, at p. 15.
[88] Benjamin I. Schwartz, "The Chinese perception of world order, past and present", in John King Fairbank (ed.), *The Chinese World Order, Traditional China's Foreign Relations*, Harvard University Press, Cambridge, Mass., 1968, pp. 276-288, at p. 281 and Samuel S. Kim, *China, the United Nations, and World Order*, Princeton University Press, Princeton, 1979, pp. 21-22.
[89] Suisheng Zhao, *Power Competition in East Asia, From the Old Chinese World Order to Post-Cold War Regional Multipolarity*, Macmillan, Basingstoke and London, 1998, (1st Ed. 1997), p. 18.
[90] Derek Howland, *Borders of Chinese Civilisation: Geography and History at Empire's End*, Duke University Press, Durham and London, 1996, p. 14.

Indeed, it is language itself as distinguished from mere varieties of speech.[91] The strength of this cultural superiority was reinforced by the fact that foreign rule such as the Mongols (the Yuan dynasty between 1280 and 1368) and the Manchu (the Qing dynasty from 1644 to 1911) adopted Chinese civilisation. There were also the Jurchen, who became the Jin from 1115-1234 but never dominated China as a whole. This perception of assimilating what is foreign and adapting it to the Chinese way can also be seen in more modern times with Mao Zedong's "sinicisation" of Marxism-Leninism, which later become known as Marxism-Leninism-Mao Zedong Thought.[92] Unlike Karl Marx and Friedrich Engels, who considered peasants not revolutionary but conservative, Mao adopted Marxism into the realities of the Chinese population and made it the crucial key for success.[93]

The Middle Kingdom was a very hierarchical world in which the Son of Heaven constituted the apex of this civilisation; the emperor possessed the Mandate of Heaven which was granted to a wise and virtuous ruler. The role of the emperor was two dimensional, one human and one cosmic, the former being as a temporal political ruler, in which his behaviour could stray from the path of true virtue, and the latter, the embodiment of virtue as the "son of heaven." The Emperor could lose his mandate if he failed to follow the precepts of Confucianism. The emperor's failures would, in turn, cause natural disasters that symbolised his or his dynasty's loss of mandate. Moreover, the Emperor was on the top of a pyramid which embodied the five Confucian relations: ruler and subject, father and son, husband and wife, elder brother and younger brother, friend and friend. Only the latter was conducted on a reciprocal basis. Nevertheless, the Mandate of Heaven functioned as a double-edged sword, since it could be a means of legitimising a dynasty's rule or a successful rebellion against it.[94] Harmony was absolute and secured through rituals and the maintenance of hierarchy; neglect and disorder were the result of man's incorrect

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[91] *Ibidem*, p. 55.
[92] See Stuart Schram, *The Political Thought of Mao Tse-tung*, Cambridge University Press, Cambridge, 1989.
[93] Karl Marx and Friedrich Engels, *The Communist Manifesto*, Penguin Classics, London, 1985 (1st Ed. 1848), pp. 84 and 91.
[94] Mark Mancall, *China at the Center, 300 Years of Foreign Policy*, The Free Press, New York and London, 1984, pp. 15-16.

procedure in the ritual. This was the most important element to characterise one's civilisational level both within and outside China, as we can see in the dual concept of barbarians divided into the *waiyi*, outside barbarians like westerners and Africans, and the *neiyi*, inside barbarians.[95]

This hierarchical view of society projected itself upon the relations with the outside and we can find three differentiated zones. The first one, known as the Sinic zone, was composed of nearby and culturally similar countries. The Second was called the Inner Asian zone and inhabited by tribes and states of nomadic or semi-nomadic peoples, who were on the fringe or outside the Chinese culture area. The third, known as the Outer zone, was inhabited by the outer barbarians of distant lands and sea.[96] Relations with the outside were traditionally described as a Sinocentric hierarchy but hierarchical in at least three ways, China being internal, large and high and the barbarians being external, small and low.[97] The symbol of the Sinocentric tribute system was the *kow tow*, three kneelings and nine knockings of the head and "one could not refuse to *kow tow* without challenging the whole of the extensive Chinese world order, domestic and international."[98] International relations of the Middle Kingdom can be characterised as based on the concept of inequality and this view of the international was based on a cultural superiority.[99] The centre always conducted foreign relations on its own terms and within this Sinocentric view there was also a lack of interest and disdain of foreign commerce.

The tribute system was well defined in the Collected Statutes which regulated the frequency, point of entry and departure in China, the route to be followed and the size of the tribute that was to be paid. All of these aspects varied according to the importance attached to the country and were specific for each tributary state. The arrival of the tribute envoy was reported by the provincial authorities to the emperor and the Board of Rites memorialised on his arrival at the

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[95] Frank Dikötter, *The Discourse of Race in Modern China*, Hurst and Company, London, 1994 (1st Ed. 1992), p. x.
[96] Wang Tieya, op. cit., p. 216.
[97] Lien-sheng Yang, "Historical notes on the Chinese world order", in John King Fairbank (ed.), op. cit., pp. 20-33, at p. 20.
[98] Gerrit W. Gong, op. cit., pp. 132-133.
[99] Shih-Tsai Chen, "The equality of states in ancient China", in *American Journal of International Law*, Vol. 35, nº 4, 1941, pp. 641-650.

capital. At the capital, the envoy would present a memorial through the Board of Rites, performing a full *kow tow* and the tribute was presented. Then the emperor gave an audience in which the *kow tow* was presented and imperial gifts were bestowed. All the expenditures and unforeseen problems were taken care of by the Chinese government and, finally, an escort was provided to accompany the tributary envoy on his way back.[100] The vitality of this system can be inferred by the facts that between 1662 and 1911 over 500 tribute missions from 62 different countries were carried out.[101]

This was a system based on bilateralism never multilateralism and reflecting Chinese superiority. It also showed that all foreign countries were considered equal and, therefore, benefited from an impartial treatment, at least in theory.[102] There was also the perception that the tribute system was economically ruinous for China, since it paid more than it received.[103] China did not feel "an aggressive mission either to civilise the rest of the world or to shoulder its burdens"[104] and foreigners were handled by the Reception Department of the Board of Ceremonies, also known as the Board of Rites, and only some through the department of the Board of War. The Qing created an office to deal with the Mongols, due to their special relation as vassals and first allies, at Mukden in 1638, the Li-fan Yuan, Mongolian Superintendency, or the court of colonial affairs, better known as the Barbarian Control Office which, after 1644, included Tibet and Xingjian.

It was this civilisation that westerners met in the 19th century and which they sought to open. The confrontation between China and the western powers has been the subject of a great variety of books and has attracted the attention of many scholars. It is very interesting to observe that the history written about China as also evolved. In other words, the way China has been studied and perceived has indeed changed. We are aware that to study the history written about China is beyond the scope of this study but we think that it is important to understand that

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[100] Masataka Banno, *China and the West, 1858-1861, The Origins of the Tsungli Yamen*, Harvard University Press, Cambridge, Mass, 1964, pp. 3-4.
[101] Mark Mancall, op. cit., p. 15.
[102] See Wang Gungwu, "Early Ming relations with Southeast Asia: a background essay", in John King Fairbank (ed.), op. cit., pp. 34-62, at p. 61.
[103] Suisheng Zhao, op. cit., p. 22.
[104] Mark Mancall, op. cit., p. 11.

there is more than one way of looking at both what happened in the 19th century clash between China and the West and also how the image of traditional Chinese World Order has been complemented by other studies. In other words, "the old picture of a stagnant, slumbering, unchanging China, waiting to be delivered from its unfortunate condition of historylessness by a dynamic, restlessly changing, historyful West, has at last begun to recede."[105]

Let us begin with the traditional Chinese world view that we have been describing, namely the approach that the Middle Kingdom always dealt with the outside on its own terms. This view has been contested and is especially true of times when China was weak or divided, a "lesser empire". This happened during the Sung dynasty and its dealings with the Jurgens, as well as in the pragmatic alliances with the Kithans, *e. g.*, the Treaty of Shan-yüan in 1005.[106] Moreover, China was more interested in the outside world than was initially presumed and there was more curiosity about world affairs than the maritime expeditions of Cheng He during 1405-1433. There is a wealth of written sources in the Sung dynasty regarding foreign regions and the importance attached to the sending of embassies.[107] Furthermore, "the delusive myth of a Chinese antiquity that abandoned racial standards in favour of a concept of cultural universalism in which all barbarians would ultimately participate has understandably attracted some modern scholars" but it has come under strong critical fire.[108] There was a perception of race even at the time "when Albuquerque first arrived in Malacca in 1511, the natives drew his attention to the existence of "white people" in the region: he found Chinese emigrants."[109] The whiter colour was favoured in detriment of darker complexion as in the case of peasants, who due to their work, were burned by the sun. In the Qing dynasty, the racial element became a significant argument in the delineation of the barbarian.

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[105] Paul A. Cohen, op. cit., p. 57.
[106] See Wang Gungwu, "The rhetoric of a lesser empire: early Sung relations with its neighbors", in Morris Rossabi (ed.), *China among Equals, The Middle Kingdom and its Neighbors, 10th -14th Centuries*, University of California Press, Berkeley, 1983, pp. 47- 65.
[107] See Herbert Franke, "Sung embassies: some general observations" in Morris Rossabi (ed.), op. cit., pp. 116-148.
[108] Frank Dikötter, op. cit., p. 3.
[109] *Ibidem*, p. 11.

The attitude towards commerce was not always rigid and disdainful and, in fact, some Qing Emperors, and especially Emperor Kang Xi, had a pragmatic approach to commerce as well as to foreign things.[110] Moreover, this pragmatism is also observed in the manner that China dealt with the first maritime contacts. These were established in Macau by the Portuguese and, unlike the treaty ports of the 19th century, were not acquired by force and but, at first, tacitly tolerated by the Chinese emperor. Only in the 19th century was a formal treaty signed regarding the sovereignty of Macao. This relation, sometimes referred to as the Macau Formula,[111] turned out to be a compromise, which worked both ways.[112] The Portuguese were concerned with commercial profits in the region and silk from Guangdong, essential for trade with Japan. For the Chinese, it had three main advantages, the first being that it worked as a way of restricting the barbarians to an area that could be controlled and, therefore, Macau acted as a buffer zone. Secondly, it was profitable due to the high customs and tariffs imposed on the foreigners and, thirdly, the latter helped to defend the coasts against piracy. Here we can observe a more pragmatic attitude on the Chinese side as to commercial activity, that was considered undignified, and also a kind of equilibrium between the centre, Beijing, traditionally more conservative, and the coastal areas, which had a more flexible approach. This is also reinforced by the fact that the Sinocentric system worked both ways, since it preserved China's central position and helped to secure its borders but at the same time, the tributary states gained prestige and legitimacy because, being recognised by the emperor, they received protection against foreign invasions, as well as luxurious gifts and were also allowed to conduct profitable trade.

The relation between China and the sea barbarians during the 17th century was quite different than the one established in the 19th century. During the 17th century, the Jesuits were permitted to establish residence in Beijing in 1601. This

[110] See Mark Mancall, "The Ch'ing tribute system: an interpretative essay", in John King Fairbank (ed.), op. cit., pp. 63-89.
[111] See Fok Kai Cheong, *Estudos sobre a Instalação dos Portugueses em Macau*, Gradiva, Lisboa, 1997.
[112] António Vasconcelos de Saldanha, *Estudos sobre as Relações Luso-Chinesas*, Instituto Superior de Ciências Sociais e Políticas and Instituto Cultural de Macau, 1996, p. 15.

relationship would suffer due to the Rites' Controversy,[113] and finally came to an end: "it was the insistence of the Pope in Rome and the anti-Jesuit Catholic Orders on the rectitude of their position that led to the Christian debacle."[114] We should also take into consideration the institution of *kow tow*, which was not only symbolic but also voluntary, representing acceptance of the Chinese Sinocentric world. This institution would, of course, clash with other countries, such as western ones, which viewed international relations within a sovereignty equality framework. This is precisely what happened with Lord Macartney's embassy in 1793. But it is interesting to see that although the British ambassador attached so much importance to state sovereignty and dignity, he failed to contest the other important element regarding Chinese protocol, the classification of the tributary embassies. This, however, was not the case of the Portuguese embassies to Beijing, of 1667 led by Manuel de Saldanha, of 1727 led by Alexandre de Sousa e Menezes and of 1752 led by Francisco Pacheco de Sampaio. These embassies showed that compatibility between the sovereignties of both countries was possible. The *kow tow*, and the humiliation or reverence associated with it, put the emphasis more on the individual than the state that the envoy represented. This can be seen in the Russian embassy of 1720 to China, in which *kow tow* was performed, and the classification of its embassy perceived as being more detrimental to the sovereignty of a state. Lord Macartney's embassy was considered to be a 'bearer of tribute' rather than 'bearer of congratulations', as was the case of the Portuguese embassies mentioned above. This was partly possible due to the firmness of the ambassadors, but the decisive factor was the knowledge of Chinese protocol by the Jesuits in Beijing.[115]

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[113] As in Japan, the rivalries between different Religious Orders were felt. The Rites Controversy was centred on the Jesuit approach to Confucianism as a philosophical system rather than a religion. Therefore, the Jesuits participated in Confucian ceremonies and tried to adapt Catholicism to the Chinese reality. This pragmatic approach was repudiated by the remaining Religious orders which had entered China in 1633. This controversy lasted for quite some time and was finally solved in 1742 when Pope Benedict XV condemned the approach of the Jesuits. See João Paulo Costa, "China", in Luís de Albuquerque (dir.), op. cit., pp. 242-249.

[114] Mark Mancall, *China at the Center, 300 Years of Foreign Policy*, The Free Press, New York and London, 1984, p. 87.

[115] António Vasconcelos de Saldanha, *De Iustum Imperium: dos Tratados como Fundamento do Império dos Portugueses no Oriente, Estudo da História do Direito Internacional e do Direito Português*, Instituto Português do Oriente, Macau, 1997, pp. 683-696.

The 19th century clash between China and the West has been debated by several generations of scholars, and it is true that most of these scholars do have western-centric assumptions.[116] We tend to look at the 19th century and consider that the most important event was the confrontation between China and the West and that China was a giant with feet of clay, a static and dying empire, incapable of accepting change or accommodating herself to foreigners. In other words, the West was active and China passive and this is called the "impact-response" approach.[117] There is a degree of truth in the fact that, despite all the examples of pragmatism and flexibility, it remains that the Chinese confronted the Europeans in the 19th century with all the "immemorial maxims".[118] When we look at China around the time of the Opium Wars, we tend to consider that the greatest fact of the 19th century was the arrival of western powers and see China's response related to its size, inertia and adherence to its own standard of civilisation. On the eve of the Opium Wars, China's foreign policy was based upon her sense of superiority in warfare, her skill in civilising barbarians and the possession of precious trading goods that would bring the barbarians to accept the tributary system.[119] But the barbarians, were interested in the opium trade, had no desire to be civilised by the Chinese. They didn't leave, and proposed an alternative system of international relations, in which its members were sovereign states on a level of equality, at least in theory.

Nevertheless, if we look at the history of China one event does stand out, namely the Taiping rebellion which was the greatest of a series of rebellions that caused tremendous social unrest.[120] The rebellion began in 1850 and lasted until the 1864, causing an estimated 20 to 40 million deaths and, in spite of the western encroachment into Chinese territory, this was not a revolt against the West, but directed at Manchu rule. Notwithstanding, "if these rebellions show the weakness of the imperial government the fact that the dynasty survived is, at the same time,

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[116] Paul A. Cohen, op. cit., pp. 1-7.
[117] *Ibidem*, pp. 9-55.
[118] Benjamin I. Schwartz, "The Chinese perception of world order, past and present", in John King Fairbank (ed.), op. cit., p. 281.
[119] Frederic Wakeman Jr., "The Canton trade and the opium war", in John King Fairbank (ed.), *The Cambridge History of China, Late Ch'ing 1800-1911*, Vol. 10, General Editors Denis Twitchett and John King Fairbank, Cambridge University Press, Cambridge and New York, 1995 (1st Ed.1978), pp. 136-212, at p. 174.
[120] Paul A. Cohen, op. cit., p. 16.

evidence of the extraordinary resilience of traditional society."[121] And this resilience leads us to the second approach to Chinese history in the 19th century known as the "tradition-modernity."[122] This approach is based on the assumption that China failed to respond to the challenges of modernity, because to do so would imply the defeat of the traditions that had upheld China for so long. This approach is evident in the idea that the T'ung-chih Restoration failed not only due to the rejection of the Alcock convention and the outburst of the Tientsin massacre but also because Confucianism and modernity were incompatible. Although the performance was brilliant, the result was dismal failure and it failed because the requirements of modernisation ran counter the requirements of Confucian stability.[123] For us to understand why this restoration failed, we need to also look at domestic affairs because, due to the Taiping Rebellion and the dangers that it presented, there was the need for some kind of *modus vivendi* with the foreign powers. When the domestic situation began to be under control, the position of the Tsungli Yamen started weakening.[124] This approach also leads us to assume that the West was active, dynamic and the West alone could change China, as it was perceived even by political thinkers such as John Stuart Mill. Despite the fact that he praises China as a nation of much talent and a glorious past, he states that the Chinese have become stationary and "(...) have remained so for thousands of years; and if they are ever to be farther improved, it must be by foreigners."[125]

Nevertheless, the issue of culture is useful for us to understand the enormous challenge of the 19th century and the clash between a civilisation and nation-states.[126] On the one hand, China's civilisation has kept China together for

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[121] The Chinese Empire had experienced several outbreaks such as the White Lotus secret society in 1796 which was repelled in 1806 and re-surfaced in the 1820s and 1830s, the Triads, in 1853, which was a southern anti-Manchu secret society, and some Muslim minorities risings. There were also several groups of bandits like the Nian that controlled large areas especially in the countryside; see Jack Gray, *Rebellions and Revolutions, China from the 1800s to the 1980s*, Oxford University Press, The Short Oxford History of the Modern World, Oxford and New York, 1990, p. 53.

[122] Paul A. Cohen, op. cit., pp. 57-96.

[123] Mary Clabaugh Wright, *The Last Stand of Chinese Conservatism, The T'ung-chih Restoration, 1862-1874*, Atheneum, New York, 1969, p. 9.

[124] Masataka Banno, op. cit., p. 245.

[125] John Stuart Mill, *On Liberty and Other Essays*, Edition and Introduction by John Gray, Oxford University Press, Oxford and New York, 1991 (1st Ed. 1859), pp. 79-80.

[126] Some authors still see the question of becoming or not a nation-state as a problem of contemporary China. See John Fitzgerald, "The Nationless state: the search for a nation in modern China", in Jonathan Unger (ed.), *Chinese Nationalism*, M. E. Sharpe, Armonk, New York and London, 1996, pp. 56-85.

so long[127] and there is the perception that "what is quintessentially Chinese is the remarkable sense of continuity that seems to have made the civilization increasingly distinctive over the centuries."[128] On the other hand, we may also claim that the weight of such as glorious past may be understood as an obstacle to modernisation, in other words the persistence of a tyranny of history, in the sense that perception and thought patterns from the past still bind living minds.[129] In our view, what is important is to bear in mind that modernity and tradition are not mutually exclusive concepts but interchanging and acting constantly. Regarding foreign policy, the persistence of tradition in Chinese foreign relations has led to a dichotomy between those who think that the Chinese perception of world order was fundamentally undermined in the 19th century[130] and the continuity school which emphasises persistence of tradition in contemporary China.[131]

This debate regarding tradition and modernity sparks the third approach regarding the economic situation of China during the 19th century and especially when compared to Japan in what is known as the imperialism debate.[132] Much has been said about these two countries, and it is true that China was unable to match the Japanese pace of modernisation. In China, the economic incorporation preceded political incorporation, unlike Japan, in which political preceded economic development: the so-called breathing space for industrialism to get under way.[133] In China, the main interest was trade at least until 1880s, when spheres of influence were established. Imperialism distorted and restructured the Chinese economy, forcing it into a condition of underdevelopment until 1949.[134] In our view, this is a biased analysis of what happened in China. It ignores the importance of domestic affairs and conditions in each country and tends to

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[127] Lucien W. Pye, "How China's nationalism was shanghaied", in *The Australian Journal of Chinese Affairs*, nº 29, January/1993, pp. 107-133, at p. 130.
[128] Wang Gungwu, *The Chineseness of China, Selected Essays*, Oxford University Press, Oxford, Hong Kong and New York, 1991, p. 2.
[129] W. J. F. Jenner, *The Tyranny of History, the Roots of China's Crisis*, Penguin Books, London, 1992.
[130] Benjamin I. Schwartz, op. cit., p. 284.
[131] See Mark Mancall, "Persistence of tradition in Chinese foreign policy", in *The Annals of the American Academy of Political and Social Science*, Vol. 349, September/1963, pp. 14-26. See also John Cranmer-Byng, "The Chinese view of their place in the world: an historical perspective", in *The China Quarterly*, Vol. 53, 1973, pp. 67-79.
[132] Paul A. Cohen, op. cit., pp. 97-147.
[133] Frances W. Moulder, op. cit., p. 96.
[134] *Ibidem*, *passim*.

assume that the economic impact of the West was negative *per se*, or that all countries would follow a western way of doing things.[135] On balance, the three debates that we have outlined reveal the different interpretations of what happened in China and especially of the encounter with western countries. If some stress the active or reactive approach of China, others have suggested that we should search for a more China-centred approach within a framework of three zones in frequent interaction.[136] In our view, all these approaches are complementary and help us to understand the events of the 19th century and show us how the same facts lead to different interpretations and how history itself does not have a static interpretation.

China's contacts with international law began in the middle of the 17th century under the influence of the Jesuits, but they were only systematically and formally introduced in the middle of the 19th century. Amidst these first contacts we find the Treaty of Nerchinsk signed in 1689 between Russia and China. This treaty had the limited scope of settling border security issues, which were important for China, and in order for this treaty to be valid and accepted by Russia, it was written in accordance with the prevailing law of nations. Nevertheless, this did not mean that the Emperor Kang Xi accepted the principles of equality and reciprocity. In fact a reference to international law made either in official or unofficial sources during the years between 1689 and 1839 is not found.[137] This is considered to be a treaty between equals with the aim of resolving border problems, like the Treaty of Kiahta of 1727, the supplementary Treaty of Kiahta in 1768 and the Protocol relating to the Treaty of Kiahta of 1792.

There are also some references to practices of international law before 700 B. C., and in the Spring and Autumn period, since both were characterised by a high degree of independence and equality of states. But, in spite of the numerous examples of customs of mediation, asylum, covenant and treaty-making and the

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[135] *Cf.* Robert F. Dernberger, "The role of the foreigner in China's economic development, 1840-1949", in Dwight H. Perkins, *China's Modern Economy in Historical Perspective*, Stanford University Press, Stanford, 1975, pp. 19-48.

[136] The first one is characterised by being an outermost zone in which some situations such as the Treaty Ports were clearly responses to or consequences of western presence. The second is considered to be an intermediate zone that embraces aspects that were activated but not originated by the West such as the T'ung-chih restoration. The third is the innermost zone in which there was no intervention of the West and were left undisturbed by foreign presence such as language and writing; see Paul A. Cohen, op. cit., pp. 53-54.

[137] Wang Tieya, op. cit., p. 228.

Spring and Autumn's effervescent interstate relations, we cannot conclude that they are international law. These epochs have more to do with the feudal system than the modern, interstate, international law system.[138] In other words, there was "inter but no nations", whilst after 221 B. C. we can say that there was "a nation but no inter".[139] The characteristic of the treaties concluded with the West in the 19th century is that they were unequal and signed under duress. They are divided in three groups, the first being the treaties celebrated in 1842 and 1843, the second in 1858-1860 and the third between the 1860s until 1895.[140] The first group began with the 1842 Nanjing Treaty. This treaty was the result of the first Opium War which resulted in a Chinese defeat. The war had its roots in the unfavourable economic relations between Britain and China as a result of the tea trade. Tea first began as a luxury, since the habit of drinking tea was introduced by the Portuguese Catherine of Braganza, who married King Charles II in the 17th century. But it soon became a staple commodity and the increasing quantities of tea were bought in China and paid for with silver. This situation began to drain the English of silver, and a solution was found by the East India Company, in what was known as the 'country trade'. This was possible after the control of the opium producing territories in India as from 1750, in which opium was produced intensively and on a large scale. It was then sold to China as a way of recovering silver. Opium provided a return for the tea trade through this indirect mechanism.

For China, the opium trade was a source of social turmoil and further increase of corruption and, despite the prohibition to smoke opium as early as 1729, and the almost successful campaign of 1839, opium commerce was unstoppable.[141] In 1842, the Treaty of Nanjing was signed and followed by the Supplementary Treaty of The Bogue of 1843. Moreover, similar agreements were established with the US and France. France managed to obtain the toleration of Catholic missionaries and believers. These treaties had profound consequences in

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[138] Iriye Keishiro, "The principles of international law in the light of the Confucian doctrine", in *Collected Courses/The Hague Academy of International Law*, Vol. 120, 1967/I, pp. 1-60 and Roswell S. Britton, "Chinese interstate intercourse before 700 B. C.", in *American Journal of International Law*, Vol. 29, nº 4, 1935, pp. 616-635, at pp. 634-635.

[139] *Cit in* Wang Tieya, op. cit., pp. 213-214.

[140] *Ibidem*, pp. 226-262 (chapter II).

[141] For a good overview of the role of opium in British-Chinese relations see Arnold Toynbee, *Civilization on Trial*, Geoffrey Cumberlege and Oxford University Press, London, New York and Toronto, 1948, pp. 94-96.

the western-Chinese relations due to the abolition of tariff autonomy, opening of five Chinese seaports, besides Canton, to western trade and residence.[142] Furthermore, extraterritoriality was established, as was free trade, which meant the end of the commercial monopoly by the Cohong. Western warships were permitted to anchor at the treaty ports to protect commerce and each nation was given Most Favoured Nation clause. China was obliged to pay 21 million *taels* of indemnity but, quite surprisingly, it did not legalise opium. The introduction of extraterritoriality clauses was also connected with the perceived cruelty of Chinese law. In this respect, the role of the British missionaries was important. Unlike the positive image conveyed by the Jesuits with their humanist characteristics (one only has to think of Matteo Ricci), the British missionaries formed a group of narrow-minded, conservative and unimaginative people.[143] This group stressed the cruelty of punishments, the concept of collective guilt and the high levels of corruption.[144] The image of a chaotic China was reinforced by the Taiping and Boxer rebellion, an image that would only change during the Second World War.

The second group of unequal treaties began with the 1858 Treaty of Tientsin and the 1860 Conventions of Beijing. They were the result of a military operation by France and Britain that also benefited Russia and United States. It imposed 16 million *taels* of indemnity, half to France and half to Britain, upon China's custom revenues, which were controlled by western nations and reduced China's tariffs; furthermore, it opened ten more ports and the Yangtze River.[145] It also permitted westerners to travel outside the ports and into the interior of China, legalised the opium trade, which was now subjected to similar import duties as other articles of trade. The territorial encroachment continued with the cession of the Kowloon peninsula to Britain. Cession of territory in the North was carried out by the Russians through the Supplementary Treaty of Beijing.[146]

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[142] These were Amoy, Ningpo, Shanghai, Hong Kong and Foochow.

[143] Colin Mackerras, op. cit., p. 46.

[144] *Cf.* with the idea that in contrast Chinese law was quite humane when compared with Britain in Frederic Wakeman Jr., op. cit., pp. 189-90.

[145] The tariffs were reduced to about 5% *ad valorem* and the ports were Nanjing, Newchwang, Tengchow, Hankow, Kiukiang, Chinkiang, Taiwanfu, Tamsui, Swatow and Kiungchow.

[146] It opened the Manchurian towns of Urga and Kashgar and lands north of the river Amur and East of the Ussuri in a total of about 300000 to 400000 square miles. This was the continuation of the 1851 treaty that had opened Ili and Tanbagatar.

Moreover, these treaties established the right to permanent diplomatic residence in Beijing by the western powers. This was a time of great chaos for China not only due to death of the emperor at Jehol in 1861, but also because the Taiping rebellion only ended in 1864 with the recapture of its capital, Nanjing. It is against this background that we have to understand the acceptance and mastering of western diplomacy with the establishment of the Tsungli Yamen. The Tsungli Yamen had two offices attached, the college of foreign languages, the T'ung-wen Kuan, in Beijing, and the inspectorate general of customs as a result of the three identical Rules of Trade signed with the US, Britain and France which stipulated under rule 10, that a uniform system for the collection of customs should be enforced on all treaty ports. But more important was the need to establish foreign relations differently from what had been the norm. The protagonists were the high civil and military officials led by Prince Kung, and the process was called the T'ung-shih Restoration. Historically in China, in cyclic periods of decline and stability, an Indian Summer was the period of temporary stabilisation before being followed by a time of catastrophe and chaos and then dynastic stability again, since it changed the order of things and "this exceptional case of a renewed lease on life is called a restoration."[147]

In the critical formation period of the Tsungli Yamen, Britain held back its private groups which considered that more treaty ports had to be opened, and endeavoured a moderate co-operation with the Chinese government and a policy of non-intervention. There was a clear perception that the issue at stake was not only the failure of China to deal with the West but also the break up of China threatening foreigners' interests. All the great powers were interested in China but none was willing or able to govern the country as a whole.[148] At this time, the cleavage widened between the diplomats, who followed this policy, and the merchants and missionaries who, for different reasons, wanted to open China even more. In spite of the support of the British government, the goal of the Restoration was not fully achieved. Notwithstanding, some success was obtained

[147] Mary Clabaugh Wright, op, cit., p. 45. The author gives the example of previous Restorations in Chinese history, between 827-782 B. C., 25-57 A.D. and 756-762 A. D., being the latter a period of outstanding poetry and prose.
[148] *Ibidem*, p. 23.

in the fact that China began to discover and master international law. To this, the translation of Henry Wheaton's *Elements of International Law* by W. A. P. Martin in 1865, a work that was ordered by the Tsungli Yamen, was crucial. In spite of the fact that "(...) this candle did not light much of the darkness"[149], it was important for China to begin the translation of other western international law works, to introduce western studies and to include geography, topography, customs, governments and products of foreign countries in the examinations on foreign affairs. In 1871, China began to send students abroad.

The third stage of unequal treaties paradoxically takes place at a time when China was beginning to master international law and to use it in practical situations. The greater knowledge of international law helped China to resolve two foreign policy issues, the first regarding the incident between Prussia and Denmark in 1864 and the second against France in 1866. In the latter, after France's invasion of Korea, China responded by arguing soundly the rights and duties of neutrals, revealing its understanding of the technical meaning of blockades. Nevertheless, more unequal treaties were signed such as the Chefoo Convention of 1876 after the Margary affair[150] and the Treaty with Russia, which opened several Mongolian and Tibetan cities to Russian trade and residence. Moreover, the French-Sino war of 1883-1885 was concluded with more unequal treaties by which other cities were opened. In addition, China was engaged to respect all treaties concluded directly between France and Annam. The same happened in the dealings between Britain relating to Tibet and Burma in 1886 and to Sikkim in 1890; step by step the Sinocentric world was collapsing.

When we look at the third group of unequal treaties imposed upon China, and despite the fact that they all contributed to the political and economic encroachment of China's sovereignty, one treaty does stand out, namely the 1895 Treaty of Shimonoseki. This is so because, for the first time, a non-western country imposed an unequal treaty. Japan was no more the country of the "dwarf

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[149] Mark Mancall, *China at the Center, 300 Years of Foreign Policy*, The Free Press, New York and London, 1984, p. 188.

[150] This convention opened four ports to western trade and residence and six other places in the Yangtze River as port of call for steamers. It also established an indemnity of 200 000 *taels* to the family of the victim.

slaves" or "dwarf pirates"[151] but a powerful country. There had already been signs of the change of Japanese attitude towards China and Korea. In 1870, after more than two centuries without official contact, Japan requested a treaty of trade and friendship. The treaty was signed in 1871 and took effect in 1873 largely because there was the perception of an ambivalent position of Japan "neither as distant and different as the westerners, nor as close and commensurate as China's dependencies."[152] In 1874, due to the Taiwan incident and after mediation by Sir Thomas Wade, Japan received an indemnity from China and reinforced its claim over the Liuqiu islands. In 1876, and despite the fact that Korea refused to accept it by stating that it was a vassal of China, a Japanese-Korean treaty was signed. The Treaty of Shimonoseki opened more cities, China lost Taiwan and abandoned the claim over the Ryukyus, ceded the Liaotung peninsula and recognised Korea's independence.[153] This was the fatal blow for the Sinocentric tributary system, since Korea was the most important tributary state.[154] The system only terminated in 1911 and the last tributary mission to be sent was in 1908 by Nepal. These facts have led to the conclusion that "the longevity of the system caused foreign observers in China to comment that the former tributary states continue to worship the shadow after the substance has departed."[155] Although this is true, it does show the strength of a system not usually based on force and that accommodate interests from both sides.

In spite of the fact that China became more involved in international relations, a member in 1868 of the International Telegraph Bureau, in 1874 of the General Postal Union, in 1875 of the International Bureau of Weights and Measures, and invited to participate at The Hague Conferences of 1888 and 1907, the imperialist projects of foreign countries continued. At the end of the 19th century, and despite a strong defence of the concept of sovereignty, spheres of influence were established in China: France on the border with Indochina; Russia on Manchuria and Liaotung; Germany in Shandong; Japan in Fujian and Britain in

[151] Frank Dikötter, op. cit., p. 62 and Derek Howland, op. cit., p. 22.
[152] *Ibidem*, p. 35.
[153] The cities opened were Soochow, Hangchow, Chungqing and Shasi,
[154] John King Fairbank "The creation of the treaty system", in John King Fairbank (ed.), op. cit., pp. 213-263, at p. 260.
[155] Gerrit W. Gong, op. cit., p. 132.

the Guangdong area. Despite the Open Door policy proclaimed by the US, the scramble for concessions continued. The situation was further enhanced by the Boxer Rebellion and the consequent intervention in 1901. China signed a treaty with eleven powers and was obliged to pay 450 million *taels* for which foreign customs' revenues, salt revenues (after 1913 also under foreign control) and even internal customs' taxes were taken as guarantees.[156] This worsened China's already precarious economic situation and the fact that it did not have one coloniser but many resulted in a sense of even deeper and shameful resentment, evident in Sun Yat-sen and Mao Zedong.[157] We may characterise China's colonial experience in three ways: partial, multiple, and layered. It was partial because China retained some sovereignty over its territory, it was multiple as we have already seen and layered because, until 1912, it was spliced into the full colonialism of the Manchu.[158]

China's situation vis-à-vis the foreign powers did not change much with the 1911 revolution that ended imperial rule. Japan's appetite for Chinese territory did not diminish. In contrast, it increased, as we can see by the "Twenty-One Demands" that were presented to the Chinese government. These demands, which were formulated on May 25th 1915, were carried out after Japan's occupation of the German concession of Shandong and were presented as an ultimatum with the threat of using force. The demands included the recognition of Japan's special position in Shandong, in Manchuria and Inner Mongolia, a joint-operation of iron and steel industries, the non-alienation of coastal areas to any third power, and more importantly, the control by Japan of important administrative positions within China's domestic apparatus.

It is against this increasing loss of sovereign control over its own country that we have to appreciate the Chinese government's approach to the peace treaty at Versailles. China was in Versailles due to the fact that it had entered the

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[156] The eleven powers were: Austria-Hungary, France, Belgium, Germany, Britain, US, Italy, Japan, The Netherlands, Russia and Spain. The treaty also included heavy punishment for the guilty, apologies to Germany and Japan, establishment of legation quarters in Beijing, prohibition of the importation of arms for two years, stationing of foreign troops in key points from Beijing to the sea, suspension of official examinations for five years in some cities and increase of commercial privileges to the powers. Russia also occupied Manchuria which it was to loose in favour of Japan in the Treaty of Portsmouth which ended the Russian-Japanese War of 1904-1905. See Wang Tieya, op. cit., pp. 246-247.

[157] John Gittings, *The World and China, 1922-1972*, Eyre Methuen, London, 1974, pp. 37 and 43.

[158] Paul A. Cohen, op. cit., pp. 144-145.

war in 1917 on the side of the Allies. Its delegation was headed by the foreign minister Lu, and formed by the Chinese ministers to the US, Britain and Belgium, respectively Wellington Koo, Alfred Sze and Wei Chentsu. The high level of the Chinese delegation was not only due to the importance of defending its sovereignty for the first time in a multilateral forum, but also because it feared being represented by Japan. For China, and in accordance with the line pursued in its foreign policy, the Shandong question became the bone of contention and also a touchstone for the Wilsonian principles.[159] China received two seats at the Peace conference and was only permitted to appear before the Council of 10 or Council of 4 (from which Japan was excluded), as a petitioner and only upon an invitation.[160] It presented a document, "Questions for Readjustment", in which it called for the abrogation of consular jurisdiction, withdrawal of foreign post offices, fiscal independence and relinquishing of leased territories. Two facts were important to understand the rejection of the Chinese proposal: one was that China's problems did not arise directly from the First World War and, secondly, the secret arrangements between China and Japan, the treaty of 1915 and the notes exchanged between the two governments in 1918.

Once again, the need to make the League of Nations work was more important to President Wilson, especially after the denial of the racial equality proposal to Japan. China's response to this proposal was shaped by two factors, firstly the concept behind the proposal was appealing to China, since Chinese were discriminated against by westerners and Japanese, but secondly their support could not run the risk of antagonising the British and the Americans, because their support was essential in recovering Shandong.[161] But in order to compensate Japan, the Shandong concession was handed out, despite the brilliant Chinese defence of their case. Moreover, President Wilson's view of secret agreements, something that was against his enunciated principles of foreign policy, did not work in China's favour. The Chinese delegation argued that these treaties had been concluded under duress and could not be considered legal, but it was to no avail. Japan refused to sign the Treaty if Shandong was not

[159] Zhang Yongjin, op. cit., p. 51.
[160] This was a disappointment for China since countries like Brazil received three seats. See *ibidem*, p. 52.
[161] Naoko Shimazu, op. cit., p. 29.

handed over, and despite speculation as to whether or not Japan would call its bluff, the fact remains that it was China that refused to sign the Treaty of Versailles.[162]

We should also bear in mind the unique and unprecedented nationalist "May 4th Movement". Albeit not with a nation wide scope, it was the first time that the Chinese voiced their displeasure at the imposed international arrangements.[163] This was due to the perception that such action went against the spirit of the League of Nations and China was not seeking territorial expansion but rather restoration. China's refusal to sign the peace treaty was an assertive moment regarding the rejection of the "(...) unjustified, and in the eyes of the Chinese unjustifiable, international order to be imposed upon it in spite of its protest."[164] It was the first active participation in managing its international relations as it was searching for its place and a role in international society. Moreover, due to the fact that China did sign the St. Germain Peace Treaty regarding the Austrian-Hungary Empire, a breach was finally implemented in the extraterritoriality regime. What is more, the League of Nations functioned as an opportunity for China to present its case as to the recovery of its sovereignty, an opportunity that was seized. China joined the League of Nations as one of the original members and, in 1920, was elected a non-permanent member of the League Council.

The road to abolish the extraterritoriality privileges of foreign powers had just begun and it was followed by the 1919 treaty with Bolivia, in which there was an application of a general tariff. Furthermore, the SU, by the Karakhan declaration of 1921 and then by the formal treaty of 1924, renounced its extraterritorial privileges in China despite the fact that the independence of Outer Mongolia, a former province, was recognised. Until this time, several treaties possessed articles in which treaty powers were prepared to give assurances that extraterritoriality would be abandoned when sufficient progress had been made. This was the case of article 12 of the Sino-British commercial treaty of 1902, article 15 of the commercial treaty of 1903 between China and the US, and article 11 of a similar treaty with Japan of 1903. Other powers promised to relinquish their

[162] Zhang Yongjin, op. cit., pp. 77-99.
[163] *Idem, ibidem.*
[164] *Ibidem*, pp. 96-97.

privileges as soon as the other treaty powers did, as was the case of Sweden, in 1908, and Switzerland in 1918. A third approach was followed by Mexico, in 1921, and Norway in 1928, in which a clause renouncing extraterritoriality would be inserted when the treaties were revised. At the Washington Conference of 1921-1922, eight powers agreed to relinquish their privileges when Chinese law permitted it and a Commission was established.[165] China presented in this Conference its "Ten Points" which focused on the need to recover its territorial integrity and to put an end to the extraterritoriality regime.[166] Despite the fact that, in the final declaration, four principles were included which focused on the respect for China's territorial integrity and political independence, renouncement of further attempts to seek spheres of influence, respect for china's neutrality in time of war and the honour of equal opportunity for all, extraterritoriality was not abolished.[167] On the foreign powers' side, there was the conviction that it was China's failure to surpass and resolve the social and political problems that prevented it from being united. This was the basis of her problems, which led to the need of extraterritoriality rights in order to protect foreigners. For China, however, the roots of its structural economic problems were precisely the western privileges and spheres of influence framework. Only when extraterritoriality was abolished and the unequal treaties renounced was it possible to begin addressing the issue.[168] The International Commission on Extraterritoriality met in Beijing in 1926. The main flaws that were pointed out were the absence of written laws, the different conception of jurisprudence, and fear of the lack of independence of the judiciary.[169] In order to suppress these flaws, provision was made for a Supreme Court in Beijing, a High Court in each province and a District Court in each district. After completing a nine-month survey of Chinese law, the Commission was unable

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[165] The eight powers were the US, Britain, Belgium, France, Italy, Japan, the Netherlands and Portugal. Denmark, Peru, Spain and Sweden joined this commission.

[166] Wesley R. Fishel, *The End of Extraterritoriality in China*, University of California Press, Berkeley and Los Angeles, 1952, p. 55.

[167] Wang Tieya, op. cit., p. 260.

[168] António Vasconcelos de Saldanha, *Estudos sobre as Relações Luso-Chinesas*, Instituto Superior de Ciências Sociais e Políticas and Instituto Cultural de Macau, 1996, pp. 624-625.

[169] Sir Skinner Turner, "Extraterritoriality in China", in *The British Year Book of International Law*, Vol. X, 1929, pp. 56-64, at p. 61.

to recommend that extraterritoriality was abolished, a resolution which was adopted unanimously.[170]

In 1928, the Nationalist government assumed the control of the whole of China and proceeded in denouncing the unequal treaties. The first to be denounced was the Belgian treaty of 1865, using the argument that a treaty may cease to be binding through lapse of time or changed conditions, altogether apart from any question of abrogation by mutual consent or in consequence of any stipulation included within the treaty itself, in other words *rebus sic stantibus*. Turkey followed the *rebus sic stantibus* line at the Lausanne Conference and subsequently the capitulations were abolished by bilateral agreement.[171] But it is interesting to observe that the doctrine of *rebus sic stantibus* was used more as a lever with which to compel Belgium to start negotiations and then dropped. The emphasis was put on the mutual consent by which the 1865 treaty was abrogated.[172] Other treaty powers followed a similar route such as the Sino-Spanish treaty of 1864, and the Sino-Italian of 1866, as in the latter there was the need to reach agreement with all the powers of the Washington treaties.

In 1928, from the original 19 foreign powers only 8 were left.[173] Of these eight powers, Britain and Japan were the more assertive in maintaining their extraterritoriality rights. As to the exercise of jurisdiction in China, Britain's machinery was regulated by the Foreign Jurisdiction Acts of 1890 onwards, but the main thrust came with the Order-in-Council of 1925. This document established a series of Provincial Courts, a Supreme Court, and a Full Court, and a provision was made for an ultimate appeal in certain cases to the Privy Council in London. The system worked in the following manner, each consular district had its provincial court, with both civil and criminal jurisdiction. The Supreme Court was placed at Shanghai as well as the Full Court which functioned as a Court of Appeal in both civil and criminal matters from the Supreme Court and the Provincial Courts. In civil matters, a final appeal could be directed to the Privy

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[170] George W. Keeton, "The revision clause in certain Chinese treaties", in *The British Year Book of International Law*, Vol. X, 1929, pp. 111-136, at p. 119 and Wesley R. Fishel, op. cit., p. 122.
[171] *Ibidem*, p. 117.
[172] *Ibidem*, p. 128.
[173] Wesley R. Fishel, op. cit., p. 147.

Council.[174] The US, with the Act of 1906, had also created an American court in China. This court acted as a court of appeal of the consular court, an appeal that could be taken to the US Circuit Court and then to the Supreme Court. But the biggest menace came from Japan and "it was ironic that just at the time when China became a more self-conscious participant of the world order, the whole framework was collapsing."[175] In 1931, after the invasion of Manchuria, China was becoming more and more isolated if only the international order propounded by the League of Nations was beginning to crumble. It is safe to say that after 1931, the rate and area of decay of the extraterritoriality system was in direct proportion to the speed and extent of Japanese encroachment in China.[176]

Japan's enlargement of its dominions and influence in China, especially after the declaration of war in 1937, was only halted when the Pacific war merged the Sino-Japanese conflict into the Japanese-American struggle, and, therefore, granted China a place in the great alliance. In 1941, China declared war against Japan, Germany and Italy and announced that all unequal treaties concluded with these powers were null and void. At the same time, negotiations began with the US and Britain and, in 1943, these two countries renounced its extraterritorial privileges. Instead of being the recognition of fulfilment of the standard of civilisation, it was an expedient to remove one of the obstacles to complete equality in the future UN.[177] Against some resistance within the Allies, China was included as one of the great powers at the Cairo meeting and afterwards one of the policemen of the world, with a permanent seat and right of veto at the UN Security Council.[178] The abolition of the extraterritoriality rights was followed by Belgium and Norway in 1943, Canada in 1944, Sweden and The Netherlands in 1945, France, Switzerland and Denmark in 1946 and Portugal in 1947. This was confirmed by the newly founded People's Republic of China in October 1st 1949.

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[174] Sir Skinner Turner, op. cit., p. 58.

[175] Akira Iriye, *The Origins of the Second World War in Asia and the Pacific*, Longman, London and New York, 1987, p. 12.

[176] With the Tangku truce of 31st May 1933 four eastern provinces were separated from the rest of China due to the establishment of a demilitarised zone south of the great wall, see Wesley R. Fishel, op. cit., p. 189.

[177] Zhang Yongjin, op. cit., p. 195.

[178] Akira Iriye, "Japanese aggression and China's international position, 1931-1949", in John K. Fairbank and Albert Feuerwerker (eds.), *The Cambridge History of China, Republican China 1912-1949*, Vol. 13, Part 2, General Editors Denis Twitchett and John King Fairbank, Cambridge University Press, Cambridge and New York, 1990, (1st Ed.1986), pp. 492-546, at p. 532.

On balance, China's response to the challenges of international law was very different from Japan. The goal was the same, *i. e.*, to abolish the unequal treaties with all their clauses so derogatory of sovereignty, but the strategies were like chalk and cheese. In 1919, there was the intention not of resisting imperialism and the humiliation of the unequal treaties but of rolling it back. This was done through an active rather than passive diplomatic activity based on the evocation of western principles such as national self-determination and territorial integrity. Moreover, unlike Japan, China's road to abolish the unequal treaties was hard and difficult, and never ceased to play a role in Chinese foreign policy.

International law in 1919 seemed to be effective and the answer to eradicate war and Man's evil doings. The horrors of a trench war that killed a generation functioned as a lever in order to bring international law to a protagonist role once more. It is trite to mention that history has proven the idealistic project of the League of Nations wrong.[179] The Versailles treaty did not satisfy some of the great powers, leaving international society without its common ground of interests. This is particularly true of Japan and Italy who would, by invading Manchuria and Abyssinia, irremediably compromise the effort of this collective agreement. The vehement appeals and condemnations of Japan and Italy by Abyssinia and China proved unsuccessful. The rise of Hitler in Germany dealt the final blow to the international order. The League had forty two members, including five Dominions, but it lacked the membership of the main protagonist, the US that refused to ratify the Covenant and the new Russia, the SU, which stayed aloof from the international scene. The serious economic depression that characterised the late 20s, with all the social and political turmoil associated with it, undoubtedly played a role in the increasing lack of solidarity that characterised the third decade. During this twenty year crisis, we can observe the "dwarfing of Europe", as it has been called, and its replacement by two great powers, the US and the SU.[180] As the dissatisfaction of states regarding the prevailing order grew, so did the concentration of power within and without, reflecting itself in the growing

[179] E. H. Carr, *The Twenty Years' Crisis, 1919-1939, An Introduction to the Study of International Relations*, Papermac/Macmillan, London and Basingstoke, 2nd Ed. 1981 (1st Ed. 1939), p. 207.
[180] See Arnold Toynbee, *Civilization on Trial*, Geoffrey Cumberlege and Oxford University Press, London, New York and Toronto, 1948, especially from pp. 97 onwards.

nationalism and imperialism. In the Italian invasion of Abyssinia (also an attempt to reverse the humiliation of Adowa, which was the first military defeat of a western by a non-western power), one of the arguments used by the Italians was that the Abyssinians were not treating war prisoners according to civilised standards. The endogenous and exogenous actions of totalitarian states showed the world that standards of civilisation were not irreversible but rather fragile and precarious.[181] It was pointless to speak of a standard of civilisation when the *civilised* members of the society of nations showed such contempt for the fulfilment of the standard either towards its own citizens or to foreigners.

Nonetheless, the atrocities committed functioned as a lever for the need to search for the "human ends of power"[182] which were already at work in international society, albeit with a dispersed and fragmentary character: the humanitarian movement for the abolition of slavery, the importance of the idea of racial equality and national self-determination. As a result, the Temporary Slavery Commission appointed by the Council of the League of Nations and, in 1926, an Anti-Slavery Convention was signed. The anti-slavery treaties were important despite the fact that slavery took on new forms and characteristics, such as the infamous coolie trade.[183] The idea of racial equality, as we have seen, was sparked by Japan at Versailles and "the irony of it all was that the contender seemed to have done so without truly recognising the inherent importance of the challenge."[184] A claim that was not universal but restricted to the members of the League of Nations, and even then applicable only to the great powers. The principle of national self-determination was also crucial for the change in international society that would mainly occur after 1945, since "the genie of equality was out of the bottle."[185] The quest for national self-determination and the appeal of the American Revolution was found in cases such as the Vietnamese declaration of independence, in which Ho Chi Minh used Thomas Jefferson's

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[181] Georg Schwarzenberger, "The standard of civilization in international law", in *Current Legal Problems*, London, 1955, p. 217.
[182] Charles de Visscher, op. cit., pp. 124-134 (chapter IV of Book II).
[183] John King Fairbank, "The creation of the treaty system", in John King Fairbank (ed.), *The Cambridge History of China, Late Ch'ing 1800-1911-Part I*, Vol. 10, General Editors Denis Twitchett and John King Fairbank, Cambridge University Press, Cambridge and New York, 1995 (1st Ed.1978), p. 236.
[184] Naoko Shimazu, op. cit., p. 188.
[185] R. J. Vincent, "Racial equality", in Hedley Bull and Adam Watson (eds.), op. cit., pp. 239-254, at p. 250.

famous words that "all men are created free and equal."[186] These peoples began to write their own account of the facts, and no longer following history from a Eurocentric point of view. Likewise, history was beginning to be seen as a whole and not just from our own, parochial viewpoint.[187] Other states began to question the West's infallibility and disagree with its values. This revolt also showed the impact of the revolutionary states in international relations and their choices regarding the *status quo*. The revolutionary state is either "socialised" into adopting acceptable patterns of international behaviour or it is the international society that is forced to change when these new states appear.[188] Nationalism, with its different forms throughout history, has been such a powerful force, whether against Imperialism or Communism.[189] The tension between revolutionary states and international society, acceptance or not of rules of international society will be pursued later on in this study by focusing on China's relation with the UN death penalty framework.

The years between 1919 and 1939 also saw an important development, the autonomy and birth of International Relations as a discipline, connected with the idea of an international community. The international dimension did begin to take its place in the foreign policy of states and, despite all the shortcomings of the League of Nations, it allowed for lessons to be learned. It developed into what has been denominated as the UN Charter model, in which international law expanded in two ways: new areas of intervention and new participants and actors.[190] In one of those areas, the UN has been a protagonist, even at the height of the Cold War and "there can be no question that it was the UN' Charter which established human rights as a major element in the sphere of international legal obligations."[191] It is this new area of international law and, more specifically, the

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[186] *Cit in* Michael R. J. Vatikiotis, *Political Change in Southeast Asia, Trimming the Banyan Tree*, Routledge, London and New York, 1996, p. 86.

[187] See Arnold Toynbee, op. cit., pp. 62-96 (chapter V: "The unification of the world and the change in the historical perspective").

[188] David Armstrong, *Revolutions and World Order, The Revolutionary State in International Society*, Clarendon Press, Oxford, 1993.

[189] Benedict Anderson, *Imagined Communities, Reflections on the Origin and Spread of Nationalism*, Verso, London and New York, 1991 (revised Ed.) and Roman Szporluk, *Communism and Nationalism, Karl Marx Versus Friedrich List*, Oxford University Press, New York and Oxford, 1988.

[190] Antonio Cassese, op. cit., p. 4.

[191] Ian Brownlie, "International law at the fiftieth anniversary of the United Nations, general course on public international law" in *Collected Courses/The Hague Academy of International Law*, Vol. 255, 1995/V,

right to life from a death penalty perspective that is the focus of this study.

pp. 9-228, at p. 79.

CHAPTER III

A FRAGILE GLOBAL INTERNATIONAL SOCIETY: THE UNITED NATIONS, INTERNATIONAL LAW AND *JUS COGENS*

1 International Society and the United Nations

"Social order over any lengthy period of time does not depend simply upon the capacity of a society's institutions to maintain stability and regularity, but upon their ability to change in response to new circumstances. International society has shown itself to be adaptable, but all too often change (usually of a very limited nature) has taken place only after the extreme violence of war and revolution."[1]

The connection between violence and change is certainly applicable to international society in 1945. As in 1648, only after extreme devastation did the need to change and adapt international politics materialise. The creation of the UN organisation was part of this adaptation. In 1939, nationalism and imperialism were such disruptive forces that a shadow was even cast as to the future role of international law and of the existence of international society.[2] It was a devastating conflict, not only due to the fact that it involved all the major powers but also because of the intensity of the fighting, not limiting itself to the military realm and overflowing into the civilian population on an unforeseen scale. The Holocaust showed the world the level of disdain of a government for its own citizens and the atomic bombings of Hiroshima and Nagasaki raised questions of an ethical nature as to the limits of the military employment of such weapons. In 1945, the revisionist powers, Italy, Japan and Germany were defeated and the SU, France and Britain were devastated. The US was clearly the strongest of the great

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[1] David Armstrong, *Revolution and World Order, the Revolutionary State in International Society*, Clarendon Press, Oxford, 1993, p. 310.

[2] Georg Schwarzenberger in 1939 envisaged three potential directions of the relation between international law and international society: the "(...) establishment of several realms of interstate law no longer connected by the general principles of law formerly recognised by all civilised states; to a new universal society regulated primarily by the balance principle, and only secondarily by international law; or to a community in which the rule of law is transformed from an aspiration into a living reality", in "The rule of law and the disintegration of the international society", in *American Journal of International Law*, Vol. 33, nº 1, 1939, pp. 56-77, at p. 77.

powers and the main supporter of the UN. The term "United Nations" was coined during the war and suggested by President Franklin Delano Roosevelt. It can be found in the Atlantic Charter of 14th August 1941 and in the "Declaration of the United Nations" of 1st January 1942. The "Conference of the United Nations" was convened in San Francisco on the 25th April 1945, and the criterion for membership was, of course, linked to the war effort.[3] The Charter of the UN (Charter) was approved unanimously by its 51 participants at the final plenary of the San Francisco Conference on 25th June 1945.[4] It is interesting to observe that the honour of being the first country to sign the Charter was accorded to China. This was justified in recognition of the "long-standing fight against aggression."[5] The Charter came into force on 24th October 1945, after the deposit of the ratification of the five permanent members, in accordance with article 110, and of the majority of the member states.[6] The UN hoped to achieve success where the previous organisation had failed: sparing future generations the scourge of war. Peace was the ultimate goal, but no more as the mere equivalent of absence of war. It was understood as a dynamic process which included the achievement of freedom, justice, progress and security on a worldwide scale.[7]

Nevertheless, the UN was also a compromise between the traditional and the new patterns of international society and this was clearly reflected in international law. From 1945 until today, international society has gone through challenges and appeals for a revision of its principles, which are discernable in the roles that the UN has fulfilled throughout its history: the Cold War division, the

[3] Since only the countries that had declared war on Japan and Germany by 1st March 1945 and also signed the "Declaration of the United Nations" could take their place at this conference.
[4] The original fifty one members of the United Nations Organisation are the US, the SU, the Republic of China, France, Britain, the Netherlands, Belgium, Argentina, Brazil, Byelorussia, Chile, Cuba, Czechoslovakia, Denmark, the Dominican Republic, Egypt, El Salvador, Haiti, Iran, Lebanon, Luxembourg, New Zealand, Nicaragua, Paraguay, Philippines, Poland, Saudi Arabia, Syria, Turkey, Ukraine, Yugoslavia, Australia, Bolivia, Canada, Colombia, Costa Rica, Ecuador, Ethiopia, Greece, Guatemala, Honduras, India, Iraq, Mexico, Norway, Panama, Peru, Union of South Africa, Uruguay, Liberia and Venezuela.
[5] United Nations, *Yearbook of the United Nations 1946-1947*, Department of Public Information, New York, 1947, p. 33. Hereafter simply cited by title and relevant pages.
[6] The Charter of the United Nations is at http://www.un.org/aboutun/charter/index.html (last access 14th February 2005).
[7] Clyde Eagleton, "Organization of the community of nations", in *American Journal of International Law*, Vol. 36, nº 2, 1942, pp. 229-241, at p. 233. The author discusses the preliminary and second reports of the Commission to Study the Organization of Peace set up by in 1939 by the League of Nations. This Commission was not devoted to the restoration of the League but was attempting to structure a different type of organisation.

SU's alternative project of an international community, the claims for justice of the developing countries and the post-Cold War era. Notwithstanding all these challenges, we believe that the main tenets of the international society have withstood them and that the process of socialisation has been successful, since the core elements have been accepted. By socialisation, we mean the process through which a potential new member to the international society internalises the norms and values of that society. By a norm, we mean a general principle that expresses some obligation that is fundamental and inescapable for all states.[8] But this is not to say that it has been a one way process, or that the socialisation has led to satisfaction. In contrast, revolutionary ideas and states have managed to influence and incorporate new elements into international society. This process has not been smooth and straightforward and if it is true that the new ideas have been powerful and inclusive, they have not managed to supplant the old order. This tension between the "old" and the "modern" and its respective claims for order and justice can be best observed in international law. It has been described as having "two souls": traditional and modern.[9] The traditional/Westphalian model is based on three principles: non-interference in the external and internal affairs of other countries, sovereignty and good faith. The modern "UN Charter model" is represented by the principles of co-operation, prohibition of the threat or use of force, self-determination, peaceful settlement of disputes and respect for human rights.[10] The latter is, of all the modern principles, the most subversive of the traditional framework. Within this framework, the state maintains its central role and now 'shares' international society with international organisations such as the UN as well as individuals. These two belong to the society and community elements that exist in international relations and are the main drive towards the reinvention and adaptation of state sovereignty.

The existence and credibility of an international society is, of course, much linked to the concept of legitimacy which, since 1945, has also changed. We understand legitimacy as the collective judgment of international society about its

[8] David Armstrong, op. cit., pp. 199-200.
[9] Antonio Cassese, *International Law in a Divided World*, Clarendon Press, Oxford, 1992 (1st Ed. 1986) p. 4, pp. 30-32 and pp. 396-412.
[10] *Ibidem*, pp. 126-165 (Chapter 6: "The fundamental principles governing international relations").

rightful membership and we can discern two levels of international legitimacy: a specific and a general principle.[11] The first level is characterised by being the specific norm prevailing at any one time by which international society identifies the form of internal state authority which it regards as acceptable. The second has the general characteristics that are looked for by states when they seek to identify others as being worthy of admission.[12] Regarding the specific principle, there has been an evolution from a dynastic to a national basis as the existence of state authority. As to the general principle, there has also been a change from territorial sovereignty to the standard of civilisation. These two principles were adapted to the realities of the post-1945 world and, in this change, the UN has played a crucial role as we will see later on. In order to analyse the existence of the international society, we have chosen to look at the UN Charter and the evolution of the UN itself, the General Assembly resolution 2625 (XXV) of 1970, also known as the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", and the emergence of the concept of *jus cogens*. In all three elements, we have to take into consideration the relation and tension between the "old" and the "new."

The UN is the symbol of the universal international society and the consequence of a process in which "the main strand is the progressive erection, by western hands, of scaffolding within which all the once separate societies have built themselves into one."[13] This is the organisation's main strength, in the sense that it is a forum in which different sides communicate, even at the peak of the Cold War division. Secondly, despite its shortcomings, it has functioned as the custodian of political legitimacy. Throughout the years, "acceptance of a state into the UN legitimised membership of the international society and, therefore, legitimised cultural diversity- a worldwide version of *cujus regio ejus religio*."[14]

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[11] This idea regarding international legitimacy belongs to Martin Wight, *cit in* David Armstrong, op. cit., p. 36.

[12] *Idem, ibidem.*

[13] Arnold Toynbee, *Civilization on Trial*, Geoffrey Cumberlege and Oxford University Press, London, New York and Toronto, 1948, p. 91.

[14] Adam Watson, "Recollection of my discussions with Hedley Bull about the place in the history of international relations of the idea of the anarchical society", July 2002, in http://www.leeds.ac.uk/polis/englishschool/watson-bull02.doc (last access 14th February 2005).

Politics is not merely a struggle for power but also a contest over legitimacy, expressed in the need to convert *power* into *authority*. Within this process, the UN has functioned as a dispenser of collective legitimisation. Because of its nearly universal membership, it provides for the "best available facsimile" of the authentic voice of Mankind, despite the drawbacks of not having effective power or having organs with deficient formal legal significance.[15] But "artificial or not, the value of acts of legitimisation by the UN has been established by the intense demand for them."[16] This is evident in the requests for membership, in the search for the "UN's stamp of legitimacy"[17] in Korea in 1950, the Suez Crisis in 1956, or in the Gulf War of 1991. Thirdly, it has been the forum in which certain normative ideas, such as decolonisation and the struggle against racial discrimination took their shape and fulfilled their potential.

Looking at the Charter, we clearly see that the main goal contained in the Preamble and Chapter I, is to maintain peace and "save succeeding generations of the scourge of war." In order to maintain peace, there is the need to develop friendly relations based on the principle of equal rights and self-determination of peoples, to achieve international co-operation in solving problems of an economic, social, cultural, or humanitarian character and promote and encourage respect for fundamental human rights.[18] There was also the awareness that, in order for the UN to be able to carry out its mission, states had to create the conditions in which it was possible to attain these common ends. As history has shown, the Cold War spirit prevailed over the UN's role in maintaining peace and security, and this was performed by the superpowers. Although avoiding a nuclear confrontation, the logic behind the Cold War led to a very violent confrontation between its blocs and in proxy wars in many Asian and African countries. If we look at the UN from the perspective of the guardian of peace, we can fairly claim that it has been a failure.[19] But in our view, it was precisely the inability to perform this function that

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[15] Inis L. Claude Jr., "Collective legitimisation as a political function of the United Nations", in *International Organisation*, Vol. 20, 1966, pp. 267-379, at p. 374.
[16] *Idem, ibidem.*
[17] *Ibidem*, p. 377.
[18] In the League of Nations the main goals were stated in the Preamble: in order to achieve peace four conditions had to be met: an obligation not to resort to war, open diplomacy, establishment of the rule of international law and *pacta sunt servanda* between organised peoples.
[19] Hedley Bull, *The Anarchical Society, A Study of Order in World Politics*, Macmillan, London, 2nd Ed.

led to a reinvention of the role of the UN in other areas, such as economic and social affairs. This was even more evident in the post-Cold War in which the UN found a broader role.[20] Not only in trying to bridge the gap between the North and South but also in the increasingly revolutionary role of human rights. It is true that "when the original conception of the United Nations was destroyed by the failure of the permanent members of the Security Council to be unanimous, the universality of the United Nations became a compensatory aim, and it was indeed remarkable and unprecedented how capacious its membership became."[21] In contrast with the League, no member has ever left the United Nations, and only Indonesia withdrew during 1965-1966. This, combined with its nearly universal membership has made it, in our view, a success.

Although the year of 1945 was a landmark in international relations, it did not start them anew, and we may identify three elements of continuity since 1919. The first was a renewed attempt to establish an effective international organisation for international security. The second was the resumed conflict between SU and the western countries, and the third was the working out of the principle of national self-determination beyond Europe to Asia and Africa.[22] Regarding the first element of continuity, it is surprising how so much of the Charter is a refinement of the Covenant of the League of Nations (Covenant) and we find many points of convergence. The aim of the UN was to be an organisation at once stronger and more adjustable than the League of 1919.[23] There was the will to improve the legacy of the Covenant, but very soon some doubts were raised as to the ability of the new organisation to fulfil its goals.[24] For instance, one characteristic that strikes us when comparing these two documents is the difference in size: whilst

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1995, (1st Ed. 1977), p. 250. Nevertheless, there were some successes either in avoiding or ending conflicts such as the Suez crisis in 1956, the Cuban Missile Crisis in 1962, the issue of Southern Rhodesia 1965-1979, the peaceful resolution of the Iranian claim to Bahrain in 1968-1970, the October war in 1973 and the Falklands/Malvinas in 1982. See Anthony Parsons, "The Cold War and the national interests of states", in Adam Roberts and Benedict Kingsbury (eds.), *United Nations, Divided World, the United Nations' Roles in International Relations*, Clarendon Press, Oxford, 1996 (2nd Ed), pp. 104-124.

[20] Adam Roberts and Benedict Kingsbury, "Introduction: the United Nations' roles in international society since 1945", in Adam Roberts and Benedict Kingsbury (eds.), op. cit., pp. 1-62.

[21] Martin Wight, *Power Politics*, Penguin, London, 2nd Edition by Hedley Bull and Carsten Holbraad, 1979, p. 232.

[22] *Ibidem*, p. 216.

[23] Clyde Eagleton, op. cit., p. 235.

[24] J. L. Brierly, "The Covenant and the Charter", in *British Year Book of International Law*, Vol. 23, 1946, pp. 83-94.

the Covenant has 26,[25] the Charter has 111 articles. This, in turn, reflects the different spirit of the texts, the rather loose definition of competences of the League contrasting with the collective scheme envisaged in the Charter. For instance, both the Assembly (under article 3) and the Council (under article 4) could discuss matters "affecting the peace of the world" while in the Charter, this is a task that was handed to the Security Council. Moreover, the UN has added two more bodies to its organisational structure, namely the Economic and Social Council (ECOSOC) and the Trusteeship Council.[26]

The League of Nations would appear to have been, at first sight, an organisation where decisions were taken by unanimity. All its members were equal and they were bound by the idea of collective security. But if we dig deeper, we find some nuances to these concepts that were taken up by the UN. In the UN, decisions were no longer taken by unanimity but rather by majority because there was the belief that unanimity was contrary to the effective functioning of an international organisation. But this is a rather perfunctory analysis of the role that unanimity played in the decisions of the Council and the Assembly of the League of Nations. It is true that unanimity was the rule[27] but there were exceptions and rather important ones, as is the case of article 15, in which parties to a dispute were excluded. Additionally, some matters of procedure including the appointment of committees to investigate particular matters could be taken by majority. Under article 6, the Secretary General was appointed by the Council with the approval of the majority of the Assembly and was present at the Council and Assembly meetings.[28]

In the UN, the power of veto was given to the permanent members of the Security Council. This can be used regarding admission of new members, admission of non-member states to the Statute of the International Court of Justice (ICJ), measures to enforce a judgment of the Court, expulsion or suspension of

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[25] The text of the Covenant of the League of Nations is at the Yale Law School site at http://www.yale.edu/lawweb/avalon/leagcov.htm (last access 14th February 2005). Hereafter simply cited as the Covenant.

[26] The League of Nations had four main bodies: the Council, the Assembly, the Secretariat and the Permanent International Court of Justice. See articles 2 and 14 of the Covenant.

[27] See Article 5 of the Covenant.

[28] The first Secretary-General was Sir Eric Drummond (1919-1933), followed by Joseph Avenol (1933-1940) and finally by Sean Lester (1940-1946).

members, appointment of the Secretary-General, amendment of the Charter and any matter concerning the maintenance of international peace and security. The belief that the power of veto held by the permanent members of the Security Council would be "(...) less subject to obstruction than the League Council was with its requirement of complete unanimity"[29] initially prevailed. It was the practical application of the main lesson that was learned from the League of Nations, that not all the states have the *same interest or ability* in the maintenance of international order. But it was also asked if the price to pay for having the great powers within this structure had not been too heavy.[30] Likewise, the point of having an international organisation "(...) if the only purpose of all these carefully thought out preparations is to deal with a small power when it misbehaves"[31] was also questioned.

The innovations presented by the UN Charter, although important, have also been balanced by the more pragmatic approach of the role of the great powers and, in this sense, it can be compared with the Congress of Vienna of 1815.[32] The power of veto was a novelty but the idea of permanent members was not. The Council (under article 4) had five permanent representatives of the five great Allied and Associated powers and four selected by the Assembly from the other members of the League and they all had one vote. During the making of the Covenant, there were inequalities shown in the Council of 10, which had two representatives of the five great powers, and in the number of representatives each country could have at the Conference.[33] In 1933, the Council was enlarged to six, and in 1936, to eleven non-permanent members.

The collective security scheme had both realistic and idealistic elements. The idealistic elements called for a need to reduce armament and more transparency regarding military information.[34] In article 11, an attack or threat of

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[29] J. L. Brierly, op. cit., p. 88.
[30] *Ibidem*, p. 89.
[31] *Ibidem*, p. 90. *Cf.* Pitman B. Potter, "The United Nations Charter and the Covenant of the League of Nations", in *American Journal of International Law*, Vol. 39, nº 3, 1945, pp. 546-551.
[32] Antonio Cassese, op. cit., pp. 68-69.
[33] The great powers were entitled to send five representatives, a second group of medium size powers three, the majority of the countries two and the remaining states only one.
[34] See article 8 of the Covenant which called for the need to achieve equilibrium between the lowest point of reduction of armament consistent with national safety in order to maintain peace. It also called for transparent interchange information as to the scale of armament, military, naval and air programmes between the

war affecting a member would be a matter of concern to all members, and this was balanced by article 12, which called for arbitration or judicial settlement of disputes, or an enquiry by the Council. Only then, and after three months, could a member resort to war.[35] Under article 16, the organisation could call for sanctions and embargos regarding the aggressor state. Moreover, if a dispute arouse from a matter which by international law was "solely within the domestic jurisdiction of that party, the Council shall so report and shall make no recommendation as to its settlement."[36] This idea is continued in the UN Charter in its article 2 (7). Furthermore, the League of Nations allowed for regional understandings such as the Monroe doctrine. This explicit reference to the Monroe Doctrine had the aim of facilitating the US admission to the Covenant.[37] Unlike President Wilson, the Senate was not at ease with this new and international project mainly due to the limitations that it would imply concerning US sovereignty, *e. g.*, idea of collective security. In the end, this approach prevailed and the US turned inwards. This was not to say that intervention outside the American borders was a closed issue. In fact, there was a reaffirmation of the Monroe Doctrine, since interventions in the domestic affairs of Central and South American countries continued.

In the Covenant, we also find the idea of the "sacred trust of civilisation" and the establishment of the three types of League mandate concerning colonies and territories.[38] This was adapted into the Trusteeship system of the Charter. Moreover, in the League, all the positions in this new structure were equally open to men and women.[39] This was a pioneering effort that was carried out by the UN. The League of Nations also called attention, under article 23, to a diversity of

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members of the League.

[35] These disputes and advisory opinions were issued by the Permanent Court of International Justice and states agreed that its decisions were to be carried out in good faith, under article 13. If a dispute was not submitted to the Court it could be placed at the Council according to article 15. The statements of the Council in case of a successful settlement were to be made public giving the facts and the terms of the settlement that it considered appropriate. If the settlement was not successful the Council could, either through unanimity or a majority vote, make and publish a report making clear the facts of the dispute and its recommendations. Any member of the League which was represented at the Council could make these informations public.

[36] See article 15 (8) of the Covenant.

[37] See article 21 of the Covenant and also Hermann Mosler, "The international society as a legal community", in *Collected Courses/The Hague Academy of International Law*, Vol. 140, 1974/IV, pp. 1-320, at p. 39.

[38] See article 22 of the Covenant.

[39] See article 7 of the Covenant. We point out the role of Dame Rachel Crowdy, the first woman to be head of an administrative section of the League of Nations, namely Chief of the Social Questions and Opium Traffic Section.

matters that would later bear fruit, namely the general supervision of the execution of agreements concerning traffic in women and children, opium and other dangerous drugs, more humane and fair working conditions for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, as well as the necessary establishment of international organisations. Article 25 called for the promotion of establishment and co-operation of duly authorised voluntary national Red Cross organisations with the goals of improving health, preventing diseases and mitigating suffering throughout the world. Furthermore, it asked for the registration of international treaties and engagements with the Secretariat in order for them to be valid.[40] This was also followed by the UN, under article 102.

It is interesting to note that the set up of the UN was thoroughly discussed and great importance was attached to the location of its headquarters. The final outcome, its location in the US, was the result of a lengthy debate between two proposals, those who favoured Europe and those who favoured the US. The former argued that the headquarters should be in Europe, based on three assumptions. Firstly, that the UN headquarters should be where the need to maintain peace and security was highest and Europe, after beginning two world wars, continued to be the most important potential centre for international unrest. Secondly, it was argued that the headquarters should not be based in the territory of one of the permanent powers of the Security Council but in a small country of Europe instead. Thirdly, that Europe was the cultural centre of a large part of the world and a natural centre of communications and closer to the capitals of the majority of the members of the UN.

In contrast, the supporters for the establishment of the headquarters in the US argued that Europe was not the only centre of international turmoil and that other areas such as Asia or South America were also important. Secondly, prevention of international conflict was not the sole purpose of this new organisation and the League of Nations was unable to prevent war, despite the fact that it was situated in Europe. Thirdly, the fact that it was established in the territory of one of the major powers was not relevant, since the UN was based on

[40] See article 18 of the Covenant.

the principle of collective security and not on the old concept of balance of power. Lastly, the fact that the headquarters would be located in the US would enable the organisation to have better support from the American people.[41] It seems to us that, rhetoric aside, this last argument is the most powerful, since one of the major shortcomings of the League of Nations was precisely the fact that the US was not part of it. This seems even more evident since, in 1945, of all the great powers, the US was a kind of *primus inter pares*, a country that was needed in order for the whole system to work.

The criterion for membership was no longer the standard of civilisation but was laid in terms of peace-loving nations, which accepted the obligations of the Charter, and had the capacity to fulfil its duties as a member.[42] Nevertheless, other factors were relevant for admission to the UN, especially in the early years. The fact that a country had been connected with the Axis Powers in the Second World War or had fought against the 'United Nations' was evidence that it was not a peace-loving member of the community of states. This was the case of the Iberian countries[43] that were prevented from joining until the logic of the Cold War prevailed. Here we find a change in the general criterion of international legitimacy, in which the fulfilment of the standard of civilisation was no longer valid. But this is not to say that the idea of civilisation had stopped exerting its influence as can be seen in article 38 of the Statute of the ICJ.[44] Despite the fact that it has

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[41] In Y. U. N. 1946-1947, pp. 41-42.

42 In the League of Nations, under article 1 of the Covenant, criteria were based on the effective guarantees given of its intention to observe its international obligations and the acceptance of regulations concerning armament and military forces. Withdrawal was possible after a two years' notice of its intention to do so provided all the obligations had been fulfilled at the time of the withdrawal.

[43] See Y. U. N. 1946-1947, pp. 66-67, p. 124, and pp. 417-418.

[44] Article 38 of the Statute of the International Court of Justice:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

See http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_II (last access 14th February 2005). The whole text of the Statute of the Court is at http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm (last access 14th February 2005).

been considered an "embarrassing qualification"[45], civilisation was one of the indisputable arguments versus the *apartheid* regime in South Africa and Rhodesia's racial discrimination policy.

The second element of continuity running from 1919 is related to the SU. In 1945, the members of the international society seemed united and shared common values and interests, but the post-war aura felt by the victors and the unity that came from the war effort began to crack quite soon, and the Cold War simmered in. It intensified the western fear and suspicion of Communism which was reflected in the relationship between the SU and the League of Nations. Not only was the SU only a member in 1934 but it was also expelled after the invasion of Finland in 1939, a punishment that was not inflicted on Japan and Italy, albeit that these two countries did withdraw.[46] The perception of the Communist threat stemmed from the nature of the challenge to the specific concept of international legitimacy. The SU did not aim at reforming or changing the basis of the core concept of international society, the state, like the American and French Revolutions had previously done. In fact, the French Revolution was the great thrust to changing the dynastic basis of the state into a national one. The threat to international society became even more powerful when France proclaimed the unilateral right to set aside existing treaties in the name of natural law and also issued an appeal to the British people so that they would adhere to the revolution, clearly violating the principle of non-interference in the internal affairs of a country and putting aside *pacta sunt servanda*. The challenge was powerful and successful but it never aimed at refuting the essential idea of the state and, in fact, it actually strengthened its role.[47] But unlike France and the US, the SU aimed at destroying the state, seen as a bourgeois instrument of maintaining the *status quo* highly favourable to the capitalist states. For the Soviets, international legitimacy was connected with the interests of the international proletariat and the cause of world revolution.[48]

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[45] B. V. A. Röling, *International Law in an Expanded World*, Djambatan, Amsterdam, 1960, p. 42.
[46] Martin Wight, op. cit., p. 221.
[47] David Armstrong, op. cit., p. 113.
[48] *Ibidem*, p. 126.

In spite of all the revolutionary zeal and fervour, the SU faced unsurpassable obstacles and had to come to terms with the institution of the state and the concepts of sovereignty, diplomacy and international law. From the acceptance of the Brest-Litovsk terms of negotiations with Germany to the conclusion of several treaties, especially regarding trade and economic relations, the SU became entangled in the very thing that it aimed at destroying. The initial position that the adoption of these institutions was a mere tactical expedient for the benefit of the socialist fatherland which, after a transitional period, would gain the breathing space that it needed to assert a world revolution, turned into an increasingly state-like practice. This foreign policy goal reflected itself in the position of the SU within the international society to which it felt not wholeheartedly committed, but still part of it. This half-commitment was also perceived by the western nations with suspicion and, in fact, the International Labour Organisation was created, in part, to avoid Soviet dominance over labour issues.[49] The suspicion regarding Communism was reawakened in the final part of the Second World War, along with the expanding role of the Red Army in Eastern and Central Europe which was followed by the Berlin Blockade, as well as the tensions in Greece and Iran.

A different atmosphere was created, not only in the relations between the SU and the US, but also in the functioning of the UN. The use of the veto by the Soviets, in a clearly unfavourable Security Council, led them to assert that the veto was the weapon of the minority.[50] The systematic use of the veto was more a symptom rather than the root of the difficulties of international politics.[51] This corresponds to the first phase of the UN, its formative years, in which the US clearly dominated and set the agenda. The western countries were the majority and led the way regarding the main declarations, resolutions and conventions signed. During this period, which lasted until the end of the 1950s, the SU used its veto in order to block what it felt was an assault of the western bloc. In our opinion, this phase is best illustrated by the General Assembly resolution "Uniting for

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[49] *Ibidem*, p. 156.
[50] Martin Wight, op. cit., p. 226.
[51] Erich Hula, "Four years of the United Nations", in Hans J. Morgenthau and Kenneth W. Thompson (eds.), *Principles and Problems of International Politics, Selected Readings*, Alfred A. Knopf, New York, 1950, pp. 120-133, at p. 123.

Peace" that enabled the US, under the UN umbrella, to intervene militarily in the Korean peninsula.[52] This was done in order to avoid the Soviet veto in the Security Council but it also set a precedent that would, in later years, turn against the western powers: the increasing role of the General Assembly due to the Security Council's inability to operate.

The Cold War also had an impact on the criteria for admission, as can be observed in the "package deal" of 1955. The admission of new members was primarily a political problem, in which compromise had to be reached. This compromise also enabled the UN to have a broader representation which was more appropriate, given the number of states. It was felt by both superpowers that the UN should strive to attain the widest possible membership. The views varied from the position of Canada which stated that although some applicants had regimes that were unacceptable by western standards, "they were more likely to increase in tolerance and understanding within the United Nations than outside it, since membership in the United Nations entailed the assumption of obligations".[53] In contrast, the SU stressed that, the UN "should accept as a member any state which, irrespective of its political philosophy, fulfilled the requirements laid down in the Charter".[54] But the most controversial issues were the two Germanys, Koreas and Vietnams. There was the conviction that to admit one country without the other would help to perpetuate the division. The two Germanys entered in 1973 and were replaced by a unified Germany in 1990, whilst Vietnam after a bitter "civil/international" war joined the UN in 1977, and the two Koreas entered in 1991. But the thorniest of all the membership issues was China. Due to the Cold War logic and the support of the US, the Chinese people were represented in the UN by the Republic of China, which was considered to be the legitimate government.

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[52] Resolution 377 (V) was adopted by the General Assembly on 3rd November of 1950, in *Y. U. N. 1950*, pp. 193-195.

[53] See *Y. U. N. 1955*, p. 23.

[54] *Idem, ibidem*. In 1955, there were 18 applicants for membership and after a lengthy battle in the Security Council, only sixteen (Portugal, Jordan, Ireland, Italy, Austria, Finland, Ceylon, Nepal, Libya, Cambodia, Laos, Hungary, Romania, Bulgaria, Albania and Spain) were recommended to be admitted, and confirmed by the General Assembly. Only Mongolia, due to the veto cast by China, and Japan due to the veto cast by the SU, were adjourned. This was the consequence of the linkage established by the SU between both applications. In contrast, for the US it "was shocking to see the Mongolian People's Republic and placed on the same footing as Japan" since the level of development and the ability to carry out its functions was incomparable. But despite Soviet resistance, the efforts bore fruit the next year and Japan joined the UN; see *ibidem*, p. 28.

The example of China illustrates beyond doubt the influence of the political element of international recognition in detriment of the legal elements, especially in such a politicised era as was the Cold War. This situation lasted until 1971 when the People's Republic of China took its place in the UN and, therefore, matched the political with the legal elements of international recognition.

The third element of continuity is seen in the expansion of the principle of national self-determination to Asia and Africa. It was only within the UN framework that this principle unleashed all its potential and was a further stretch of the specific principle of international legitimacy, this time from the nation to the people. This led to an expansion of membership characterising the UN's second phase, which began in 1960 and ended in 1974. During this phase, the SU began to challenge and finally top the American ascendancy in the UN, a process in which it was supported by the newly decolonised countries. The latter also had an impact on the structure of the UN, which was reformed in order to provide a more equitable distribution of power due to the increase in membership. The Charter was amended in 1963, in order to enlarge the membership of the Security Council and ECOSOC. It implied the amendment of articles 23, 27, 61 and 109. Due to these changes, the Security Council changed to ten non-permanent members and a nine vote majority needed for adopting decisions. Moreover, ECOSOC changed from 18 to 27 members. These amendments came into force in 1965. ECOSOC would undergo further another enlargement in 1971 (which came into force in 1973) and made this Council a body of 54 members. All these enlargements of members were carried out with an equitable geographic representation.

The membership of the UN became very heterogeneous and we can distinguish three groups: western, socialist and developing countries. The division grew wide during the third phase of the UN that began in 1974, and in which developing countries made their calls for justice heard against both superpowers, especially after the invasion of Afghanistan. This is best described by the calls for a "New Economic International Order" and the "Charter of Economic Rights and Duties of States" both in 1974[55] made at the General Assembly. Nonetheless, the

[55]The General Assembly adopted on 1st May 1974, the "Declaration on the Establishment of a New International Economic Order" as resolution 3201 (S-VI) which was complemented by resolution 3202 (S-VI) known as the "Programme of Action on the Establishment of a New International Economic Order", and

newly independent states did not aim at replacing the state as the central notion of international society, but rather at the accomplishment of statehood. Indeed, it was embraced as the crux of the anti-colonial framework.

The fourth phase began with the end of the Cold War and where UN involvement in international affairs increased, as we can observe from the extension, in depth and number, of its peacekeeping operations. In the post-Cold War world, the function of the UN as a forum was crucial for peaceful territory transitions to take place, as some countries were dismembered (*e. g.,* Czechoslovakia and the SU) and others reunited (*e. g.,* Germany). Its function of political legitimacy was reinforced, meeting the concept expressed in 1965 by His Holiness Pope Paul VI of guaranteeing an honourable international citizenship.[56] Once again, the state was the goal to be achieved by these new countries and sometimes after great civil strife and violence, as in the case of Yugoslavia. What is remarkable about the changes in membership in international society is the maintenance of the state as the core concept of international relations.

If it is a truism that international society has never ceased to be divided, it is also true that there is a common ground where states agree to certain principles. In our view, the best means of assessment of the "(...) degree of social solidarity between states is to look at the type of international law which is accepted by them."[57] In our view, the increasing role of the UN and of international law go hand in hand, as can be observed for instance by the creation and activity of the International Law Commission (ILC). It is responsible for the codification and progressive development of international law and was created in 1947 to fulfil the goal set out in the Preamble, paragraph 3 and in article 13, paragraph 1 (a). All these developments in international society reflect the decline of the total dominance of positivism in international law. Even if absolute positivism was not advanced by some of its leading authors and, in some cases, the separation of law

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the "Charter of Economic Rights and Duties of States" was adopted as resolution 3281 (XXIX) on 12th December 1974, in *Y. U. N. 1974*, pp. 324-336 and pp. 402-407.

[56] Address by His Holiness Pope Paul VI to the General Assembly on 4th October 1965, "Never Again War!": "You do not, of course, confer existence upon States, but you qualify each nation as worthy to sit in the ordered assembly of the peoples: you grant to each national sovereign community a recognition of high moral and juridical value, and you guarantee it an honourable international citizenship", in *Y. U. N. 1965*, p. 239.

[57] Hidemi Suganami, "International law", in James Mayall (ed.), *The Community of States, A Study in International Political Theory*, George Allen and Unwin, London, 1982, pp. 63-72, at p. 67.

from morals and politics was not totally followed,[58] it gave way to the acceptance of a more "spontaneous law" in the sense that international law should be freed from the conviction that all law in force must necessarily be positive, a turn that would not endanger the seriousness and objectivity of international law.[59]

On balance, the impact of change in international society was felt in international law, where we find two souls working side by side. They co-exist and compete, as in the case of non-intervention and respect for human rights. The principles that belong to the traditional model are societal and sometimes systemic, whilst the modern ones clearly belong to the realm of international and world society.

[58] Within the positivist school some authors put more emphasis on the depth and strength of common values and civilisation such as John Westlake: "states are its immediate, men its ultimate members. The duties and rights of states are only the duties and rights of the men who comprise them." See Martin Wight, "Western values in international relations", in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations, Essays in the Theory of International Politics*, Allen and Unwin, London, 1966, pp. 89-131, at p. 102.

[59] Roberto Ago, "Positive law and international law", in *American Journal of International Law*, Vol. 51, nº 4, 1957, pp. 691-733, at pp. 732-733. Additionally, J. L. Brierly considered that due to the intractability of the facts international law is, and will always be, an art and not a science, *The Outlook for International Law*, Clarendon Press, Oxford, 1944, p. 12.

2 The United Nations and the Principles of International Law

"The generality of the language used in the Declaration does not deprive this instrument of its significance as the most important single statement representing what the members of the UN agree to be law of the Charter on these seven principles."[60]

Resolution 2625 (XXV) of 1970 adopted by the General Assembly encompasses explicitly seven of the principles that we have referred to and implicitly the remaining principle, namely respect for human rights.[61] As its title indicates, the goal was to reach an agreement as to the fundamental principles of international law which enabled friendly relations between states. This Declaration has left a decisive mark upon the development of international law because it is both the living proof of the existence of agreed principles of international law and, at the same time, how this consensus is fragile. In order to better understand the importance of this Declaration, we have to look at the different motivations of the three main blocs of states in 1970. The genesis of this declaration belonged to the Soviet initiative of codifying the main tenets of its idea of peaceful coexistence. In contrast, western countries viewed it as propaganda and were very sceptical. To the Third World, this was seen as an opportunity of piercing western-based international law with new principles and concepts that would be more favourable to them.[62]

The Declaration was the result of the work of the Sixth Committee, concerned with legal affairs and the ILC. It began, step by step, with resolutions 1505 (XV) of 12th December 1960,[63] 1686 (XVI) of 18th December 1961, which changed the focus of the title from peaceful coexistence to friendly relations[64] and resolution 1815 (XVII), which led to the agreement of seven principles as a

[60] R. Rosenstock, "The Declaration of Principles of International Law concerning Friendly Relations. a survey", in *American Journal of International Law*, Vol. 65, nº 5, 1971, pp. 713-735, at p. 714.
[61] The resolution was adopted on 24th October 1970; see *Y. U. N. 1970*, pp. 788-792.
[62] Sir Ian Sinclair, "The significance of the Friendly Relations Declaration", in Colin Warbrick and Vaughan Lowe (eds.), *The United Nations and the Principles of International Law, Essays in Memory of Michael Akehurst*, Routledge, London and New York, 1994, pp. 1-32, at p. 2.
[63] In *Y. U. N. 1960*, p. 549.
[64] In *Y. U. N. 1961*, pp. 524-525.

workable basis.[65] In this selection of seven principles from the Charter, there was a clear will to move away from abstract declarations regarding peaceful coexistence and to achieve a more consensual framework to begin the process of codifying principles of international law.[66] The search for consensus left out what was the most controversial matter, namely respect for human rights, and this implied the rejection of a Colombian amendment to consider the question of establishing an international tribunal for the protection of human rights. It was rejected on the grounds that it was already on the agenda of the Commission on Human Rights.[67] In spite of being left out as one of the explicit principles, human rights took on a life of their own, as we shall see later on.

The codification process was lengthy and some principles were more consensual than others. The work was carried out by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, this Special Committee being the consequence of resolution 1966 (XVIII) of 16th December 1963.[68] This resolution also requested the Special Committee to develop and codify four of these seven principles: the prohibition of threat or use of force, non-intervention, sovereign equality and the peaceful settlement of disputes according to paragraph 3 of resolution 1815 (XVII). Twenty seven members were appointed to the Committee on a twofold basis: equitable geographic distribution that, at the same time, guaranteed the presence of the main legal systems of the world. The mandate of this Committed was widened, following paragraph 5 of the 1966 (XVIII) resolution, to include all the seven principles.[69] In 1967, consensus was reached regarding four principles: sovereign equality, good faith, duty of co-operation and peaceful settlement of disputes. Regarding the latter, the main issue of contention was the role of the ICJ. Some states argued that it should have compulsory jurisdiction in legal disputes arising from treaties, as well as arbitration in disputes of any other kind, but others found this an unacceptable attack on their sovereignty.

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[65] This resolution was adopted unanimously by the General Assembly on 18th December 1962. See also *Y. U. N. 1962*, pp. 494-495.
[66] Sir Ian Sinclair, op. cit., p. 3.
[67] See *Y. U. N. 1961*, pp. 521-524.
[68] In *Y. U .N. 1963*, pp. 517-518.
[69] Through resolutions 2103 A (XX) of 20th December 1965 and 2181 (XXI) of 12th December of 1966; see *Y. U. N. 1965*, pp. 631-633 and *Y. U. N. 1966*, pp. 911-912.

As for the remaining principles the road was longer and the different approaches of all the groups were more visible. For instance, there was the proposal of extending the concept of self-defence in order to include the fight against colonial rule. This was unacceptable to various members, with Britain being the most vociferous.[70] As a result, finding consensus on two principles was impossible: national self-determination and prohibition of the use or threat of use of force. As for the principle of non-intervention which was based on resolution 2131 (XX), there were different views expressed as to its character. Whilst for the third world countries, the declaration was the "expression of a universal juridical conviction" for others, such as the Netherlands, it was an important political declaration, but not a legal document.[71]

In 1967, the General Assembly insisted on the need to overcome the standstill regarding this issue.[72] Some success was achieved in 1969, at the fourth session of the Special Committee, when consensus was reached as to the basic elements of the principle of equal rights and self-determination. In addition, for the first time there was a widening of the area of agreement on some elements defining the principle of prohibition of threat or use of force.[73] Nonetheless, some controversy remained and the SU, along with Asian and African countries, stressed that the right to self-determination not only included the right to chose their political and economic systems but also the right to defeat colonialism by any means, including force. Afghanistan proposed that this principle should be understood as the exception to the two principles that it contradicts: the principle of prohibition of use of force and the principle of non-intervention. Where a "people" were fighting for their self-determination, these two principles would not be applicable.[74] In contrast, countries such as Japan, Australia, the Netherlands and France insisted that there was no foundation in the Charter that enabled dependant peoples to have an inherent use of force and to be assisted by foreign

[70] See Britain's position in *Y. U. N. 1967*, p. 745.
[71] *Ibidem*, p. 746.
[72] Resolution 2327 (XXII) was adopted by the General Assembly on 18th December 1967 with 84 votes in favour and 17 abstentions. In *ibidem*, pp. 748-749.
[73] See General Assembly's resolution 2533 (XXIV) adopted on 8th December 1969 by unanimity, in *Y. U. N. 1969*, pp. 767-768.
[74] *Ibidem*, pp. 763-764.

states. For these countries, the term "peoples" could not be identified, under the Charter, with the term "States."[75]

The inability to reach an agreement even led developing countries to have second thoughts as to the unanimity rule in the voting procedure, since they argued that it was blocking progress; a position refuted by western countries who maintained that there was no need to change the rules of the game, but that a more flexible and co-operative attitude was in order. Britain stated that "international law could not be developed by either a majority or a minority, but only through consensus."[76] Finally, and after protracted negotiations, compromise was reached and the importance of this principle was found unquestionable. All peoples had equal rights, all had the right to freely decide their political and economic system and every state had a duty to assist the implementation of these rights in accordance with the Charter and the many resolutions of the General Assembly and Security Council.[77] The agreement was reached and the text of the draft declaration was approved on 1st May 1970.

The fragile consensus and the wording of the document go hand in hand. As was remarked by the representative of the Chairman of the Special Committee, the "(...) subtle balance of the text of the draft declaration was the necessary prerequisite for its unanimous endorsement by all members of the Special Committee (...)."[78] This unanimity was repeated at the General Assembly without a vote. Notwithstanding, the codification of these principles of international law was done without a parallel reinforcement of the powers of the UN as the organisation which had the task of assessing the extent to which these principles are followed in practice. Furthermore, the fact that it was in some aspects an ambiguous declaration enhanced the possibility of different interpretations as to the co-ordination between conflicting or partially conflicting principles.[79]

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[75] *Ibidem*, p. 762.
[76] *Ibidem*, p. 766.
[77] See *Y. U. N. 1970*, pp. 784-788.
[78] *Ibidem*, p. 787.
[79] Gaetano Arangio-Ruiz, "The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations, with an appendix on the concept of international law and the theory of international organisation", in *Collected Courses/The Hague Academy of International Law*, Vol. 137, 1972/III, pp. 419-742, at p. 606.

It is true that too many issues were not covered and that there was a "scarcity of progressive content". In this sense, it was not a landmark in the progressive development of international law.[80] But, in our view, the main strength of this Declaration was that it did not aim at setting a radical stand but rather to clarify key concepts of international law, which it succeed in doing consensually.[81] Another important issue that was raised by this Declaration was the legal status of declarations adopted by the General Assembly. The controversy circles around whether these declarations have legally binding effects or not.[82] The classical approach would say that, under the UN Charter, the tasks of the General Assembly are confined to the making of non-binding recommendations. But we could also argue that other important documents, such as the Universal Declaration on Human Rights were passed as declarations and with even less consensual voting. The 2625 (XXV) resolution was adopted by unanimity and passed without a vote, whilst the Universal Declaration was adopted by 48 votes, none against but with 8 abstentions. However, resolution 2625 (XXV) is more complex and problematic, due to the number and variety of principles and rules it embodies in a single instrument.[83] Notwithstanding, perhaps the tone should be that "the important question is not whether they would stand up to legal challenge, but whether they are challenged."[84]

In the formation of custom, two elements work together: the primary or material element, which is the accumulation of state acts asserting or repudiating claims with respect to concrete situations and the psychological element, its *opinio juris*, the conviction that this practice is binding. The main question is linked to the understanding of state practice, *i. e.*, which practices may be considered to create customary international law. Some would say that the state practice includes "any act or statement by a state from which views about customary international law can be inferred; it includes physical acts, claims, declarations in *abstracto* (such as

[80] *Ibidem*, p. 614.
[81] R. Rosenstock, op. cit., p. 735.
[82] *Ibidem*, p. 714.
[83] Gaetano Arangio-Ruiz, op. cit., p. 432.
[84] Nagendra Singh, "The United Nations and the development of international law", in Adam Roberts and Benedict Kingsbury (eds.), op. cit., pp. 384-419, at p. 396. This author also points out the numerous resolutions of the General Assembly that were used by the ICJ in its rulings and advisory opinions at pp. 398-400.

General Assembly resolutions), national laws, national judgments and omissions.[85] These have to be accompanied by *opinio juris*, which is necessary for the creation of customary rules, and what is important is that these statements are not challenged by other states rather than the state believing these statements to be true. Another important factor is the coherence of state practice in that major inconsistencies prevent the creation of a customary rule.[86] In contrast, some believe that voting in favour of these resolutions cannot be considered state practice because it remains to be seen whether actual state practice will conform to the resolution. But we could also view the voting in favour of a declaration as an expression of the *opinio juris* contributing to the psychological element.[87] All these considerations, along with the problems of repetition, the time and the number of states needed for the formation of custom are beyond the scope of our study, but remain controversial.[88] In our view, what is important is to understand that the very discussion of this issue is an indication of the increasing role of the General Assembly which, in turn, is a consequence of the change of membership of the international society.

This declaration is a conservative formulation of the basic principles of international law, but it is not holy writ and does not exhaust the international principles contained in the UN Charter.[89] There is also the need, as is stated in the general part of the Declaration, to interpret and apply these principles in the context of all the other principles, since they are all interrelated. Let us begin with the principle of sovereign equality. This principle is, as we have seen, strongly connected with the rise of the European system of states. It was reinforced by the Charter, in its articles 2 (1) and 78. It is a fundamental concept, since it is linked to the very existence of international law in the sense that "if sovereignty were to mean absolute and unrestrained power, then no system of law could be created to regulate relations between sovereign states, or indeed to protect the continued

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[85] Michael Akehurst, "Custom as a source of international law", in *British Year Book of International Law*, Vol. XLVII, pp. 1-53, at p. 53.
[86] *Idem*, *ibidem*.
[87] Sir Ian Sinclair, op. cit., p. 27.
[88] For the different approaches and a synthesis of the literature regarding this matter see *ibidem*, pp. 7-28 and Michael Akehurst, op. cit., pp. 1-53.
[89] *Ibidem*, p. 28.

personality of any one of them."[90] It is an "umbrella concept", one that enables the others to take place.[91] The principle of sovereign equality was articulated in the Westphalian order but its effective application was only carried out within the UN. We might say that sovereign equality was a reality, but only among the great powers, and in which the material inequality did bluntly override the principle. Within the UN's framework, sovereign equality was put into practice in the decolonisation period. It is a fact that "perhaps Asian and African societies have found some ideas indigestible, but the concept of the sovereign state is not one of them. On the contrary, it is the most successful western export to the rest of the world."[92] Sovereignty, the key concept, was fully adopted by the colonies and dependant territories. The fact that these sovereign states were entitled to membership of the UN was of crucial importance, since membership had great symbolic and practical meaning.[93]

If the fact that they were sovereign was very important, so was the concept of equality. This concept encompasses equality before the law and equality of rights and duties, not only in the formal status of states, in matters of diplomatic precedence, but also equal weight of its participation in international meetings and conferences. The concept of sovereign equality raises a number of issues in that, from an objective point of view (territory, population and natural resources) states are unequal. If all states are equal, it is also true that states' equal capacity to obtain remedy is wholly different.[94] Moreover, the concept of equality is subject to different interpretations, as has been very well pointed out; *e. g.* the controversy around the Non-Proliferation of Nuclear Weapons Treaty raised by India on the grounds that it crystallised a nuclear inequality, dividing the world between the haves and the have-nots.

The concept of sovereign equality has fundamentally raised two issues: the question of micro-states and the power of veto of the permanent members of the

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[90] Colin Warbrick, "The principle of sovereign equality", in Colin Warbrick and Vaughan Lowe (eds.), op. cit., pp. 204-229, at p. 204.
[91] Antonio Cassese, op. cit., p. 130.
[92] James Mayall, *Nationalism and the International Society*, Cambridge University Press, Cambridge, 1993, p. 111.
[93] R. P. Anand, "Sovereign equality of states in international law", in *Collected Courses/The Hague Academy of International Law*, Vol. 197, 1986/II, pp. 9-228, at p. 19.
[94] Colin Warbrick, op. cit., p. 209.

Security Council. The latter is enshrined in article 27 (3) and, as we have seen, was intended to recognise that a security framework could not work without the great powers, and that they had greater responsibilities. The idea that "the result is that the permanent members are protected against any decision uncongenial to themselves while any other member is susceptible to be bound by a decision to which it objects" was heightened by the Cold War.[95] It does also reflect a reality that is very difficult to ignore, some states are more powerful than others, and perhaps it is better to have them constructively engaged within an international framework than outside it.

The US raised the issue of micro-states, *i. e.*, states that were exceptionally small in area, population, and human and economic resources, in the Security Council in 1969.[96] The proposal intended to create the category of associate membership, since it could be questionable whether according to article 4, these states were able to carry out their obligations of membership. For the US, these micro-states gaining juridical independence could weaken the UN, because "not only are these states weak but there are many of them."[97] Because the proposal ran counter to the principle of sovereign equality, it was doomed from the start. The issue was taken up the following year, and a proposal for "associate member" was discussed.[98] In the end, and unlike the League of Nations which rejected the admission of smaller states such as Liechtenstein, the issue was not fully taken into consideration. The new countries, understandably so keen on their sovereignty, refused to accept any curb of their cornerstone principle, even against practical considerations, such as those presented by the US.[99] It ended being a problem swept under the rug.[100]

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[95] *Ibidem*, p. 211.
[96] In *Y. U. N. 1969*, pp. 260-262.
[97] Colin Warbrick, op. cit., p. 210.
[98] An "associate member" would enjoy the rights of a member in the General Assembly except to hold office or vote and at the same time would be exempt of the obligation to pay financial assessments and would enjoy access to aid and social programmes. Because this proposal implied the amendment of the Charter, Britain suggested that a declaration be signed whereby a state could voluntarily renounce certain rights but otherwise enjoy all the rights and privileges of membership. In addition, the Legal Counsel considered that this proposal also implied the amendment of article 18, which states that every state shall have one vote; see *Y. U. N. 1970*, pp. 300-301.
[99] R. P. Anand, op. cit., pp. 172-173.
[100] *Ibidem*, p. 183.

The principle of non-interference in the internal and external affairs of other states was already contemplated in article 15 (8) of the Covenant and was reinforced in article 2 (7) of the Charter. This principle has been invoked in many situations, such as in the relations between the superpowers. For instance, in 1956, the year of the Suez crisis, the SU asked to include an item in the agenda of the General Assembly entitled "Intervention by the US in the domestic affairs of the people's democracies and its subversive activity against those States." This was the result of the recent events in Hungary which the SU claimed were the result of American propaganda through broadcasting. The counter-arguments of the US were based on the fact that it was the SU that was undermining the stability of free countries and Hungary was a good example of how the aggressive policy of the SU led to the "suppression of every expression of independence."[101]

Again in 1965, the SU raised this issue at the General Assembly and entitled it "The inadmissibility of intervention in the domestic affairs of States and the protection of their independence and sovereignty." The SU and its allies charged that certain western powers were intervening in the domestic affairs of Latin American, Asian and African countries. The examples given were the American interventions in Vietnam and in the Dominican Republic.[102] The US aimed at changing the Soviet proposal by enlarging the scope of "intervention", making it direct or indirect, and by changing all references to "some states" to States or any state. In so doing, the US hoped to include the political issues pertaining relations within the Communist bloc. These amendments were successful but the process was tortuous.[103] Despite the Cold War rhetoric on both sides, this declaration was later on the basis for the consensus that was achieved in 1970.

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[101] See this controversy in the *Y. U. N. 1958*, pp. 145-147. The American argument was corroborated by the report of the Special Committee on the Problem of Hungary. The Committee had concluded that the Hungarian revolt had been spontaneous and directed against the SU. The resolution was defeated by 53 votes against to 8 in favour and 11 abstentions.

[102] See *Y. U. N. 1965*, p. 89.

[103] Resolution S/5471was adopted unanimously by the Security Council on 4th December 1963. At the General Assembly it involved three more proposals: one by 18 Latin American states, another by Asian and African states, and one introduced by Peru and Mal. After several amendments, in the end the final text resulted in a vague and imprecise declaration, namely resolution 2131 (XX), which was adopted by the General Assembly on 21st December 1965 with 109 votes in favour, none against and one abstention (Britain).

Regarding non-intervention, the principle was also stated by the ICJ in 1986. The Court concluded that the US had justified its intervention in Nicaraguan internal affairs politically but not legally. The political justification was based on the domestic ideology and direction of the foreign policy of this country towards the other side of the Cold War. This line of argument led the Court to conclude that "if a state acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained in the rule itself, then whether or not the State's conduct is in fact justified on that basis, the significance of that attitude is to confirm rather than to weaken the rule."[104] The Court also ruled that the fact that the US signed resolution 2625 (XXV) of 1970 could be understood "as an acceptance of the rule or set of rules declared by the resolution, by themselves."[105] The principle of non-intervention or domestic jurisdiction has been stated on many occasions, and the list would be endless if we were to enumerate all the examples. This is a principle that functions as a shield for states and it was invoked by all three groups of states during the Cold War. The Soviet repression of Czechoslovakia in 1968 and the Brezhnev doctrine are examples of an understanding that this principle was only applicable in the "external" relations of the socialist bloc, but not within.

The principle of good faith is the third pillar of the Westphalian model. The majority of the legal rules leave to states a margin of manoeuvre as to the decision and level of implementation of certain rules, but it is expected that *pact sunt servanda* and *consuetudo est servanda*. This is an essential principle enshrined in article 2 (2) of the Charter but which has resulted from a long historical process and we may also find it, for instance, in article 26 of the Vienna Convention on the Law of Treaties of 1969. The incorporation of this principle in the Charter was the result of a proposal of the representative of Colombia and was adopted unanimously.[106] This proposal was also connected with the disrespect shown for international law by the Axis powers during the Second World War, as was the principle of prohibition of force or the use of force, adopted of the Charter in article

[104] The ICJ judgment of 27th June 1986 regarding the *Case concerning Military and Paramilitary Activities in and against Nicaragua vs. US*, p. 98, paragraph 186, at http://www.icj-cij.org/icjwww/icases/inus/inus_ijudgment/inus_ijudgment_19860627.pdf (last access 14th February 2005).
[105] *Ibidem*, pp. 99-100, paragraph 188.
[106] Antonio Cassese, op. cit., p. 153.

2 (4). Threat or use of force is only permitted in the case of self-defence, either individually or regionally, under articles 51 and 53. It is interesting to see that the prohibition is concerned with inter-state relations and its military element, which during the past century have been overridden by intra-state conflict. This principle is also linked to another, the peaceful settlement of disputes between states, under article 2 (3) of the Charter. The co-ordination between these two principles is evident in the criterion of membership, that of peace-loving countries.

The principle of co-operation is considered to be the "fragile thread of the whole normative texture of international principles"[107] and is stated in article 56 of the Charter as the instrument to achieve the purposes of article 55. In the Declaration, different motives led to the restatement of this principle. For the western and socialist blocs, this was seen as a way of promoting a détente without undermining their own political and economic bloc whilst, for the developing countries, it was understood as a window of opportunity to push for more development aid. It is also a very fragile principle, since there is no clear indication of how to put this principle into practice, and since there are clear divisions, it is still at an emergent stage.

The principle of equal rights and the self-determination of peoples has been, since 1919, "(...) as subversive as 1789."[108] It is not geographically confined, ranging from Catalonia to Eritrea, and its origins are diversified and specific. This principle has had an enormous influence on the outlook of membership in international society. No one has better captured this appeal than Thomas Paine in the opening lines of his first paper entitled "the American crisis" at a time when the war seemed lost: "these are the times that try men's souls. Tyranny, like hell, is not easily conquered; yet we have this consolation with us, that the harder the conflict, the more glorious the triumph."[109] It was applied selectively to the empires that lost the First World War through plebiscites under the prevailing assumption

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[107] *Ibidem*, p. 151.

[108] Elie Kedourie, "A new international disorder", in Hedley Bull and Adam Watson (eds.), *The Expansion of International Society*, Clarendon Press, Oxford, 1985, pp. 347-355, at p. 348.

[109] Thomas Paine, "The American crisis", in Michael Foot and Isaac Kramnick (eds.), *Thomas Paine Reader*, Penguin Books, 1987, London, pp. 116-123, at p. 116. This was the first out of sixteen papers entitled "The American Crisis" written between 1776 and 1783. The first was written on 23rd December 1776 at a time when George Washington's troops were in full retreat and the British seemed to be winning the war.

that nations already existed and only needed to be recognised.[110] It was stated as a principle in the Charter, but neither the Trusteeship system nor the colonial powers envisaged a deadline for the independence of the colonies. In 1945, we can see why France and Britain were not very interested in giving this principle, not yet a right, its full meaning. For some, nationalism is linked with a linguistic identity and the rise of print-capitalism, in the sense that the printing of vernacular languages laid the basis for national consciousness,[111] while others see it as having an ethno-historical pre-industrial foundation.[112] For some, it is understood as an industrial feature, having its legitimacy as the political organisation able to deal with Industrial societies[113] and, for others, it is the convergence of territorial and political loyalty irrespective of competing focus of affiliation such as race, religion or kinship.[114] Irrespectively of its genesis, nationalism has played an important role and the idea that "every nation has a right to decide on its own fate, to be independent, or, if not, to choose freely to be a part of a larger state"[115] has been very persuasive in international society. It undermined both sides of the Cold War, overcoming colonialism and challenging the socialist supremacy of the class as the ultimate allegiance. Already in 1939, there was the perception that "Marx guessed that the nation would be superseded by class, but it already seems clear that this guess was wrong."[116] The affirmation of this principle in the Declaration was the outcome of divergent positions and a final compromise.

The main debate took place in ECOSOC, the Commission on Human Rights (Commission) and in the General Assembly where, step by step, it became

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[110] Robert H. Jackson, "Negative sovereignty in sub-Saharan Africa", in *Review of International Studies*, Vol. 12, October/1986, pp. 247-264, at p. 249.

[111] See Benedict Anderson, *Imagined Communities, Reflections on the Origin and Spread of Nationalism,* Verso, London and New York, 1996 (revised Ed. of 1991). This author considers nations to be "(...) an imagined political community- and imagined as both inherently limited and sovereign".

[112] See Anthony D. Smith, *Nations and Nationalism in a Global Era*, Polity Press, London, 1995.

[113] See Ernst Gellner, *Nations and Nationalism, New Perspectives on the Past*, Blackwell, Oxford and Cambridge, 1996 (1st Ed. 1983). For a critical assessment of this theory see also John A. Hall (ed.), *The State of the Nation, Ernst Gellner and the Theory of Nationalism*, Cambridge University Press, Cambridge, 1998, especially the articles by Roman Szporluk and Tom Nairn.

[114] See Ernst B. Haas, "What is Nationalism and why should we study it?", in *International Organisation*, Vol. 40, nº 3, Summer/1986, pp. 707-744.

[115] Fred Halliday, "Nationalism", in John Baylis and Steve Smith (eds.), *The Globalization of World Politics, An Introduction to International Relations*, Oxford University Press, Oxford, 1997, pp. 359-373, at p. 361.

[116] RIIA (Royal Institute for International Affairs), *Nationalism, A Report by a Study Group of Members of RIIA*, Oxford University Press, London, New York and Toronto, 1939, p. 338. The Chairman of this Study Group was the historian E. H. Carr.

clear that the *principle* would give way to a *right*. In this process, the decision of the Commission was crucial, following resolution 545 (VI) of the General Assembly, to include as article 1, the principle of respect for the self-determination of peoples, both in the draft covenant on civil and political rights and the one regarding economic, social and cultural rights.[117] The lengthy debate is illustrated in the resolutions presented by the Commission in 1952 to ECOSOC. The first of these considered that the right to self-government should be ascertained through a plebiscite held under the auspices of the UN. The second resolution requested the General Assembly to recommend states that they submit voluntarily, under article 73 (e), the information regarding the extent to which this right was being exercised by the peoples and the measures taken to help them fulfil this right. These resolutions were met with fierce opposition of the states which administered dependant territories.[118]

These resolutions of the Commission were transmitted by ECOSOC to the General Assembly, where the debate continued. On one side, there was the worry that the exercise of the right of self-determination without restraints could lead to friction and disturb the friendly relations among nations, and might even lead to anarchy and, on the other, there was the worry that the attempt to draw up precise legal definitions would have the consequence of delaying the implementation of this right which was within the spirit of the Charter. These resolutions, after some amendments and controversy, were finally adopted by the General Assembly as resolutions 637 A (VII) and 637 B (VII). Moreover, a third resolution, 637 C (VII), was adopted that entrusted the Commission to continue preparing recommendations concerning this matter. The focus on this issue grew, as we can see from the increasing debate of this question at ECOSOC and the General Assembly. To the western countries, national self-determination was a political principle, rather than a right, and it was subordinated to other principles such as the maintenance of international peace.[119] Therefore, the appropriate place to deal with these questions was the Security Council. Moreover, it was a matter within

[117] See *Y. U. N. 1951*, pp. 486-487.
[118] *Ibidem*, pp. 440-447.
[119] See the British position in *Y. U. N. 1954*, p. 209.

the internal jurisdiction of states and it, therefore, went against article 2 (7) of the Charter.

In addition, there was concern about the need to conduct a thorough study of the concept of self-determination; the concept of peoples and nations; essential attributes and the applicability of the principle of equal rights and self-determination; the relation between this and other Charter principles; and the economic, social and cultural conditions under which the application of the principles was facilitated. This was the aim of a US proposal for a draft resolution that would establish an *ad hoc* commission on self-determination, and it was adopted by ECOSOC.[120] Another important aspect was the scope of national self-determination, which for the US should include internal self-determination, that is to say, all peoples in sovereign states who were deprived of their political freedom.[121] This proposal was rejected and, instead, the General Assembly adopted a resolution in which the self-determination of peoples was a right which included permanent sovereignty over their natural wealth and resources.[122]

The climax of this issue at the UN was reached with the adoption by the General Assembly of the "Declaration on the Granting of Independence to Colonial Countries and Peoples."[123] This declaration strengthened the previous resolutions in asserting that all colonies, Trust and Non-Self-Governing territories should be granted independence. Moreover colonialism, and all practices of segregation and discrimination associated with it, should be eliminated in all countries. This matter was initially proposed by the SU and then taken up and sponsored by 43 African and Asian states. Britain albeit stating that it had accepted colonialism as an "out-of-date political relationship", took up the issue that it had not been a serious discussion adding that the SU's role did not help to bring about an orderly and peaceful transition and that the "world's three newest colonies", Lithuania, Estonia and Latvia should also be included.[124] Likewise, the emphasis put on paragraph

[120] Resolution 586 D (xxv) was adopted by ECOSOC on 29th July 1955.
[121] See *Y. U. N. 1958*, p. 212.
[122] Resolution 1314 (XIII) was adopted by the General Assembly on 12th December 1958 by 52 votes to 15, with 8 abstentions.
[123] Resolution 1514 (XV) was adopted by the General Assembly on 14th December 1960 with 89 votes in favour, none against and 9 abstentions. The abstentions came from the US, Britain, France, Portugal, South Africa, Australia, Belgium, Spain and the Dominican Republic.
[124] See *Y. U. N. 1960*, p. 45.

3, stating that inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence, was clearly in contrast with the real situation of most territories. The US reaffirmed these arguments and observed that since 1946, 34 countries had gained independence and that this was a process that was approaching the end, but that it was not sufficient to abolish the old but also necessary to "plan soundly for what will replace it."[125]

In 1969, Australia, Cameroon, France, Japan and Britain stressed the close relationship between the principle of equal rights and self-determination, on the one hand, and human rights on the other.[126] The international consensus grew and on this basis, the Declaration adopted the principle for the respect of self-determination of peoples. In 1971, ECOSOC adopted a resolution concerning the importance of the right to self-determination.[127] Nevertheless, the issue of the use of force by the liberation movements continued, as we can see in paragraph 1, which confirmed the legality of the struggle against colonial and foreign domination by all available means. In the discussions that followed, several amendments were put forward and the final result was a more balanced resolution by the General Assembly.[128] The paragraph in question was rephrased into "by all available means consistent with the United Nations Charter". This compromise was reinforced in Resolution 3314 (XXIX) regarding the Definition of Aggression, in which none of the groups of states managed to supplant each others' claim.[129]

There were three criteria for achieving national self-determination: the movement's political goal, effective struggle against colonial, foreign or racist regimes, the goal of obtaining effective control over its population and territory and the representative factor, its broad-base support.[130] These criteria left out claims for internal self-determination and also insurgents, which derive their main strength from the control of territory. The UN decided to pass its task of assessing the

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[125] *Ibidem*, pp. 47-48.
[126] In *Y. U. N. 1969*, p. 762.
[127] Resolution 1592 (L) by ECOSOC adopted on 21st May 1971 in *Y. U. N. 1971*, pp. 422-423.
[128] Resolution 2787 (XXVI) adopted by the General Assembly on 6th December 1971 in *ibidem*, pp.423-424.
[129] This resolution was adopted without vote by the General Assembly on 14th December 1974, in *American Journal of International Law*, Vol. 69, nº 2, 1975, pp. 480-483.
[130] Antonio Cassese, *Self-Determination of Peoples, A Legal Appraisal*, Grotius Publications/Cambridge University Press, Cambridge, 1996 (1st Ed. 1995), pp. 165-167.

representativeness of these movements to regional organisations in the African and Asian cases. In the case of Africa, through resolution 2918 (XXVII) adopted in 1972, to the Organisation of African Unity (OAU) and, in the Middle East, through resolution 3102 (XXVIII) of 1973 to the Arab League.

Some of the secessionist claims were successful, as was the case of Bangladesh and Eritrea, whilst others such as Katanga and Biafra were not. In the end, "(...) an accommodation was reached between the prescriptive principle of Sovereignty and the popular principle of National Self-Determination." [131] The best example of this compromise is Africa. The African movements for independence were based on the right to self-determination of peoples from colonial rule. Nevertheless, when the Organisation of African Unity (OAU) was formed in 1963, it accepted the artificial colonial boundaries. Ironically, the Congress of Berlin, which set the rules for the "scramble for Africa", was being legitimized by the African new states. The transfer of negative sovereignty, *i. e.*, sovereignty *de jure*, without being accompanied by positive sovereignty, *i. e.*, effective self-government, has had disturbing consequences in international affairs.[132] Most of the Sub-Saharan African countries would qualify as nations sharing a common destiny but without a shared history. In these countries, the never-ending process of nation-building and nation-maintenance was not promoted by the governing elites.[133] Either due to the Cold War logic or to the manifest inability to merge state and nation, these "quasi-states"[134] were the results of the inversion of the process of achieving sovereignty; the logic of sovereignty that comes from "within" was turned around, because sovereignty was achieved from "without".[135] The end of the Cold War allowed for more breathing space for national self-determination claims. Despite the momentum of this period, there was resilience on the part of the sovereign states to redraw boundaries. As for the issues left from colonial times, after the independence of Timor Lorosae, only the Western Sahara issue remains as the most visible territory awaiting decolonisation. The Trusteeship

[131] James Mayall, op. cit., p. 35.
[132] Robert H. Jackson, op. cit., p. 255.
[133] Ernst B. Haas, op. cit., p. 725.
[134] Robert H. Jackson, "Quasi-States, dual regimes, and neoclassical theory: international jurisprudence and the third world", in *International Organisation*, Vol. 41, nº 4, autumn/1987, pp. 519-549.
[135] *Idem*, "Negative sovereignty in sub-Saharan Africa", in *Review of International Studies*, Vol. 12, October/1986, p. 257.

Council suspended its operation with the independence of Palau in 1994, which was the last remaining UN trust territory.

Also important was the movement of developing countries to achieve their place in international society, known as the "revolt against the West."[136] This revolt derived its strength from the fact that it was done in the name of the great majority of states, representing the great majority of human beings. In a world in which order prevails, they focused on the issues of justice within the international society.[137] The prevailing sense of justice is one of proportionate justice, in which rich and poor should have unequal rights and benefits. The main goal is to achieve peace not through order but in securing justice.[138] This revolt against the West is characterised by a shifting membership and a shifting target. The country that led the way as to the equality claim, Japan, became one of the targets of this revolt later on due to its level of development.[139] In their initial phase, the agenda of developing countries was dominated by achieving and consolidating equality of rights, sovereign equality and racial equality. As these claims became indisputable and gradually consolidated, developing countries enlarged their range of claims and equality spilled over to the economic domain and to the assertion of a right of cultural protest against the cultural ascendancy of the West. In their initial claims, the fact that developing countries took western moral premises as their departure point made these claims very legitimate. What was required was an extension of basic elements of the West, namely sovereignty, national self-determination and racial equality to non-western peoples. In fact, the struggle against racial discrimination and especially *apartheid* was taken up by the developing countries as its banner. The rather dubious policy of some western states, especially the US, regarding South Africa was highly criticised not only by the developing countries but also in the West, and especially President Reagan's initial policy towards the South African regime.[140]

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[136] Hedley Bull, "The revolt against the West", in Hedley Bull and Adam Watson (eds.), *The Expansion of the International Society*, Clarendon Press, Oxford, 1985, pp. 217-228.
[137] *Idem*, *Justice in International Relations, the Hagey Lectures, 12th – 13th October 1983*, University of Waterloo Press, Waterloo, 1984.
[138] Michael Howard, "The historical development of the UN's role in international security", in Adam Roberts and Benedict Kingsbury (eds.), op. cit., pp. 63-80, at p. 69.
[139] Hedley Bull, op. cit., pp. 20-22.
[140] *Idem*, "The West and South Africa", in *Daedalus*, Vol. 111, 1982, pp. 255-270.

As for the economic and social claims, the response by the West was different and these are still highly contentious matters. As for economic justice, it has been met up to a certain point and developed countries have accepted a degree of responsibility to help the developing countries. But beyond this point, there is a very deep division between developing and developed countries. The link between the need for better material conditions in order to achieve a durable peace is found in articles 56 and 55 of the Charter and it was with this starting point that the policy of positive discrimination favouring developing countries, especially in the economic field, has worked. But the claims increased considerably with the Group of 77's project for a New Economic International Order in 1974 and, later, in 1986 with the Right to Development.[141] These also showed that the challenge to western dominance was facilitated by commanding a majority in the General Assembly. And to the increasing level of demands, the West responded with refusals, stating that the "tyranny of the majority" could endanger the credibility and capacity to command obedience from the "minority".[142] In addition, claims for cultural liberation and the revival of tradition cannot be valued when they are invoked as a reason for not abiding by the international civil and political human rights' treaties.

The increasing importance of the principle of respect for human rights is very much connected with the principle of national self-determination. Not only because they are both at odds with another principle, of non-interference, but also because national self-determination was understood as the *summa* of individual rights. In other words, the enjoyment of individual human rights presupposes the realisation of external self-determination;[143] colonialism and *apartheid* were the negation of the most elementary human rights in a collective form. But despite this element in common, tensions began to rise when civil and political rights entered the domain of internal self-determination, *i. e.,* the ability to choose one's political and civil organisation model.

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[141] UN document A/res/41/128 adopted on 4th December 1986.
[142] These expressions were used by the US during the much heated debate in 1974 over the claims for a New International Economic Order, in *Y. U. N. 1974*, p. 98.
[143] Antonio Cassese, op. cit., p. 337.

The first impetus regarding the recognition of universal human rights was western and it is an area in which the UN has acted in a decisive matter. We can observe this in the Charter, in the Universal Declaration of Human Rights and in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In the Charter, we find human rights' considerations in the second paragraph of the Preamble: "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". There is also the need to respect human rights in article 1 (3) as one of the purposes of the UN and article 13 (1); article 55 (c) as one of the conditions for stability and one of the goals of ECOSOC; article 56 in which all members pledge themselves to take joint action in co-operating with the UN for the achievement of the purposes of article 55; article 62 (2) the duty of ECOSOC to make recommendations for the purpose of promoting respect and observance; article 68 as an area where ECOSOC has the mission of setting up a commission; and article 76 (c) as to the duties of the international trusteeship system. The western base of the recognition of human rights is also observed in the so-called first generation of human rights: civil and political. These were expressed in the Universal Declaration of Human Rights of 1948. But after this initial phase, the SU and the developing countries began to make their interest felt in this area, shifting the focus to the second generation of rights, economic, social and cultural rights. This is clear in the adoption of the two International Covenants of 1966, one pertaining civil and political and the other economic, social and cultural rights. These two International Covenants and the Universal Declaration on Human Rights form the International Bill of Rights.

The international discourses of human rights reflect the selective approach of the superpowers as well as the developing countries. The latter, focused on *apartheid*, colonialism and racial discrimination as massive violations of human rights. Additionally, as we have seen, the right to development and matters related to international economic redistributive justice were also considered primordial in the development of human rights. The US clearly preferred the first generation of civil and political rights, whilst the Soviet side preferred to discuss the importance of the second generation rights (economic, cultural and social rights). It also

perceived, as did developing countries, civil and political rights as a weapon of the West in the Cold War logic and this influenced the lack of interest of the socialist and developing countries to include these rights as a principle in the Declaration. But despite the fact that human rights were not included in the Declaration as a principle *per se*, (indirectly included as paragraph b) of the principle of co-operation) there was an increasing recognition that human rights' standards do matter. In 1975, and outside the UN framework, thirty five countries signed a Declaration of Principles under the title "Questions Relating to Security in Europe", known as the Helsinki Final Act.[144] The importance of this meeting of the Conference for Security and Co-operation in Europe (CSCE) is not only that the superpowers were present and that it was part of a détente period, but also that there was evidence of the participating states accepting certain principles of international law, including respect for standards of human rights.[145] These can be found in Principle VII: "respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief." Also important was the reaffirmation of the will of participating states to act in conformity with the purposes and principles contained in the Charter, in the Universal Declaration of Human Rights and the International Covenants on Human Rights.[146] The role of the CSCE evolved and these principles were confirmed in subsequent documents, such as the Paris Charter of 1990. In this document, we find a clear statement of the link between the attainment of external and internal self-determination regarding criteria such as respect for human rights, democracy and the rule of law, as well as the recognition of the role of the Council of Europe in the consolidation of these criteria.[147]

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[144] In http://www.osce.org/docs/english/1990-1999/summits/helfa75e.htm (last access 14th February 2005).

[145] Ian Brownlie, "International law at the fiftieth anniversary of the United Nations, general course on public international law", in *Collected Courses/The Hague Academy of International Law*, Vol. 255, 1995/V, pp. 9-228, at p. 81.

[146]The inclusion of the principle of human rights was greatly due to the Western countries and it represented the acknowledgment of the compatibility of this principle with the principle of non-intervention; this was carried out with the confirmation of the international instruments of human rights. See Gaetano Arangio-Ruiz, "Human rights and non-intervention in the Helsinki Act", in *Collected Courses/The Hague Academy of International Law*, Vol. 157, 1977/IV, pp. 195-331.

[147] This Charter exulted the end of the Cold War and of European division at http://www.osce.org/docs/english/1990-1999/summits/paris90e.htm (last access 14th February 2005); see also the "Document of the Copenhagen Meeting" of 1990 also known as the "Conference on the Human Dimension of the CSCE" at http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm (last access 14th February 2005), and the "Helsinki Summit Declaration" of 1992 at http://www.osce.org/docs/english/1990-

The UN's action in the field of human rights has been crucial to its development and consolidation in international law. The idea that human rights must be respected and upheld is no longer controversial and a general principle has emerged gradually prohibiting gross and large-scale violations of human rights. In our view, the role of the UN is not limited to standard-setting, but also to the protection, through the role of the Commission on Human Rights and other Committees, and punishment of human rights violations, not only through international tribunals such as those regarding former Yugoslavia and Rwanda, but also with the creation of the International Criminal Court . This complex and Herculean task has been gradually developed and carefully constructed throughout the history of the UN. The principle of respect for human rights is subversive of the international order, not only because it has made the individual a new actor of international society, but also because it has introduced the issue of state accountability and has set limits, albeit a minimum standard, based on shared values, in a state's conduct towards its citizens.[148] Some would perceive international human rights as a potential new standard of civilisation, whilst others would argue that it is not a consensual move.[149] The very notion that individuals can redress a wrong through the international society against their own state is revolutionary *per se*. The evolution of the idea and principle of human rights within the UN framework is not without its problems and complexities but it is part of the international society, as we shall see later on.

1999/summits/hels92e.htm (last access 14th February 2005). The increasing importance of the CSCE is also evident in its organizational change, moving from being a more loosely structured Conference to a more solid Organisation, namely OSCE.

[148] Antonio Cassese, *Human Rights in a Changing World*, Polity Press, Cambridge, 1990, p. 49.

[149] Gerrit W. Gong discusses human rights, anti-colonialism, non-discrimination, national self-determination and equitable re-distribution of wealth but finds that none has achieved universal consensus, in *The Standard of "Civilization" in International Society*, Clarendon Press, Oxford, 1984, p. 13. On the other hand, Jack Donnelly sees human rights as a good candidate for the next standard of civilisation, in "Human rights: the next standard of civilization?", in *International Affairs*, Vol. 74, nº 1, 1998, pp. 1-23.

3 The Doctrinal Expression of Community Interest in International Law: *Jus Cogens*

"A first, very tentative, definition of "community interest" could perceive it as a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognised and sanctioned by international law as a matter of concern to all States."[150]

The concept of *jus cogens* which "(...) refers to restrictions on freedom of contract which are imposed on all members of the international community in their mutual relations" is included within this notion of community interest.[151] The definition of a community interest could also encompass other elements such as the concept the 'common heritage of mankind' or the protection of the environment. *Jus cogens* is defined by the Vienna Convention of the Law of Treaties of 1969 in article 53, which declares that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general law having the same character."[152] Furthermore, regarding the emergence of a new peremptory norm it is asserted, under article 64, that "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."[153] Moreover, under article 66 and if a dispute arises as to the interpretation of a peremptory norm, it falls under the jurisdiction of the ICJ. The special force of a peremptory norm lies in rendering null and void any

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[150] B. Simma, "From bilateralism to community interest in international law", in *Collected Courses/The Hague Academy of International Law*, Vol. 250, 1994/VI, pp. 217-384, at p. 233.
[151] Hermann Mosler, op. cit., p. 35.
[152] The Vienna Convention on the Law of Treaties was concluded and opened for signature on 23rd may 1969. It was the result of a conference, convened by resolutions 2166 (XXI) of 5th December of 1966 and 2287 (XXII) of 6th December of 1967, that held two sessions in Vienna; the first during 26th March and 24th May of 1968 and the second during 9th April and 22nd May 1969. It came into force on 27 January 1980. The text of the Convention is in http://www.un.org/law/ilc/texts/treatfra.htm (last access 14th February 2005). Hereafter simply cited as the Vienna Convention.
[153] *Idem, ibidem.*

international treaty that violates *jus cogens*. It is the doctrinal element of the existence of a group of higher rules which are the outcome of shared values of the international society.

The issue of *jus cogens* is not a new one and it has been discussed in international law. The positivist school, despite its emphasis on the will of the states, and with some radical exceptions, admitted the importance of universally recognised basic principles, for instance the prohibition of slavery. The idea of restrictions upon the full freedom of states to celebrate treaties is related with the search for the ethical minimum which is recognised by all states in the international society.[154] We can find expressions of limits to treaties in the proceedings of the Permanent International Court of Justice. In 1923, in the judgement of the case *S.S. Wimbledon* of August 17th Judge M. Schücking, in his dissenting opinion stated that neutral duties and a special right of necessity must take precedence over any contractual obligations.[155] In 1934, we can find references to limits regarding treaty making in the separate opinion of Judge Jonkheer van Eysinga, but more detailed references to *jus cogens* are found in the separate opinion of Judge Schücking regarding the judgment of December 12th of the *Oscar Chinn* Case.[156] For Judge van Eysinga, there was the need to obtain agreement in order for revision of all the thirteen countries that had signed the General Act of Berlin. He stated that this Act did not constitute a *jus dispositivum* but it provided the Congo Basin with a "regime, a statute, a constitution."[157] For Judge Schücking, the Convention of Saint-Germain of 1919 (signed by the US, Belgium, Britain, France, Italy, Portugal and Japan) was an invalid treaty because it was not in conformity with the will of the thirteen states that had drawn up the Congo Act of 1885. This Act had the intention of prohibiting a limited group of signatories from modifying the terms of the Act and, therefore, preventing conflicts

[154] Alfred von Verdross, "Forbidden treaties in international law", in *American Journal of International Law*, Vol. 31, nº 3, 1937, pp. 571-577.
[155] Judgment of the *S. S. Wimbledon Case*, in *World Court Reports, A Collection of the Judgments, Orders and Opinions of the Permanent International Court of Justice 1922-26*, Vol. I, edited by Manley O. Hudson, Carnegie Endowment for International Peace, Washington, 1934, pp. 163-189. The dissenting opinion of Judge Schücking is in pp. 186-189.
[156] Judgment of the *Oscar Chinn Case*, in *World Court Reports, A Collection of the Judgments, Orders and Opinions of the Permanent International Court of Justice 1932-35*, Vol. III, edited by Manley O. Hudson, Carnegie Endowment for International Peace, Washington, 1938, pp. 418-483. The separate opinion of Judge van Eysinga is in pp. 467-479 and Judge Schücking's is in pp. 479-481.
[157] *Ibidem*, p. 470.

between the great powers. He also considered that the fact that the signatories of the Congo Act had not impugned the Convention could not remedy its absolute illegality. He considered that the Convention of 1919 "(...) remains null and void, because it transgresses the bounds which the authors of the Berlin Act established for themselves when they subscribed to that Act."[158] In his view, the nullity contemplated by the Congo Act was an absolute nullity, not only could the signatories invoke it at any time but also that the Convention concluded in violation of the prohibition was automatically null and void. For these reasons, the Convention of 1919 should not be applicable by the Court, "the custodian of international law."[159] In 1947-1948, the US Military Tribunal in Nuremberg in the case *US vs. Alfred Krupp and Others* refuted the argument presented by the defence which claimed that an agreement between Germany and the Vichy Government was conducted as to the use of French prisoners of war in the armament industry. The Military Tribunal found no evidence of the agreement but "if there was any such agreement it was void under the law of nations."[160] In 1952, the existence of peremptory norms was reaffirmed by the German Supreme Constitutional Court, which recognised that customary peremptory rules are those firmly rooted in the legal conviction of the community of nations.[161]

The initiative of raising the *jus cogens* issue at the Vienna Convention belonged to the Soviet bloc, and found strong support from the developing countries.[162] This initiative was encompassed in the much wider project of revising and adapting international law to the demands of these two groups of states. The developing countries saw in *jus cogens* another tool to fight colonialism and racial discrimination, mainly *apartheid*. The socialist bloc envisaged it as a way of furthering smoother relations between the two blocs, but the West was more on the defensive. All these positions can be seen in the comments of governments

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[158] *Ibidem*, p. 480.
[159] *Ibidem*, p. 481.
[160] Egon Schwelb, "Some aspects of international *jus cogens* as formulated by the International Law Commission", in *American Journal of International Law*, Vol. 61, nº 4, 1967, pp. 946-975, at pp. 950-951.
[161] *Cit in* Stefan A. Riesenfeld, "*Jus dispositivum* and *Jus cogens* in international law: in the light of a recent decision of the German Supreme Constitutional Court", in *American Journal of International Law*, Vol. 60, nº 3, 1966, pp. 511-515, at p. 513.
[162] Antonio Cassese, *International Law in a Divided World*, Clarendon Press, Oxford, 1992 (1st Ed. 1986) p. 175.

on the draft article proposed by the ILC.[163] Except for Luxembourg, that contested the existence of these norms, states agreed upon the existence of such peremptory norms. Where problems arise is mainly in two areas: the need to define the peremptory norms and the need of setting up machinery that would deal with disputes arising from the interpretations of *jus cogens*. The proposed draft left it to state practice and the jurisprudence of international courts to enumerate these peremptory norms for two reasons. Firstly, it would imply a prolonged study of the matter, therefore, delaying the Convention and, secondly, in order to avoid confusion as to the position of other possible cases. Some countries such as Portugal, Brazil, Cyprus, France, Spain and Syria saw this proposal as both wise and balanced. For instance, Portugal had the additional motive of excluding the concept of self-determination of peoples from a potential list of peremptory norms due to its colonies.

Other countries stressed the need to establish machinery that would ameliorate tensions arising from disputes such as Turkey, Britain and the US. Moreover, socialist countries such as Bulgaria stated that the principles governing friendly relations would help to clarify the rules of *jus cogens* and Hungary stressed that ideological differences did not prevent the reaching of consensus. Cyprus, due to domestic conditions stated that the principles of non-interference and prohibition of threat or use of force were *jus cogens*. Of the developing countries, Algeria stated that it would seek the annulment of the agreements regarding states which practised *apartheid* or racial discrimination. The reaction of the Philippines was interesting: very enthusiastic about the consideration of self-determination and human rights as of the essence of *jus cogens*.

Another difference of approach had to do with the source of the peremptory norms. For the SU, *jus cogens* rested on positive law.[164] This position was shared

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[163] United Nations, *Yearbook of the International Law Commission 1966*, Vol. II, New York, 1967, pp. 20-25, "Article 37-Treaties conflicting with a Peremptory Norm of General International Law (*Jus Cogens*)." Hereafter simply referenced as *Y. I. .L. C. 1966*, Vol. II. See also United Nations, "Official documents of the United Nations, reports of the International Law Commission, on the second part of its seventeenth session and its eighteenth session, 1966", in *American Journal of International Law*, Vol. 61, nº 1, 1967, pp. 248-475.

[164] L. A. Alexidze, "Legal nature of *Jus cogens* in contemporary international law", in *Collected Courses/The Hague Academy of International Law*, Vol. 172, 1981/III, pp. 219-270 and Grigory Tunkin, "International law in the international system", in *Collected Courses/The Hague Academy of International Law*, Vol. 147, 1975/IV, pp. 1-218, especially pp. 85-94.

by Iraq, which stated that "it derives from positive law, not from natural law" and Thailand expressed the same view. The Soviets stressed the need for consent from states, reducing *jus cogens* to positive law and this side prevailed in the words used in the article, "accepted and recognised." The West placed greater emphasis on the notion of *jus cogens* as deriving from customary law and above the will of the states. They have an absolute character because they represent the "higher interest of the whole international community."[165] If a state violates humanitarian laws, for instance, regarding prisoners of war, this does not free the other belligerent from respecting these rules; "the obligation is, for each state, an absolute obligation of law not dependant on its observance by others" and this is so because these rules are intended to benefit not so much states but individuals. The same is true for human rights' conventions.[166] But in our view, the emphasis on natural law is best explained by Judge Tanaka in his dissenting opinions regarding judgments of the ICJ, especially in the *South West Africa Cases-Second Phase*. To Judge Tanaka, "the principle of the protection of human rights is derived from the concept of man as a *person* and his relationship with society which cannot be separated from universal human nature."[167] The ILC established that custom and treaty are on the same footing and the only limitations that exist to these sources of international law derive from *jus cogens*. The Soviets' preference for treaties can be explained by the conviction that custom was western-based and had an unwritten character, "undefined" development coming from immemorial practice.[168] This contrasts with the examples of the formation of customary rules regarding the continental shelf, freedom of movement into outer space or the principle of national sovereignty over air space which were formed, at least comparatively, quite swiftly.[169]

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[165] Alfred von Verdross, "*Jus dispositivum* and *jus cogens* in international law", in *American Journal of International Law*, Vol. 60, nº 1, 1966, pp. 55-63, at p. 58.
[166] Sir Gerald Fitzmaurice, "General principles of international law", in *Collected Courses/The Hague Academy of International Law,* Vol. 92, 1957/II, pp. 1-228, at p. 125.
[167] Judgment of South West cases (second phase) of 1966, Dissenting opinion of Judge Tanaka, "The concept of equality: the dissenting opinion of Judge Tanaka, South West Africa cases (second phase), 1966", in Ian Brownlie (ed.), *Basic Documents in Human Rights*, Clarendon Press, Oxford, 1994 (3rd Ed.), pp. 568-598.
[168] Antonio Cassese, op. cit., pp. 180-181.
[169] Michael Akehurst, op. cit., p. 5.

Moreover, the US stressed the question of retroactivity and this is linked to the notion of *jus cogens* either being part of the codification process or being progressive law. In other words, whether *jus cogens* is *lex lata*, an institution existing within the framework of international law, or *lex ferenda*, which will have an obligatory character only after the convention comes into force. Under article 28, and unless otherwise agreed, no retroactivity is the rule. Notwithstanding, it was also argued that some peremptory norms already existed in international law and, consequently, the codification of *jus cogens* was the "logical consequence from that fact."[170] The article on *jus cogens* was adopted by 87 in favour, 8 against and 12 abstaining and article 64 was adopted with 84 in favour, 8 against and 16 abstentions. The countries that voted against admitted to the existence of *jus cogens* but disagreed with the lack of a machinery implementation in case of disputes.[171] Notwithstanding, the existence of peremptory norms was not without fierce criticism in the West and some considered that "unlike municipal law, international customary law lacks rules of *jus cogens* or international public policy, that is, rules which, by consent, individual subjects may not modify."[172] It presupposes the existence of an effective *de jure* order, which has at its disposal legislative and judicial machinery, able to formulate rules of public policy, and, in the last resort, can rely on overwhelming physical force. The efforts are still precarious and the UN and European project as consensual orders are better described as international quasi-orders.[173]

There are other limits and even contradictions to the application of peremptory norms. At first sight, the decision not to list the norms that are *jus cogens* functioned in a way as a penal code which provides that crimes shall be punished without saying which acts constitute crimes.[174] Furthermore, under article 65, only the contracting parties to a treaty that is alleged to be contrary to a peremptory rule are entitled to challenge the validity of that treaty. In other words, although it is an offence against all, only those directly involved are entitled to

[170] Comments of Special Rapporteur, in *Y. I. L. C. 1966*, p. 25.
[171] Giorgio Gaja, "*Jus cogens* beyond the Vienna Convention", in *Collected Courses/The Hague Academy of International Law*, Vol. 172, 1981/III, pp. 271-316, at p. 279 and endnote nº 5 in p. 302.
[172] Georg Schwarzenberger, *A Manual of International Law*, Stevens & Sons, London, 1967 (5th Ed.), pp. 29-30 and pp. 108-109.
[173] *Ibidem*, p. 30.
[174] Egon Schwelb, op. cit., p. 964.

react. Likewise, it is also very unlikely that two or more states decide to conclude a treaty in which their illegal behaviour is recorded for all to see, as was pointed out by Turkey in 1966, during the discussion of the draft article regarding *jus cogens*, "states do not conclude treaties dealing with the use of force, crime, traffic of slaves and genocide."[175] In addition, the fact that the ICJ does not have compulsory jurisdiction over all states makes it difficult to determine the content.[176] This limit was demonstrated by the ruling of the Court regarding the *East Timor Case* of 1995. Portugal contended that Indonesia had no right to celebrate treaties that involved East Timor's natural resources because East Timor was still a territory that had not yet expressed its right to self-determination. This right had been effectively denied by the Indonesian government, since 1975 when the latter invaded and incorporated East Timorese territory. Although recognising the right of East Timor to self-determination, the Court decided that it could not "rule on the lawfulness of the conduct of a state when its judgment would imply an evaluation of the lawfulness of the conduct of another state which is not a party to the case."[177] In other words, because Indonesia did not accept the jurisdiction of the ICJ, the Court could not pronounce over this issue.[178] This decision reinforced the opinion held by some that, due to international structural weaknesses such as the inadequacy of sanction mechanisms and the mediocrity and controversy of many norms, we may be heading dangerously to "relative normativity."[179]

Notwithstanding all these limitations we consider that peremptory norms exist. The limits pointed out are indicative of the embryonic stage of *jus cogens* and not the negation of its existence. They have been recognised by the ICJ and states.[180] Throughout the years after the signing of the Vienna Convention, it has

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[175] In *Y. I. L. C. 1966*, Vol. II, p. 21.

[176] For Alfred Verdross the need to have a rule submitting all disputes concerning the interpretation and application of a norm of *jus cogens* to arbitration is an essential condition in order for peremptory norms to function, op. cit., pp. 61-62.

[177] See the Judgment of the International Court of Justice of 30th June 1995 of the Case concerning East Timor (Portugal vs. Australia), especially paragraph 29, http://www.icj-cij.org/icjwww/icases/ipa/ipa_ijudgments/ipa_ijudgment_19950630.pdf (last access 14th February 2005).

[178] Juan Antonio Carrillo Salcedo, "Reflections on the existence of a hierarchy of norms in international law", in *European Journal of International Law*, 1997, pp. 583-595, at p. 594.

[179] See Prosper Weil, "Towards relative normativity in international law?", in *American Journal of International Law*, Vol. 77, nº 3, 1983, pp. 413-442.

[180] See the International Court of Justice's judgment of 20th February 1969 concerning the *North Sea Continental Shelf Cases*, in *I. C. J. Reports 1969*. See especially the separate opinion of Judge Padilla Nervo,

increasingly become an accepted concept and the main problem is in the consensual identification of its content.[181] For some authors, the principles of international law that we have identified are *jus cogens* with the exception of good faith and co-operation.[182] Some states such as the Ukraine and the United Arab Republic in 1966 considered that the treaties concluded between colonial powers and former colonies were null and void, because they were leonine treaties. For others, all the principles enshrined in the Charter of the UN could be considered peremptory norms.[183] In our view, the most consensual of the peremptory norms is the principle prohibiting force or the threat of the use of force.[184] The US has recognised that "while agreement on precisely what are the peremptory norms of international law is not broad, there is universal agreement that the exemplary illustration of a peremptory norm is Article 2, paragraph 4."[185] Moreover, the prohibition of genocide, slavery and the slave trade, the self-determination of peoples, the ban on torture, and the prohibitions of racial discrimination, especially apartheid, have also been frequently addressed as peremptory norms.[186]

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pp. 86-99, at p. 97 ("Customary rules belonging to the category of *jus cogens* cannot be subjected to unilateral reservations"), the dissenting opinion of Judge Tanaka, pp. 171-196, at p. 182 ("(...) in this case the reservation would in itself be null and void as contrary to an essential principle of the continental shelf institution which must be recognised as *jus cogens*") and p. 193 ("Natural law does not venture to interfere with positive law except in the case that positive law rules are manifestly immoral and violate the principles of natural law"), and the dissenting opinion by Judge Sorensen in pp. 242-257, at p. 248 ("provided the customary rule does not belong to the category of jus cogens, a special contractual relationship of this nature[the capacity to establish reservations regarding the articles of the Convention on the Continental Shelf] is not invalid as such").

[181] Juan Antonio Carrillo Salcedo, op. cit., p. 590 and also L. Henkin, "General course on public international law", *Collected Courses/The Hague Academy of International Law*, Vol. 216, 1989/IV, pp. 9-416, at p. 60.

[182] Antonio Cassese, op. cit., pp. 158-159.

[183] Grigory Tunkin, op. cit., p. 93.

[184] Commentary of the Special Rapporteur in *Y. I. L. C. 1966*, p. 24 and statement delivered on 18th October 1983 to the Sixth Committee of the General Assembly by the British representative Mr. F. Berman, in "United Kingdom materials on international law 1983", edited by Geoffrey Marston, in *British Year Book of International Law*, Vol. LIV, 1983, p. 379. See also the ICJ Judgment of 27th June of 1986 of the *Case concerning Military and Paramilitary Activities in and Against Nicaragua vs. United States of America*, p. 100, paragraph 190, in op. cit.

[185] See also "Department of State Memo", in *American Journal of International Law*, Vol. 74, nº 2, 1980, p. 419. For a critical view regarding the principle of prohibition of the use and threat of use of force see W. Michael Reisman, "Coercion and self-determination: construing Charter article 2 (4), in *American Journal of International Law*, Vol. 78, nº 3, 1984, pp. 642-645. This author argues for the need to interpret this article taking into account the spirit of the Charter and not just its letter and, therefore, not to treat, in the same way, Tanzania's intervention in Uganda to overthrow Amin's despotism and the Soviet intervention in Hungary and Czechoslovakia to overthrow popular governments and to impose an undesired regime on a coerced population.

[186] See for instance the dissenting opinion of Judge Tanaka concerning the *South West case*, op. cit., especially p. 577.

In 1970, in the *Barcelona Traction case*, emphasis was put on recognising that "an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*."[187] These obligations are owed to the international society as a whole. They concern and are binding on all states, irrespective of the existence of a direct interest on their part. The Court considered that examples of obligations *erga omnes* derived from "the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[188] The ICJ reinforced this concept of *erga omnes* with its advisory opinion concerning *Namibia* in 1971. This advisory opinion was requested by the Security Council which enquired about the legal consequences for states of the continued presence of South Africa in Namibia, disrespecting Security Council's resolution 276 of 1970. Amongst other decisions, the Court concluded that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all states in the sense of barring *erga omnes* the legality of the situation which is maintained in violation of international law."[189]

Despite their special character, these obligations *erga omnes* are not accompanied by a procedural mechanism of enforcement and, like *jus cogens*, face some limits when applied in practice. This was evident in the East Timor case, in which the Court stated that "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice has an *erga omnes* character is irreproachable."[190] But, at the same time, it also concluded that whatever the nature of the obligations involved, it could not

[187] See the Judgment of the *Case concerning the Barcelona Traction, Light and Power Company, Limited-Second Phase of 1970*, paragraphs 33-34, *Cit in* Theodor Meron, "On a hierarchy of international human rights", in *American Journal of International Law*, Vol. 80, nº 1, January/1986, p. 10.
[188] *Idem, ibidem.*
[189] ICJ Advisory Opinion of 21st June 1971 concerning *Legal Consequences of the continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, at http://www.icj-cij.org/icjwww/idecisions/isummaries/inamsummary710621.htm (last access 14th February 2005).
[190] See Ian Brownlie, op. cit., p. 83.

act without the consent of the state in question, even if the right in question was a right *erga omnes*. *Jus cogens* and the concept of *erga omnes* are at the beginning of their development and the relation between other areas of international law is also taking its first steps. There has been some attention drawn to the relation between peremptory norms and norms which impose obligations *erga omnes*. One could argue that only norms which impose obligations *erga omnes* can reasonably held to be peremptory but not all *erga omnes* are peremptory norms. We could also argue, however, that in practice it is difficult to think of an example of an obligation *erga omnes* which is not at the same time to be considered to derive from *jus cogens*.[191] We agree with the idea that *jus cogens* focuses on the consequences of violations of obligations *erga omnes* for the validity of treaties and other legal acts.[192] Some authors have focused on the need to analyse the implications of *jus cogens* together with the law of state responsibility and specifically the international crimes of states.[193] Others have emphasised the need to explore the rights of third states to take counter-measures.[194]

In addition, there is the need to study the potential tension between the need to have consent from the "international community as a whole" and regional peremptory norms. This very issue, regarding the need of consensus from the "international community" as a whole has raised some interesting questions.[195] Here, need for consent from all the states has been transformed into the need to have consent from a very large majority. This is to say that an isolated or a small number of states cannot prevent a general rule of international law from becoming a peremptory norm.[196] For instance, a persistent objector such as South Africa regarding the inclusion of *apartheid* as a violation of customary law and of *jus cogens* did not prevent this norm from becoming exactly *jus cogens*.[197] But the issue of consensus and consent is also important, because there is some

[191] B. Simma, op. cit., p. 300 and Giorgio Gaja, op. cit., pp. 280-282.
[192] See B. Simma, op. cit., p. 301.
[193] Giorgio Gaja, op. cit., pp. 271-316 and B. Simma, op. cit., pp. 301 *ff.*
[194] O. Schachter, "International law in theory and practice, general course in public international law", in *Collected Courses/The Hague Academy of International Law*, Vol. 178, 1982/V, pp. 9-395, at pp. 182-184.
[195] See for instance Michael Akehurst, "The hierarchy of the sources of international law", in *British Year Book of International Law*, Vol. XLVII, 1974-1975, pp. 273-285, at p. 285. This author states that "a rule in order to be accepted as peremptory must pass two tests- it must be accepted as law by all the states in the world and an overwhelming majority of states must regard it as *jus cogens*."
[196] B. Simma, op. cit., pp. 290-291.
[197] L. Henkin, op. cit., p. 60.

dissatisfaction of states regarding *jus cogens* including the great powers. The provisions regarding *jus cogens* and the jurisdiction of the ICJ were, no doubt, one of the main reasons why it took so long for some countries to become parties of the Convention.[198] In fact, France refused to sign the Convention precisely because it opposed articles 53 and 64.[199] In practical terms, it is difficult for a state, other than a great power, to oppose the formation of a peremptory norm.[200] This raises the need to study the role of great powers alongside the emergence of peremptory norms because there is the risk of blurring the distinction between desired and established law, in which more powerful states may impose peremptory norms on other states.[201]

This is even more perceptible in the issue of how *jus cogens* and *erga omnes* obligations and rights work regarding human rights. Whether focusing on the "basic rights of the human person" or realising that "if we can introduce in the international field a category of law, namely *jus cogens*, (...) surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*."[202] The impact of peremptory norms and its contents are still being explored, and this is especially true in the area of human rights. This matter will be analysed later, focusing on which norms within the vast body of human rights international law have a *jus cogens* nature and their relation with the international society.

In the post-Cold War era, the UN was revitalised not only in terms of its legitimacy but also the enlargement of its capacities and areas of intervention. The end of the great ideological confrontation allowed the UN a greater margin of manoeuvrability as regards the national interests of states. Without the superpower rivalry, the UN would be able to fulfil the original intentions proclaimed in the Charter and this state of grace is best expressed by the response of the international society and the subsequent UN intervention in the Gulf War of

[198] *Ibidem*, p. 279 and see also Antonio Cassese, op. cit., p. 177.
[199] See Prosper Weil, op. cit., p. 428. The Convention was adopted by 79 votes in favour, 1 against (France) and 19 abstentions, in *Y. U. N. 1969*, p. 734.
[200] Antonio Cassese, op. cit., p. 179.
[201] Prosper Weil, op. cit., pp. 440-442.
[202] See JudgeTanaka's dissenting opinion regarding *South West case*, op. cit., p. 581.

1991.[203] The relatively peaceful collapse of the SU and some Eastern countries reinforced the idea of the world moving towards a unified goal of peaceful relations. But this momentum began to lose ground with the resurgence of intra-state wars of such a ferocity and intensity that there was a "return of geography."[204]

The recognition of the problem was swift, as we can see from the Secretary-General's proposals "An Agenda for Peace,"[205] the follow up in 1993,[206] and the "Supplement to an Agenda for Peace."[207] Responding and solving the problems were more complex and lengthy. It was recognised that the "inter-State wars requiring the classical peace-keeping approach gave way to intra-State, ethnic and factional confrontations, necessitating the United Nations, in its settlement and relief operations, to deal with factions and religious and ethnic movements."[208] It called for a second-generation peace-keeping which comprised not only military, but also political, economic, social, humanitarian and environmental dimensions, demanding a unified and integrated approach. This multidimensional and interdisciplinary concept of peace-building was the answer for conflicts *within* rather than *between* and of an unusual violence and cruelty. It was also understood that the greatest obstacle was the reluctance of individual member states to accept UN help when they were part of the conflict.

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[203] This consensus was expressed especially in resolution 688 of 1991 of the Security Council. See also resolutions 660 (2nd August), 661, 662, 664, 665, 666, 667, 669, 670, 674, 677 and 678 of 1990 in http://www.un.org/Docs/scres/1990/scres90.htm (last access 14th February 2005) and resolutions 686, 687, 692, 699, 700 and 706 of 1991 in http://www.un.org/Docs/scres/1991/scres91.htm (last access 14th February 2005).

[204] David Hooson, "After word: identity resurgent-geography revived", in David Hooson (ed.), *Geography and National Identity*, Coll. Institute of British Geographers, nº 29, Blackwell Publishers, Cambridge, Mass. and London, 1994, pp. 367-370.

[205] UN document A/47/277-S/24111 of 17th June 1992 in http://www.un.org/Docs/SG/agpeace.html (last access 14th February 2005). This report was a response to a Security Council request, it was adopted by the Security Council and also by the General Assembly on 18th December 1992 without vote as resolution 47/120 "An Agenda for Peace: Preventive Diplomacy and Related Matters", in *Y. U. N. 1992*, pp. 38-41. Hereafter simply cited as "Agenda for Peace".

[206] UN document resolution 47/120 B adopted by the General Assembly on 20th September 1993 without vote, in *Y. U. N. 1993*, pp. 78-81.

[207] UN document A/50/60-S/1995/1 of 1st - 3rd January 1995 in http://www.un.org/Docs/SG/agsupp.html (last access 14th February 2005). It was adopted by the General Assembly as resolution 51/242 on 15th September 1997 without vote, in *Y. U. N. 1997*, pp. 32-36.

[208] In *Y. U. N. 1993*, p. 71. The "Agenda for Peace" document stressed the importance of preventive diplomacy in order to avoid conflicts, of peacemaking to halt conflicts, of peace-keeping to preserve peace once it has been attained, and of post-conflict peace-building to avoid recurrence of conflicts. It also recognised the importance of fact-finding and the need for military "stand-by arrangements."

Not only were these UN documents the consequence of the intensity of intra-state violence but they also reflected a new emphasis on the "relation that democracy, within nations, required respect for human rights and fundamental freedoms set forth in the Charter."[209] In addition, "democracy within the Family of Nations means the application of its principles within the world organisation itself."[210] It stressed the idea that democracy, at all levels, is essential to attain peace for a new era of prosperity and justice.[211] We find evidence of this trend in the increasing humanitarian and electoral operations organised within the UN structure.[212]

The need to adapt the UN to the post-Cold War era has also been extended to the fundamental structure of the organisation, although it is still just a matter of discussion. The greater emphasis has been put on the reform of the Security Council. There is growing dissatisfaction at the composition of its permanent members on the grounds that it does not reflect the reality of international politics anymore. Some argue for the inclusion of Japan and Germany, a modern version of the popular idea of "no taxation without representation"[213], whilst others argue for a better geographical representation, and in this sense, countries such as India, Brazil or Nigeria would be likely candidates. Others would argue that to change this structure would entice disorder and instability, and it would be difficult to achieve the needed consensus among the permanent members. It is our opinion that this issue will continue to be a matter of discussion for many years to come. What is relevant is that states are discussing how to reform the UN but not to end or curtail its area of intervention.

We believe that there is a global international society, albeit a very fragile and heterogeneous one, but still a society in which there are common interests and values. The existence of this international society can be seen in the UN, in the fundamental principles of international law that govern international relations

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[209] See paragraph 81 of "Agenda for Peace".
[210] *Ibidem*, paragraph 82.
[211] *Idem*, *ibidem*.
[212] Likewise, within the logic of strengthening the role of the UN, we notice the 1995 Joint Inspection Unit report regarding the UN's capacity for conflict prevention and the role of the Administrative Committee on Coordination that aims at improving the co-ordination between the different UN bodies. See *Y. U. N. 1995*, p. 117. The Secretary-General also called to the attention of states that, in order for the UN to fulfil its tasks, it needs an efficient and independent international civil service and an assured financial basis.
[213] Adam Roberts and Benedict Kingsbury, op. cit., p. 40.

and in the existence of peremptory norms. Nowadays, we live in a unique historical international society, one in which the world is formed by nominally equal sovereign states and almost all of them are part of the UN. It is an international society that remains anarchical, *i. e.,* without a central ruler, and this is reflected in the UN's structure and the functions of international law, namely law-making, law-determination and law-enforcement are decentralised and all rely heavily on the UN for its application. The UN plays a complex role in international society and it is an organisation that, although formed by states, is not just the sum of its parts. It has shown resilience and capacity to adapt through the intense rivalry of the Cold War, *e. g.* the "invention" of peace-keeping. It helps to sustain a viable international order by enabling to set the international agenda and being a forum where shared values and norms are discussed and reshaped. The UN is now an international organisation with 191 states, the most recently admitted being Switzerland and Timor Lorosae.[214] In the development of international law, the UN has played a crucial role and the set of principles which are agreed upon reveal the coexistence of the two patterns, the Westphalian and the UN Charter. The less controversial principles are those firmly rooted in the Westphalian model because they represent the most elementary demands for state co-existence, whilst the modern principles are based on the goal of co-operation. We can say that the first stage of the evolution of international society was one in which the systemic and societal elements prevailed, whilst the new elements are societal and communitarian.

The international society is still a society of states but in which new actors such as the UN and the individual have a role. We would argue that "the trend of history is towards *relative* sovereignty."[215] Whilst some sovereignty has been "lost" to regional and global institutions as well as markets, some has been "gained" in other areas such as control over inward migration, some areas of trade and the fundamental role of equity and distribution.[216] In our view, the state remains the

[214] For membership and its evolution regarding the UN see http://www.un.org/Overview/growth.htm (last access 14th February 2005).
[215] Hermann Mosler, op. cit., p. 21.
[216] Vincent Cable, "The diminished nation-state: a study in the loss of economic power", in *Daedalus*, Spring/1995, Vol. 24, nº 2, pp. 23-53.

foundation-stone of the international society.[217] The latter has been facing great challenges, not only two World Wars, but also problems that transcend boundaries such as environmental threats,[218] international migrations, international terrorism, and nuclear proliferation. This set of problems, along with the terrible conflicts that have dominated the 20th century can be described as an "eighty year crisis."[219] It is still a heterogeneous society, in which north and south have different agendas and contending claims, for order in the case of the former and for justice in the case of the latter.[220] The persistent problem of global inequality has raised many outcries and reservations against the process of globalisation, in the sense of whether it is a process that reduces or exacerbates the existing inequalities.[221] The failure of the state to deal with these problems has led to the idea of a Westfailure system.[222] We, however, think that "the traditional normative concept of sovereignty is strained and flawed, but in the absence of better means to manage inequality it remains preferable to any of the alternatives on offer."[223]

In fact, the issue at stake is the adaptation of state sovereignty to all the challenges that are contained in the UN Charter model, and especially human rights. In our opinion, this is the most revolutionary element of all the modern principles. During the Cold War, both sides propounded their selective view of human rights as a weapon for world dominance. At the same time, this propelled

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[217] See paragraph 17 of "An Agenda for Peace." See also Hedley Bull, "The state's positive role in world affairs", in *Daedalus*, Vol. 108, nº 4, fall/1979, pp. 111-123.

[218] In this area the effort of the UN has been impressive, *e. g.*, UN Conference on the Human Environment in Stockholm in 1972 and the UN Conference on Environment and Development of 1992 held in Rio de Janeiro, known as the Rio Summit. See also Andrew Hurrell, "International political theory and the global environment", in Ken Booth and Steve Smith (eds.), *International Relations Theory Today*, Polity Press, Cambridge and Oxford, 1996, (1st Ed. 1995), pp. 129-153.

[219] Tim Dunne, Michael Cox and Ken Booth, "Introduction: the eighty years' crisis, 1919-1999", in *Review of International Studies: Special Issue: the Eighty Years' Crisis, 1919-1999*, Edited by Tim Dunne, Michael Cox and Ken Booth, Vol. 24, December of 1998, pp. v-xii, at p. vi.

[220] See paragraph 7 of the "Agenda for Peace." Secretary-General Boutros Boutros-Ghali also stressed the importance of economic and social development as the most secure basis for lasting peace in his proposal "An Agenda for Development" of 16 June 1997, UN document A/48/935.

[221] Andrew Hurrell and Ngaire Woods, "Globalisation and inequality", in *Millennium*, Vol. 24, nº 3, 1996, pp. 447-470.

[222] See Susan Strange, "The Westfailure system", in *Review of International Studies*, Vol. 25, 1999, pp. 345-354. The author lists environmental, socio-economic, and financial system failures as the three main tasks that the state has yet to come to terms with. Notwithstanding, she does recognise that failure isn't equal to collapse and this is shown by the difficulties in finding and building an alternative. But she does appeal for the need to resist and escape state-centrism which is inherent in the analysis of international politics.

[223] Benedict Kingsbury, "Sovereignty and inequality", in *European Journal of International Law*, Vol. 9, 1998, pp. 599-625.

the US to act as a socialising agent on behalf of its own conception of international legitimacy, which focuses on free political institutions, open market economies and human rights' guarantees.[224] This socialisation continued after the end of the Cold War and it is what we would describe as the "homogeneity package", in which these core elements are closely linked. The US is beyond doubt the greatest power of the international society of today, even if in our opinion it seems to lack the ability to transform its power into legitimate authority. The challenge of human rights is posed to all states including the great powers, albeit on different levels. Here we find system, society and community elements co-existing and competing. This "burning question of the hour"[225] is at the crux of the development of today's embryonic international society into a more homogenous one. The problems of international human rights' standards have eroded the classical distinction between the domestic and the international, the internal and the external, the endogenous order and the exogenous anarchy.

[224] David Armstrong, op. cit., p. 157.

[225] R. J. Vincent lists besides human rights along with equality as a value in world politics and the division between realists and idealists in his article "Western conceptions of a universal moral order", in *British Journal of International Studies*, Vol. 4, April/1978, pp. 20-46, at p. 32.

CHAPTER IV

THE UNITED NATIONS' FRAMEWORK OF HUMAN RIGHTS

"the individual has acquired a status and a stature which have transformed him from an object of international compassion to a subject of international rights."[1]

The International Bill of Human Rights is not the outcome of 20th century enlightenment, but rather a conclusion of a historical process which was catalysed by the atrocities of the period between 1939 and 1945. The idea of human rights throughout history has suffered different and sometimes antagonistic influences. The modern idea of a human rights' discourse can be seen in the Stoics and Classical writers, in the concern regarding religion recognised in the 1660 Treaty of Oliva,[2] the emphasis on natural rights and consent in the American Declaration of the Rights of Man (the Lockean aims of life, liberty and pursuit of happiness), to the focus of the rights of the citizen in the French Declaration of the Rights and Duties of Man and Citizen.[3] The self-evident truths would exert their influence much later, due to the rise of the positivist discourse of human rights that took hold of international concerns over human rights. This discourse gave pride of place to state rights.

Until 1945, we find five main issues that captured the attention of states on the issue of human rights. The first one was the abolition of the slave trade propounded by Britain, the second the humanitarian interventions as a

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[1] Sir Herst Lauterpacht, "The international protection of human rights", in *Collected Courses/The Hague Academy of International Law*, Vol. 70, 1947/I, pp. 1-108, at p. 11.

[2] This treaty was concluded by Sweden, Poland, Brandenburg and the Holy Roman Empire on 3rd May 1660. It ended the contention of Poland to the Swedish crown. Poland also had to recognise the Swedish claim to Livonia. Moreover, this treaty also marks the beginning of the ascendancy of the elector of Brandenburg, now with full sovereignty over Prussia that would later become one of Europe's leading great powers. This treaty featured the obligation of states receiving cessions of territory to guarantee to the ceding states the continuance and protection of the religion in those territories.

[3] For a general overview of the evolution of the idea of human rights, see R. J. Vincent, *Human Rights and International Relations*, Cambridge University Press, Cambridge, 2001 (1st Ed. 1986), pp. 19-36, Clifford Orwin and Thomas Pangle, "The philosophical foundations of human rights", in Marc F. Plattner (ed.), *Human Rights in Our Time: Essays in Honor of Victor Baras*, Westview Press, Boulder, Colorado and London, 1984, pp. 1-22 and Kenneth Minogue, "The history of the idea of human rights", in Walter Laqueur and Barry Rubin (eds.), *The Human Rights Reader*, Temple University Press, Philadelphia, 1979, pp. 3-17. For the importance of the French revolution and its comparison with the American revolution see Geoffrey Best, "The French Revolution and human rights", in Geoffrey Best (ed.), *The Permanent Revolution, the French Revolution and its Legacy, 1789-1989*, Fontana Press, 1989, pp. 101-127.

consequence of the massacres of religious minorities by the Ottomans in Europe. The classical examples are the help given to the Greek insurrection in 1827 and the authorisation given by the great powers concert to intervene in favour of the Maronite Christians of Syria in 1860. In the third, positivist influence can be observed in the interventions to protect nationals abroad in the Far East, as we have already seen in chapter II. In these cases, "(...) the individual disappeared and the state became the owner of the international right of action deriving from the denial of justice."[4] In other words, the wrong was done to the state in the person of a national, whilst the treatment of a state's own nationals was a matter of domestic jurisdiction. The maintenance of order was more important than the protection of human rights.

Fourthly, in the aftermath of the First World War, not only were national minorities asserted within the boundaries of the defeated empires, but also minorities within these independent countries. Additionally, and for the first time, individuals were given access as parties to the peace treaties and filed private claims regarding the payment of debts owed to nationals of Allied powers as well as the restitution of Allied private property. A large number of these claims was resolved through international arbitration.[5] The fifth issue is concerned with working conditions and labour rights which were developed and perfected under the International Labour Organisation umbrella.

The increasing awareness of the "humanness" of individuals is also present in the humanitarian concerns regarding the laws of war. These concerns were best captured by the Martens Clause, which stated that in case of doubt or inexistence of regulation, civilians and combatants remain under the protection of the "laws of humanity" and the "dictates of public conscience." It is interesting how such a loosely written clause has commanded such an appeal and has been frequently relied upon.[6] Moreover, when looking at the genesis of the Clause, we find that it

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[4] Until the 18th century, intervention on behalf of nationals had its origins in a system of private reprisals; see Sir H. Waldock, "General course on public international law", in *Collected Courses/The Hague Academy of International Law*, Vol. 106, 1962/II, pp. 1-252, at pp. 194-196.

[5] *Ibidem*, pp. 196-197.

[6] It was established in the Preamble of the Hague Convention of 1899, and restated in 1907, that regarding the laws and customs of land-warfare, until a more complete code of the laws of war had been issued and in the cases not included in the regulations, "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised

was not proposed with a humanitarian goal but rather as a compromise solution between the small and the great powers in order to resolve a diplomatic standstill.[7] But it took on a life of its own and its main merit was that it approached the issue of the laws of humanity not as a moral issue but from a positivist approach, in a way mixing positive and natural law.[8]

The transposition of moral human rights into legal rights on an international level, *i. e.,* rights defined and protected by positive legal instruments, was carried out by the UN. The protection conferred was not restricted to nationality, belonging to a minority or working status, but was universal because based on human dignity. The rescue from and affirmation of the individual in positive law in the field of international human rights can be seen in three UN areas of action: standard setting, implementation and monitoring, and punishment of violations of human rights. These three aspects of the UN action regarding human rights are also parallel to the evolution and development of the international human rights' framework.

The first phase corresponds to the definition of human rights in the International Bill of Human Rights. This International Bill is composed of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and also the First and Second Optional

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peoples, from the laws of humanity, and the dictates of the public conscience." See B. V. A. Röling, *International Law in an Expanded World*, Djambatan, Amsterdam, 1960, pp. 36-37. The Martens Clause has been widely used, *e. g.*, the Nuremberg Charter, the four Red Cross Conventions of 1949, namely article 63 of Convention I (protection of the wounded and sick in armed forces in the field), article 62 of Convention II (protection of wounded, sick and shipwrecked members of armed forces at sea), article 142 of the Convention III (protection of prisoners of war), article 158 of the Convention IV (protection of civilians in time of war), article 1 (2)Protocols I (international armed conflicts) and the Preamble of II (non-international armed conflicts) of 1977 to the Geneva Conventions of 1949, and resolution XXIII of the Tehran Proclamation. It was also considered to be a minimum yardstick in the *International Court of Justice Judgment of 27th June of 1986 concerning Nicaragua*, pp. 113-114, paragraph 218, at http://www.icj-cij.org/icjwww/icases/inus/inus_ijudgment/inus_ijudgment_19860627.pdf (last access 14th February 2005).

[7] Professor Cassese reached this conclusion when looking at the preparatory work of The Hague 1899 Conference and the intentions expressed by Martens himself. See Antonio Cassese, "The Martens Clause: half a loaf or simply a pie in the sky?", in *European Journal of International Law*, Vol. 11, nº 1, 2000, pp. 187-216.

[8] It has a twofold legal importance, being that in case of doubt, humanitarian law should be applied in a manner consistent with the "laws of humanity" and "dictates of public conscience." Secondly, in relation to the specific matter of international humanitarian law it can function as loosening the requirements prescribed for *usus* whilst at the same time raising *opinio* to a rank higher than that normally admitted, in *Ibidem*, pp. 187-188.

Protocols to the ICCPR. The first Optional Protocol deals with individual petition and the Second Optional Protocol aims at the abolition of the death penalty. These are the core documents of the international human rights' framework and were the first main goal of the UN. The second phase deals with the protection of human rights either through the implementation of these human rights treaties or the fact-finding task regarding communications of violations of human rights. The task of supervision is done by the monitoring treaty bodies, such as the Human Rights Committee and the fact-finding task has been carried out within ECOSOC framework, namely by the Commission and the Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission). The emergence of country and thematic reports was also important, as well as the 1993 establishment of the High Commissioner for Human Rights, a symbol of the greater attention paid to the role of human rights in international society.

The third phase corresponds to the punishment of violations of human rights with the corresponding individual international criminal responsibility. Despite the precedent set by the Nuremberg and Tokyo Trials, international criminal law only re-surfaced in the 1990s with the *Ad Hoc* Tribunals for the former Yugoslavia and Rwanda. It also benefited from the coming into force of the Rome Statute of the International Criminal Court (ICC). If standard setting and protection of human rights were done within ECOSOC (mainly through the Commission and the Sub-Commission) and the General Assembly, (in the Third Committee of social, humanitarian and cultural affairs), the great bulk of the development of international criminal law and the punishment of human rights' violations were dealt with by the ILC.

These three functions intertwine in many aspects and, therefore, should be seen as one package. Notwithstanding, human rights have also been described as having a three-generational evolution: firstly political and civil, secondly economic and social and thirdly collective rights such as the right to development, the right to peace and to a healthy environment. The first two are well established in the International Bill, whilst the last generation remains a controversial issue. In this chapter, and due to our focus on the death penalty, greater attention is paid to the

so-called first generation but bearing in mind that the human rights considered in the International Bill are interdependent and constitute a single body.

Additionally, we believe that human rights should be understood as an evolutionary body of rights and not a static process. This is seen, for instance, in the notion of crimes against humanity which are now much more detailed and have a wider scope. Likewise, new threats to human dignity arise, as in the case of biotechnology (for instance, human cloning). In our view, the attention paid to these novelties as well as its articulation with the existing body of international human rights is indicative of the weight that the discourse of human rights plays in international relations. The role of the UN has been crucial in defining and protecting human rights, as well as punishing their violation. Its great merit is that it is not just the sum of all past efforts but their incorporation into a systematic and organised whole. In this effort, the individual has re-emerged as the focus of international society, this time not as the prince or the king, but as the citizen or subject, a bearer of rights and duties because he/she belongs to an international community.[9]

[9] John Gerard Ruggie, "Human rights and the future international community", in *Daedalus*, Vol. 112, 1983, pp. 93-110, at p. 106.

1 The United Nations and the International Bill of Human Rights

"Members of the Commission also expressed the view that the constitutions of member states should be taken into account; that the Bill should be acceptable to all members of the United Nations; that it should be short; simple, easy to understand and expressive; and that it should be a reaffirmation of the most elementary rights."[10]

These were the parameters of the drafting committee, empowered by the Commission, whose main task was to elaborate an international bill of rights. The Commission itself was first established in its nuclear form on 15th February 1946 by ECOSOC. On the 21st June of 1946, the terms of reference for the establishment of the full Commission on Human Rights were adopted and the Commission held its first session between January 27th and February 10th 1947. The establishment of this Commission was carried out, under article 68, by ECOSOC and it is interesting to note that it is the only Commission to be specifically named in the Charter.

As we have seen in the previous chapter, the Charter does contain references to the promotion of human rights in the Preamble and articles 1 (3), 13 (1), 55 (c), 56, 62 (2), 68 and 76 (c). These articles constitute the normative source for the development of multiple human rights' instruments, beginning with the UDHR which, in turn, became part of this normative framework.[11] The fact that in the Preamble, the faith of the UN in "fundamental human rights, in the dignity and worth of the human person" is deliberately inserted between the determination to "save succeeding generations from the scourge of war" and the assertion of the resolution to "establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained" does lead to the conclusion that from a political perspective, human rights stand forth as one of the guarantees of peace, and from the legal point of view, as a

[10] In *Y. U. N. 1946-1947*, p. 524.
[11] A. A. Cançado Trindade, "Co-existence and co-ordination of mechanisms of international protection of human rights (At global and regional levels), in *Collected Courses/The Hague Academy of International Law*, Vol. 202, 1987/II, pp. 9-435, at p. 22.

condition closely linked with respect for international law.[12] This is an inextricable consequence of the level of depersonalisation associated with the totalitarian states of the 30s, and the inevitable concern with the human ends of power. In other words, to restore the dignity of the individual by developing international standards on human rights that would establish a yardstick, a benchmark that states would comply with.[13]

In 1945, there was already some suggestion that an international bill of rights should be drafted. President Harry Truman, at the final plenary session of the San Francisco Conference, on 26th June 1945, declared that "under this document [the Charter] we have good reason to expect an international bill of rights, acceptable to all the nations involved."[14] In the second session of the Commission, a compromise was reached as to the structure of the international bill of rights. This bill was understood as having three parts: a declaration of general principles with moral rather than legal force, a convention on such specific rights as would lend them to binding legal obligations and a third part concerned with the measures of implementation.[15] Moreover, it decided to appoint a drafting committee in order to carry on with this task.

In its first session, the drafting committee had as a working document a draft prepared by the Secretariat which had 48 articles.[16] The western countries were the main architects of the drafting of the international bill of rights. Nevertheless, we find differences among national approaches, mainly between Britain and France.[17] The US, after a period of great enthusiasm, was surpassed by these two countries, and due to domestic conditions relinquished leadership in

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[12] Charles De Visscher, *Theory and Reality in Public International Law*, translated by P. E. Corbett, Center of International Studies/Princeton University, Princeton, 1968 Revised Edition, (1st Ed. 1957), p. 130.
[13] Adam Roberts and Benedict Kingsbury, "Introduction: the United Nations' roles in international society since 1945", in Adam Roberts and Benedict Kingsbury (eds.), *United Nations, Divided World, the United Nations' Roles in International Relations*, Clarendon Press, Oxford, 1996 (2nd Ed), pp. 1-62, at p. 5.
[14] *Cit in Y. U. N. 1948-1949*, p. 524.
[15] *Cf.* Sir Herst Lauterpacht who considered in 1947 that "it would result in the unedifying spectacle of the fundamental and inalienable rights of man being made the object of separate treaties, signed by a limited number of states, subject to denunciation and other vicissitudes to which treaties are liable, and ratified, slowly and precariously, by an even smaller number-an undignified anti-climax to the solemn proclamation of human rights and to what ought to have been a decisive landmark in the history of freedom.", in op. cit., pp. 95-96.
[16] UN document E/CN.4/AC.1/3 (4th June 1947).
[17] See the comparative outline between the draft prepared by the Secretariat and the draft international bill of human rights submitted by Britain in UN document E/CN.4/AC.1/3/Add.3.

drafting the covenants. Within the drafting committee, a working group was established and had three members: Britain, France and Lebanon. Professor René Cassin (who later received the Nobel Peace Prize in 1968) was asked to prepare a new draft based on those articles of the Secretariat draft.[18] If for the French the document to be prepared had a huge moral authority from which it derived its main strength, for the British a universal declaration had to be accompanied by measures of implementation, because it either meant something serious or not.[19]

On 18th June 1948, at the end of the third session of the Commission, a draft was adopted with no votes against but with the abstention of its four Eastern European countries.[20] A draft of twenty eight articles was forwarded to ECOSOC (adopted with no changes) and then to the General Assembly. The Third Committee considered the draft and held eighty one meetings in order to reach a "common standard of achievement for all peoples and all nations." At the end, the final text resembled the Committee's draft very much.[21] In the discussion of the general views regarding the draft declaration, we may find that most countries, such as China, Chile, Lebanon, understood that the Declaration was merely explicitly stating rights granted by the Charter. Therefore, it could be considered as an authoritative interpretation of the UN Charter in this matter.

Nevertheless, this was not an easy task and the draft was faced with strong criticisms. These can be divided into four kinds. The first one is associated with the

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[18] In *Y. U. N. 1946-1947*, pp. 525-526. See all the comments made by member states to the forty-eight article draft in UN document E/CN.4/AC.1/3/Add. 1.

[19] See the comments made by Brazil and New Zealand in UN document E/CN. 4/82/Add. 2 and Add. 12. Brazil considered that "The International Declaration on Human Rights should be as broad as possible. There would hardly be any point in making a declaration embodying only those principles already accepted by the States. (...) It would thus become a stimulus to the progress of the legal organisation of all States." New Zealand considered that the declaration "cannot in itself impose any legal obligation on States or call for any measures of implementation (...). For this country, "the first essential step in the implementation of the human rights provisions of the Charter of the United Nations is the conclusion of an international treaty defining those human rights and fundamental freedoms which can at this stage be framed as binding obligations upon states." See also Geoffrey Best, "Whatever happened to human rights?", in *Review of International Studies*, Vol. 16, 1990, pp. 3-18, at pp. 7-10.

[20] These countries were the Ukrainian SSR (Ukraine), Yugoslavia, Byelorussian SSR (Byelorussia) and the SU. See John Humphrey, *No Distant Millennium: the International Law of Human Rights*, 1989, UNESCO, Paris, p. 150. New Zealand also submitted a revised draft with twenty articles of the international declaration on human rights in annex C of UN document E/CN.4/82/Add. 12.

[21] *Ibidem*, p. 152.

socialist countries led by the SU and Poland.[22] The main issue was directed at the potential interpretation of the Declaration as an instrument of intervention in the domestic jurisdiction of states. Additionally, there were some loopholes that rendered the draft imperfect and these were the need to introduce the obligations of the individual to his neighbour, family, nation and society, as well as a guarantee for all economic rights. For the socialist bloc, the criticisms were valid because the human rights that were under consideration were unsatisfactory. There was the need to guarantee the basic freedoms for all, with due regard for the national sovereignty of states, a guarantee that human rights could be exercised with due regard to the particular economic, social and national circumstances prevailing in each country, and a definition of the duties of citizens to their country, their people and their state. Likewise, there was no reference in the draft of the dangers of fascism, as well as no effective guarantees to implement the rights under consideration.

The second criticism came from the Union of South Africa that considered this document to go beyond the generally accepted rights. For this country, and due to its policy of *apartheid*, concepts such as racial equality and non-discrimination were at odds with its existence.[23] The third criticism, from New Zealand, went the opposite way because it believed that in order for the Declaration to be successful, it had to be supplemented by means of implementation, and needed to go even further. The fourth criticism was from Saudi Arabia, and considered the Declaration to be based largely on western patterns of culture. These were frequently at variance with the patterns of culture of other states but this did not mean that the Declaration went counter to the latter, even if it did not conform to them.[24]

The draft declaration was adopted by the Third Committee on 6th December as a whole and the voting was 29 in favour and 7 abstentions.[25] The resistance from the socialist countries was reaffirmed by the submission of a draft resolution

[22] For the text of the draft declaration and the main criticisms see *Y. U. N. 1947-1948*, pp. 575-578.
[23] The results of the 1948 election were favourable to the establishment of an *apartheid* policy; a policy that was put into practice with the 1951 Population Registration Act of 1951 where classification was made according to race.
[24] For the criticisms voiced by these countries see the *Y. U. N. 1948-1949*, pp. 528-529.
[25] The countries that abstained were Byelorussia, Canada, Czechoslovakia, Poland, Ukraine, the SU and Yugoslavia.

that aimed at postponing the adoption of the Declaration until the next session because, in their view, it needed to seriously improve a whole series of articles. This draft was presented on 7th December and rejected. The report of the Third Committee was considered at the plenary meeting of the General Assembly on 9th and 10th December. Egypt restated the earlier comments made by Saudi Arabia and considered that the article concerning the freedom to marry without any restrictions as to race, nationality or religion would, in reality, meet with limitations and restrictions in Moslem countries. This was especially the case regarding the marriage of women with persons belonging to another faith.[26] Moreover, the SU again proposed amendments on the basis that it considered that the Declaration went against national sovereignty and, therefore, inconsistent with the Charter itself.[27] The Bolivian representative summoned effectively summed up the confrontation between socialist and democratic states, by stating that "there had been, on the one hand, the thesis upheld by the SU, characterised by the "desire to subordinate the individual to the state" and, on the other hand, the thesis supported by all the democratic countries, which was designed "to make the individual capable of organising a state which, in turn, would respect the rights of the individual."[28]

The Declaration was finally approved as resolution 217 A (III) on 10th December.[29] At the request of Poland, the UDHR vote was held twice, once as a whole and another, in which the preamble and the thirty articles were considered one by one. Of the thirty articles, twenty three and paragraph 1 of article 2 were adopted unanimously. The preamble was also adopted by unanimity with the exception of the first recital.[30] As a whole, the UDHR was adopted with 48 votes in favour and 8 abstentions, from the SU, Byelorussia, Czechoslovakia, Poland, Saudi Arabia, Ukraine, Union of South Africa and Yugoslavia. The hallmark of the

[26] In *Y. U. N. 1948-1949*, p. 532.
[27] UN document A/784.
[28] In *Y. U. N. 1948-1949*, pp. 533-534.
[29] For the voting and text of the Universal Declaration of Human Rights see *ibidem*, pp. 534-537. See as well the Office of the High Commissioner for Human Rights internet site at http://www.unhchr.ch/udhr/lang/eng.htm (last access 28th February 2005). Hereafter simply cited as UDHR.
[30] *Idem, ibidem*. Article 1 (all human beings are born free and equal in dignity and rights), article 2, second paragraph (non-discrimination), article 13 (freedom of movement and residence as well as leaving one own country) with six votes against including the SU, article 18 (freedom of thought and religion), article 19 (freedom of opinion and expression) with seven votes against, article 26 (the right to education) and article 28 (the right to a social and international order in which rights can be fulfilled).

signature of the UDHR was later reinforced by the American proposal that Human Rights' Day should be commemorated on the same day of its adoption, 10th December.[31] Professor Cassin considered that the UDHR was, in some measure, an instrument of obligation for all members of the UN and it was his idea that the "international" be replaced by the "universal" in its title.[32] The UDHR contains thirty articles and gives pride of place to civil and political rights. It affirms, in its first two articles, that all human beings are entitled to these rights and that they should be enjoyed equally by all without discriminations of any kind.[33] Economic, social and cultural rights are also asserted.[34] All these rights are to be observed within two umbrella articles (articles 28 and 29) which claim not only the right to a social and international order, in which the rights and freedoms set forth in the Declaration can be fully realised but also the duties of the individual to the community (albeit in a very general manner) and the condition under which derogation of these rights is possible (determined by law and public order).

The controversial issue of the right to petition granted to individuals was not included in the Declaration, and resolution 217 (III) B was passed on the same day instead, with the request that it should be studied within the covenant and

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[31] See resolution 423 (V) adopted on 4th December 1950, in *Y. U. N. 1950*, p. 535.

[32] The idea of a French cultural mission can also be seen in the imposition of French as one of the UN official languages and the location of the UNESCO headquarters in Paris. See Geoffrey Best, "The French Revolution and human rights", in Geoffrey Best (ed.), op. cit., p. 116.

[33] The civil and political rights contained in the UDHR are the right to liberty, life and security of the person (article 3); the right to be free from slavery and servitude (article 4); the right not to be tortured or to suffer any cruel, inhuman or degrading treatment or punishment (article 5); the right to a legal personality (article 6); the right to be equal before the law and to have an equal protection of the law (article 7); the right to have an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or by law (article 8); the right not to be subjected to arbitrary arrest, detention or exile (article 9); the right to a fair and public hearing in the determination of one's rights and freedoms (article 10); the right to be presumed innocent until proven guilty (article 11 (1); the right not to be held guilty of a crime which did not constitute a penal offence at the time of commission (article 11 (2); the right to privacy, family, home or correspondence and not to be subjected to attacks upon one's honour and reputation (article 12); the right to freedom of movement and residence within one's country (article 13 (1); the right to leave any country including your own and to return (article 13 (2); the right to seek and enjoy asylum (article 14); the right to a nationality (article 15); the right to marry and to found a family (article 16); the right to own property (article 17), freedom of thought, conscience and religion (article 18); freedom of opinion and expression (article 19); freedom of assembly and association (article 20) and the right to take part in the government of one's country, of access to public service and democratic governance (article 21).

[34] The economic, social and cultural rights found in the UDHR are the right to social security (article 22); the right to work and to form and join trade unions (article 23); the right to rest and leisure (article 24); the right to a standard of living adequate for the health and well-being of oneself and one's family (article 25); the right to education (article 26); the right to participate in the cultural life of the community (article 27 (1) and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is an author (article 27 (2).

measures of implementation framework.[35] At the time of the discussion at the General Assembly, France considered that petition was not to be considered a measure of implementation but a *right* in itself, and in fact questioned whether the Declaration could be considered complete without this right which had been part of all historical declarations on the rights of man. To the SU, however, the right of individuals to petition the UN was a violation of national sovereignty.[36] The other controversial issue was the balanced definition of human duties and rights, and this was also proposed by Professor Cassin.[37] This pioneering idea was given form in article 29 (1), as we have seen, but not to its full extent. Whether we believe that Professor Cassin was the principal architect of the UDHR or it was the result of a dynamic process in which the Division of Human Rights of the Secretariat, several individuals and organisations played a pivotal role,[38] what remains certain is that this Declaration represents a benchmark in the history of the idea of human rights. It set the pace in numerous ways and, after its adoption, there was the intention of completing the other two pillars of the International Bill of Rights as soon as possible. On the same day, the General Assembly passed resolution 217 (III) E which reasserted the need for the fulfilment of the task that was handed to the Commission, this being the preparation of a draft Covenant on Human Rights and Measures of Implementation in order that the International Bill of Rights would come full circle.[39]

At the fifth session (9th May to 20th June 1949) of the Commission, a draft was prepared concerning the future Covenant on Human Rights, which took the text drawn up by its Drafting Committee in May of 1948 as a basis. The plan was to request the Secretary-General to transmit the draft to the member governments for comments with 1st January 1950 as the time-limit for receiving observations and additional proposals. As for the drafting of the Measures of Implementation, the Commission considered that it was essential to have the views of as many states as possible and, therefore, it sent a questionnaire composed of four

[35] In *Y. U. N. 1948-1949*, p. 541.
[36] *Ibidem*, p. 540.
[37] Geoffrey Best, "Whatever happened to human rights?", in *Review of International Studies*, Vol. 16, 1990, p. 11.
[38] John Humphrey, op. cit., pp. 149-150.
[39] In *Y. U. N. 1948-1949*, pp. 537-538.

questions: the form of these measures, who and under what circumstances should have the right to initiate proceedings, what bodies should deal with violations of human rights and what would be their powers and, finally, what general provisions should be laid down. The Commission requested that comments should be submitted within the same deadline as the drafting of the Covenant. Several organisations, such as the International Labour Organisation and the World Health Organisation, participated in the making of these two pillars of the international bill.[40]

The ideological divide between the East and the West, which was noticeable in the making of the UDHR, reflected itself in the increasing perception that human rights were no longer indivisible. A distinction, at first subtle and then assertive, between economic, social and cultural on the one hand, and political and civil rights on the other, became obvious.[41] The initial steps were taken in 1950, at the sixth session of the Commission, when a resolution was adopted as to the structure of the draft Covenant. The first rights to be adopted were some of the fundamental rights of the individual and certain essential civil freedoms (articles 1 to 18) and it was suggested that an additional covenant (as well as measures for implementation) regarding economic, social and cultural should be drafted. As for civil and political rights, it was proposed that the draft implementation machinery (articles 19 to 38) was converted into the establishment of a permanent Human Rights Committee. The members of the Committee were to be elected by the State parties to the Covenant and, in order for this committee to function, domestic remedies had to be exhausted. It also had the power to obtain advisory opinions from the ICJ on questions of law arising in the course of its work. These considerations of the Commission were passed onto ECOSOC which decided that before the works continued, the General Assembly should pronounce over these issues.[42] In addition, Egypt, pursuing its earlier efforts regarding the draft of the UDHR, presented a draft resolution recommending to the

[40] The comments received are in UN documents E/CN.4/353 &Addenda and E/CN.4/365 and Corr.1.
[41] See the proposed additional articles concerning economic, social and cultural rights to the draft Covenant (in 1950 it had 26 articles) made by the SU and the reactions mainly from the US and Britain in UN document E/CN.4/365 and Corr. 1, pp. 71-90. The US was of the opinion that these rights should be included in subsequent conventions or protocols but not on the Covenant (p. 74).
[42] See Resolution 303 I (XI) adopted on 9th August 1950 by ECOSOC, in *Y. U. N. 1950*, p. 523.

Commission the deletion from the draft Covenant of the right of freedom to change one's religion or belief.[43]

It is interesting to observe that the division between civil and political and economic, social and cultural rights into separate covenants was proposed by the western countries that feared that the incorporation of the latter set of rights would delay the conclusion of the project. They considered that there were doubts as to the feasibility of implementing economic rights and, therefore, because they posed special problems as to its applicability, it was best to incorporate them in a separate covenant.[44] The debate continued and centred around two opposite sides. The first, led by the SU, was against a separation of what it regarded as a single covenant. The second was led by the US and Britain, and insisted on that separation. This stemmed from the practical application of civil and political rights on which legislation could be enacted and implemented, while economic, social and cultural rights could only be achieved progressively.

This central theme was present in resolution 384 (XIII) adopted by ECOSOC which requested that the General Assembly reconsider its earlier decision of including in one covenant both types of rights.[45] The reconsideration of the decision to set up a single covenant took place in the Third Committee, in which the confronting groups maintained their arguments. The supporters of the reconsideration, including US and China, added that safeguarding civil and political rights would require non-intervention by the state and that the opposite was true of economic, social and cultural rights. In contrast, the opponents to this proposal emphasised that the division of rights into two groups was artificial. At the end of the debate, a joint amendment by India, Belgium, Lebanon and the US[46] proposed that the General Assembly should reconsider its decision, and this was

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[43] UN document A/C.3/L.75/Rev.1.

[44] All these observations and comments are reflected in resolution 421 (V) of the General Assembly adopted on 4th December 1950. The General Assembly considered that the list of rights was not complete; the wording should be improved; decided to include an explicit recognition of the equality between man and women; and also a "clear expression" of economic, social and cultural rights in a manner which relates them to the civic and political freedoms; to consider ways and means of ensuring the rights of peoples and nations to self-determination; and also to continue examination of provisions to be inserted as to the receipt and treatment of petitions from individuals and organisations with respect to alleged violations of the covenant; in *Y. U. N. 1950*, pp. 530-531.

[45] In *Y. U. N. 1951*, pp. 480-481.

[46] UN document A/C.3/L. 185/Rev.1.

supplemented by a sub-amendment of France.[47] This sub-amendment focused on the idea that the two covenants should contain as many similar provisions as possible. The ideas presented by these two amendments are clearly the core of resolution 543 (VI) adopted by the General Assembly. In the first paragraph, we find the decision to draft two covenants, the French proposal of including as many general provisions as possible along with the simultaneous submission for approval of both Covenants.[48]

Nevertheless, the struggle of the socialist bloc did bear fruit with the recognition of the importance of self-determination as a right encompassed in both Covenants.[49] This was the result of a hard discussion in the Third Committee which began with the proposal of a joint draft resolution by Afghanistan, Burma, Egypt, India, Indonesia, Iran, Iraq, Lebanon, Pakistan, the Philippines, Saudi Arabia, Syria and Yemen.[50] This proposal sparked a total of ten amendments and sub-amendments and, after a fierce debate, the General Assembly adopted resolution 545 (VI) on 5th February 1952. It stated that the right of all peoples and nations to self-determination was to be included in the international covenants in the following terms:"all peoples shall have the right of self-determination"; in addition, this right was applicable to all states, including those with responsibility for the administration of non-self-governing territories.[51]

As for the measures of implementation, once again the two blocs were divided. The socialist bloc suggested that the procedure of the human rights committee should apply to both groups of rights. In contrast, the western countries were in favour of restricting the jurisdiction of the Human Rights Committee to civil and political rights, and of only applying the reporting system to economic, social and cultural rights. In 1953, the Commission, with help from the Commission on the Status of Women, decided to include in the draft Covenant regarding civil and political rights, article 16 of the UDHR, relating to marriage and family rights.[52] In

[47] UN document A/C.3/L.192/-Rev.2. Both were approved by 28 votes in favour, 23 against and 7 abstentions.
[48] It was adopted by 27 votes in favour, 20 against and 3 abstentions. See *Y. U. N. 1951*, p. 484.
[49] It was already present in the Soviet proposal for additional articles to the draft Covenant in 1950; see UN document E/CN.4/365 and Corr. 1, p. 85.
[50] UN document A/C.3/L.186 &Add.1.
[51] In *Y. U. N. 1951*, pp. 486-487.
[52] It also adopted six new articles: on the right to vote, to be elected and to hold office; on the rights of

1954, the Commission adopted the following provisions for inclusion in the Covenants: articles relating to a system of periodic reports on the implementation of economic, social and cultural rights, and an article concerning reporting on measures to guarantee civil and political rights. Moreover, the final clauses and the federal clause (extended to all parts of federal states without exceptions and limitations) were adopted.

At the General Assembly, the debate took place within the Third Committee where Australia, Canada, the Netherlands and Britain were against the inclusion of the article regarding self-determination because they deemed it to be a collective right and, as such, had no place in a covenant devoted to the individual. In 1955, the General Assembly held a first reading of the draft International Covenants on Human Rights and recommended that the Third Committee discuss it article by article. The proceedings followed the following order: firstly, the preambles of both draft Covenants; secondly, the operative parts common to and similar in both drafts; thirdly, remaining articles in their present order in the two draft Covenants, beginning with the Covenant on Economic, Social and Cultural Rights.

The text of the preambles was slightly amended and adopted with only two abstentions (Union of South Africa and US) as well as article 1. The discussion around this article was less consensual and the article on self-determination was adopted with 12 votes against and 13 abstentions.[53] In 1956, articles relating to economic, social and cultural rights, were adopted, concerning the obligations of states to recognise the right to work (article 6), the right to just and favourable conditions of work (article 7), the right to form and join local, national and international trade unions (article 8), the right to social security (article 9), the right to protection of mothers, children and family (article 10), the right to everyone to adequate food, clothing and housing and also to an adequate standard of living

minorities; on the treatment of persons deprived of liberty and on the penitentiary system; on the equal rights of men and women; on the protection of privacy, home, correspondence, honour and reputation of the individual; and on condemnation of incitement to hatred and violence.

[53] Australia, Belgium, Canada, France, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Turkey, Britain and US voted against and Brazil, Burma, Republic of China, Cuba, Denmark, Dominican Republic, Ethiopia, Honduras, Iceland, Iran, Israel, Panama and Paraguay abstained; see *Y. U. N. 1955*, pp. 157-158.

and the continuous improvement of living conditions (article 11 resulting from the merge of draft articles 11 and 12) as well as the right to health (article 12).[54]

In 1957, the process carried on and within the economic, social and cultural rights' framework, articles 13 (the right to education), 14 (the right to free and compulsory primary education) and 15 (the right to take part in cultural life and enjoy the benefits of scientific progress) were adopted. As for civil and political rights, article 6 concerning the right to life was adopted after a thorough debate on the issue of capital punishment, as we will see later on.[55] In 1958, articles 7 (prohibition of torture and cruel, inhuman and degrading treatment), 8 (prohibition of slavery, slave trade, servitude and forced or compulsory labour),[56] 9 (the right to liberty and security), 10 (the right to a minimum standard of treatment of persons deprived of their liberty) and 11 (prohibition concerning imprisonment of anyone merely on the grounds of inability to fulfil a contractual obligation) concerning civil and political rights were discussed and adopted. It is interesting to observe that article 11 was adopted unanimously, whilst there were no votes against the remaining articles but some abstentions.[57] In 1959, articles 12 (freedom of residence and movement as well as the right to leave and enter one's own country), 13 (guarantees against arbitrary expulsion of aliens from the territory of a state party) and 14 (the right to a fair and public trial, presumption of innocence, to review and appeal, and to seek compensation in case of a miscarriage of justice) regarding civil and political rights were adopted. Although some abstentions were recorded only article 12 had votes against.[58]

In 1960, regarding civil and political rights, articles 15 (prohibition of the retroactive application of criminal law), 16 (the right to recognition as a person before the law), 17 (the right to privacy, family, home and correspondence, honour and reputation) and 18 (the right to freedom of thought, conscience and religion) were discussed and approved. The adoption of article 18 by unanimity was notable, and was preceded by a discussion on the decision to refer in an explicit

[54] See *Y. U. N. 1956*, pp. 213-219.
[55] See *Y. U. N. 1957*, pp. 198-203.
[56] The concern over the issue of forced labour and the need to fight it was first expressed at the eighth session of ECOSOC with the support of the American Federation of Labor and the International Labor Organization; see *Y. U. N. 1948-1949*, pp. 545-547.
[57] See *Y. U. N. 1958*, pp. 205-209.
[58] See *Y. U. N. 1959*, pp. 188-192.

way or not, to the right to change one's religion or belief. Saudi Arabia proposed an amendment that aimed at deleting the specific reference to "maintain or to change one's religion or belief," whilst most members of the Third Committee were in favour of maintaining the wording. Saudi Arabia claimed that this wording could favour missionary activities and, in addition, it was unnecessary because it was already implicit in the first sentence of the article. A compromise was reached with the revision of a Brazilian and Philippine amendment which proposed the substitution of the contentious wording by "freedom to have and to adopt a religion or belief of his choice."[59]

In 1961, the Third Committee completed the discussion and approval of the substantive part of the draft Covenant, namely articles 19 (freedom of opinion and expression and its specific restrictions), 21 (the right to assembly and the conditions under which derogation is possible), 22 (freedom of association and its restrictions), 23 (the right to marry and to found a family), 25 (the right to vote and to hold office, to democratic government and access to public service), 26 (the right to be equal before the law), 27 (the right of minorities to enjoy own culture, religion and language) and 20 (prohibition of propaganda for war and incitement to hatred and violence). Articles 19 and 20 were adopted respectively with 1 and 19 (including US and Britain) votes against and the abstention of China, article 21 by unanimity and article 23 with one vote against.[60] Still to go were the general articles of both Covenants, the articles of implementation, the final clauses and any new substantive articles that might be proposed.

In 1962, two new additional articles concerning the rights of the child and the right of asylum were proposed. The article concerning the rights of the child was proposed by Poland, later joined by Yugoslavia, and the article on the right of asylum was proposed by the SU. The latter's discussion was postponed, while the former was remitted to the Commission for further study as to the legal implications of the inclusion of such an article. Additionally, articles 2 (progressive achievement of the full realisation of the rights enumerated in the Covenant), 3 (the equal right between men and women to the enjoyment of all economic, social and cultural rights), 4 (restrictions of these rights provided by law) and 5

[59] See *Y. U. N. 1960*, pp. 327-331.
[60] See *Y. U. N. 1961*, pp. 292-300.

(reiteration of the limits placed upon derogations and restrictions of these rights) of the draft Covenant on economic, social and cultural rights were adopted as well as articles 3 (the equal right between men and women to the enjoyment of all civil and political rights) and 5 (reiteration of the limits placed upon derogations and restrictions of rights) of the draft Covenant on civil and political rights. Article 2 was adopted with four votes against, whilst the others were adopted by unanimity, including articles 3 and 5 of the civil and political rights' Covenant.[61]

Concerning the measures for implementation, the trend of subjecting economic, social and cultural rights to a system of reports continued to hold force, whilst civil and political rights would be subjected not only to a reporting system but also had the possibility of allegations of a state party being brought before a permanent fact-finding and good offices' committee. In addition, there was the option, if necessary, of recourse to the ICJ. In 1963, the Third Committee reached a conclusion regarding the remaining general provisions and articles 2 (achievement of the full realisation of the rights enumerated in the Covenant to everyone) and 4, by unanimity, (restrictions of these rights in time of public emergency) of the Covenant on Civil and Political Rights, as well as a provision regarding the right of freedom from hunger that was added to article 11 concerning the right to an adequate standard of living of the Covenant on Economic, Social and Cultural Rights. Moreover, the proposed article on the rights of the child was adopted with one vote against and 14 abstentions and included in the Civil and Political Rights Covenant as article 24. In contrast, the proposal concerning the right to asylum was withdrawn.[62]

In 1964 and 1965, no improvement was made and it was only in 1966 that the drafting of the two Covenants was completed, with the approval of the final clauses and measures of implementation that were contained in an Optional Protocol. The two Covenants were adopted unanimously and the Optional Protocol was adopted by 59 votes in favour, 2 against and 32 abstentions.[63] The

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[61] See *Y. U. N. 1962*, pp. 311-318.
[62] In *Y. U. N. 1963*, pp. 316-323.
[63] Votes against came from Niger and Togo. See also the International Covenant on Economic, Social and Cultural Rights at http://www.ohchr.org/english/law/cescr.htm (last access 28th February 2004) and International Covenant on Civil and Political Human Rights at

Covenants were passed onto the General Assembly and, through resolution 2200 A (XXI) of 16th December 1966, were adopted unanimously by recorded vote of 104 to 0. In separate votes, the Covenant on Civil and Political Rights was adopted unanimously by 106 to 0 and the Covenant on Economic, Social and Cultural Rights also by unanimity with 105 to 0. The Optional Protocol to the Covenant on Civil and Political Rights was adopted with a recorded vote of 66 in favour, 2 against and 38 abstentions.[64] The permanent members of the Security Council voted in favour of the Covenants as a whole and in the separate vote, while in regards to the Optional Protocol, China, US, Britain and France voted in favour and the SU abstained. In order for the Covenants to come into force, thirty five ratifications were needed and, in the case of the Optional Protocol, ten. On balance, the ICESCR has 31 articles, the ICCPR 53 articles, and the Optional Protocol 14 articles. The differences between the two Covenants reside essentially in their respective measures of implementation. Whilst civil and political rights are of immediate application, economic, social and cultural rights are implemented progressively (article 2 (2) and depend on the availability of resources and ability of the state to provide them. The ICESCR has a system of periodic reports which are transmitted to ECOSOC and, under resolution 1988 (LX), these reports concerning economic, social and cultural rights were to be delivered in biennial stages.[65] Moreover, the working group established in 1978 was renamed Committee on Economic, Social and Cultural Rights in 1985.[66] In contrast, the ICCPR contains three means of implementation being the first one, the periodic reports to the Human Rights Committee and not to ECOSOC. The Human Rights Committee, a monitoring treaty body (and, therefore, not a UN body) is composed of 18 members elected by State Parties serving in their personal capacity. The second is based on article 41, an optional system of state-to-state communication and conciliation in matters concerning the application of the Covenant. In order for this system to work, there was the need to recognise the competence of the

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http://www.ohchr.org/english/law/ccpr.htm (last access 28th February 2005). Hereafter simply cited as ICESCR and ICCPR.

[64] In *Y. U. N. 1966*, pp. 418-433. See as well the Optional Protocol to the International Covenant on Civil and Political Human Rights at http://www.ohchr.org/english/law/ccpr-one.htm (last access 28th February 2005). Hereafter simply cited as Optional Protocol.

[65] This resolution was adopted on 11th May 1976. See *Y. U. N. 1976*, p. 615.

[66] See resolution 1985/17.

Human Rights Committee in this matter and, even so, only on a reciprocal basis. The third method of implementation of the Covenant is the one envisaged in the Protocol and in which a state party recognises the competence of the Committee, on certain conditions, to receive and consider communications from individuals subject to its jurisdiction claiming to be victims of a violation by the state party of any of the rights set forth in the Covenant.

The Covenants came into force when Jamaica deposited its instrument of ratification regarding the ICESCR on 3rd October 1975, and when Czechoslovakia deposited its instrument of ratification regarding the ICCPR on 23rd December 1975. The former came into force on 3rd January 1976 and the latter on 23rd March 1976. The optional protocol received its 10th ratification from Mauritius on 12th December 1975 and came into force together with the Covenant on Civil and Political Rights. The last element of the International Bill of Human Rights to be adopted was the Second Optional Protocol aiming at the Abolition of the Death Penalty in 1989, and came into force in 1991. Within the UN framework, we should also mention the 1968 (International Year of Human Rights) International Conference held in Teheran between 22nd April and 13th May. This conference had 84 participants and observers from specialised agencies and regional organisations. It resulted in the Proclamation of Teheran, which was approved unanimously as were its 29 resolutions. It was endorsed as a timely and necessary reaffirmation of the principles embodied in the UDHR and other international instruments in the field of human rights by the General Assembly.[67]

On balance, the establishment of an International Bill of Human Rights was a lengthy process. Unlike the adoption of the UDHR, which benefited from the post-war momentum, the conclusion of the international covenants and the means of implementation took two decades to come to life. The unity of human rights was pierced after its division into two international covenants. This division was proposed by the western countries, but the strategy of the Communist bloc was also successful, since it managed to include national self-determination as a right common to both Covenants. The ideological divide between the East and the West

[67] Resolution 2442 (XXIII) of 19th December 1968 adopted by 115-0-1; in *Y. U. N. 1968*, pp. 547-548.

explains why it took so long to achieve consensus regarding the International Covenants.

2 From Promotion to Protection: the Role of the Commission on Human Rights and the Human Rights Committee

"The Commission recognises that it has no power to take any action in regard to any complaints concerning human rights."[68]

This was the original statement of the Commission as to its powers regarding violations of human rights, but instead of following a static "promotion" of human rights, it adopted a much more active approach aiming at "protection." The Commission and its Sub-Commission were crucial in limiting the application of the domestic jurisdiction of states when dealing with violations of human rights.[69] The structure and functioning of the Commission has undergone several changes, and it currently has 53 members. This was the result of an evolution that began in 1961, when it changed from 18 to 21 members through resolution ECOSOC 845 (XXXII),[70] in 1967 to 32, and in 1979 to 43 members. In 1990 it was enlarged to its current composition. The Sub-Commission began with 12 members, then changed in 1959 to 14, then in 1965 to 18 and lastly, in 1969, to its current composition of 26 members. Both the Commission and the Sub-Commission meet annually.

In 1979, ECOSOC authorised the Commission to hold longer sessions of six weeks, with an additional week for working groups[71] and, in the case of the Sub-Commission, of four weeks. The fact that the Sub-Commission is composed of independent experts has granted it a greater margin of manoeuvre when dealing with human rights' violations. This was enhanced through resolution 1991/32 of 31st May 1991 that contained the decision that the Sub-Commission could vote on resolutions concerning allegations of human rights' violations in countries by secret ballot, when so decided by a majority of its members present and voting. In 1993, a proposal to establish an emergency mechanism of the Commission to enable the UN to react appropriately and immediately to acute

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[68] In the report adopted on February 1947 by the full Commission and endorsed by ECOSOC through its resolution 75 (V) of 5th August 1947; See *Y. U. N. 1947-1948*, p. 579.
[69] Dominic McGoldrick, "The principle of non-intervention: human rights", in Colin Warbrick and Vaughan Lowe (eds.), *The United Nations and the Principles of International Law, Essays in Memory of Michael Akehurst*, Routledge, London and New York, 1994, pp. 85-119, at pp. 87-88.
[70] In *Y. U. N. 1961*, pp. 395-396.
[71] Resolution 1979/36 was adopted by ECOSOC on 10th May 1979; see *Y. U. N. 1979*, pp. 864-865.

situations arising from gross human rights violations was approved by decision 1993/286 of the Council on 28th July which was adopted without vote.[72] The first special session was concerned with the human rights' violations in former Yugoslavia.

The procedure for handling communications concerning human rights was first considered by ECOSOC in its resolution 75 (V) of 1947. The established *modus operandi* was modified by resolution 116 (VI) A of 1948.[73] Under this procedure, the Secretary-General was requested to compile a confidential list of communications received concerning human rights, containing a summary of each, and to furnish the list to the Commission in private meeting, without divulging the identity of the authors. In the opinion of Egypt and Uruguay, the procedure for dealing with communications was unsatisfactory, and "the Commission's inability to act on those communications not only diminished its prestige but also damaged the reputation of the UN."[74] Furthermore, these countries considered that to wait for the set up of the machinery regarding the international covenant would bring considerable delay. The following year, Egypt made the same comments regarding the inefficacy regarding the current procedure with communications. The next step was taken by ECOSOC through resolution 728 F (XXVIII)[75] on 30th July 1959, which established a distinction between two categories of communications. The first one dealt with the communications referring to promotion of human rights upon which a non-confidential list was produced. The second category concerned communications that revealed violations of human rights. A summary of these communications is sent to the members of the Commission in private, and also to the member states referred to in the documents. The replies from states are sent to the Commission together with the list of these communications and both are confidential.

But the main shift took place with resolution 1235 of 1967, in which ECOSOC authorised the Commission and its Sub-Commission to make a thorough study of situations revealing a consistent pattern of gross human rights'

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[72] In *Y. U. N. 1993*, p. 902.
[73] See *Y. U. N. 1947-1948*, pp. 579-580.
[74] In *Y. U. N. 1952*, p. 449.
[75] In *Y. U. N. 1959*, p. 221.

violations, as exemplified by *apartheid* in South Africa and racial discrimination in Southern Rhodesia.[76] After this study, a report containing recommendations is sent to ECOSOC. The greatest innovation of this resolution was the fact that it was a public procedure. In 1968, the Commission expressed concern over South Africa, Namibia, Southern Rhodesia, Portuguese colonies, Greece, Haiti and also Israel. In 1969, the Sub-Commission proposed that it should be authorised by ECOSOC to appoint a working group, of no more than five of its members, to meet in private each year, immediately before the sessions of the Sub-Commission. This working group would consider all communications, including replies received under resolution 728 F of 1959, and bring to the attention of the Sub-Commission those communications which appeared to reveal a consistent pattern of gross violations of human rights and fundamental freedoms. Afterwards, the Sub-Commission would consider in private meetings to determine whether to refer to the Commission particular situations which appeared to reveal a consistent pattern. Then, the Commission had at its disposal two possible measures (that can be cumulative): it could require a thorough study by the Commission under the resolution 1235 procedure followed by a report and a recommendation to ECOSOC; or it could consider that the situation might be the subject of an investigation by an *Ad Hoc* Committee (to be appointed by the Commission after obtaining the consent of the state concerned) which would report to the Commission. It was also suggested that all actions taken, until the Commission might decide to make recommendations to the Council, would remain confidential. This was approved by ECOSOC and transmitted to states for consideration and comment.[77]

In the following year ECOSOC through its resolution 1503 (XLVIII), endorsed the proposal with some amendments: the investigation would be carried out only if all available means at the national level had been resorted to and exhausted and only if the situation did not relate to a matter being dealt with under other procedures of the UN or regional conventions. It was also considered that the procedure set out in this resolution would be reviewed if any new organ

[76] Resolution 1235 (XLII) was adopted by 20-4-2 and it followed resolution 8 and 9 (XXIII) of the Commission; in *Y. U. N. 1967*, p. 512.
[77] Resolution 1422 (XLVI) of ECOSOC adopted on 6th June 1969; see *Y. U. N. 1969*, p. 515.

entitled to deal with such communications were to be established within the UN or by international agreement.[78] In 1971, the Sub-Commission during its twenty fourth session held between 2nd and 20th August, approved a set of provisional procedures as to the admissibility of communications, and these consisted mainly of four requisites. Firstly, there had to be reasonable grounds that a consistent pattern of gross and reliably attested violations of human rights existed. Secondly, the object of the communication had to be consistent with relevant principles of the UN Charter, UDHR and international instruments of human rights. Thirdly, it had to have originated from a person or group of persons who could reasonably be presumed to be victims or persons or Non-Governmental Organisations (NGOs), who had direct and reliable knowledge of the violations. Lastly, each communication had to contain a description of the facts, as well as the purpose of the petition and the rights that had been violated. These requirements were made in order to avoid anonymous communications, written in abusive language or politically motivated. Moreover, it reinforced that domestic remedies had to be exhausted and the communication submitted to the UN within a reasonable time after the exhaustion of these remedies.

In 1971, the Sub-Commission also appointed a five-member working group to consider all the communications received, as was stated in resolution 1503.[79] In 1972, it was asked that the working group clarified the meaning and implications of the formula "consistent pattern of gross and reliably attested violations."[80] Likewise in 1975, a resolution adopted by the Council established that any NGO in consultative status which failed to show proper discretion in an oral or written statement relating to allegations or complaints on human rights might render its status subject to suspension or withdrawal.[81] The procedure was very successful, as we can see from the number of communications received, *e. g.*, in 1975 and 1976 the working group received 54 510 confidential communications. The

[78] This resolution was adopted by 14 votes in favour, 7 against and 6 abstentions; see *Y. U. N. 1970*, pp. 530-531.
[79] Resolutions 1(concerning criteria for admissibility of communications) and 2 (concerning the establishment, composition and designation of the Working Group on Communications) (XXIV) of the Sub-Commission, see *Y. U. N. 1971*, p. 419.
[80] In *Y. U. N. 1972*, p. 436.
[81] Paragraph 4 of resolution 1919 (LVIII) adopted by ECOSOC on 5th May 1975, in *Y. U. N. 1975*, pp. 614-615.

Commission and the Sub-Commission have paid attention to countries such as Chile, Cyrus or Uganda. The confidentiality of the 1503 procedure was partially breached when, in 1978, names of the countries under consideration began to be announced by the Commission, as well as the names of the countries that no longer were under its consideration, but everything else within this procedure remains confidential.

Additionally, other instruments such as the thematic and study reports have been useful in exposing violations of human rights. This in line with the role of ECOSOC, which through resolution 624 B II, paragraph 2 (XXII), approved "the right of everyone to be free from arbitrary arrest, detention and exile" as the first subject for special study.[82] A special committee of four members was established by the Commission and presented its first report to the Commission on 1961. This thematic report system took on a new life in the 1980s with the establishment of a five-member working group concerning Enforced or Involuntary Disappearances, which was connected with the situation in Argentina. These procedures have become more acceptable to states because they are not so 'interventionist' as the 1503 procedure or country-specific and, for this reason, have been consistently developed.

Another instrument of action by the Commission are the country reports which began with the establishment, in 1967, of an *Ad Hoc* Working Group of Experts to investigate charges of torture and ill-treatment of political prisoners, detainees and persons in police custody in South Africa. In 1975, the Commission decided to appoint and to chair an *Ad Hoc* Working Group consisting of five Commission members, to inquire into the current situation of human rights in Chile.[83] This type of intervention has also multiplied itself throughout the years. Both the thematic and country approaches reveal the ability of the Commission and the Sub-Commission to overcome its initial limited role. The multitude of Special Rapporteurs and themes under consideration is indeed impressive. It has another advantage, since these thematic and country reports are carried out by

[82] In *Y. U. N. 1956*, pp. 222-223.
[83] See resolution 3448 (XXX) of the General Assembly adopted on 9th December 1975 concerning the violations of human rights in Chile and in which US, SU, France and Britain voted in favour, in *Y. U. N. 1975*, pp. 627-628.

independent experts usually less constrained by the activity of member states. The extended net of working groups, thematic and country specific studies, special rapporteurs, special representatives and independent experts is quite indicative of the increasing development of the Commission and Sub-Commission's expanding activities.[84] The implementation and monitoring of human rights is mainly carried out by the treaty monitoring bodies such as the Human Rights Committee. There are others such human rights treaties' instruments in force that provide for the monitoring of treaty implementation by expert bodies.[85] In addition, the creation of the post of High Commissioner for Human Rights, in 1993, gave a greater visibility to human rights and especially to its violations.

In 1977, the first session of the Human Rights Committee (Committee) took place (from 21st March to 1st April 1977) in New York and the second session in Geneva (from 11th to 31st August). The Committee is entrusted with monitoring and compliance with the rights contained in the ICCPR and has three sessions per year, in that its annual report is produced at the end of the mid session and presented to the General Assembly. The ICCPR followed the recognition of the civil and political rights contained in the UDHR even if, for some, the UDHR had a rather vague and imprecise language.[86] Of all the rights stated in the UDHR, only three are not reaffirmed in the ICCPR, and these are the right to property (article 17), the right not to join an association (article 20 (2) and the right to change

[84] For a critical view of these activities see Tom J. Farer and Felice Gaer, "UN and human rights: at the end of the beginning", in Adam Roberts and Benedict Kingsbury (eds.), op. cit., pp. 240-296.
[85] The first is the ICESCR Committee. The second is the Committee on the Rights of the Child in charge of the monitoring of the 1989 Convention of the Rights of the Child. The Convention also benefited from the 20th November 1959 General Assembly's Declaration of the Rights of the Child consisting of a Preamble and ten Principles which was approved as resolution 1386 (XIV) and adopted unanimously, see *Y. U. N. 1959*, pp. 198-199. The third is the Committee concerning the monitoring of the Convention on the Suppression and Punishment of the Crime of Apartheid. This was an initiative of SU and Guinea that presented a draft Convention in 1971, which was endorsed by the General Assembly as resolution 2786 (XXVI) of 6th December 1971, in *Y. U. N. 1971*, p. 408. The fourth is the Committee against Torture that monitors compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This Convention was adopted in 1984, opened for signature in 1985, and came into force in 1987. It has optional clauses (articles 21 and 22) which recognised the competence of the Committee against Torture to receive and consider communications from or on behalf of the victims/individuals, and these optional clauses also came into force in 1987. The fifth is the Committee on the Elimination of all Forms of Racial Discrimination that monitors the compliance with the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. Lastly, the Committee on the Elimination of Discrimination against Women is the body that followed from the 1979 Convention on the Elimination of All Forms of Discrimination against Women.
[86] This was the position of Canada because the UDHR had not been a product of the ILC; see *Y. U. N. 1948-1949*, p. 532.

religion contained in article 18. As for the novelties of the Covenant, we find the right to self-determination (article 1), the rights of members of minorities (article 27) and the prohibition of any propaganda for war and any advocacy of national, racial or religious hatred (article 20). In addition, and unlike the UDHR which deals with limitations to rights in one article, namely article 29 (which states the restrictions provided by the law when it is necessary to protect national security and public order, public health or morals, or the rights and freedom of others), the ICCPR deals with this issue in general terms under article 4 and more specifically in the articles concerning freedom of information, assembly and association (articles 19 (3), 21 and 22 (2). Under article 2, civil and political rights have an immediate application, but this is somewhat weakened by the second paragraph in which necessary steps are to be taken, without specifying a deadline, to bring national legislation into line within its territory.

As we have seen, there are three ways of monitoring the implementation of the Covenant. The first one is set forth in article 41, which recognises the competence of the Committee to receive and consider communications from other states. This article, in order to come into force, needed ten declarations of recognition, which happened in 1979.[87] It is a purely optional procedure and a highly lengthy and complicated one, since it can take over three years. The first step is taken when a complaining state brings the matter to the attention of the other state party, which then has three months to give a clarification of the matter in writing. If, after six months from the date of the initial complaint, the matter is not resolved satisfactorily for both parts, it is referred to the Committee, which decides whether all domestic remedies have been exhausted and uses its good offices in order to reach a friendly solution. Afterwards, the Committee has a year to report to the state parties, and then two possible ways are considered. If the matter is settled, the Committee report is confined to a brief statement of the facts and of the solution that was reached. If a solution is not found, an *ad hoc* conciliation commission is appointed with prior consent of the parties.

[87] In 1976, Norway, Denmark, Finland, Sweden, Federal Republic of Germany and Britain had issued such declarations. In 1978, Austria, Italy, the Netherlands and New Zealand also recognised article 41 which enabled it to come into force on 28th March 1979.

This commission (article 42) is composed of five persons serving in their personal capacity and who are acceptable to both parties. Nevertheless, if no consensus is achieved regarding the composition of the commission within three months, the members concerning whom no agreement is possible are elected by a two-thirds' majority vote of the Committee from among its own members. The conciliatory commission has one year to produce a report to the states concerned. There are then three possible situations: if it is unable to complete its consideration of the matter within the deadline, its report is confined to a brief statement of the facts; a solution is reached and the report contains a brief statement of the facts and of the solution; and if a solution is not reached, the report is to embody the findings of the commission on all questions of fact relevant to the issues and its views on the possibilities of an amicable solution of the matter. Afterwards, the parties have three months in which to inform the chairperson of the Committee whether or not they accept the contents of the report. Finally, under article 45, which established the submission of the Committee's annual report to the General Assembly via ECOSOC, these issues are presented, especially if they fail to reach an amicable solution, and debated. A resolution might be adopted either in one or in both of these bodies relating to the matter.

The second process of monitoring implementation is the reporting system. In 1978, the Committee considered reports from 16 states and ECOSOC decided to exempt reporting states' parties to the Committee from also reporting on similar questions under the periodic reporting procedure established by the Council on 28th July 1965.[88] Reports must be submitted within one year of becoming a party to the Covenant and this is referred to as the "get to know you" report. Afterwards, it is followed by a second report, on a five-yearly basis, which is immensely detailed. The subsequent five-yearly reports are mostly updates focusing on previously perceived problem areas and recent developments. Nevertheless, there

[88] Resolution 1978/20 adopted by ECOSOC on 5th May 1978, in *Y. U. N. 1978*, p. 729; States reported to the Commission on a three-year cycle after resolution 1074 C (XXXIX) of ECOSOC on 28th July 1965. The schedule was the following: on the first year, civil and political rights, on the second year economic, social and cultural rights, and on the third year on freedom of information; see *Y. U. N. 1965*, pp. 487-488.This procedure was changed in 1971 through resolution 1596 (L) of ECOSOC which requested the reports to be delivered every two years following the same order. With this measure, the reporting cycle was enlarged from three to six years; see *Y. U. N. 1971*, p. 445.

is also the right to call in special reports between the regular cycle.[89] In 1985, an interim arrangement of the Committee established that the Committee was to transmit regularly to ECOSOC the general comments adopted by it and also its full annual report directly to the Assembly later in the year, an arrangement that was accepted by ECOSOC.[90] The reports drawn up by states are only subject to the observations and comments of the Committee, and not criticisms or condemnations.

As for the individual complaints concerning violations by state parties to the Covenant, in 1979, the Committee for the first time concluded consideration of a communication submitted to it under the Optional Protocol by adopting final views.[91] The Optional Protocol states the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction claiming to be victims of a violation by a state of any of the rights set forth in the Covenant. Unlike the Covenant, it is not limited by the territory of its members since individuals who have escaped persecution in their own country can file a complaint. This right to petition is limited to victims but Rule 90 (b) of the Committee Procedures does contemplate the possibility of accepting communications submitted on behalf of an alleged victim, when it appears that she/he is unable to submit the communication himself.[92]

An individual can only file a complaint if the same matter is not under investigation or settlement (article 5 (a)). In addition, it has to pass an admissibility test set forth in article 3 which considers that in order for a communication to be valid it can't be anonymous, it should not be an abuse of the right of communications and it cannot be incompatible with the provisions set forth in the

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[89] Rosalyn Higgins, "Opinion: 10 years on the United Nations Human Rights Committee: some thoughts upon parting", in *European Human Rights Law Review*, Issue 6, 1996, pp. 570-582, at pp. 570-572.

[90] ECOSOC decision 1985/105 adopted on 8th February; see *Y. U. N. 1985*, p. 853. In 1986, through decision 1986/124 of 21st May, ECOSOC authorised the Secretary-General to transmit the Committee's annual report directly to the Assembly at its 1986 regular session; See *Y. U. N. 1986*, p. 693.

[91] This was the case presented by Moriana Hernández Valentini de Bazzano who complained about the detention and torture of her husband, her stepfather and her mother. Because in one of the cases, the torture had resulted in permanent physical damage, Uruguay was obliged under the Covenant to provide effective remedies to the victims. The validation of this case was refuted by Uruguay on two arguments, firstly, that the detained charged with subversive association were not tortured and secondly, since the case was before the Inter-American Commission on Human Rights, the work of the Committee was rendered inadmissible. See *Y. U. N. 1979*, p. 857.

[92] See UN document CCPR/C/3/Rev. 6, under the title "Rules of Procedure of the Human Rights Committee."

Covenant. Likewise, under article 2, domestic remedies have to be exhausted before a communication is submitted to the Committee. This is reiterated by article 5 (b) which, at the same time, also affirms that this shall not be the rule when the application of the remedies is unreasonably prolonged. Under the same article, and after the communication has been received, the concerned state party has six months to respond in writing to the Committee with all the required information. Furthermore, under Rule 93 of Procedures additional information or observation can be requested. The matter is considered in closed session and the Committee may express its views not only to the possibilities of amicable settlement but also as to whether there has been a violation of the Covenant. The Committee shall forward its views to the state party concerned and to the individual. As in the state-to-state procedure, the Committee shall include in its annual report a summary of its activities under the present Protocol (article 6 of the Protocol).

In July 1994, the secretariat submitted a working paper on the reform, and possible abolition, of the procedure for dealing with communications referring to violations of human rights as governed by resolution 1503 of 1970. Paragraph 10 of this resolution called for the review of the procedure in case a new organ entitled to deal with these matters was established. In 1977, this became reality with the coming into force of the Human Rights Committee.[93] The debate was intense and within the wider topic of enhancing the co-ordination and effectiveness of all UN organs and bodies that deal with human rights. It was stressed that the 1503 procedure and the role of the Committee were perfectly compatible, since the former dealt with the examination of situations which appeared to reveal a consistent pattern of gross violations of human rights whilst the latter was concerned with individual situations, on a case by case basis. Moreover, the 1503 procedure, apart from the listing of the countries under consideration, is confidential while under the Committee its decisions of a final nature are made public. Additionally, the 1503 procedure applies to all states whilst the Committee can only deal with the states parties to the ICCPR. Likewise, ECOSOC procedure covers all human rights and the Committee, in contrast, deals only with civil and political rights.

[93] UN document E/CN.4/Sub.2/1994/17.

In 1999, a Working Group was established to consider the enhancement of the mechanisms of the Commission and considered that the 1503 procedure remained valid but required significant overhaul. It was also decided to recommend to ECOSOC the immediate change of the title of the Sub-Commission, from Sub-Commission for the Prevention of Discrimination and Protection of Minorities to Sub-Commission on the Promotion and Protection of Human Rights. This change of title reflects the importance of the role of the Sub-Commission which enlarges its scope but also reveals a clear adaptation to its post-Cold War/*apartheid* international environment. In 2000, ECOSOC decided to maintain the 1503 procedure and called for a greater co-ordination between all the intervening parts in the procedures for dealing with communications concerning human rights, namely the Working Group on Communications, the Sub-Commission, the Commission and the Secretariat.[94]

Within the UN human rights' framework we also have to look at the impact of the 1993 Vienna Declaration and Programme of Action.[95] This document was adopted by the World Conference on Human Rights that took place between 14th and 25th June. The attendance at this second world conference on Human Rights was impressive both in the number, as well as in the diversity of the participants.[96] Its conclusions reflected the increased attention that human rights have received, and the most visible action was the recommendation of creating the post of High Commissioner for Human Rights. The High Commissioner has been an issue present throughout the history of the UN, but only made possible after the end of the Cold War.[97] The General Assembly did transform this recommendation into

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[94] Resolution 2000/3 adopted by ECOSOC under the title "Procedure for dealing with communications concerning human rights."

[95] UN document A/CONF.157/23. From now onwards cited as Vienna Declaration and Programme of Action.

[96] It was attended by 171 states, 2 national liberation movements, 15 UN bodies, 10 specialised agencies, 18 intergovernmental organisations, 24 national institutions and 6 ombudsmen, 11 UN human rights and related bodies, 9 other organisations, 248 NGOs in consultative status with the Council and 593 other NGOs.

[97] The issue was first taken up by Uruguay (UN document A/C.3/L. 74 &Add. 1) that presented a proposal for the creation of a permanent agency regarding measures of implementation of the UN, to be known as the Attorney-General or High Commissioner for Human Rights. This proposal was turned into an amendment (UN document A/C.3/L.93) in 1950. In 1951, Uruguay insisted on this issue with a memorandum (UN document A/C.3/564) setting out the reasons for the establishment of a UN Attorney-General for Human Rights, as well as its contemplated functions, powers and organisation. In 1954, the Third Committee expressed interest in discussing, at a later stage, the Uruguayan amendment regarding the matter of the High Commissioner for Human Rights (UN document A/C.3/L. 424). In 1956, Uruguay proposed an amendment

reality through its resolution 48/141 on 20th December 1993. The High Commissioner is the UN official with principal responsibilities for the UN human rights' activities either under the direction of the Secretary-General or within the framework of the overall competence of the General Assembly, ECOSOC and Commission. It is mainly a co-ordinating and centralising role but it has also given a "face" to the promotion and protection of human rights.

Additionally, on 1st September 1997, the Office of the High Commissioner and the Centre for Human Rights[98] were consolidated as the Office of the UN High Commissioner for Human Rights. The enhanced role that human rights play in the structure and functioning of the UN can be seen even in its expansion in the UN Yearbook, in which from 1995 onwards, human rights became an autonomous part instead of being included in the Economic and Social Questions. In 1998, the fiftieth anniversary of the UDHR was commemorated under the theme "All human rights for all". In December, the General Assembly adopted the "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms."[99] Out of twenty articles, most of them are still directed at states, with paragraph 7 of the Preamble "stressing that the prime responsibility and duty to

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(UN document A/C.3/L. 595), which was later withdrawn requesting the Commission to consider appointing a High Commissioner or establishing a special organ to deal with individual petitions on violations of human rights. In March 1965, Costa Rica made three initiatives in order to place the issue of a High Commissioner for Human Rights on the UN agenda. The first was made at the Commission and was not considered due to lack of time; whilst the second one was made at the ECOSOC and was not decided upon (UN document E/CN.4/887 and Corr.1, Letter of 18th March 1965 from Costa Rica and UN document E/L.1080, letter from Costa Rica of 6th July 1965). The third one (UN document A/5963, letter from Costa Rica of 16th August 1965) was presented to the General Assembly and led to resolution 2062 (XX), which returned the issue to ECOSOC and Commission with the recommendation that, after further study, it should be reported back to the General Assembly (in *Y. U. N. 1965*, p. 497). In 1966, the Commission decided to establish a working group composed of nine members of the Commission to study all relevant questions concerning the establishment of a High Commissioner. This decision was reinforced by ECOSOC resolution 1163 (XLI); see *Y. U. N. 1966*, pp. 485-486. In 1967, both the Commission and ECOSOC recommended that the post for a High Commissioner be established though resolutions 1237 (XLII) and 1238 (XLII) of the ECOSOC in *Y. U. N. 1967*, pp. 542-543. The General Assembly did not take up the item and postponed it. This proposal was opposed on the grounds that it was an attack on sovereignty, an added bureaucracy and also a financial burden. In 1981, the issue was 'resurrected' and in 1993, through resolution 48/141 of 20th December, the General Assembly adopted without vote, the post of High Commissioner for the promotion and protection of all human rights (in *Y. U. N. 1993*, pp. 906-908). The first High Commissioner was José Ayala Lasso from Ecuador.

[98] On 28th July 1982, the Division of Human Rights within the Secretariat framework was renamed Centre for Human Rights; see resolution 37/437 of 18th December 1982 of the General Assembly, in *Y. U. N. 1982*, p. 1101.

[99] Resolution 53/144 and Annex adopted without vote on 9th December, in *Y. U. N. 1998*, pp. 608-611.

promote and protect human rights and fundamental freedoms lie with the State," whilst individuals, NGOs and relevant institutions (articles 16 and 18) play a role. In fact, NGOs such as Amnesty International have been crucial in publicising human rights' violations but also in helping to improve the UN human rights system.[100]

[100] See *e. g.* its written statement concerning the reform of the Commission on Human Rights (UN document E/CN.4/2003/NGO/179).

3 International Criminal Law and Human Rights

"On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state."[101]

The third aspect of the role of the UN regarding the establishment of international human rights is concerned with the definition of international criminal law and the punishment of those individuals who violate human rights. In this sensitive area, the classical pioneering effort was the Breisch War Crime Trial of 1474. The defendant, Sir Peter of Hagenbach, was charged with crimes against humanity committed during the siege of Breisch on the Upper Rhine. The *ad hoc* tribunal of 28 judges discarded the defence of following superior orders from the Duke of Burgundy, and condemned him.

The first concerted international attempt was made in 1919 under Article 231 of the Treaty of Versailles, where Germany and its allies were considered to be guilty of causing the First World War. This "moral guilt" clause, which later served as a lever for the exacerbation of nationalist feelings that Hitler (the duress of the *Versailles Diktat*) mastered with great skill, was not the only innovation of the 1919 settlement. Under article 227, the Kaiser himself was considered to be individually responsible for the aggressive war of Germany upon other countries, "a supreme offence against international morality and the sanctity of treaties". In addition, a tribunal of five judges was to be appointed by the Principal Allied and Associated Powers. This attempt was frustrated by the Netherlands' refusal to extradite the Kaiser, who had taken refuge in this country, to stand trial in the international tribunal. This refusal was grounded on two elements, firstly that Germany was not a party to the Treaty of Versailles and secondly, it was against Dutch traditions of asylum to extradited individuals accused of political offences. Moreover, as to men accused of violating the laws of war, under articles 228-30 of the Treaty of Versailles, the Allied powers required Germany to hand these persons over in order for them to be judged by allied military tribunals. Germany

[101] International Military Tribunal in Nuremberg, "International Military Tribunal (Nuremberg), judgment and sentences", in *American Journal of International Law*, Vol. 41, 1947, pp. 172-333, at p. 221.

refused to do so and entrusted the task to the German Supreme Court at Leipzig instead, where few persons were actually found guilty.[102]

This idea of the guilt clause applicable to Germany was not without criticism. At the time, some considered that to isolate Germany as the sole responsible party for the First World War was not an accurate description of reality. The emphasis should be put on the fact that the World War was the consequence of the dominance of self-defence, balance of power and all the other characteristics of the "old anarchy" that the League of Nations attempted to renew.[103] As we have seen, the will of the states to construct a collective security framework was not very strong and the second world conflict surpassed the intensity of 'the war to end all wars.' As the magnitude of human rights' violations began to unveil, it became clear that a threshold had been passed. Therefore, there was a need, best captured by the closing remark of the opening speech of the British Attorney-General Sir Hartley Shawcross at Nuremberg, to "let us once again restore sanity and with it also the sanctity of our obligations towards each other."[104]

The Allied countries leaning on the previous and failed attempt of the Versailles treaty of 1919, decided to include in the conditions of the Armistice to be negotiated with the Axis Powers the hand over of named criminals wanted for war crimes.[105] In 1942, on January 13th, a Joint Declaration on Punishment for War Crimes was signed in London. In its third paragraph, we find the determination to "place among their principal war aims the punishment, through the channel of organised justice, of those guilty or responsible for these crimes, whether they

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[102]The Allies had a list of 901 persons guilty of such crimes. From this number, 888 persons were not tried at all or tried and summarily acquitted or released; thirteen were convicted and given light sentences. In Julio Barboza, "International criminal law", in *Collected Courses/The Hague Academy of International Law*, Vol. 278, 1999, pp. 9-200, at p. 34.

[103] See C. G. Fenwick, "Germany and the Crime of the World War", in *American Journal of International Law*, Vol. 23, nº 4, 1929, pp. 812-815.

[104] Sir Hartley Shawcross in his opening speech at the International Military Tribunal in Nuremberg, in *Opening Speeches of the Chief Prosecutors at the Trial of German Major War Criminals by the International Military Tribunal in Nuremberg*, published under the Authority of H. M. Attorney-General by His Majesty's Stationery Office, London, 1946, p. 88. The other chief prosecutors were Justice Robert H. Jackson for the US, François de Menthon for France and General R. A. Rudenko for the SU.

[105] This different approach can be seen in the change of positions of the US which in 1919 argued that the former Kaiser was not amenable to a foreign jurisdiction, see Quincy Wright, "War criminals", *American Journal of International Law*, Vol. 39, nº 2, 1945, pp. 257-285, at p. 267.

have ordered them, perpetrated them, or participated in them."[106] In order for this process to be effective, a commission was created on October 20th 1943, namely, the UN War Crimes' Commission composed of 16 members. It had three committees that enabled fact-finding regarding war crimes, and also government advice on how to best establish their own national commissions.[107] A Sub-Commission in the Far East, and another in China, were also created but the SU did not participate in this process and established its own Russian Extraordinary State Commission.

In the Moscow Declaration of 1943, and more specifically in its "Statement on Atrocities", two types of war criminals were defined: "major" and "lesser" war criminals. The International Military Tribunals of Nuremberg and Tokyo were designed to deal with the first category, whilst the second type of war criminal was dealt with under Control Council Law nº 10, and through national tribunals. The Nuremberg Charter which had thirty articles dealt with the trial of major German war criminals, those "whose offences have no particular geographical location."[108] It began on 20th November 1945 and ended on October 1st, 1946.[109] This tribunal was composed of four Allied Countries, namely, the US, the SU, France and Britain that were followed by another nineteen countries, which adhered to the agreement.[110] The case of the prosecution was based on four types of offences. The first one was presented by the US and concerned aggressive war which, it was claimed, had been outlawed by the community of states. The second was presented by Britain, and it consisted of the accusation that the acts committed in planning or waging such a war were international crimes for which individuals were criminally punished. These two constituted the offence of crimes against peace. The third was presented by France and dealt with the violations of the laws and

[106] M. E. Bathurst, "The United Nations War Crimes Commission", in *American Journal of International Law,* Vol. 39, nº 3, 1945, pp. 565-570, at pp. 565-566.
[107] These were the Committee on Facts and Evidence, the Committee on Enforcement and the Committee on Legal Questions.
[108] International Military Tribunal in Nuremberg, op. cit., p. 172.
[109] The Moscow Declaration, Control Council Law nº 10 and the Nuremberg Charter were retrieved from the Yale Law School site, respectively http://www.yale.edu/lawweb/avalon/wwii/moscow.htm (last access 15th February 2005), http://www.yale.edu/lawweb/avalon/imt/imt10.htm (last access 15th February 2005), and http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm (last access 15th February 2005).
[110] These countries were Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay.

customs of war. The last concerned crimes against humanity, and was presented by the SU. Crimes against peace were considered to be the 'heart of the case.'

The seventeen-article Charter of the International Military Tribunal for the Far East, pursuant to the Potsdam Declaration and its unconditional surrender clause, defined the crimes in article 5 in the same terms.[111] In Tokyo, the same types of crimes were maintained and defendants were divided into three types: Class A war criminals were those accused of "crimes against peace", Class B were those charged with conventional war crimes and Class C were those accused of "crimes against humanity". The first and the last types were tried and had their sentences executed in Sugamo Prison in Tokyo, whilst the second were tried in several countries, such as the Philippines or China, where the crimes were committed.[112] The trial of all Class "A" criminals took place between May 1946 and November 1948. The prosecution team was made up of justices from eleven Allied nations.[113]

These tribunals did constitute an important precedent by going against traditional assumptions that war criminals could not be punished under international law because international law only bonded states and not individuals, especially Heads of State.[114] The Tribunals asserted that individuals were responsible for their crimes, independently of their official or governmental position, and that the defence of obedience to superior orders should not be accepted. These were crimes that surpassed the duties imposed by the state on the individual. A crime against humanity was not a new concept but it was systematised and structured at these Tribunals. The criminal acts committed

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[111] Appendix C in John L. Ginn, *Sugamo Prison, Tokyo, An Account of the Trial and Sentencing of Japanese War Criminals in 1948, by a U. S. Participant,* McFarland & Company, Jefferson, North Carolina and London, 1992, pp. 261-266.

[112] The most notorious of these large scale atrocities were the Rape of Nanjing, the construction of the Siam-Burma Railway, the Bataan Death March and the issue of Comfort Women. The latter has remained sensitive until today especially for Japan's neighbouring countries; see the final report of the Special Rapporteur Gay J. McDougall (UN document E/CN.4/Sub. 2/1998/13, Appendix), concerning "Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like practices during armed conflict" (The Appendix entitled "An Analysis of the Legal Viability of the Government of Japan for Comfort Women Stations established during the Second World War" deals with this specific issue). See also the update to her final report in 2000 (UN document E/CN.4/Sub.2/2000/21. The Special Rapporteur continued the work of her predecessor, Linda Chavez who had submitted in 1995 and 1996 a working paper and a preliminary report on the same issue (UN documents E/CN.4/Sub.2/1995/38 and E/CN.4/Sub.2/1996/26).

[113] These were Australia, Canada, Republic of China, France, Britain, India, the Netherlands, New Zealand, the Philippines, the SU and the US.

[114] Quincy Wright, op. cit., pp. 257-285.

against the international community, the *delicti juris gentium* were recognised by the classical text writers on international law and have been employed in national constitutions and statutes. The best example of an offence against universal law is piracy.[115] Individuals in addition to being citizens/subjects of their national communities are to a limited extent subjects/citizens of a world society. But the real essence of the 1945 concept of crime against humanity was that it breached the domestic jurisdiction of states regarding the treatment of its own population. No longer were foreigners or nationals abroad the sole concern of international law, and the way a state treated its own population became a concern of the international society.

The Nuremberg Charter held that the International Military Tribunal was to have the jurisdiction of crimes against humanity before or during the war, whether or not these were crimes recognised by domestic law. The International Tribunal, however, considered that in order for a crime to be considered as against humanity it must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal adopted a more restrictive approach than the one set out in article 6 of the Nuremberg Charter and, in practice, liability for both war crimes and crimes against humanity was confined to acts committed after September 1st 1939.[116] Nevertheless, there were criticisms regarding the constitution and jurisdiction of the Tribunals, the type of law to be applied and the definition of the crimes. The first criticism deals with the idea that these tribunals were part of a victors' justice in which the guilt of the individuals was not established by a competent court with due process of the law. This is partly true in the sense that these tribunals were not extended to the victorious side and it has been well pointed out that the Allies, although fighting a just war (*jus ad bellum)* did not always fight it with just means (*jus in bello*). We only have to think of the disproportionate acts of war such as the fire bombings of German cities (*e. g.* Dresden) in 1945 when the war was already won, the Katyn massacre and other atrocities committed by the "liberating" Red Army through Eastern Europe and Germany, as well as the systematic rape of Italian women by the Moroccan

[115] See for instance, H. Waldock, op. cit., pp. 212-213 and Richard B. Lillich, *International Human Rights, Problems of Law, Policy and Practice*, Little, Brown and Company, Boston, 1991 (2nd Ed.), p. 872.
[116] See International Military Tribunal in Nuremberg, op. cit., p. 248.

mercenaries fighting with the Free French Forces in Italy during 1943.[117] More arguably we could also consider the atomic bombing of Hiroshima and Nagasaki (indiscriminate because directed at civilians) after the Japanese failure to follow the prophetic warnings of the Allied countries in 1945 stating that "the alternative for Japan is prompt and utter destruction."[118] As for the jurisdiction of the International Military Tribunal of Nuremberg, after the unconditional surrender of Germany, its sovereignty was held in trust by the condominium of the occupying powers and so, the making of the Charter was within the exercise of the sovereign legislative powers by these countries.[119] The main controversy is concerned with the application or not of *ex post facto* law especially regarding the offence of crimes against peace. In other words, an individual cannot be punished for an act, however shocking, unless the act was a crime under the law applicable at the time when it was committed. This was stated in the Potsdam Agreement which called for the need to apply "existing international law."

The notions of crimes against humanity and war crimes did not offer much controversy and were accepted as having a universal basis.[120] For instance, the Martens Clause was invoked as to assert that the Nuremberg Charter did not constituted retroactive penal legislation.[121] Later, in 1948, the US Military Tribunal stated that "the Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilised nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to

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[117] For a comprehensive account of just/unjust wars and just/unjust means see the brilliant book by Michael Walzer, *Just and Unjust Wars, A Moral Argument with Historical Illustrations*, Basic Books, 2nd Ed. 1992 (1st Ed. 1977).

[118] This is the final sentence of the thirteenth paragraph of the Potsdam Declaration defining terms for Japanese Surrender which was done on 26th July 1945; in John L. Ginn, op. cit., pp. 259-260.

[119] Quincy Wright, "The law of the Nuremberg trial", in *American Journal of International Law*, Vol. 41, nº 1, 1947, pp. 38-72, at p. 50.

[120] *Idem*, "War criminals", in *American Journal of International Law*, Vol. 39, nº 2, 1945, p. 285.

[121] Theodor Meron, "The Martens Clause, principles of humanity and dictates of public conscience", in *American Journal of International Law*, Vol. 94, nº 1, 2000, pp. 78-89. This author also raises the danger of equating public conscience with public opinion. He also raises the question of how to mould public opinion through the infusion of moderating and humanitarian views in order to make it worthy of public conscience.

warfare."[122] Moreover, another important aspect is that it reinforced the idea that what is not prohibited by a treaty may not necessarily be lawful.[123]

The main problem rested with the offence of crimes against peace. The Tribunal listed the argument that an international custom had emerged and given formal sanction at the time of the ratification of the Pact of Paris. The Pact condemned the recourse to war as a solution for disputes and instrument of national policy. Moreover, it was argued that international law was a progressive system, and there could be little doubt that international law had designated as crimes the acts so specified in the Charter long before the acts charged against the defendants were committed.[124] Even if the importance attached to the Pact of Paris or the 1924 Geneva Protocol can be rebutted, in our view what weighs the most in the argument that the accusation was flawed is the failure of the Tribunal to take into account the actions of the prosecuting countries regarding the criminal actions of Germany. These include the prompt recognition of the *Anschluss*, the accommodation regarding the German invasion of Czechoslovakia in the Munich Agreement and the Ribbentrop-Molotov Non-Aggression Pact of 1939. Furthermore, on September 28th of the same year, the agreement regarding the total partition of Poland between Germany and the SU clearly shatters the argument proposed by the prosecution. All these actions make the Allies, at least accomplices and, at most co-actors, since there was not the perception that German actions were of a criminal nature. It was not a clear prohibition, let alone a

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[122] In the *Krupp case*, 1948 *cit in* Theodor Meron, op. cit., p. 80. This Clause has also been used in decisions of the ICJ, namely in its Advisory Opinion regarding the *Legality of the Threat or Use of Nuclear Weapons* of 1996, paragraph 87. In this paragraph it is stated, by unanimity, that the Martens Clause "(...) whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons." Nevertheless, in the final decision the "Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake." See *Advisory Opinion of the International Court of Justice regarding the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, paragraphs 78-87. It is also interesting to see the Dissenting Opinion of Judge Shahabuddeen who establishes the essence of the question in whether the exercise of the right to self-defence can be taken to the point of endangering the survival of mankind and the Dissenting Opinion of Judge Weeramantry who assertively considers that the use or threat of use of nuclear weapons is illegal in any circumstances whatsoever. This is so, because it violates the fundamental principles of international law, negates humanitarian concerns and endangers the human environment in a manner which threatens the entirety of life in the planet. The Advisory Opinion and all Dissenting Opinions are at http://www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm (last access 15th February 2005).

[123] Theodor Meron, op. cit., pp. 87-88.

[124] Quincy Wright, "The law of the Nuremberg trial", in *American Journal of International Law*, Vol. 41, 1947, pp. 38-72, especially pp. 54-70.

criminal offence. The charge of Crimes against Peace was a new international criminal concept.[125] The very definition of aggression is, even today, not agreed upon, as can be seen by the discussion around the Draft Code of Offences against the Peace and Security of Mankind in 1954.[126] Due to the problems raised by the definition of aggression, it was postponed. The consensus regarding the definition of aggression was partly reached only in 1974, through resolution 3314 (XXIX) of 14th December. The issue of defining aggression was also postponed within the Statute of the International Criminal Court, as we will see later in this chapter.

Nonetheless, we consider that the Nuremberg and Tokyo Trials and Judgments were a turning point in criminalising individuals, as well as some Nazi organisations, such as Gestapo. The emphasis is put on the individuals and not the state, in the sense that the tribunal aimed at punishing German individuals not Germany. But despite the fact that a precedent was established, there was also the notion that the preventative effect of these trials could take place "(...) only if assurances could be given-and carried out-that the legal principles proclaimed by what has been called the "basic charter in the international law of the future" will apply to victors and vanquished alike."[127] There was the need to establish an international court with jurisdiction over individuals for such crimes as stipulated in article 6 of the Nuremberg Charter. Furthermore, and especially concerning the "lesser" war criminals, it highlighted the dangers of leaving the exercise of war crimes jurisdiction to the hands of national tribunals. Not only were doubts raised as to some of the individuals accused, but also to the discrepancy between the punishments that were handed out in different countries.[128] In this specific area, the Nuremberg legal precedent failed to bear fruit in the immediate run.

Although the trials were carried out by the "United Nations" and not on behalf of the United Nations' Organisation, the latter endorsed them in 1946.[129]

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[125] For a very persuasive and succinct approach to the idea that crimes against peace were a new criminal concept see George A. Finch, "The Nuremberg Trial and international law", in *American Journal of International Law*, Vol. 41, nº 1, 1947, pp. 20-37. See also F. B. Schick, "The Nuremberg Trial and the international law of the future", in *American Journal of International Law*, Vol. 41, nº 4, 1947, pp. 770-794 (especially pp. 782-784).

[126] The Draft Code of Offences against the Peace and Security of Mankind of 1954 is at http://www.un.org/law/ilc/texts/offfra.htm (last access 15th February 2005).

[127] F. B. Schick, op. cit., pp. 771-772.

[128] See H. Waldock, op. cit., pp. 224-225 and Richard B. Lillich, op. cit., pp. 870-872.

[129] See General Assembly's resolution 95 (I) of 11th December 1946; in *Y. U. N. 1946-1947*, p. 254.

The General Assembly directed the ILC to formulate the Nuremberg Principles,[130] which it did in 1950. This recognition encompassed seven principles that set the course: individual responsibility for crimes under international law (I), non-recognition of these crimes under domestic law does not relieve the individual from his/her responsibility (II), no immunity even for Heads of State or responsible government officials (III), the defence of "just following orders" is no longer accepted provided a moral choice was possible (IV), the accused has a right to a fair trial on the facts and law (V), definition crimes against peace, war crimes and crimes against humanity (VI) and complicity in the commission of these crimes is also punishable under international law (VII).

The Genocide Convention had its first initial step with resolution 96 (I) of the General Assembly[131], in which genocide was affirmed to be a crime under international law. In addition, it requested ECOSOC to undertake the necessary studies with the goal of drafting a convention on the matter.[132] Two years later, the UN Convention on the Prevention and Punishment of the Crime of Genocide was adopted on December, 9th and came into force on January 12th 1951.[133] This Convention did not establish an extradition or prosecuting system and instead granted jurisdiction to the courts of the state where genocide took place or to an international penal tribunal (article 6). But it did establish an important exception to the tradition of not extraditing individuals for political offences in the case of genocide (article 7). The main innovation of this Convention was the fact that genocide was punishable not only in times of war but also in times of peace (article 1). Already in 1952, an attempt to reach a consensus concerning a statute draft was made by the Committee on International Criminal Jurisdiction[134] that had prepared a draft statute for an international criminal court. The report was sent to

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[130] The ILC was established in pursuance of General Assembly resolution 174 (II) of 21st November 1947 and was entrusted with the codification of the Nuremberg Principles as well as a draft code of offences against the peace and security of mankind by resolution 177 (II) of the same day, in *Y. U. N. 1947-1948*, pp. 210-215.

[131] This resolution was passed on 11th December 1946; see *Y. U. N. 1946-1947*, pp. 531-532.

[132] At the time, the fact that ECOSOC was charged with carrying out such important convention was criticised by the United Kingdom since genocide was so closely associated with crimes against humanity that it was more sensible that should task be carried out by the ILC. See as well General Assembly's resolution 180 (II) of 21st November 1947, in *Y. U. N. 1947-1948*, pp. 219-220.

[133] The UN Convention on the Prevention and Punishment of the Crime of Genocide is at http://www.ohchr.org/english/law/genocide.htm (last access 15th February 2005).

[134] This Committee was established by resolution 489 (V) of the General Assembly of 12th December 1950.

member governments for their comments, and only eleven countries responded to this proposal.[135] It is interesting that the arguments both in favour and against were repeated until the 90s. Those in favour of establishing an International Criminal Court, such as France and the Netherlands stated five arguments: the individual had become a subject of international law, as well as there being increasing acceptance at international level of personal criminal responsibility; criminals should be tried by a court already functioning rather than *ad hoc* tribunals such as those of Nuremberg and Tokyo; it would function as a deterrent; it would contribute to the establishment of a body of precedents in international law and the court would have many functions to perform and could deal with the lesser as well as the graver crimes of international concern. Those against the idea, such as the socialist countries, stated that criminal jurisdiction was part of the sovereign rights of states, that it constituted an interference in the domestic affairs of states (and, therefore, a violation of article 2 (7) of the Charter), it was incompatible with the principle of territorial jurisdiction and it did not contribute to the maintenance of international peace.[136] The issue was postponed on the grounds that further study was required, as well as more comments from states, and this was to be done by a new committee of seventeen members, which would report the following year.[137]

The issue of war criminals was put back on the international agenda with the capture of Adolf Eichmann in 1960 by Jewish "volunteer groups", in Argentina. The thin line between crimes against humanity and sovereignty was again tested, this time by Argentina.[138] It protested against the disrespect by Israel of its territory and domestic jurisdiction and under articles 34 and 35 (1) of the Charter, presented the matter to the Security Council. The Israeli response stressed the nature of the crimes, and their historical and ethical factors, committed by Eichmann, contending that this matter should be decided through bilateral negotiations.[139] Notwithstanding, the matter was pursued within the Security Council in which Argentina was a non-permanent member and Israel was invited

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[135] See summary of UN documents A/2186 and A/2186/Add. 1 in *Y. U. N. 1952*, pp. 803-807.
[136] *Ibidem*, p. 804.
[137] General Assembly's resolution 687 (VII) of 19th December 1952 in *ibidem*, pp. 806-807.
[138] See *Y.U. N. 1960*, pp. 196-198.
[139] See the letters of 17th and 21st June 1960 by the Permanent Representative of Israel; UN Documents S/4338, S/4341 and S/4342 (includes a letter from Israeli Prime-Minister David Ben-Gurion).

to take part without vote. Israel expressed its regret at having violated Argentina's sovereignty and it considered that this expression of regret was the adequate reparation to this "isolated violation of Argentine law".[140] Argentina argued that if the principle of non-interference could be violated with impunity, international law would become the "law of the jungle."[141] At the Security Council, a resolution was passed concerning this matter and a compromise was reached.[142] It was recognised that Israel had violated the sovereignty of Argentina but also that Eichmann was accused of odious crimes, and that acts such as the Israeli intervention in a foreign country, which affected the sovereignty of a member state and, therefore, caused international friction could, *if repeated*, endanger international peace and security.

It is interesting to note the reactions of the other members of the Security Council in regards to this matter, since the resolution was adopted by 8 votes in favour and 2 abstentions, in that Argentina did not participate in the vote. The US and allies put the nature of Eichmann's crimes at the centre of the Israeli intervention. The SU and Poland abstained because they considered that this resolution was ambiguous as to the future of war criminals like Eichmann. Also, in these countries' opinion, the second paragraph, referring to appropriate reparation, could not be understood as legitimising the return of Eichmann to "a country where he had evaded justice for so many years."[143] To Ecuador, nevertheless, it was regrettable that "Israel had announced that the unilateral suspension of international law was permissible when justified by moral considerations to be defined by the state suspending the law."[144] Tunisia was also critical of the fact that when the Holocaust was committed, Israel did not exist as a sovereign state and, therefore, the Israeli arguments involved "a disquieting conception of the extension of the exercise of sovereignty both in space and in time."[145] Moreover, Tunisia stressed that voting in favour of this resolution should not be interpreted as implying recognition of Israel in any manner. Adolf Eichmann's Trial began in April

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[140] In *Y. U. N. 1960*, p. 197.
[141] *Idem, ibidem.*
[142] Security Council's resolution S/4349 adopted on 23rd June 1960.
[143] See *Y. U. N. 1960*, p. 197.
[144] *Idem, ibidem.*
[145] *Idem, ibidem.*

11th and ended in mid August. He was found guilty of war crimes and crimes against humanity against the Jewish people.

Regarding crimes against humanity and war crimes, the UN adopted a "Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity."[146] Additionally, the General Assembly in resolution 3074 (XXVIII) reaffirmed that universal jurisdiction applies to war crimes and crimes against humanity.[147] But it was until the end of the Cold War that the punishment of human rights' violations was put in practice. The first step was taken, albeit through *ad hoc* international tribunals, regarding the human rights' violations in the former Yugoslavia and Rwanda. These international tribunals have the fact in common that they were created under the Security Council umbrella. They were both considered to be threats to international security and peace under Chapter VII of the Charter. They are constituted by 16 judges and have concurrent jurisdiction with national courts, however, retaining primacy over national jurisdiction. The legitimacy of the solution found did raise some criticism, because it was felt that the establishment of these tribunals was an unacceptable stretching of the powers of the Security Council conferred by the Charter. The International Tribunal for the former Yugoslavia addressed this issue and considered that the establishment of the International Tribunals falls squarely within the powers of the Security Council under article 41.

The tribunal in Europe was created by paragraph 1 of resolution 808 of 1993. In the second paragraph, it was requested that the Secretary-General produced a report to best implement this International Tribunal and the report was presented on May 3rd 1993.[148] It is linked to the restoration and maintenance of international peace and security in the territory of former Yugoslavia.[149] The statute of the court was adopted through resolution 827 of 25th May 1993, and has thirty-four articles.[150] The sixteen judges were elected by the General Assembly

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[146] This convention was adopted as resolution 2391 (XXIII) 26th November 1968 in *Y. U. N. 1968*, pp. 608-611 and the convention is at http://www.ohchr.org/english/law/warcrimes.htm (last access 15th February 2005).
[147] This resolution was adopted under the title "Principles of Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity."
[148] UN document S/25704 and Add.1.
[149] *Ibidem*, paragraph 28.
[150] This Statute was amended on 13th May 1998 by resolution 1166, 30th November 2000 by resolution 1329,

and this *ad hoc* Tribunal has a defined territorial and temporal jurisdiction. It has the power to prosecute individuals responsible for serious violations of international law in the territory of ex-Yugoslavia since 1991. It also establishes the possibility of appellate proceedings either on a question of law or an error of fact (article 25). Amongst the inhuman acts on trial, there was specific mention to the ethnic cleansing and widespread, systematic rape.[151]

In contrast, the International Criminal Tribunal for Rwanda has the power to prosecute persons responsible for genocide and other serious violations of international humanitarian law in Rwanda and in the territory of neighbouring countries by Rwandan citizens. The temporal jurisdiction is asserted between 1st January and 31st December 1994. It was created by Security Council resolution 955 of 8th November 1994,[152] after consideration of the reports of the Secretary-General[153] and of the Special Rapporteur of the Commission on Human Rights.[154] The reports of the Secretary-General were pursuant to paragraph 3 of resolution 935 of 1994, which also established a Commission of Experts that produced a preliminary report on violations of international humanitarian law.[155] The Statute of this International Court has thirty-two articles.

The evolutionary characteristic of international criminal law is seen in the forming of the International Criminal Court (ICC). In 1989, due to a request by Trinidad and Tobago to resume work on the creation of an international court (mainly concerned with the punishment of the crime of drug trafficking), this item was put back on the international agenda. Furthermore, the end of the Cold War allowed for situations such as Rwanda and former Yugoslavia to show the need to create a permanent international court. It benefited from the parallel drafting of a Code of Crimes against the Peace and Security of Mankind, which was finalised in 1996. The Statute of the ICC was concluded in 1994 and opened for signature on

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17th May 2002 by resolution 1411 and 19th May 2003 by resolution 1481, and the amended statute is at http://www.ohchr.org/english/law/itfy.htm (last access 15th February 2005).

[151] See paragraph 48 of UN document S/25704.

[152] The Statute is annexed to this resolution at http://www.ictr.org/ENGLISH/Resolutions/955e.htm (last access 15th February 2005) and can also be retrieved at http://www.ohchr.org/english/law/itr.htm (last access 15th February 2005).

[153] UN documents S/1994/879 and S/1994/906.

[154] UN document S/1994/1157, annexes I and II. The Commission held its third special session on 24-25 May 1994.

[155] UN document S/1994/1125 (letter of 1st October 1994 of the Secretary-General).

July 1998. It came into force on July 1st 2002, after the 60th instrument of ratification was deposited on 11th April 2002.[156]

Unlike the *Ad Hoc* International Tribunals of the Second World War and of former Yugoslavia and Rwanda, that had a specific territorial and temporal jurisdiction, the ICC is a permanent body. It is not dependant on the Security Council but independent from the UN (although bound to it by an Agreement under article 2) and it is based at The Hague. In its Preamble, it takes into account the victims of "unimaginable atrocities that deeply shock the conscience of humanity" and, therefore, states its jurisdiction to the "most serious crimes of concern to the international community as a whole." The main goal of the ICC is to avoid impunity for those who commit the following crimes: genocide (article 6), crimes against humanity (article 7), war crimes (article 8) and the crime of aggression.[157] It has no retroactive reach and only crimes committed after July 1st 2002 are punishable (articles 11 and 24).

It is formed by 18 independent judges (article 36) elected for a 9 year term by secret ballot and a two-third majority at a meeting of the Assembly of State Parties. There can be only one judge per state party and they are not eligible for re-election. The Assembly of State Parties is composed of one representative per each State Party and each has one vote (article 112). This Assembly, which meets at least once a year, also elects the Prosecutor through secret ballot and by an absolute majority (article 42). The Prosecutor is also elected for a nine-year term and not eligible for re-election. Its structure is complex, as can be seen from its 128 articles, with the Office of the Prosecutor, the Presidency (a judge elected by an absolute majority of its peers and who is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor), the registry, an appeals division, a trial division and a pre-trial division. The Court complements the national jurisdictions and it may only exercise its jurisdiction if

[156] The Rome Statute is at the ICC's official website at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (last access 23rd February 2005).

[157] On the question of the impunity of perpetrators of violations of civil and political human rights, see the revised report by the Special Rapporteur Louis Joinet entitled "The administration of justice and the human rights of detainees, question of the impunity of perpetrators of human rights violations (civil and political", (UN document E/CN.4/Sub.2/1997/20/Rev.1). He argues that victims are entitled to three fundamental rights: to know (paragraphs 17-25), to justice (paragraphs 26-39) and the right to reparation (paragraphs 40-42). In Annexes I and II to the report, the author establishes 42 principles for the protection and promotion of human rights through action to combat impunity.

the states concerned are unable or unwilling to prosecute the accused individuals.[158]

Like its predecessors, it reaffirms that official capacity is irrelevant, since it does not grant immunity (article 27), command responsibility (article 28), the non-applicability of statute of limitations to crimes within the jurisdiction of the Court (article 29), but it goes even further when it clearly states (article 33, paragraph 2) that orders to commit genocide or crimes against humanity are manifestly unlawful. It also reaffirms that the inexistence of domestic legislation regarding these crimes is not a defence to avoid punishment and individual criminal responsibility. One of its innovations is that not only can states submit cases, but also the Security Council and the Prosecutor. When cases are submitted by states or by the prosecutor, the Court may only exercise its competence when the state on whose territory the crimes were committed or the state of which the person accused of the crime is a citizen have either ratified the Statute or accepted the Court's competence (article 13). In some cases, the Security Council through a resolution adopted under chapter VII of the UN Charter may request that an investigation or prosecution may be deferred (either commenced or proceeded) for a period of 12 months and this request is renewable by the Council under the same conditions (article 16). Furthermore, the ICC defines penalties rather than leaving it to national courts the penalties applicable to the offences and it sets the minimum age of over 18 at the time of the facts for an individual to stand trial (article 26). Under article 63, no one can be judged *in absentia* (unlike Bormann at the Nuremberg Trial *via* article 12 of the Charter), both the victims (article 75) and the pronounced innocent (article 85) can be compensated and a trust fund is established for the victims of crimes and the families of such victims (article 79).

It has, in common with the Draft Code of Crimes (previously Offences) against the Peace and Security of Mankind[159], the recognition of customary law incorporation in war crimes in relation to internal conflicts. Moreover, and following

[158] Paula Escarameia, "Quando o mundo das soberanias se transforma no mundo das pessoas: o Estatuto do Tribunal Penal Internacional e as Constituições nacionais", in *Themis*, Year II, nº 3, 2001, pp. 143-182.
[159]This draft has twenty articles and is at http://www.un.org/law/ilc/texts/dcodefra.htm (last access 15th February 2005). It is much more detailed and specific than the 1954 version which was composed of four articles (affirming individual responsibility for international crimes; defining the offences; reinforcing that there is no immunity for those accused; and the 'just following orders' defence is not permissible).

the Rwanda and former Yugoslavia Tribunals, they recognise the right of appeal and review, and they allow for defences and excuses (part VIII of the Rome Statute: articles 81-85). These were not recognised at Nuremberg, Tokyo and in the Genocide Convention. They follow the Genocide Convention precedent that crimes are punishable either in war or peace, but they enlarge it to all categories. The Draft Code and the ICC also have in common the fact that, in order for a crime against humanity to be within their jurisdiction, they have to be part of a widespread or systematic attack directed against any civilian population with knowledge of the attacks and carried out by a government, organisation or group (in the case of the Draft Code (article 18), or with furtherance of a state or organisational policy to commit such attack (in the case of the ICC Statute article 7 (2). They both have extensive and detailed definition of these crimes. In the ICC, we find a complex and sophisticated definition of these types of crimes showing that some unfortunate lessons have been learned.[160] War crimes, again only those committed as a part of a plan or policy or as part of a large-scale commission, are extremely detailed. It comprises both the "Geneva" and "The Hague" laws, it distinguishes international and internal conflicts, it prohibits certain types of weapons, as well as intentional attacks with the knowledge that such an attack will clearly be excessive in relation to the military goal and cause widespread, long-term, severe damage to the natural environment.

These two documents, the ICC statute and the Draft Code, diverge essentially on two points. The first one is the issue of aggression, which is criminalised in article 16 of the Draft Code, but still not very clearly defined. In the ICC Statute, the definition of the crime of aggression was postponed and is dependant on the adoption of a provision in accordance with article 121 (amendments) and 123 (review conference). Aggression has been the object of an express provision which conditionally postpones its application because no consensus was reached. Even resolution 3314 of 1974 was understood as a

[160] The crimes against humanity are defined as inhumane acts such as murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy (as the unlawful confinement of a woman forcibly made pregnant with the intent of affecting the ethnic composition of a certain population (article 7, paragraph 2 (f), persecution, enforced disappearance of persons (article 7, paragraph 1 (i) and apartheid (article 7, paragraph 1 (j) as well as other inhumane acts.

guiding document and not as an authoritative definition. The second issue concerns the fact that the Draft Code, in its article 4, leaves the door open for state responsibility. The ICC clearly rejects this notion and reaffirms individual criminal responsibility. Moreover, no reservations are allowed under article 120 and withdrawal is possible under article 127 and through written notification addressed to the Secretary-General of the UN. It will take effect one year after the date of receipt of the notification, unless the notification specifies a later date. Amendments are possible after the expiry of seven years from the coming into force of the Statute and, in order for it to be successful, it requires a two-thirds' majority of state parties (article 121 but exceptions are made to provisions of an institutional nature). Also after seven years, under article 123, the Secretary-General shall convene a Review Conference to consider any amendments to the Statute.

4 The United Nations' Structure of Human Rights: Theory and Practice

"International Human Rights, rather than a deviation from principles defining the essence of the "Westphalian" system, represent a return to a conception of international society that is older and morally much more attractive than the positivist vision of pristine sovereignty."[161]

It is clear that the structure of the UN has been adapting to the outside world, and this is particularly true of its human rights' framework. It has been able to move from a static concept of human rights (conceived just as a means to maintain international peace) into a dynamic concept which fosters protection in an active manner. The line is clearly moving towards a greater regulation of the practices in the field of human rights, limiting the scope of the state's domestic jurisdiction. Widespread and systematic violations of human rights which are, in turn, violations of the Charter and of the pledge that states have committed themselves to, under article 56, are no longer essentially within the domestic jurisdiction of states.

There are limitations to its actual functioning, as can be seen from the fact that the right to petition by individuals is still an optional one, *i. e.*, "the enforcement measures have teeth, though whether they shall bite is optional."[162] Furthermore, it is a lengthy process until the situation is finally addressed. What is more, the rights that are recognised in the International Bill of Rights are not absolute, since they contemplate derogations. These can be found in article 29 (2) of the UDHR and in article 4 (1), 19 (3), second phrase of article 21 and 22 (2) of the ICCPR. But the Covenant did go a step further by establishing that some rights are non-derogable even in times of public emergency. In article 4, we find an explicit prohibition of derogations from articles 6 (the right to life), 7 (prohibition of torture and other cruel punishment), 8, paragraphs 1 and 2 (prohibition of slavery and servitude), 11 (the right not to be imprisoned merely on the ground of inability to fulfil a contractual

[161] Jack Donnelly, "Human rights: a new standard of civilisation?", in *International Affairs*, 1993, Vol. 74, nº 1, pp. 1-23, at p. 23.
[162] Rosalyn Higgins, "Conceptual thinking about the individual in international law", in *British Journal of International Studies*, Vol. 4, 1978, pp. 1-19, at p. 11.

obligation), 15 (non-retroactivity of criminal offences and ex-post facto law), 16 (the right to recognition as a person before the law) and 18 (the right to freedom of thought, conscience and religion).

The influence of western countries in the UDHR is self-evident but, over the years, it has enjoyed a wide acceptance. Nowadays, almost all of the eight states that abstained have repudiated their position, Saudi Arabia being the notable exception, and the states that have, in the meantime, joined the UN have adhered to its principles.[163] We can safely say that the UDHR is considered to live up to its title and really be *universal*. It has become a yardstick to measure the degree of respect for human rights in states and international organisations and it also has a direct influence on national Constitutions, municipal legislation and court decisions.[164] Some of its provisions either constitute general principles of law or represent elementary considerations of humanity, and they have been invoked by municipal courts. For instance, it was a standard-reference to the Helsinki Final Act.[165] Moreover, the UDHR clearly "(...) demonstrates that the normative impact of an instrument does not necessarily depend upon its formal legal status."[166] This is even truer when we look at the International Covenants that, because they are treaties, result in a paradox: they are stronger because they lay down binding legal imperatives and, at the same time, weaker due to the fact that they only involve those countries that have ratified them.[167]

The UN human rights' framework is a complex system and in which, as we have seen, several actors take part. Our account was not exhaustive, far from it, but it enables us to see the myriad of activities and bodies involved in this process. The evolution of the role of the Commission and the Sub-Commission from a non-responsive approach to the active and systematic handling of communications of human rights violations is a good barometer of its institutional capability to adapt. The very doctrine of human rights has continued to develop and what was

[163] David P. Forsythe, "Introduction", in David P. Forsythe (ed.), *Human Rights and Comparative Foreign Policy*, United Nations University Press, Tokyo, New York and Paris, 2000, pp. 1-18, at p. 9.
[164] Egon Schwelb, "The influence of the Universal Declaration on Human Rights on international and national law", in *Proceedings of the American Society of International Law*, 1959, pp. 217-229.
[165] Ian Brownlie, "International law at the fiftieth anniversary of the United Nations, general course on public international law", in *Collected Courses/The Hague Academy of International Law*, Vol. 255, 1995/V, pp. 9-228, at pp. 80-81.
[166] *Ibidem*, p. 80.
[167] Antonio Cassese, *Human Rights in a Changing World*, Polity Press, Cambridge, 1990, pp. 48-49.

considered to be essential two hundred years ago has undergone changes. For instance, in the West, the right to vote is now radically different from the 19th century. Its scope has been widened to encompass all citizens. Conceptions of welfare and development, as well as racial equality have been enlarged and helped to bring about some of the radical changes of the 20th century.[168]

Despite all these efforts, the UN activity in this field has encountered some hindrances. We have divided them into two groups: endogenous and exogenous. We find four endogenous factors that have a bearing on the functioning of the human rights' framework. The first problem has to do with the fact that the UN can be criticised for having double-standards or a selective approach. The UN was, in many cases of flagrant, systematic violations of human rights, incapable of acting. This can be explained by the Cold War paralysis and the fact that each side effectively used human rights as a tool in the ideological struggle. Thus, human rights policies were aimed at showing one's virtues and the other's failures. This, of course, prevented many UN attempts to intervene more assertively. In some cases, the unilateral intervention of a state resolved the issue, such as the examples of the Indian intervention in what became Bangladesh, the Tanzanian action in Idi Amin's Uganda and the Vietnamese intervention in Pol Pot's Cambodia. These situations clearly show that the UN is limited in its scope of intervention. With the demise of the Cold War, the flagrant violations of human rights that took place in former Yugoslavia and Rwanda have given a new dynamic to the UN human rights' framework. But despite the end of the Cold War momentum, the UN is still limited when confronting state sovereignty, especially when dealing with the great powers.[169]

Secondly, the credibility of the UN has been reduced through the tendency for "conjuring up" new human rights that have brought confusion into international human rights' discourse.[170] The Vienna World Conference called for the need to

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[168] Hedley Bull, "The universality of human rights", in *Millennium: Journal of International Studies*, Vol. 8, nº 2, pp. 155-159, at p. 159.
[169] R. J. Vincent, op. cit., p. 100.
[170] Phillip Alston, "Conjuring up new human rights: a proposal for quality control", in *American Journal of International Law*, Vol. 78, nº 3, 1984, pp. 607-621.

maintain consistency with the high quality of existing international standards and to avoid proliferation of human rights instruments.[171]

In this regard, besides the international core human rights that are enshrined in the International Bill of Rights, we find the "third generation-solidarity rights". These include, among others, the right to development, to peace, or the right to communicate.[172] The confusion is the result of an absence of any established procedure to deal with candidates for new rights which, in turn, has resulted in the proclamation of new rights without adequate consideration of the basis, the implications and the possibilities of implementation.[173] The right to development, as well as other solidarity rights have had no prior discussion. There has been no attempt to seek consensus among all the intervenient groups and a certain vagueness to its contents. In other words, the "incubation" phase at national and international level has not been carefully handed.[174]

Within the third generation rights, collective rights are more important than individual rights and their centre is the community/state. These rights have been at the heart of the north and south debate, in which the latter has aimed at establishing a new economic international order with redistribution of wealth. These rights continue to be controversial especially when asserted against, rather than being complementary, to the individual. The same is true of the adoption of the Declaration on the Right to Development which was not consensual.[175] In the post-Cold War, this controversy has been heightened. At the Vienna World Conference, however, the right to development, although reaffirmed, was also restricted since "the lack of development may not be invoked to justify the abridgement of internationally recognised human rights."[176] In our view, it is a difficult task to keep up with the evolutionary flux of human rights, but to move forward without solid foundations and consensus is even worse than not moving at all.

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[171] See paragraph 6 of the II part/A (Increased co-ordination on human rights within the United Nations system) of the Vienna Declaration and Programme of Action.
[172] Phillip Alston, op. cit., p. 610.
[173] *Idem, ibidem.*
[174] *Ibidem*, pp. 613-614.
[175] This declaration was adopted by the General Assembly on 4th December 1986 as resolution 41/128. It was adopted with 146 votes in favour, 1 against (US) and 8 abstentions; to the US, development was not assured by governmental promises but by performances, in *Y. U. N. 1986*, pp. 717-719.
[176] See paragraph 10 of the Vienna Declaration and Programme of Action.

Thirdly, the fact that the UN human rights' framework is a complex and wide ranging system also has its drawbacks. The co-ordination of all its actors and activities is a challenge in order to avoid overlapping of issues and roles. Several studies have been made in this regard, aiming at possible long-term approaches to enhance the effective operation of existing and prospective bodies established under UN human rights' instruments. In 1997, as non-reporting by states on measures taken to implement treaties had reached chronic proportions, the implementation of a specially tailored project for the provision of advisory services, was advocated. Furthermore, it was recommended that the High Commissioner convened a high-level meeting to explore better means of co-operation with the treaty bodies. In addition, it was advised that priority should be given to electronic databases, which ensure the availability of relevant information and publicise UN activities.[177] The fourth factor is connected with the previous situation, and it has to do with financial difficulties and understaffing resources. This is a problem that affects the UN as a whole, because it is dependant on member states' contributions.

The exogenous factors are divided into two groups but can be generally characterised as challenging either the unitary or the universal interpretation of human rights. The first one springs from the issue of universality of human rights. Are human rights universal, in the sense of being possessed by all human beings, by virtue of being *human*, or are they collective and positive, deriving from the state and with the consent of the state? This controversy was seen in the making of the International Covenants, with each bloc siding with a group of rights. For some, the idea to include self-determination as a right had the result of wandering farther from the spirit in which defence of human rights was contemplated, and to assign to this right priority over individual human rights is a "(...) radical inversion of the order of concepts and values."[178]

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[177] See the Final Report by independent expert Philip Alston in 1997 under the title, "Effective functioning of bodies established pursuant to United Nations human rights instruments, final report on enhancing the long-term effectiveness of the United Nations human rights treaty system", (UN document E/CN.4/1997/74); the Report by the Secretary-General in 1998, under the title, "Effective functioning of bodies established pursuant to United Nations human rights instruments" (UN document E/CN.4/1998/85/Corr. 1); and the note by the Office of the High Commissioner for Human Rights entitled "Effective functioning of human rights mechanisms: treaty bodies" (UN document E/CN.4/2003/126).

[178] Charles De Visscher, op. cit., p. 133. Also noteworthy was the Mexican proposal concerning the

In our view, this clear-cut division is artificial. Human rights are rights that we all have equally by virtue of our humanity.[179] We are not entitled to them because we have a certain religious faith, or due to our colour, sex, political standing or citizenship. We have these rights not as privileges or favours but as entitlements conferred by a valid rule.[180] It is also true that the core systematisation of these rights was a product of western history; it was in the West that these rights were first achieved as well as best enjoyed.[181] The conquest of the idea of human rights was fundamentally a reaction to two events. The first one was the excesses of the state which originated the proclamation of civil and political rights; in other words, "the great practical achievement of the older human rights tradition, in establishing the "inalienable rights" of the individual, was precisely to deprive despotism of theoretical or philosophical credibility. There was no right, individual or collective, however derived, whether of majority or minority, in the name of which any individual could be deprived of his rights unless he had voluntarily transferred or forfeited them."[182] The second event was the emergence of the modern capitalist economy, which originated the need to safeguard economic and social rights. Likewise, collective ideas such as national self-determination were western, either in its American or French version. The idea that all men have an equal right to be free was asserted as an essential core of the very nature of human rights.[183] Furthermore, we have the concept that there is a minimum area of personal freedom which must, on no account, be violated. We cannot remain absolutely free and must give up some of our liberty in order to live in society, "but total self-surrender is self-defeating".[184]

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replacement of the Spanish term "derechos del hombre" by "derechos humanos" which was adopted by the General Assembly resolution 548 (VI). Mexico felt that the new term reflected more the concept of solidarity and collective responsibility and the equality in rights of women, children and old people. In contrast, France believed that the former expression exactly because of its individualistic meaning expressed better the principles of the UDHR.; see *Y. U. N. 1951*, p. 491.

[179] R. J. Vincent, op. cit., p. 13.

[180] Hedley Bull, "Human rights and world politics", in R. Pettman (ed.), *Moral Claims in World Affairs*, Croom and Helm, London, 1979, pp. 79-91, at p. 79.

[181] See Jack Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca and London, 1996 (1st Ed. 1989), especially pp. 49-65.

[182] Clifford Orwin and Thomas Pangle, op. cit., p. 16.

[183] H. L. A. Hart, "Are there any natural rights?", in A. Quinton (ed.), *Political Philosophy*, Oxford University Press, London, 1967, pp. 53-66, at p. 53.

[184] Sir Isaiah Berlin, "Two concepts of liberty", in A. Quinton (ed.), op. cit., pp. 141-152.

The identification of civil and political rights with "human freedoms" and economic, social and cultural rights with "human needs" as two opposing concepts was greatly magnified by the Cold War logic.[185] The prevailing framework in the West asserted that civil and political rights were old and few in number, capable of precise definition and, therefore, of implementation. In contrast, economic and social rights were much more extensive, their implementation depending on economic factors, population, weather and, in some cases, could not be considered proper human rights.[186] In addition, for some "there began to be no fixed limits to the rights people claimed or were said to posses. The United Nations is perhaps responsible for a great deal of this."[187] The artificial division between "human rights" and "human needs" is well captured by article 6 of the ICCPR which asserts the right to life. This article can be seen as having the two sides of the same coin, in the sense that we have a right not to be arbitrarily deprived of our life but it can also mean the right to eat.[188] The main difficulty is to find a balance between these human rights and human needs. Human rights are also the rights that a person needs in order to lead a life worth living, with dignity, as is stated in the Preambles of both International Covenants. In most western countries, the welfare state and the scope of responsibilities that it has taken upon, has blurred the distinction between the first and the second generation of human rights. The General Assembly has repeatedly affirmed that all human rights are indivisible, interdependent and interrelated.[189]

The heart of the problem lies in the use of one set of rights at the expense of the other. In western countries, the individual aims at establishing a state that preserves and defends individual human rights. The inalienable human rights are intended to foster the conditions under which individuality and creativity can flourish.[190] The starting point and the finishing line is the individual. The second and third generation rights sometimes depart from this crucial understanding and

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[185] Stephen Shute and Susan Hurley, "Introduction", in Stephen Shute and Susan Hurley (eds.), *On Human Rights: the Oxford Amnesty Lectures*, Basic Books, New York, 1993, pp. 1-18.
[186] See Maurice Cranston, "Are there any human rights?", in *Daedalus*, 112, fall/1983, pp. 1-17.
[187] *Ibidem*, p. 6.
[188] R. J. Vincent, op. cit., p. 90 and see also Geoffrey Best, "The French Revolution and human rights", in Geoffrey Best (ed.), op. cit., p. 117.
[189] *E. g.*, resolution 32/130 of 1977 in *Y. U. N. 1977*, pp. 734-735.
[190] Clifford Orwin and Thomas Pangle, op. cit., p. 18.

this is where the claim to be a human right loses its grounds. The right to work and to have social security are as important as the right to vote and to have freedom of expression, because they enable individuals to lead a life with dignity.[191]

The second challenge to the universality of human rights has come from cultural relativism, best exemplified by the regional meetings held in connection with the Vienna World Conference on Human Rights. If the spread of technology can help to develop a world culture it can also produce pressures to preserve and magnify cultural particularism.[192] The main argument is that human rights, as enshrined in the International Bill, are a product of the West and are not applicable to communities which have a different culture. The individual as the centre of rights should be secondary to the community. These regional understandings were explicitly refuted by the Vienna World Conference, which stated that the universal nature of human rights and freedoms is beyond question (paragraph 1) and that "all human rights are universal, indivisible and interdependent and interrelated." It pointed out that the "significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms" (paragraph 5). This "communitarian" response to the UN "cosmopolitanism" is also due to the increasing link between human rights and democracy as detrimental to these countries' sovereignty.[193] The issue of a democratic government was pioneered by the UDHR in its articles 21 (3) and 29 (2) which called for the existence of periodic and genuine elections, universal and equal suffrage by secret vote or by equivalent free voting procedures. This idea of a democratic government was

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[191] R. J. Vincent, op. cit., pp. 4-18 and also chapters 4 and 5 (pp. 61-91).

[192] Hedley Bull, "The universality of human rights", in *Millennium: Journal of International Studies*, Vol. 8, nº 2, pp. 155-159, at p. 158.

[193] In 1995, the General Assembly pursuing resolution 49/30 of 7th December 1994 asked the Sub-Commission to discuss ways of overcoming obstacles to the consolidation of democratic societies, taking into account the relation between democracy, development and human rights. It resulted in the 1995 working paper by Osman El-Hajjé from Lebanon on democracy and the establishment of a democratic society, (UN document E/CN.4/Sub.2/1995/49); in his second working paper in 1996 under the title "Working paper on the promotion of human rights by the exercise of democracy and the establishment of a democratic society", (UN document E/CN.4/Sub.2/1996/7); and in his 1997 working paper under the same title (UN document E/CN.4/Sub.2/1997/30). The author considers in paragraph 13 of the 1997 working paper that "hence, it becomes a matter of urgency to concretize the unanimously recognized rule laying down the equality of human beings before the law and the rule of law which democratic society is considered to be the most able to realize."

reinforced in the ICCPR via article 25 (b) and has received increasing attention given by the General Assembly. The idea is controversial and has sparked a fierce debate in its meetings.[194] The Vienna Declaration stated in its paragraph 8 that "democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing." Despite the link between these elements and a concerted action on the part of the UN, we have not yet arrived at the existence of a right to democratic governance.[195] It remains one of the UDHR's aspirational standards. The fiercest response to this cosmopolitan approach has come from the "Asian Values" bloc which, due to the role played by China, will be analysed later on.

But despite the cultural or economic cleavage between countries in the world, most states have accepted the International Bill of Human Rights, there is some consensus that international concern with human rights is legitimate and minimal consensus as to gross violations of human rights that are unacceptable. The UN Charter, the Charter of Nuremberg and the Universal Declaration on Human Rights "arose not from evidence of state practice, *but* from a conviction about right conduct *regardless* of state practice."[196] There is also an increasing awareness of human rights as an important issue in public opinion, a phenomenon in which the role of some NGOs has been important. In addition, the increasing "Homocentric focus" of international humanitarian law has reduced the traditional interstate emphasis on the law of war and the weight of reciprocity.[197]

Genocide is at the core of an emerging post-Cold War minimum standard of civilisation and even if our responses to it, such as the case of Rwanda or former Yugoslavia, are reactive and curative, this is a new fact of international relations. Human rights do impose constraints on the freedom of action of states, albeit limited and functioning as legitimisation norms. They are not an alternative to

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[194] See, for instance, the debate that took place in 1989 regarding this issue that led to the adoption of two resolutions, one aiming at enhancing the effectiveness of the principle of periodic and genuine elections, and the other, stressing the need to respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes. See resolutions 44/146 and 44/147 in *Y. U. N. 1989*, pp. 526-528 and see as well *Y. U. N. 1991*, pp. 590-591 and *Y. U. N. 1992*, pp. 773-775.

[195] See Thomas M. Franck, "The emerging right to democratic governance", in *American Journal of International Law*, Vol. 86, nº 1, 1992, pp. 46-91.

[196] R. J. Vincent, "Western conceptions of a universal moral order", in *British Journal of International Studies*, Vol. 4, April/1978, pp. 20-46, at p. 34.

[197] Theodor Meron, op. cit., pp. 88-89.

power politics but they exert its influence, however minimal, and they link international and national legitimacy.[198] But we should not build castles in the sand, since genocide is indeed a very minimal consensus. The crux of the matter is that states have not given up their "human rights' sovereignty" especially when it comes to enforcement.[199] Indeed, the whole framework of human rights' analysis has to take into consideration the fact that it is included in the larger debate regarding sovereignty.[200]

Even when states ratify or adhere to human rights' treaties, they still have retained important ways of limiting these treaties' capacity of action, for example *via* reservations. This is also true of the ICC, so important because "the cause of constructing a just peace also required effective mechanisms of accountability for past wrongs"[201] which has some articles that reveal the compromise that was reached, namely in the attention paid to the protection of the national security information (article 72) and article 124, which establishes that a transitional provision may be declared for a period of seven years and in which a state does not accept the jurisdiction of the court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory.

On balance, we are better than we were fifty years ago regarding human rights, but still have a long way to go in order to meet the aspirational standards set in the UDHR. The international human rights' framework, under the aegis of the UN, has been established. At the apex of this structure, we find the UDHR, with the status of an authoritative guide to the interpretation of the Charter. The

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[198] Jack Donnelly, "Human rights: a new standard of civilisation?", in *International Affairs*, Vol. 74, nº 1, 1993, pp. 16-23.

[199] Zdenek Kavan, "Human rights and international community", in James Mayall (ed.), *The Community of States, a Study in International Political Theory*, George Allen and Unwin, London, 1982, pp. 128-139, at pp. 135-136.

[200] Resolution 1999/59 of the Commission adopted with 30 votes in favour, 2 against and 20 abstentions on 28th April and resolutions 1999/8 and 1999/29 of the Sub-Commission adopted on 25th and 26th August. In 1999, by a roll-call vote of 30-2-20, the Commission recognised that, while globalisation, by its impact on the role of the state, might affect human rights, the promotion and protection of all human rights was the responsibility of the state. See the preliminary report by J. Oloka-Onyango and Deepika Udagama, under the title "The realisation of economic, social and cultural rights: Globalisation and its impact on the full enjoyment of human rights (UN document E/CN.4/Sub.2/2000/13) and their final report under the title "Economic, social and cultural rights, globalization and its impact on the full enjoyment of human rights" (UN document E/CN.4/Sub.2/2003/14).

[201] UN document A/52/1.

UN, conscious of the huge task ahead, has concentrated its efforts on the goal of achieving universal ratification of its core treaties.[202] The Covenants are now well accepted: the ICESCR has 151 state parties; the ICCPR 154 and the Optional Protocol 104. In addition, the Genocide Convention has 136 state parties but by far the most ratified UN human rights' treaty is the Convention on the Rights of the Child, with 192 parties.[203]

[202] Indeed, it was recommended that in order to achieve universal ratification of the core treaties, amongst other measures, there was the need to hold consultations with international agencies to explore their potential involvement in a ratification campaign; to appoint special advisors on ratification and reporting; to streamline the reporting process for states with small populations; to pay attention to other substantial categories of non-parties; and to establish a public information budget to disseminate information about the treaty bodies in more popular formats and media. See paragraphs 32-35 of the Final Report by independent expert Philip Alston in 1997 under the title, "Effective functioning of bodies established pursuant to United Nations human rights instruments, final report on enhancing the long-term effectiveness of the United Nations human rights treaty system", (UN document E/CN.4/1997/74). See also the 2003 working paper by Emmanuel Decaux entitled "Issues and modalities for the effective universality of international human rights treaties" (UN document E/CN.4/Sub.2/2003/37).

[203] This is the status of ratifications at the Office of the High Commissioner on Human Rights as of 24th November 2004. The ratifications of the ICESCR are at http://www.ohchr.org/english/countries/ratification/3.htm (last access 15th February 2005), of the ICCPR at http://www.ohchr.org/english/countries/ratification/4.htm (last access 15th February 2005), of the Optional Protocol at http://www.ohchr.org/english/countries/ratification/5.htm (last access 15th February 2005), of the Genocide Convention at http://www.ohchr.org/english/countries/ratification/1.htm (last access 15th February 2005), of the Convention on the Rights of the Child at http://www.ohchr.org/english/countries/ratification/11.htm (last access 15th February 2005).

CHAPTER V

INTERNATIONAL RELATIONS' THEORY AND HUMAN RIGHTS

"In view of this, the building of a moral order, were it to rest on a Western foundation, might more profitably refer for inspiration to the visions of world society contained in its tradition, rather than to its classical account of international relations. But the classical account remains a description of an order achieved, not awaiting construction."[1]

The accommodation that is taking place between state sovereignty and human rights has also made its impact felt in international relations' theory. International relations' theory encompasses many ways of explaining and understanding what goes on in international politics. Although we consider that there is no context-free knowledge, theories provide intellectual order to the subject matter of international relations and they help us to conceptualise and contextualise both past and contemporary events. There have been several ways of looking at the role of theory in international relations, as well as different levels of analysis.[2] In our view, international relations is characterised by having systemic, societal and communitarian elements that co-exist and compete with each other. This is particularly the case of human rights, where we find different (and conflicting) discourses within the three traditions that we have identified in the first chapter.

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[1] R. J. Vincent, "Western conceptions of a universal moral order", in *British Journal of International Studies*, Vol. 4, April/1978, pp. 20-46, at p. 46.

[2] See Steve Smith, "The self-image of a discipline: a genealogy of international relations theory", in Ken Booth and Steve Smith (eds.), *International Relations Theory Today*, Polity Press, Cambridge and Oxford, 1996 (1st Ed. 1995), pp. 1-37, at pp. 26-27 and Martin Hollis and Steve Smith, *Explaining and Understanding International Relations*, Oxford University Press, Oxford,1991. Here we find the distinction between theories that seek to offer explanatory accounts of international politics and those which see theory as constitutive of that reality. For the levels of analysis in international relations see Kenneth N. Waltz, *Man, the State, and War, A Theoretical Analysis*, Columbia University Press, New York, 1959 (1st Ed. 1954); J. David Singer, "The level-of-analysis problem in international relations", in Klaus Knorr and Sidney Verba (eds.), *The International System-Theoretical Essays*, Greenwood Press, 1961, pp. 77-92; and Andrew Moravcsik, "Introduction" and Robert D. Putnam "Appendix, diplomacy and domestic politics, the logic of two-level games", in Peter Evans, Harold Jacobson and Robert Putnam (eds.), *Double-Edged Diplomacy: International Bargaining and Domestic Politics*, University of California Press, Berkeley and London, 1993, pp. 3-42 and 431-468.

In a general overview, we find that until recently human rights have been given a rather marginal role. This is due to the dominance of the first tradition, also known as Realism or power politics, with its 'timeless wisdom' on the perennial questions of power, state sovereignty and national interest.[3] It has undergone several nuances with its appealing subtlety and cunning reason of the 18th century *raison d'état* or the blood and iron of the 19th century *realpolitik*.[4] It was reinforced after the debacle of the League of Nations' project with what is known as political realism and, in the 1970s, with structural or neo-realism. Although far from being a homogenous tradition since it contains several realisms, its core elements are discernable[5] and, in fact, "political realism is deeply embedded in western thought."[6] Realism is very persuasive, as it aims to analyse what the world is and not what it ought to be. In other words, it avoids the dangers of prescription and stays on safer ground, by appealing to our common sense, by describing reality, solving problems and understanding the recurrent patterns of international politics, giving it a universal and ahistorical quality. Its timeless wisdom reveals that international relations are an arena resulting from power competition, where conflict is natural and co-operation the exception; something which is the result of human nature and its lust for power as history, recurring wars and conflicts can prove.[7] Since there is no central authority able to regulate relations between states and no compulsory jurisdiction that enables order to be maintained, states which are rational and unitary actors, look for survival and preservation of the self in the

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[3] See Scott Burchill, "Realism and neo-realism", in Scott Burchill and Andrew Linklater *et al*, *Theories of International Relations*, Macmillan Press, Basingstoke and London, 1996, pp. 67-92 and Timothy Dunne, "Realism", in John Baylis and Steve Smith (eds.), *The Globalization of World Politics, An Introduction to International Relations,* Oxford University Press, Oxford, 1997, pp. 109-124.

[4] John Vincent, "Realpolitik", in James Mayall (ed.), *The Community of States, a Study in International Political Theory*, George Allen and Unwin, London, 1982, pp. 73-84.

[5] For the evolution of traditions of "realisms" and particularly political realism see Michael J. Smith, *Realist Thought from Weber to Kissinger*, Louisiana State University Press, Baton Rouge and London, 1986, esp. chapters on Reinhold Niebuhr, Hans Morgenthau, George Kennan, and Henry Kissinger. See also Henry Kissinger, *Diplomacy*, Simon and Schuster, New York, 1994 and E. H. Carr, *The Twenty Years' crisis: 1919-1939, An introduction to the Study of International Relations,* Macmillan Press, London, 1981(1st ed. 1939) and Kenneth N. Waltz, op. cit. See also Justin Rosenberg who considers E. H. Carr a descriptive realist, Hans Morgenthau a axiomatic realist and Kenneth Waltz a theoretical realist, "What's the matter with realism?", in *Review of International Studies*, Vol. 16, 1990, pp. 285-303.

[6] Robert O. Keohane, "Realism, Neorealism and the study of world politics", in Robert O. Keohane (ed.), *Neorealism and Its Critics*, Columbia University Press, New York, 1986, pp. 1-26, at p. 4.

[7] For a very powerful critique of the Machiavellian description of international relations as a state of nature see Charles R. Beitz, *Political Theory and International Relations*, Princeton University Press, Princeton, 1999 (1st Ed. 1979), esp. Part I, pp. 11-66.

anarchic world. The two tenets that "govern" international relations are sovereignty and non-intervention. The behaviour of states can be understood rationally as the pursuit of power defined as national interest; rationality presupposes that states have consistent, ordered preferences and that they calculate the costs and benefits of all alternatives in order to maximise their utility. The only thing that minimises the natural drive for pursuit of national interest of states and adjusts diverging interests is the balance of power.

Although there are different perspectives, all realisms display a sceptical view about the role of morality in international relations.[8] The latter should be seen with prudence, since there is no consensus on what constitutes international morality. This follows from the structural feature that there is no central authority in the anarchic world. States are guided in their foreign policy by their national interest, whose primary goals are military strength, integrity of their political life and the well-being of their people. For realists, "these needs have no moral quality"[9] although we could argue that to self-preserve the national community is, in fact, a normative stance. Another reason for not including moral judgments in foreign policy is that different cultures have radically different conceptions of morality and, therefore, it is arrogant to presume that one's own morality is the same as other countries'.[10] Moral judgments are also dangerous as history can corroborate as moralist foreign policies have led to disastrous consequences in international relations such as those following 1919. Normative considerations do not override pragmatic considerations in foreign policy and in this respect, human rights as well as humanitarian concerns are not goals of foreign policy. When they do become a goal of foreign policy, it is because it is in the national interest to do so. States pay lip service to international rules and, despite recognising that they have to justify their actions in terms of rules, this recognition is not equated with a normative commitment to the rules in question. At best, one has to hope for a coincidence between national interest and human rights and "it is natural that the avoidance of

[8] See Robert McElroy, *Morality and American Foreign Policy,* Princeton University Press, 1992 and Marshall Cohen, "Moral scepticism and international relations", in Charles R. Beitz, Marshall Cohen, Thomas Scanlon and A. John Simmons (eds.), *International Ethics*, Philosophy and Public Affairs Reader, Princeton University Press, Princeton, 1990 (1st Ed. 1985), pp. 3-50.
[9] George F. Kennan, "Morality and foreign policy", in *Foreign Affairs*, Vol. 64, nº 2, Winter 1985/1986, pp. 205-218, at p. 206.
[10] *Ibidem*, p. 208.

the worst should often be a more practical undertaking than the achievement of the best (...)."[11] In other words, realists prescribe courses of action but deny normative intent.[12]

In the wake of the challenge posed by interdependency theory and a neglect of the role that economic forces play in international relations, as well as the relative American decline in the 1970s, neo-realism has parted ways with the idea that politics are guided by objective laws which have their roots in the inherent pessimism of human nature. This turn was made by Kenneth N. Waltz and included in his wider framework of establishing a theory of international politics that, unlike others, was centred on the notion that "theory isolates one realm from all others in order to deal with it intellectually. To isolate a realm is a precondition to developing a theory that will explain what goes on within it."[13] In doing so, Waltz aimed at establishing a theory that was not reductionist and not based on a "second image" approach, *i. e.*, one that explains the global system by examining the interaction of its units, whether states and their domestic conditions or individuals.[14] International relations' theory became 'scientific.' A system is composed of a structure and of interacting units, in that the structure is the system-wide component that makes it possible to think of the system as a whole.[15] Waltz establishes that the structural conditions which are part of the international system impose themselves on all units and, therefore, determine the outcomes of the interactions between states. Units' attributes are abstracted, which results in a purely positional picture of society, a general description of the ordered overall arrangement of a society written in terms of the placement of the units rather than in terms of their qualities.[16] This theory has three important elements: the ordering principle of the system, the character of the units in the system, and the distribution of the capabilities of the units in the system. As for the first, it is anarchy, the second reveals that all units are identical in their functions because

[11] George F. Kennan considered that: "it must also be understood that in world affairs, as in personal life, example exerts a greater power than precept", in *ibidem*, pp. 212-216.
[12] Chris Brown, *International Relations Theory, New Normative Approaches*, Columbia University Press, New York and Oxford, 1992, p. 97.
[13] Kenneth N. Waltz, *Theory of International Politics*, Addison-Wesley, Reading, MA/Columbia University Press, New York, 1979, p. 8.
[14] *Ibidem*, p. 18.
[15] *Ibidem*, p. 79.
[16] *Ibidem*, p. 99.

they all seek survival, and the third is characterised by inequality. All states in the international system are made functionally similar by the constraints of the structure and the anarchic realm imposes a discipline on states that they are all required to pursue security before they can perform any other functions. However, states differ vastly in their capabilities and although these are attributes of units, their distribution is not. In fact, it is a system-wide concept. There is always an unequal and constantly shifting distribution of power across the international system as its unitary actors seek, at least, minimum self-preservation and, at most, a drive for universal domination.[17] International politics is the realm of power, struggle and accommodation.[18]

Waltz's systemic theory raised the level of theoretical debate and provoked a great number of criticisms that pierced through what has been very aptly described as the "interpretative straitjacket" of the Cold War/ American assumptions and dominance of international relations' theory.[19] His three-level conception of systemic political structure (organising principles, functional differentiation of units and distribution of power) has been a landmark from which to improve or reject in terms of international relations' theory. The most controversial element of his theory is the closure of the second layer (functional differentiation of units) as a source of structural change in international systems. It has been pointed out that this has left out change induced by the units themselves in world politics. This is particularly evident in the impossibility to account for the transition from the medieval to the modern period, in which the latter is distinguished from the former "by the principles on the basis of which the constituent units are separated from one another."[20] The transition from feudalism to state sovereignty cannot be fully accounted for unless we take into consideration the unit-level processes of transformation. This is especially acute when we discuss revolutions and their impact on the units and their internal

[17] *Ibidem*, pp. 88-101.
[18] *Ibidem*, p. 113.
[19] See Jim George, *Discourses of Global Politics: A Critical (Re) Introduction to International Relations*, Lynne Rienner Publishers, Boulder, Colorado, 1994, p. 86.
[20] See John Gerard Ruggie, "Continuity and transformation in the world polity: toward a neorealist synthesis", in Robert O. Keohane (ed.), op. cit., pp. 131-157, at p. 142.

characteristics and on the structure.[21] More recently, looking at the end of the Cold War without understanding the impact of the second image in the Soviet collapse is to be left with a partial picture of such a systemic change.

The difficulty of neo-realism in accounting for change can also be extended beyond functional and into structural differentiation.[22] The neo-realist distinction between anarchic and hierarchic systems is based on the functionally undifferentiated nature of the units of the former and the differentiated function of the latter. Neorealism depicts world history in terms of an anarchic international system in which there has been no structural change and although allowing for news types of units, it assumes that at any given point in time all of the major units will be of the same type because the imperative of self-help (faced with the same tasks to perform) within the balance of power logic leads, over time, to units becoming structurally alike. The pressure of this homogeneity makes sense when we are dealing with the system of sovereign states, in which the units did become like-units (all sovereign states). Nevertheless, in terms of world history this description does not hold water and we find that anarchy has been compatible with differentiation of the major units. International systems have been composed of a broader range of political units and differentiated major units can durably co-exist within anarchic systems.[23] In fact, contrary to the dichotomy of anarchy-hierarchy, world history can be understood in terms of a pendulum swing between two theoretical absolutes, namely empires (centralised and hierarchic) and anarchies (decentralised).[24] Within these two poles stand several types of relations namely suzerainty, dominion and hegemony and in fact, "anarchy has never been a persistent structure in world history."[25]

Another powerful critique considered that the theoretical move away from political realism to a positivist commitment to technical rationality with a scientific

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[21] See Fred Halliday, *Revolution and World Politics, The Rise and Fall of the Sixth Great Power*, MacMillan, Basingstoke and London, 1999, especially pp. 293-322.

[22] Barry Buzan and Richard Little, "Reconceptualizing anarchy: structural realism meets world history", in *European Journal of International Relations*, Vol. 2, nº 4, 1996, pp. 403-438.

[23] *Idem, ibidem, e. g.*, the Classical Greek city-states where the system can be represented as like-units in terms of autonomy within anarchy. But these political units did not constitute a self-contained international system since they dealt with barbarian tribes to the North, Carthage and later Rome to the West, Egypt to the South and the Persian Empire to the East.

[24] Adam Watson, *The Evolution of International Society, A Comparative Historical Analysis*, Routledge, London and New York, 1992, pp. 13-17.

[25] Barry Buzan and Richard Little, op. cit., p. 417.

aim led to the narrowness of knowledge as value-neutral; in addition, by isolating the political sphere and limiting themselves to the political-military relations, neo-realists have neglected economic processes (most notably the emergence of capitalism) and relations.[26] Attention was paid to the need to include explanatory factors, such as the interdependent world economy processes, transnational forces, technological innovations and international political institutions.[27] Neorealism is also unable to account for change, since it considers contemporary institutions and power relations as permanent and, in fact, it has become part of the reality it aimed at objectively describing, a conservative ideology aimed at maintaining the *status quo*. It is a "problem-solving theory" rather than critically inquiring into how that order came about and what forces are at work to change it. [28] For some, it has been ideologically at the 'service' of American foreign policy and "realism is the conservative ideology of the exercise of state power."[29] Notwithstanding, the association between a realist theoretical position and the political legitimisation of existing foreign policy is not so forthright. In fact, realists and neo-realists have been quite critical of American foreign policy and especially its sentimental moralism which they consider does not serve the American national interest. The best example is the public opposition of Reinhold Niebuhr, Hans Morgenthau, George Kennan and Kenneth Waltz to the Vietnam War. [30]

In our view, the focus on international relations as a state of nature also fails to capture the increasingly complex pattern of social interaction, characteristic of international relations. It leaves out norms, values, rules and institutions and what

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[26] See Richard K. Ashley, "The poverty of Neorealism", in Robert O. Keohane, op. cit., pp. 255-300. Jim George also considers that in the Cold War context it was the *discursively produced reality* that the policy makers and intellectuals responded to and not some external world "out there" that imposed its real knowledge upon them, op. cit., p. 86.

[27] Robert O. Keohane's critique has the goal of improving the structural framework and in which all these factors are important in order to better understand international relations as well as ways in which international systems may facilitate or inhibit the flow of information, thereby affecting the behaviour of actors and their ability to co-operate with one another, "Theory of world politics: structural realism and beyond", in Robert O. Keohane (ed.), op. cit., pp. 158-203.

[28] This was a critique made by Robert W. Cox who presented the alternative of "critical theory" based on analysing the interplay of ideas, material capabilities, institutions and social forces through the lenses of historical materialism and class struggle, in "Social forces, states and world orders: beyond international relations theory", in Robert O. Keohane (ed.), op. cit., pp. 204-254.

[29] Justin Rosenberg, op cit., p. 296.

[30] This was the case of Kenneth N. Waltz, "Interview with Ken Waltz", by Fred Halliday and Justin Rosenberg, in *Review of International Studies*, Vol. 24, 1998, pp. 371-386, at p. 373 (The interview was conducted in 1993) and Reinhold Niebuhr, Hans Morgenthau and George Kennan, see Michael J. Smith, op. cit., p. 128, pp. 157-158 and pp. 185-188.

is more, realism ignores how far the need to justify in terms of rules constrains state action or, to put it more simply, how states are constrained if they cannot justify certain actions in terms of a plausible legitimating reason.[31] Furthermore, the scientific objectivity/value neutrality meant that consideration of normative issues in international relations was a turn not taken; and for some authors, the dominance of realism in international relations' theory and its state-centrism has led to such a marginalisation of areas like human rights and made some room for the idea that the state is the main hurdle for the fulfilment of individual human rights.[32]

Additionally, realism ignores how states are socialised and how they define their national interests, in that these are shaped by the rules prevailing in the international society. States worry about ostracism in international society if only "(...) because their standing in the community facilitates their ability to achieve their other goals as, for that matter, does the maintenance of rules that promote collective ends."[33] The Cold War was not just a military-political confrontation but rather involved all other areas of society without which it is not possible to understand it.[34] Furthermore, the very concept of power is open to discussion, since power can be seen as not only based on relations of domination, as in the realist perspective, but also as legitimate power because it is based on shared norms.[35] In addition, power politics does not fully explain, for instance, the results of the American foreign policy towards Argentina and Guatemala in the second half of the 1970s, regarding the need to respect human rights. Contrary to what we would expect, it was the smaller and more dependant state on the US, namely Guatemala, which withstood American pressure better.[36]

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[31] For the argument for the "shaming power of humanitarian norms" which constrains states' actions, see Nicholas J. Wheeler, *Saving Strangers, Humanitarian Intervention in International Society*, Oxford University Press, Oxford, 2000, pp. 287-290.

[32] See Mervyn Frost, "A turn not taken: ethics in international relations at the millennium", in Tim Dunne, Michael Cox and Ken Booth (eds.), *Special Issue: The 80 Years' Crisis, 1919-1999/Review of International Studies*, Vol. 24, December/1998, pp. 119-132 and *Constituting Human Rights, Global Civil Society and the Society of Democratic States*, Routledge, London and New York, 2002, pp. 17-39.

[33] Duncan Snidal, "The politics of scope: endogenous actors, heterogeneity and institutions", in *Journal of Theoretical Politics*, Vol. 6, nº 4, 1994, pp. 449-472, at p. 464.

[34] Justin Rosenberg, op. cit., p. 300.

[35] Nicholas J. Wheeler, op. cit., p. 290.

[36] Lisa L. Martin and Kathryn Sikkink, "U. S. policy and human rights in Argentina and Guatemala, 1973-1980", in Peter Evans, Harold Jacobson and Robert Putnam (eds.), op. cit., pp. 330-362.

This said, we should not disregard realism since it is a good starting point for explaining the outcomes of conflicts. It focuses on the crucial questions of interest and power, despite the fact that its "ambitious attempt of structural realist theory to deduce national interests from system structure via the rationality postulate has been unsuccessful."[37] Its emphasis on the attitude regarding the human condition as founded on pessimism regarding moral progress and human possibilities, the primacy in all political life of power and security in human motivation, as well as its focus on the essence of social reality as the group which is predominantly represented in our time by the state,[38] should not be rejected altogether, for they are part of international relations. The state, as well as the adequacy of the inter-state system, has been proven to withstand both transnational as well as sub-national challenges. Realism offers a persuasive account of why so many foreign policies are alike, despite their diverse internal natures. In sum, realism is the language of power and interests rather than of ideals and norms.

Revolutionists, and especially Liberals, have the opposite starting point in terms of building an international relations' theory, namely the idea of human progress centred on the goodness of human nature. It is a tradition in which "conviction usually precedes the evidence."[39] It encompasses many diverse thinkers and some of quite contrasting backgrounds and like any international relations' theory, "(...) Liberalism has always been far from coherent or unified."[40] We can discern several liberalisms such as liberal internationalism, idealism and

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[37] Robert O. Keohane, "Theory of world politics: structural realism and beyond", in Robert O. Keohane (ed.), op. cit., p. 190.

[38] Robert G. Gilpin, "The richness of the tradition of political realism", in Robert O. Keohane (ed.), op. cit., pp. 304-305 and on the rebuttal of the assumption that realists take the state as immutable see Kenneth N. Waltz, "Reflections on *Theory of International Politics*", in Robert O. Keohane (ed.), op. cit., pp. 339-340.

[39] Martin Wight, "Why is there no international theory?", in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations, Essays in the Theory of International Politics*, George Allen and Unwin, London, 1966, pp. 17-34, at p. 27.

[40] Stanley Hoffmann, *Janus and Minerva: Essays in the Theory and Practice of International Politics*, Westview Press, Boulder, 1987, p. 395. We also find commercial (linking peace with trade), republican (linking democracy and peace) and sociological liberalisms (linking transnational interactions with international integration), in Robert O. Keohane, "Institutionalist theory and the realist challenge after the Cold War", David A. Baldwin (ed.), *Neorealism and Neoliberalism, The Contemporary Debate*, Columbia University Press, New York, 1993, pp. 269-300, at p. 271. Joseph M. Grieco names them respectively trade liberalism, democratic structural liberalism and liberal transactions approach, "Anarchy and the limits of cooperation: a realist critique of the newest liberal institutionalism", in David A. Baldwin (ed.), op. cit., pp. 116-140, at 135-136.

liberal institutionalism and all of them share the elements of self-restraint, moderation, compromise and search for peace. Liberalism's central concern is the liberty of the individual, where the state is only the servant to society since it protects individual freedom from restraints and constraints imposed by other individuals.[41] Despite the crash of the interwars years' project, with its belief in collective security and harmony of interests,[42] Liberalism has remained a very resilient tradition in international relations, as can be seen by the institutionalists' work which focuses on the role of international institutions carrying out a number of functions that the state could not encompass. Liberalism has been adapted to "modern reality", as can be seen in the approaches of neo-liberal internationalism, neo-idealism and neo-liberal institutionalism.

The latter accepts Waltz's concept of the state as a unitary actor, along with the centrality of anarchy, in international politics but considers that once co-operation is achieved, institutions could help to sustain it.[43] In this sense, and like neo-realists, they do not problematise interests and identities of states but consider that anarchy places fewer constraints on state behaviour than neo-realists, emphasising absolute rather than relative state gains, as well as the fact that international institutions play a role in changing conceptions of self-interest.[44] Although states are the central actors, they are in declining ability to control either transnational actors or problems.

The neo-idealist approach focuses on the emergence of a global civil society, the "global village" and the need to make states and international institutions more democratic, leading to the more radical view of a genuinely democratic and accountable global parliament. This institution is the best answer to ensure respect for human rights as well as facing up to the challenges that are posed by environmental degradation. More recently, we find an appeal for a kind of practical utopia, namely "process utopias" which are benign and reformist steps

[41] Stanley Hoffman, op. cit., pp. 395-396. See as well Timothy Dunne for a good overview of liberalisms in international relations, "Liberalism", in John Baylis and Steve Smith (eds.), op. cit., pp. 147-163.
[42] Robert McElroy considers that "the politics of nations was for the internationalists a malleable thing that was capable of being patterned, albeit imperfectly, according to an effective moral order", op. cit., pp. 5-13.
[43] For the "neo-neo" debate between neo-liberalism and neo-realism see David A. Baldwin (ed.), op. cit.
[44] See Robert O. Keohane, op. cit., pp. 269-300. The similarity of both neo-realism and neo-liberalism is a good example of the difficulties in making a clear cut "labelling" since it has been argued that the institutionalist reasoning borrows elements as much from liberalism as realism. Therefore, it is misleading to include it as a liberal theory and instead should be called "rational institutionalist theory", at pp. 271-273.

"calculated to make the world a better world somewhat more probable for future" which include reducing the risk of war, improving human rights and spreading economic justice.[45] This does not involve a world government but rather that power should be diffused above and below state level. The latter should be handed to local communities for the full satisfaction of human needs and the former should be used within regional or international organisations to deal with transnational issues such as the economy and environment. States would wither but not disappear.[46]

As can be seen, there are many liberalisms which pursue their belief in progress towards the perfectibility of the human condition by very different means. The main characteristic, with the exception of neo-liberal institutionalism is its 'inside-out' approach to international relations in which "the exogenous behaviour of states can be explained by examining their endogenous political and economic dispositions", quite the opposite of the 'outside-in' approach which is at the centre of the realist approach.[47] Its characteristic identity and essence is the prospect that "we can affect, if not control, our fate, and thus encourages both better theory and improved practice."[48] The mixture of both normative (what the world ought to be) and explanatory (what the world is) remains its most powerful tool. This blend between normative and explanatory is seen in the idea that liberal democracies do not go to war with each other. The revival of the Kantian liberal internationalism has posed a theoretical challenge to the concept that units can do little to change the structure of the system and units' internal attributes of actors are given by assumption rather than treated as variables.[49]

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[45] Ken Booth, "Security in Anarchy: utopian realism in theory and practice", in *International Affairs*, Vol. 67, nº 3, 1991, pp. 527-545, at pp. 536-537.
[46] *Ibidem,* p. 541.
[47] Scott Burchill, "Liberal Internationalism", in Scott Burchill and Andrew Linklater *et al*, op. cit., pp. 28-66, at p. 29.
[48] Robert O. Keohane, "International liberalism reconsidered", in John Dunn (ed.), *The Economic Limits to Modern Politics*, Cambridge University Press, Cambridge, 1990, pp. 165-194, at p. 194. For a powerful rebuttal of the pursuit of a positivist approach to liberalism following the footsteps of neo-realism and institutionalism see Christian Reus-Smit, "The strange death of liberal international theory", in *European Journal of International Law*, Vol. 12, 2001, pp. 573-593.
[49] Kenneth N. Waltz considers the democratic don't fight theme as suggestive but unsound, in "Interview with Ken Waltz", by Fred Halliday and Justin Rosenberg, in *Review of International Studies*, Vol. 24, 1998, pp. 378 and 381.

For Immanuel Kant, peace was a possible goal that had to be constructed upon three main pillars, his definitive articles of the 1795 project for a perpetual peace.[50] Firstly, there was the need for a republican civil constitution with a representative government and separation of powers. Whenever there was a need to go to war, consent of citizens was needed. Citizens would not want to go to war because they would pay for it, both in money (having to bear the costs of reparation and expurgate the burden of debt) and with their lives. Secondly, there was the need for a "league of peace (*foedus pacificum*)" in the international level, with mutual respect between republics and agreement on the principles of government. This federation would include all countries leading to a perpetual peace. In order for this federation to come to life, one people should form a republic and become an anchor for the others.[51] The *foedus pacificum* is neither a *pactum pacis* (a simple peace treaty that only ends one war and not all) nor a *civitas gentium* (a world state).[52] In fact, Kant was very resistant to the idea of creating a world state because he considered that it was potentially tyrannical. Thirdly, Immanuel Kant emphasized the need for a cosmopolitan law limited by universal hospitality and in which the spirit of commerce would work as an incentive to peace provided by trade between free economies.[53] In order to better illustrate his idea, Kant gave the example of China and Japan, where the "right to visit" had been forfeited by foreigners and that, therefore, the restriction policies towards them were wise.

Regarding war and peace, Kant considered that a peace treaty should not reserve issues for a future war which would not make it a real treaty but a mere truce.[54] He was confident that "finally, after much devastation, upheaval, and even

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[50] Immanuel Kant, "To perpetual peace: a philosophical sketch", in Immanuel Kant, *Perpetual Peace and Other Essays on Politics, History, and Morals*, Translated by Ted Humphrey, Hackett Publishing Company, Indianapolis and Cambridge, 1983, pp. 107-143. It is composed of six preliminary articles (section I), three definitive articles (section II), first supplement on the guarantee of perpetual peace, second supplement-secret article for perpetual peace and appendix I ("On the disagreement between morals and politics in relation to perpetual peace") and II ("On the agreement between politics and morality under the transcendental concept of public right").

[51] *Ibidem*, p. 117 in which "(...) a powerful and enlightened people should form a republic and (...), it will provide a focal point for a federal association among other nations (...)."

[52] *Ibidem*, second definitive article, pp. 115-118.

[53] *Ibidem*, third definitive article and the first supplement on the guarantee of perpetual peace, in which "the spirit of trade cannot coexist with war, and sooner or later this spirit dominates every people", pp. 118-125, at p. 125.

[54] *Ibidem*, first preliminary article, p. 107. In our opinion, the best example of this idea is the Peace treaty

complete exhaustion of their inner powers, they are driven to take the step that reason could have suggested (...)."[55] In fact, the process towards peace would be very gradual stressing the importance of evolution and the progress of knowledge through generations.[56] Moreover, he emphasised that the lessons of history would serve to educate the nations of the importance of peace.[57] Likewise, there was the need for standing armies to be gradually abolished and the laws of war to be fully respected.[58] For Kant, the abolishment of war was vital for the existence of a perfect civil constitution. Only when a state is at peace can it secure every citizen's rights and freedoms, because when the survival of the community is at stake, it prevails over the protection of individual rights.[59] So, in this sense, peace is an end but, at the same time, also a means to achieve Kant's civil constitution. Regarding the way to expand republican constitutionalism, Kant was very sceptic and, in fact, stressed non-intervention in the constitution and government of another state.[60] This emphasis on respect and tolerance was described by Kenneth Waltz as optimistic non-interventionism.[61]

The ideas that people should be treated as ends and not means and states, in contrast, should be considered as means to ends, along with the emphasis on respect for human rights and rule of law were revived by Michael Doyle in his defence that democracies do not go to war with each other and benefit from a "separate peace". This neo-liberal internationalist approach is centred on the

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with Germany in 1919.

[55] The "Idea for a universal history with a cosmopolitan intent" was written in 1784 and it brings together nine theses, in Immanuel Kant, op. cit., pp. 29-39; this idea is part of the seventh thesis at p. 34.

[56] *Ibidem*, second thesis at p. 30.

[57] Although Kant is considered to be one of the fathers of liberalism it is very interesting to see the similarities between the ideas of Thomas Hobbes regarding man's state of nature and what Kant describes as the "(...) the lawless state of savagery (...)" in his seventh thesis of the "Idea for a universal history with a cosmopolitan intent" (at p. 34) and in the second section of "To perpetual peace, a philosophical sketch", "the state of peace among men living in close proximity is not the natural state; instead the natural state is one of war, which does not just consist in open hostilities, but also in the constant and enduring threat of them" (at p. 111). In what they do diverge is that for Kant there is a way to go beyond the state of nature, through a federation of peoples ("The state of peace must therefore be *established* (...)", whilst Hobbes believes that international relations will remain in its savage state of nature.

[58] See the third and sixth preliminary articles of "To perpetual peace, a philosophical sketch", in Immanuel Kant, op. cit, pp. 108-110.

[59] See the seventh thesis of his "Idea for a universal history with a cosmopolitan intent", in Immanuel Kant, op. cit., pp. 34-36.

[60] See the fifth preliminary article of "To perpetual peace, a philosophical sketch", in Immanuel Kant, op. cit, p. 109.

[61] Kenneth N. Waltz, *Man, the State, and War, A Theoretical Analysis*, Columbia University Press, New York, 1959, p. 103.

concept of democracy rather than the republican constitution that was preferred by Kant,[62] who was pessimistic about the aims and functions of a democracy.[63] For Kant, democracy, in the proper sense of the term, is necessarily despotism because it aims at representing all, something which is chimerical. Therefore, all, who are not quite all, decide, so that the general will contradicts both itself and freedom. In fact, Kant believed that "the smaller the number of persons who exercise the power of a nation (the number of rulers), the more they represent and the closer the political constitution approximates the possibility of republicanism (...)."[64] Additionally, modern times have added limits, namely nuclear weapons to the lengthy process of 'educative wars.'[65]

Michael Doyle focuses on the concept of liberal democracy: liberal because it aims at limiting the coercive powers of government and democratic because it is ruled by a majority who makes and determines the principles by which the rule of law is upheld. There are four criteria essential in a liberal democracy: market and property rights, external sovereignty, judicial individual rights and a republican representative government, with competitive elections and an effective role in public policy. For Doyle, war is avoidable because there is public discussion of foreign policy, accountability of the leaders and the political elites and economic interdependence with the pacifying effects of free trade. Additionally, liberal values and norms, like peaceful resolution of conflicts, also play a role, as do the principle of freedom of the individual, constraints on the government, such as the existence of parliaments, public opinion and constitutional checks and balances. Moreover, transparency and freedom of information (what Kant called "publicity"[66]) are vital to maintain a democratic system healthy.

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[62] For a critique regarding the predominant interpretation of Kant's political writings made by Michael W. Doyle see John MacMillan, "A Kantian protest against the peculiar discourse of inter-liberal state peace", in *Millennium: Journal of International Studies*, Vol. 24, nº 3, 1995, pp. 549-562.

[63] Michael W. Doyle, "Kant, liberal legacies, and foreign affairs", in *Philosophy and Public Affairs*, Vol. 12, nº 3, 1983, pp. 205-235 and "Kant, liberal legacies, and foreign affairs, part II", in *Philosophy and Public Affairs*, Vol. 12, nº 4, 1983, pp. 323-353.

[64] See the first definitive article in "To perpetual peace, a philosophical sketch", Immanuel Kant, op. cit., pp. 113-115.

[65] Michael W. Doyle, "Kant, liberal legacies, and foreign affairs, part II", in *Philosophy and Public Affairs*, Vol. 12, nº 4, 1983, p. 350.

[66] See appendix II of "To perpetual peace, a philosophical sketch", in Immanuel Kant, op. cit., pp. 135-139.

Michael Doyle does not assert that democracies are not capable of violence but that they are more peaceful towards each other.[67] This is not to say that the relations between liberal democracies have always been harmonious, in contrast he gives five examples of situations of great tension between democratic countries. He also argues that these situations did not degenerate into war precisely because they were democracies.[68] This is due to conventions of mutual respect that view war between liberal states to be illegitimate and this shared perception was more powerful than geo-strategic considerations.[69] Moreover, in the end, liberal states end up fighting on the same side, despite the fact that liberal states have been very reluctant to help other liberal regimes throughout history.[70] According to Michael Doyle, there are 53 members of the liberal community, although liberal states have become involved in numerous wars with non-liberal states.[71] The idea that democracies do not go to war with each other has its strongest appeal precisely in the fact that internally, through public resolutions, domestic negotiations, and political bargains, democracies are more peaceful. And it is this domestic analogy that is externalised in the relations with other democracies, if a conflict of interests should emerge.[72] In addition, democratic

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[67] Regarding the evolution of the concept of democracy and its requisites see Robert Dahl, *On Democracy*, Yale University Press, New Haven and London, 1998. For this author, modern representative democracy or rather polyarchal democracy is characterised by six democratic institutions: elected officials, free, fair and frequent elections, freedom of expression, access to alternative sources of information, associational autonomy and inclusive citizenship.

[68] Michael Doyle, "Kant, liberal legacies, and foreign affairs", in *Philosophy and Public Affairs*, Vol. 12, n° 3, 1983, pp. 215-216. Doyle gives five examples that support his theory: the relations between Britain and the US, especially during the American Civil War, the Fashoda crisis between France and Britain, the fact that the British and the French, despite their colonial rivalries, fought together against the Germans in 1914, the role of Italy during the First World War and the fact that in spite of British restrictions on American Trade, the Americans joined Great Britain's war efforts in 1917.

[69] *Cf.* Christopher Layne, "Kant or cant, the myth of democratic peace", in *International Security*, Vol. 19, n° 2, 1994, pp. 5-49. Layne talks about the "near misses" and disagrees with Doyle's explanations of the Trent Affair (between US and Britain) and the Fashoda crisis (between France and Britain). He believes that war was avoided not because the democratic peace theory worked but due to geo-strategic reasons and concerns, namely that one of the democratic countries was more powerful than the other. He gives two other examples: the Ruhr crisis of 1923 between France and Germany and the Venezuela crisis of 1895-1896 between US and Britain.

[70] The lack of solidarity was present in the failure to help the Weimar Republic, the Spanish Civil War, and the initial isolationist position of the US in the First and Second World Wars.

[71] Michael W. Doyle, "Liberalism and international relations", in Ronald Beiner and William James Booth (eds.), *Kant and Political Philosophy, the Contemporary Legacy*, Yale University Press, New Haven and London, 1993, pp. 173-203, at pp. 193-194.

[72] Furthermore, recent studies demonstrate that democracies are less likely to be the targets of military intervention, see Margaret G. Hermann and Charles W. Kegley, Jr, "Ballots, a Barrier against the Use of Bullets and Bombs, Democratization and Military Intervention", in *Journal of Conflict Resolution*, Vol. 40,

countries believe that it is easier to deal with foreign governments that have the same values.

This is not without problems, nevertheless, since it is sometimes difficult to establish how long it takes to become a democratic country (democratic credentials). Likewise, the existence of democratic machinery is not enough to explain the absence of war in intra-democracy relations. In fact, "the crucial element in defining democracy involves the society's codetermination of whether to go to war or not" but this codetermination is very difficult to measure.[73] Moreover, some democratic countries are experiencing a challenge with the high levels of abstention in elections. These reflect a gap between the government and public opinion, and an alienation or indifference of the majority of the population regarding the political process.[74] Additionally, the idea that people will not want to go to war is not always the case,[75] and history is replete with examples of manipulation of public opinion either through propaganda or with nationalist appeals.[76] Moreover, to say that democracies are more peaceful towards each other does not mean the renunciation to force and coercion both from below and with non-liberal democratic countries. In the case of the former, claims for national self-determination, autonomy, and secession have sometimes been met with a very powerful response from the central government. The existence of civil wars gives us food for thought, since they represent the breakdown of the domestic negotiating/bargaining power of democratic countries.[77]

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nº 3, September 1996, pp. 436-459.

[73] Ernst-Otto Czempiel, "Governance and Democratization", in James N. Rosenau and Ernst-Otto Czempiel (eds.), *Governance without Government: Order and Change in World Politics*, Cambridge University Press, Cambridge, 1992, pp. 250-271, at p. 264.

[74] For a good overview of the challenges that the liberal democratic state is facing both from below and above, see David Held and Anthony McGrew, "Globalization and the liberal democratic state", in *Government and Opposition*, Vol. 28, nº 2, 1993, pp. 261-288.

[75] Joseph S Nye, *Understanding International Conflicts, An Introduction to Theory and History*, Longman, New York, 1997 (2nd Ed.), p. 40. The classical examples are the pressure of the American public on the reluctant President McKinley to go to war with Spain in 1898 and the French and British public opinions in 1914.

[76] See E. H. Carr, op. cit., pp. 120-134. Also see Robert McElroy, op. cit., p. 18 and Kenneth N. Waltz who considers that "faith in public opinion or more generally, faith in the uniformly peaceful proclivities of democracies has proved utopian", op. cit., p. 102.

[77] Christopher Layne, op. cit., p. 40. Michael Doyle argues that the US only became fully liberal after the end of the Civil War and until then it was only liberal north of the Mason-Dixon line, in "Kant, liberal legacies, and foreign affairs", in *Philosophy and Public Affairs*, Vol. 12, nº 3, Summer 1983, p. 212.

What is more, leaving the liberal democratic area, Michael Doyle admits the failure of liberalism outside the liberal world.[78] This situation highlights the dilemma of how to expand liberal democracies. For some, the option is to consider lack of liberal democracy as a legitimate reason for intervention in other countries, since the answer lies in the nature of the compact established between ruled and rulers. Here, only democratic states have a right against external intervention because the compact is a legitimate one (it comes from free choice).[79] Others have warned that the road to promoting democratisation abroad maybe counterproductive. Instead of establishing a more peaceful environment, it may increase conflict and the potential for war. It is a very volatile process, and in which "formerly authoritarian states where democratic participation is on the rise are more likely to fight wars than are stable democracies and autocracies"[80] and, in the short run, the strategy of democratisation is not the answer for peace. This is due to the combination of several factors such as the syndrome of weak central authority, unstable domestic coalitions, inflexible interests and short time horizons, competition for popular support, waving the nationalistic flag and prestige strategies.[81]

Other authors, such as John Rawls, consider that the relation between liberal and tolerant societies and non-liberal, well-ordered hierarchical societies is possible when the latter fulfil three requisites: peaceful and not expansionist, legitimate legal system guided by a common conception of justice, and honouring of basic human rights, *i. e.*, guaranteeing minimum rights to means of subsistence

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[78] Michael W. Doyle, "Kant, liberal legacies, and foreign affairs, part II", in *Philosophy and Public Affairs*, Vol. 12, nº 4, Fall 1983, p. 323. Nevertheless he does point out that "(...) global peace should be anticipated, at the earliest, in 2113", in *ibidem*, p. 352.

[79] David Luban, "Just war and human rights" and "The romance of the nation-state", in *International Ethics*, edited by Charles R. Beitz, Marshall Cohen, Thomas Scanlon and A. John Simmons, Philosophy and Public Affairs Reader, Princeton University Press, Princeton, 1990 (1st Ed. 1985), pp. 195-216 and 238-243.

[80] Jack Snyder and Edward D. Mansfield, "Democratization and war", in *Foreign Affairs*, Vol. 74, nº 3, 1995, pp. 79-97. The authors reached this conclusion after a study of international politics between 1811 and 1980. *Cf.* William R. Thompson and Richard Tucker which consider that regime transitions are statistically independent or war, "A tale of two democratic peace critiques", in *Journal of Conflict Resolution*, Vol. 41, nº 3, June 1997, pp. 428-454. Edward D. Mansfield and Jack Snyder counter argued in the same issue maintaining their initial conclusion that democratisation increases the likelihood of war, pp. 457-461. This was also followed by another rebuttal by William R. Thompson and Richard Tucker in pp. 462-477.

[81] See Jack Snyder and Edward D. Mansfield, "Democratization and war", in *Foreign Affairs*, Vol. 74, nº 3, 1995, pp. 79-97, in which the authors give the example of the Falkland/Malvinas Islands where the Military Junta needed a nationalistic victory to divert the pressure of the public opinion that was calling for the return of democracy.

and security (the right to life), to liberty (freedom from slavery, serfdom and forced occupations) and (personal) property, as well as to formal equality as expressed by the rules of natural justice.[82] Here, human rights have three roles: they are a necessary condition of a regime's legitimacy and of the decency of its legal order; by being in place, they are also sufficient to exclude justified and forceful intervention by other peoples, say by economic sanctions, or in grave cases, by military force; they set a limit on pluralism among peoples.[83] When these conditions are met, then admission as a member in good standing of a reasonable society of peoples is possible. Well-ordered hierarchical societies that respect the three conditions set above should not be forced by liberal societies to change their ways.

Other hindrances to the promotion of democratisation abroad are also found in the idea that the democratic peace project may be restricted in time, place and civilisation and, therefore, not exportable.[84] There is the perception from outside the centre of liberal democracies that this attempt to push democratic values is nothing more than domination of the "periphery" using different means. The emphasis on individualism within liberal democracies is criticised at home, as well as abroad, and the equation of liberal democratic expansion with an attempt to maintain a favourable *status quo* is not a novelty.[85] This critique is especially acute when the international economy of market capitalism has not been able to deal with a widening gap between the developed and the developing.[86] In fact, the widening of this gap and the "silent genocide of the poor and malnourished" have made this scenario quite real.[87] For all those who see economic interdependence

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[82] John Rawls, "The law of peoples", in Stephen Shute and Susan Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures*, Basic Books, New York, 1993, pp. 41-82. *Cf.* David Fagelson, "Two concepts of sovereignty: from Westphalia to the law of peoples", in *International Politics, A Journal of Transnational Issues and Global Problems*, Vol. 38, nº 4, December/2001, pp. 499-514.

[83] John Rawls, op. cit., p. 71.

[84] See Raymond Cohen, "Pacific unions: a reappraisal of the theory that "democracies do not go to war with each other", in *Review of International Studies*, Vol. 20, nº 3, 1994, pp. 207-223.

[85] John Gray considers that liberal democracies are a "bankrupt western model" and a "project of modern liberal individualist society-and above all, of US individualist society", in *Enlightenment's Wake: Politics and Culture at the close of the Modern Age*, Routledge, London, 1995, p. 150. As for the link between maintenance of the favourable *status quo* and western values see E. H. Carr, op. cit., p. 74.

[86] *Ibidem*, p. 47 and p. 57. E. H. Carr believed that "laissez-faire meant an open field and the prize to the strongest" and added that "state control, whether in the form of protective legislation or of protective tariffs, is the weapon of self-defence invoked by the economically weak."

[87] Tim Dunne, Michael Cox and Ken Booth, "Introduction", in Tim Dunne, Michael Cox and Ken Booth

as the way to promote peace and harmony of interests, there are others who see it as "(...) both an opportunity and a threat."[88]

Notwithstanding, the idea that liberal democratic societies do not go to war with each other is, in our view, successful in establishing that the attributes of units are, in fact, a variable that should be studied and not a unitary assumption. It does help us to better explain why it is so unthinkable to imagine a war between Canada and the US or between France and Germany. The "'domestic' and 'international' are continuously exploding and collapsing into each other"[89] and, therefore, they are both needed to understand international relations. Of a more problematic nature is to take this liberal-democratic project as the blueprint for a normative view of the international which claims to be not an ideology, but *the* ideology.[90] The greatest challenge to the liberal project is of reinvention as a non-universalising and non-western political idea preserving, at the same time, its traditional liberal value of human solidarity without undermining cultural diversity.[91]

The Grotian tradition asserts the existence of an anarchic society and agreements on certain rules of conduct that persist over time as well as a growing body of international law, institutions and practices that provide the basis of international order.[92] Within this approach, we find two perspectives: pluralist and solidarist.[93] The latter is best defined by the solidarity of states comprising

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(eds.), op. cit., pp. v-xii. See as well Susan Strange, "The Westfailure system", in *Review of International Studies*, Vol. 25, 1999, pp. 345-354.

[88] Stanley Hoffmann, op. cit., p. 407.

[89] Justin Rosenberg, op. cit., p. 301. See as well the further development of this argument in *The Empire of Civil Society-A Critique of the Realist Theory of International Relations*, Verso, New York and London, 1994.

[90] For a powerful critique especially concerning liberalism in Africa which remains a project (coercive in nature) to be realised, see Tom Young, "A project to be realised: global Liberalism and contemporary Africa", in *Millennium: Journal of International Studies*, Vol. 24, nº 3, 1995, pp. 527-546.

[91] Edmund Burke captured very well the powerful appeal of the discourse of human rights: "They have 'the rights of men.' Against these there can be no prescription; against these no agreement is binding; these admit no temperament, and no compromise; anything withheld from their full demand is so much of fraud and injustice", in *Reflections on the Revolution in France including Letter to a Member of the National Assembly of 1791*, Edition with an Introduction and notes by L. G. Mitchell, Collection of Oxford World's Classics, Oxford University Press, Oxford, 1999 (the original is from 1790 and this is the ninth edition of 1791), p. 58.

[92] Benedict Kingsbury and Adam Roberts, "Introduction: Grotian thought in international relations", in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), *Hugo Grotius and International Relations*, Clarendon Press, Oxford, 1990, pp. 1-64.

[93] Martin Wight divided Grotian into realist and idealist wings and suggested that Machiavellian and Kantian patterns could also be sub-divided, in *International Theory, The Three Traditions*, Edited by Gabriele Wight and Brian Porter, Leicester University Press and The Royal Institute of International Affairs, London, 1996 (1st Ed. 1991), pp. 158-163.

international society with respect to the enforcement of the law; the former considers that states are only capable of agreeing on certain minimum purposes which fall short of that of the enforcement of the law.[94] Regarding the role of war in international society these two perspectives diverge. The solidarist considers both *jus ad bellum* and *jus in bello* to be essential for conducting war in international relations. It is part of the substantive doctrine of the just war established in the Middle Ages and systematised by Hugo Grotius.[95] In contrast, the pluralist does not make a distinction between just and unjust causes for war, focusing rather on lawful conduct in war. For the solidarist, there are three just causes for going to war: defence, recovery of property and infliction of punishment. The idea of a just cause raises many issues as to the relationship between the belligerents and the remaining members, namely concerning neutrality and alliances. When a war breaks out in which one party has a just cause, all other states have the right to join (but not a duty) in the struggle, but should they chose to be neutral, solidarists speak of a qualified discrimination in favour of the just party. This understanding of neutrality is rejected by the pluralist to whom neutrality means impartiality. As for alliances, the solidarist considers that a just cause prevails over the obligations that one party might have under an alliance. In contrast, pluralists clearly dissociate an obligation to assist from a just cause.

The differences between these two conceptions of international society are best highlighted when we deal with humanitarian intervention. Pluralists presuppose that sovereignty is about the cultivation of political difference and distinctiveness. From this, flows the idea that the scope of international society is fairly minimal, centred on shared concerns about international order under anarchy and, therefore, largely confined to agreement about sovereignty, diplomacy and non-intervention. Pluralism stresses the instrumental side of international society as a functional counterweight to the threat of excessive disorder in international anarchy. Solidarism presupposes that the potential scope for international society is somewhat wider, possibly embracing shared norms about such things as

[94] Hedley Bull refers to the solidarists as the Grotians, "The Grotian conception of international society", in Herbert Butterfield and Martin Wight (eds.), op. cit., pp. 51-73, at p. 52.
[95] See Terry Nardin, "The moral basis of humanitarian intervention", in *Symposium on the Norms and Ethics of Humanitarian Intervention*, Centre for Global Peace and Conflict Studies, University of California, Irvine, 26th May 2000, at http://www.socsci.uci.edu/gpacs/TerryNardin01.pdf (last access 15th February 2005).

limitations on the use of force, and acceptable 'standards of civilisation' with regard to the relationship between states and citizens, *i. e.*, human rights. In this view, sovereignty can also embrace many degrees of political convergence, as in the case of the European Union. Solidarism focuses on the possibility of shared moral norms underpinning a more expansive, and almost inevitably more interventionist, understanding of international order.

The pluralist approach is one that recognises such an intervention in order to uphold minimum standards of humanity, but denies that there is an already recognised international right of military intervention to enforce standards of conduct. For the pluralists, international law is the law arising from custom or treaty which fits well into the European international society and its standard of civilisation. They focus rather on state practice as the defining test of a legitimate humanitarian intervention. States are the only members of international society and regarding humanitarian intervention, they consider that in the absence of an international consensus there is the danger that states will act out of self-interest. It is counter-productive because it weakens the pillars of international society: sovereignty, non-intervention and non-use of force. The pluralists argue that to allow these exceptions is to undermine international order. In addition, such interventions can be perceived as a form of paternalism which is morally objectionable because there are other ways of leading a good life.[96]

Humanitarian intervention is included in the greater controversy over intervention defined as an act aimed at influencing the domestic affairs of a state. Since international society is founded upon state sovereignty, we would logically consider that all kinds of intervention would be illegitimate. This, in turn, is linked to the very nature of international society and the fact that there is no recognised centre/superior.[97] In contrast, solidarists consider that there is a right of humanitarian intervention which stems from the conception that human beings are subjects of International law and members of the international society in their own right, and this is also linked to the emphasis on natural law.[98] The society of states

[96] This is the approach defended by Robert Jackson, *The Global Covenant: Human Conduct in a World of States*, Oxford University Press, Oxford, 2000.
[97] On the broader issue of intervention see Stanley Hoffman, "The problem of intervention", in Hedley Bull (ed.), *Intervention in World Politics*, Clarendon Press, Oxford, 1984, pp. 7-28.
[98] See Hedley Bull, "The importance of Grotius in the study of international relations" and R. J. Vincent,

is present but at a secondary level to the universal community of mankind and its legitimacy derivative from it. Hugo Grotius is considered to be the father of solidarist international society theory when he asserted that atrocities could lead to a right to wage war of others on behalf of the oppressed.[99] As with human rights in general, it was later subdued by the rise of positivism and slowly recaptured along with the creation of the UN and the development of humanitarian law. The "neo-Grotian" school of law considered that positive law had as much to offer as natural law and, consequently, both were of interest and bind states. This school places its emphasis on the individual as a beneficiary of international law by its untiring opposition to the extreme creed of positivism.[100] As we have seen in chapter II, the revival of Grotius was carried out by Sir Hersch Lauterpacht who best captured its essence by asserting that "for in the long run, peace is more endangered by tyrannical contempt of human rights than by attempts to assert, through intervention, the sanctity of human personality."[101]

Pluralist and solidarist approaches to international society can't be understood as being on opposite sides but rather as complementary and co-existing, and this can be observed in the work of Hedley Bull. His first works reveal the concern for order which was dependent on the survival of international society and reform in the states' system and not necessarily of it.[102] Notwithstanding, as has been argued, there are several solidarist elements at work in the anarchical society. The European international society was based both on pluralist (different religions) and solidarist (common culture) foundations; furthermore, in order to pursue one of its primary goals, international society required a degree of normative solidarity, namely the restraint on violence.[103] Hedley Bull's later works

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"Grotius, human rights, and intervention", both in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), op. cit., pp. 65-94 and pp. 241-256.

[99] See Nicholas J. Wheeler, op. cit., p. 45.

[100] See Ijaz Hussain, *Dissenting and Separate Opinions of the World Court*, Martinus Nijhoff Publishers, Dordrecht, 1984, pp. 126-135.

[101] Sir Hersch Lauterpacht, "The international protection of human rights", in *Collected Courses/The Hague Academy of International Law*, Vol. 70, 1947/I, pp. 1-108, at p. 10 and "The Grotian Tradition in International Law", in *British Year Book of International Law*, 1946, pp. 1-53.

[102] This defence is best seen in *The Anarchical Society, A Study of Order in World Politics*, Macmillan, London, 2nd Ed. 1995 (1st Ed. 1977) and "The state's positive role in world affairs", in *Daedalus*, Vol. 108, nº 4, Fall/1979, pp. 111-123.

[103] João Marques de Almeida, "Review article: Pluralists, Solidarists and issues of diversity, justice and humanitarianism in world politics", in *The International Journal of Human Rights*, Vol. 7, nº 2, summer/2003, pp. 144-163.

reveal a greater concern for the compatibility between order and justice in which there was a need for greater justice (emphasis on cultural and economic justice) so that order could be maintained.[104] This meant that "(...) the rights and benefits to which justice has to be done in the international community are not simply those of states and nations, but those of individual persons throughout the world as a whole."[105] Nevertheless, Hedley Bull considered that a humanitarian intervention, so as to take place without endangering inter-state order, should be, at most, multilateral or unilateral acting with the consent of the society of states as a whole or, at least, that of the great powers. In addition, the state being intervened against should be a weak state, an entity whose credentials as a state are uncertain or non-existing.[106] This said, although order is important it does not mean that it should always lead to affronts of justice, and for Hedley Bull the support of *apartheid* was wrong and he condemned the West for maintaining contacts with South Africa.[107]

The fertile ground of the English School concerning Solidarism can be found in Martin Wight,[108] but it is more explicit in the work of R. J. Vincent, which proposed a bridge between international society and world society *via* human rights. He focused on respect for the basic human right: the right to life.[109] This right encompasses the right to security (freedom from want) and the right to subsistence (freedom from hunger).[110] It "seeks to put a floor under the societies of the world and not a ceiling over them. From the floor up is the business of the

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[104] This can be seen in his *Justice in International Relations, the Hagey Lectures, 12th – 13th October 1983*, University of Waterloo Press, Waterloo, 1984. See also R. J. Vincent, "Order in international relations", in J. D. B. Miller and R. J. Vincent (eds.), *Order and Violence: Hedley Bull and International Relations*, Clarendon Press, Oxford, 1990, pp. 38-64, at p. 41; Nicholas J. Wheeler, "Pluralist or Solidarist conceptions of international society: Bull and Vincent on humanitarian intervention", in *Millennium: Journal of International Studies*, Vol. 21, nº 3, 1992, pp. 463-487, and Andrew Linklater, "Rationalism", in Scott Burchill and Andrew Linklater (eds.), op. cit., pp. 93-118, at pp. 107 and 109-110.

[105] Hedley Bull, op. cit., p. 12.

[106] *Idem*, "Human Rights and world politics", in R. Pettman (ed.), *Moral Claims in World Affairs*, Croom and Helm, London, 1979, pp. 79-91, at p. 83.

[107] *Idem*, "The West and South Africa", in *Daedalus*, Vol. 111, nº 2, spring/1982, pp. 255-270.

[108] Martin Wight, "Western values in international relations", in Herbert Butterfield and Martin Wight (eds.), op. cit., pp. 89-131, at pp. 101-102.

[109] R. J. Vincent, *Human Rights and International Relations*, Cambridge University Press, Cambridge, 2001 (1st Ed.1986).

[110] *Ibidem*, p. 125. For a special emphasis on the right to subsistence, particularly the right to food as the underpinning for establishing a human rights cross-cultural project across see Ana Gonzalez-Pelaez and Barry Buzan, "A viable project of Solidarism? The neglected contribution of John Vincent's basic human rights initiative", in *International Relations*, Vol. 17, nº 3, September/2003, pp. 321-339.

several societies."[111] These rights are basic because they enable all other rights to be enjoyed and take, as a starting point, the very basic needs of each human being. The Vincentian approach presented an alternative to both the ideas that human rights undermined state sovereignty/order and that cultural differences make consensus impossible on human rights. The goal is to open the state within a thicker international society that strengthens sovereignty by respecting the most basic human rights. Human rights are not a challenge to the system of sovereign states, but rather a lever for greater legitimacy with the state seen as a "potential civilising force."[112] The consequence is added authenticity for state sovereignty and the society of states, whilst respecting cultural pluralism.[113]

This Vincentian approach does not follow the traditional view of the morality of states which flows from an egg-box conception of international society that does not act but rather cushions and separates.[114] On the contrary, states have to fulfil certain basic requirements of respect for human rights before they qualify for the protection that the principle of non-intervention provides. States, by respecting basic human rights, enhance both their domestic and international legitimacy.[115] When this is not the case, and states violate basic human rights in a systematic and massive way, then it might follow that humanitarian intervention is a duty of the international society which, nevertheless, is not the same as states having a right to intervene to states. The suspension of the non-protection umbrella should be exceptional rather than routine.[116] The Vincentian approach focuses not on the right of intervention, but on the responsibility of international society and it highlights the Janus-faced role of states regarding human rights, both as responsible for the respecting of standards and, at the same time, their most frequent violators. Therefore,"they will always bear a similarity with foxes guarding

[111] R. J. Vincent, op. cit., p. 126.
[112] Nicholas J. Wheeler, op. cit., p. 485.
[113] R. J. Vincent, op. cit., pp. 150-152.
[114] *Ibidem*, p. 123. In this egg-box conception, states have a moral standing because they provide collectively for the purpose of individuals. Therefore, other states should not intervene because they are interfering with the way those citizens have decided to pursue their good life.
[115] *Ibidem*, pp. 127-128 and p. 130.
[116] Nicholas J. Wheeler, op cit., p. 480.

the chickens."[117] In this way, the English School is much more an 'inside-out' than 'outside-in' theory.

Historically, the classical Millian standard established three situations that could allow for a foreign intervention: secession (when a community actually existed and was ready and able to determine their own existence), counter-intervention (a balancing act that aims at neutralising a former foreign intervention in a civil war) and humanitarian intervention (in the case of enslavement and massacre); within these exceptions to the rights of political communities, *i. e.,* territorial integrity and political sovereignty, the latter is linked to the observance of standards of human rights.[118] The interventions of the Concert of Europe in Europe were, in essence, multilateral and hand in hand with wider strategic interests in preserving the balance of power, as in the case of the intervention in 1827 to end the civil war in Greece against the Ottoman rule or in the defence of the Christian maronites in Mount Lebanon. Prior to the Second World War, both Japan and German interventions in China and Czechoslovakia were partly based on humanitarian grounds. Hitler argued that the German population in Czechoslovakia was the target of massive violations and discrimination by the Czech central authorities.[119] Even more distressing was the complacence of the western countries to the preparation and execution of the German "final solution."[120] Despite article 4 (2) of the UN Charter, interventions on the two sides of the Cold War were not a rare situation, as in the case of the American interventions in Cuba in 1961 and the Dominican Republic in 1965, as well as the case of the Soviet interventions in Hungary in 1956 and Czechoslovakia in 1968.

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[117] B. Simma, "From bilateralism to community interest in international law", in *Collected Courses/The Hague Academy of International Law*, Vol. 250, 1994/VI, pp. 217-384, at p. 243.

[118] See Michael Walzer, *Just and Unjust Wars, A Moral Argument with Historical Illustrations*, Basic Books, 2nd Ed. 1992 (1st Ed. 1977) and "The rights of political communities", in *International Ethics*, op. cit., pp. 165-194. The problematic relation between national self-determination by the *self's* own means and capacities up to the point of secession and the recognition of the legitimacy of this struggle in order for a foreign power to intervene is very well explored by Michael J. Glennon, "Self-determination and cultural diversity", in *The Fletcher Forum of World Affairs*, Vol. 27, nº 2, summer/fall 2003, pp. 75-84.

[119] See Jarat Chopra and Thomas G. Weiss, "Sovereignty is no longer sacrosanct: codifying humanitarian intervention", in *Ethics and International Affairs*, Vol. 6, 1992, pp. 95-117, at p. 99.

[120] Nevertheless, see the exception provided by Ellery C. Stowell, who wrote in 1939 as a reaction to the recent barbarities committed against Jews in Europe: "It is true that such intervention [humanitarian] in the past has usually been directed against the governments of less powerful or less developed states, but the same principle is appropriate of application against any state whenever guilty of conduct unworthy of a civilised member of international society", in "Humanitarian intervention", in *American Journal of International Law*, Vol. 33, nº 4, 1939, pp. 733-736, at p. 734.

During the Cold War, the four examples that can best claim to have been humanitarian were the Indian intervention in 1971 in favour of the East Bengalis, the Tanzanian intervention against Idi Amin's regime in Uganda in 1978-1979, the Vietnamese intervention in Pol Pot's Cambodia in 1979 and, in the same year, the French intervention to depose Bokassa in the Central African 'Empire.'[121] All these interventions were met (although with different intensity) by a hostile international environment. In the first case, it is interesting that India which, at first claimed humanitarian reasons for its intervention, quickly reversed them to, on the one hand, the claim for national self-determination of the East Bengalis that led to the creation of Bangladesh and, on the other hand, reasons of self-defence because Pakistan had attacked India first.[122] As for Vietnam, it first denied that its forces had entered Cambodia and argued that Pol Pot had been overthrown by Cambodian forces. Regarding the Central African Republic, France claimed that it had intervened at the request of the new government which had, all by itself, deposed Bokassa. Tanzania stated that it had been invaded by Uganda and when Tanzanian forces responded, it coincided with a Ugandan revolt against Idi Amin. In our opinion, besides all the national interests on the part of the intervening countries such as avoidance of refugees and border instability, the fact remains that they halted gross and systematic human rights' violations.

In the post-Cold War world, several humanitarian interventions took place and led to the possibility of reaching a "humanitarian war" level where consent of the target state would not be indispensable.[123] Nevertheless, the successful reawakening of humanitarian intervention was accompanied with problems and failures. The most "successful" intervention took place in 1991 in the wake of the Gulf War, when two major relief operations, *Safe Haven* and *Provide Comfort*, were carried out in order to ameliorate the Kurdish plight, despite resistance from Baghdad. Unfortunately, this situation does not allow us to extrapolate general

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[121] For a thorough account of these cases as well as an historical appraisal of humanitarian intervention see Michael Akehurst, "Humanitarian intervention", in Hedley Bull (ed.), *Intervention in World Politics*, Clarendon Press, Oxford, 1984, pp. 95-118.

[122] *Cf.* India's approval of the Soviet intervention in Budapest refusing to accept the argument that national self-determination includes independent decision of one's own national political and economic arrangements; see Thomas M. Franck and Nigel S. Rodley, "After Bangladesh: the law of humanitarian intervention by military force", in *American Journal of International Law*, Vol. 67, nº 2, 1973, pp. 275-305.

[123] Adam Roberts, "Humanitarian war: military intervention and human rights", in *International Affairs*, Vol. 69, nº 3, 1993, pp. 429-449.

conclusions about a new consensus regarding humanitarian war since they were carried our under special circumstances, namely after the war against the Iraqi invasion of Kuwait, in which the coalition powers were still powerful and on the ground.[124]

Besides this intervention others took place in the post-Cold War world and showed the difficulties that these situations give rise to. In 1992-1993, humanitarian intervention took place in Somalia, where the absence of government had led to famine, drought and warlord chaos. Despite good intentions it failed and was withdrawn.[125] In 1995, humanitarian intervention in Bosnia was unable to prevent massacres in UN "safe areas" such as Srebrenica. In Rwanda, where although there was credible information that genocide was to take place/taking place, the Security Council's unwillingness to intervene destabilised the whole area of the Great Lakes. In 1999, in Kosovo, intervention was carried out by the North Atlantic Treaty Organisation (NATO), without Security Council authorisation, and had the reverse result of accelerating the ethnic cleansing. This was due to the strategy employed by NATO, namely air-bombing which had the advantage of limited casualties among its military forces, which prevailed over the employment of troops on the ground. All these post-Cold War situations reveal the intensity of intra-state fighting and problems, the impact of modern mass media communications (the CNN factor) as well as the proliferation of cheap and highly destructive weapons. All these elements have lead to the increasing vulnerability of civilians, often becoming the deliberate target.

In our view, humanitarian intervention is controversial, whether it takes place or is avoided.[126] We have to accept that if an intervention is motivated by non-humanitarian reasons, it can still count as humanitarian provided that the motives and the means employed do not undermine a positive humanitarian outcome.[127] But unilateral enforcement as an alternative is not a substitute for *but* the opposite of collective action. This can have two main consequences: it could

[124] *Ibidem*, pp. 434-444.
[125] For a detailed evolution of humanitarian intervention see Simon Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law*, Oxford University Press, Oxford, 2001.
[126] See Jacques deLisle, "Humanitarian intervention, legality, morality, and the good Samaritan", in *Orbis*, Vol. 45, nº 4, Fall/2001, pp. 535-556.
[127] This is a claim made by Nicholas J. Wheeler, *Saving Strangers, Humanitarian Intervention in International Society*, Oxford University Press, Oxford, 2000, pp. 38-39.

be an incoherent principle (applied selectively), and could be inimical to the emergence of an international rule of law because it would weaken the normative restraints on the use of force.[128] In other words, how is it possible to make the "pill of intervention easier to swallow?"[129] Most importantly, there is the need to codify criteria for permissible humanitarian intervention.[130] This challenge was taken up by the International Commission on Intervention and State Sovereignty. It began by stressing that sovereignty implies a dual responsibility: external and internal. The former entails the respect for the sovereignty of other states, and the latter, respect for the dignity and basic rights of all the people within the state. What is needed is more effective international machinery for the protection of human rights, in that humanitarian intervention is an inadequate substitute for such machinery.[131] Responsibility to protect entails the notion that sovereign states have a responsibility to protect their own citizens from gross and systematic violations of their human rights but that when states are unwilling or unable to do so, that responsibility must be borne by the broader community. This international responsibility to protect embraces three specific responsibilities: to prevent, to react and to rebuild.[132] It produced principles upon which international responsibility can be carried out namely, just cause, precautionary principles (right intention, last resort, proportional means and reasonable prospects) and the right authority meaning the Security Council.[133]

When the Security Council is paralysed by one of its permanent members' veto power, then the special procedure of the 1950 "Uniting for Peace" should be followed having two thirds majority of the General Assembly (Korea in 1950, Egypt

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[128] These are the main conclusions of Simon Chesterman, op. cit.

[129] Stanley Hoffmann, "Sovereignty and the ethics of intervention", in Stanley Hoffmann with contributions by Robert C. Johansen, James P. Sterba and Raimo Väyrynen, *The Ethics and Politics of Humanitarian Intervention*, University of Notre Dame Press, Notre Dame, Indiana, 1996, pp. 12-37, at pp. 20-21. See also Jarat Chopra and Thomas G. Weiss, op. cit., p. 112.

[130] *Ibidem*, pp. 100-101.

[131] See Michael Akehurst, op. cit.

[132] See the Report of the International Commission on Intervention and State Sovereignty entitled The Responsibility to Protect of December 2001, at http://www.dfait-maeci.gc.ca/iciss-ciise/pdf/Commission-Report.pdf (last access 15th February 2005). This Independent Commission was the Canadian response to the UN Secretary-General's appeal at the 54th Session of the General Assembly in 1999 to reflect upon the dilemma of reconciling intervention for human protection purposes and sovereignty. The Commission was composed of twelve members reflecting the diverse regional law backgrounds of the world and chaired by Gareth Evans from Australia and Mohamed Sahnoun from Algeria.

[133] See articles 24, 39 and 42 of the Charter of the UN.

in 1956 and Congo in 1960) or action within the area of jurisdiction by regional or sub-regional organisations under chapter VII of the Charter subject to their seeking subsequent authorisation from the Security Council. The permanent members should agree not to apply their veto power in matters where their vital state interests are not involved regarding situations where there is majority support ("constructive abstention"). The Secretary-General's power should also be used to bring to the Security Council's attention, under article 99, any matter that may threaten the maintenance of international peace and security. The military interventions for humanitarian purposes have to take place on a multilateral and collective rather than single-country basis, and they have to look to whether and to what extent, the intervention is actually supported by the people for whose benefit the intervention is intended.[134] The aim is not to find alternatives to the Security Council as a source of authority but rather to make it work much better than it has.

We find diverse discourses on the role that human rights play internationally whether they are located in a system (Realist), society (Grotian) or community (Revolutionist) framework. Massive and systematic violations of human rights which, in extreme cases, lead to humanitarian intervention do pose the conflict between order and justice in its starkest form. Here, the conflict between respect for human rights and non-intervention raises many contentious points. Humanitarian intervention has been argued against because there are different ways of life; it may be counterproductive and result in greater harm, as well as being a Trojan horse for self-interests of the intervening power. It has been defended on the grounds that respect for human rights takes priority over all matters in international relations and it is a goal that we should work for. Whether we see humanitarian intervention as being an exception to non-intervention (thinner international society) or actual practices of international society that aim at balancing justice and order (thicker international society), international human rights are more than just adjustments of diverging interests. In our view, they are a community building block co-existing with the systemic and societal features of international relations. It is this background that enables us to framework the question of the death penalty in international politics.

[134] See Hedley Bull, "Conclusion", in Hedley Bull (ed.), *Intervention in World Politics*, Clarendon Press, Oxford, 1984, pp. 181-195.

CHAPTER VI

UNITED NATIONS AND CAPITAL PUNISHMENT

"Since the issuance of these reports [Ancel and Morris Reports], the United Nations has gradually shifted from the position of a neutral observer concerned about, but not committed on the issue of capital punishment, to a position favouring the eventual abolition of the death penalty."[1]

The right to life has been integrated in the International Bill of Human Rights and in regional human rights' instruments. It is a basic right that enables all the others to be fulfilled and fits like a glove into the idea that human rights were not created but recognised. It is a good example of how certain human rights can entail positive and negative obligations, as has been the interpretation of the Human Rights Committee (Committee). The Committee began, in 1980-1981, to produce general comments that highlighted matters of general interest with the aim of assisting states' parties to fulfil their reporting obligations and promoting the Covenant's implementation. These have contributed to the erosion of the view that civil and political rights only entail negative obligations and economic and social rights only positive measures.

The Committee regarding article 6, asserts that the right to life is to be interpreted in a broad manner that requires states to take positive action, such as the reduction of infant mortality, increase of life expectancy and measures to eliminate malnutrition and epidemics.[2] Moreover, the Committee has also expressed concern regarding nuclear weapons as menaces to the right of life and as "antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights."[3] Even more recently, this was an argument in the dissenting opinion of Judge Weeramantry

[1] In paragraph 16 of the UN document E/5242 of 23rd February 1973.
[2] See the UN document CCPR/General Comment 6 of 30th April 1982, especially paragraph 5 and see also paragraph 43 of the preliminary report by J. Oloka-Onyango and Deepika Udagama, under the title "The realisation of economic, social and cultural rights: Globalisation and its impact on the full enjoyment of human rights" (UN document E/CN.4/Sub.2/2000/13).
[3] In paragraph 5 of UN document CCPR/General Comment 14 of 9th November 1984.

regarding the ICJ advisory opinion on the legality of the threat or use of nuclear weapons.[4] Furthermore, other issues arise of out the right of life, such as abortion (when does the right of life begin?), euthanasia (right/ duty to live) and suicide (consent and the right to life/death).[5]

The death penalty shows us the dynamic evolution of international human rights' standards. If some restrictions were made in the 19th century, the death penalty *per se* was taken for granted. Throughout the 20th century this assumption began to change, especially after the two world conflicts. Throughout history, the death penalty has been present and widely used. The examples are numerous, it can be found in the *lex talionis* of the Code of Hammurabi, in some passages of the Ancient Testament, and in ancient Greece where Socrates was condemned to die, which he did by drinking the poisonous hemlock.[6] In the Middle Ages, the use of the death penalty was intensified as crime and criminals were understood to be the work of the devil. The Reform and Counter Reform did nothing to improve this record as torture and the death penalty became current practice and widespread phenomena. The death penalty was applied without restrictions and not even royal heads escaped it, such as Charles I of England, Mary Stuart of Scotland, and Louis XVI of France. It was the normal outcome for a plethora of crimes, and was carried out through a ghastly variety of means as, in most cases, the cruelty was proportional to the offence.[7]

Despite the earliest recognition of general procedural guarantees of law against arbitrariness, in the English Magna Carta in 1215,[8] the questioning of the deterrence and efficacy of the death penalty only took place in the 18th century.

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[4] The *Advisory Opinion of the International Court of Justice regarding the Legality of the Threat or Use of Nuclear Weapons* was given on July 8th of 1996 and the full text as well as all the opinions expressed by its Judges can be found at http://www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm (last access 15th February 2005).

[5] See Paul Sieghart, *The International Law of Human Rights*, Clarendon Press, Oxford, 1983, pp. 132-134.

[6] For the history of the death penalty and its use before the 18th century see William A. Schabas, *The Abolition of the Death Penalty in International Law*, Grotius Publications Limited, Cambridge, 1993, pp. 2-6 and Thorsten Sellin, "Capital Punishment", in *Crime Prevention and Criminal Justice Newsletter*, Vols. 12 and 13/Special Combined Issue on Capital Punishment, November/1986, pp. 5-9.

[7] *E. g.* a person could be sentenced to death by hanging, boiling, drowning, strangulation, quartering, breaking on the rack, crucifixion or burning at the stake. In the most serious crimes, such as lese-majesty, the condemned individual was tortured with special cruelty before actually being executed.

[8] In this pioneering document it was stated that no one should be taken or imprisoned, outlawed, exiled or condemned except "by the lawful judgment of his peers or by the law of the land", in William A. Schabas, op. cit., p. 9.

This pioneering effort was carried out by the Marquis of Beccaria, Cesare Bonesana, in 1764.[9] The main novelty was that it treated crime as a social malady and, therefore, its punishment should encompass the reformation of the criminal, as well as the deterrence of potential criminals. He considered that criminal law was marked by arbitrariness and caprice and, also, that cruel punishments were not effective in reducing crime rates. In addition, attention was called to the need to reform society through education and the social environments which foster crime, "let us attack injustice at its source."[10] Cesare Beccaria proposed life imprisonment as an alternative to the death penalty.[11] This modern approach influenced Austria and Tuscany which were the first to abolish the death penalty. Leopold II of Tuscany abolished the death penalty in 1786 and Joseph II of Austria did the same in 1787. Despite the initial success of these measures, the death penalty was reinstated in both countries in the following years. It influenced some individuals such as Edmund Burke and Thomas Paine, who despite having different conceptions as to the origin of human rights, agreed on the cruelty and inefficacy of this punishment. Edmund Burke in 1777 stressed the idea that there was no link between deterrence and the death penalty.[12] He also reviewed favourably Beccaria's book in 1789, and urged Parliament to revise its criminal law.[13] Thomas Paine appealed to the National Convention in order to save the life of the king of France.[14] He justified this appeal not only because the king had helped the Americans during their revolution against Britain but also because he considered this punishment to be cruel and sanguinary. He even argued that with

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[9] Of special interest is chapter XXVIII, "The Punishment of Death", of his book *On Crimes and Punishments* which deals specifically with the issue of the death penalty. This chapter is reproduced in Barry O. Jones (ed.), *The Penalty is Death, Capital Punishment in the Twentieth Century, Retentionist and Abolitionist Arguments with Special Reference to Australia*, Sun Books in association with the Anti-Hanging Council for Victoria, Melbourne, 1968, pp. 27-39.

[10] *Ibidem*, p. 32.

[11] This was presented as the best alternative to the death penalty because it was a better deterrent and because it was in fact crueller than the death penalty. This line of reasoning has been questioned by retentionists because it is incoherent with an abolitionist defence. Abolitionists counter argue that we should bear in mind that it was a savage age and unless a savage punishment was presented the argument was unlikely to be taken seriously, in *ibidem*, 38.

[12] Edmund Burke, "Notes for Speech on Capital Punishment (14th May 1777)", in W. M. Elofson and John A. Woods (eds.), *The Writings and Speeches of Edmund Burke, Party, Parliament, and the American War, 1774-1780*, Vol. III, Paul Langford (general editor), Clarendon Press, Oxford, 1996, pp. 338-339.

[13] Michael Freeman, *Edmund Burke and the Critique of Political Radicalism*, Basil Blackwell, Oxford, 1980, p. 154.

[14] Thomas Paine, "Reasons for preserving the Life of Louis Capet", in Michael Foot and Isaac Kramnick (eds.), *Thomas Paine Reader*, Penguin Books, 1987, London, pp. 394-398.

France having been the pioneer in Europe in abolishing the royal institution, it should also be the first country in Europe to abolish this penalty and "(...) find out a milder and more effectual substitute."[15]

In the 19th century, the abolitionist ideas did bear fruit, since a movement began for restricting the number of offences that were punishable by death, especially the exclusion of political offences, and an enlargement of mitigating circumstances. In addition, public executions gradually moved indoors and a search for more 'humane' ways to perform the execution also began. On the other side of the Atlantic, in the US, the state of New York led the way in 1835, when it ended public executions. The replacement of the death penalty with life imprisonment also led to a reform of the penitentiary system which was almost non-existent until that date. A bigger step was taken when Michigan abolished the death penalty in 1847. The first countries to take the same action were Venezuela in 1863, San Marino in 1865 and Portugal in 1867.[16] They were followed by the Netherlands in 1870, Costa Rica in 1878, Brazil in 1882, Ecuador in 1897, Colombia in 1910 and Panama in 1903.[17]

Notwithstanding all these individual first steps to abolish the death penalty, the first half of the 20th century saw an increase of the number of persons executed. This was the consequence of the two World Wars (where the survival of states was at stake), the economic instability of the interwar years that led to the recrudescence of crime rates and, lastly, the massive use by totalitarian states of

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[15] *Ibidem*, p. 398.

[16] In Portugal, the death penalty was already abolished *de facto* as no execution took place since 1846, in that the last execution for political offences took place in 1834. The last woman, Luíza de Jesus, was executed in 1772. In 1802, torture and cruel executions were forbidden by law and the death penalty was abolished for political offences in 1852. Since 1837, it became mandatory to appeal for royal clemency in capital cases and from 1847 onwards, death sentences were systematically commuted. In 1911, the death penalty was abolished for military offences. Nevertheless, Law nº 635 of 28th September 1916 reinstated capital punishment for military crimes in the theatre of war, and this was due to the Portuguese participation in the First World War. This situation remained until 1976 when the death penalty was totally abolished and incorporated into the Constitution as article 24. See Guilherme Braga da Cruz, "O movimento abolicionista e a abolição da pena de morte em Portugal-Resenha Histórica", in *Colóquio Internacional Comemorativo do Centenário da Abolição da Pena de Morte em Portugal*, Vol. II, Faculdade de Direito da Universidade de Coimbra, Coimbra, 1967, pp. 423-557 and Maria João Vaz, *Crime e Sociedade, Portugal na Segunda Metade do Século XIX*, Celta Editora, Oeiras, 1998, p. 21, p. 39, and pp. 47-48.

[17] In Costa Rica, the death penalty was abolished in 1878 and given constitutional status in 1882; whilst Panama affirmed its abolition of the death penalty through article 1 of the Acts of Amendment to its Constitution in 1918. For a general overview of the death penalty in Latin America see Ricardo Ulate, "The death penalty: some observations on Latin America", in *Crime Prevention and Criminal Justice Newsletter*, Vols. 12 and 13/Special Combined Issue on Capital Punishment, November 1986, pp. 27-31.

capital punishment as a means to an end. The abolitionist movement had to wait until the end of the Second World War and its war trials, in order to begin questioning the legitimacy of the death penalty. This process was carried out in several states and, at the international level, within the UN framework. The UN began as a neutral observer regarding capital punishment as belonging to criminal law and changed into a supporter of its abolition within a human rights' framework.

The UN work in this field can be divided into three phases. The first one concerns the creation of standards regarding the right to life, and this was done *via* article 3 of the UDHR and article 6 of the ICCPR. This period ranges from 1948 to the end of the 1950s. It is noteworthy that, although the ICCPR was only adopted in 1966, the discussion around article 6 was carried out in 1957. The wording of article 6 remained unchanged until the adoption of the Covenant. In this phase, the main actors were the Commission and ECOSOC as well as the Third Committee and the General Assembly. The second phase ranges from 1960s, when the first report concerning the death penalty was made, until the adoption of the Second Optional Protocol. In this phase, the number of actors in this process increased and the death penalty from being an infrequent issue became a routine matter which was studied thoroughly by reports. In addition, the UN approach was transformed into a dynamic, albeit careful, support for the abolition of the death penalty. This culminated in the specific standard setting concerning the abolition of the death penalty. Furthermore, a dual strategy was pursued, accumulating the goal of abolition with the approach of reducing the scope of application of the death penalty as well as guaranteeing procedural safeguards to those that were sentenced to death. This led to the 1984 safeguards and the 1989 implementation of the safeguards adopted by ECOSOC. The third phase is characterised by the progression of the number of abolitionist countries in the post-Cold War world. The Commission and the Sub-Commission began to voice their concerns regarding the death penalty, and the execution of persons who were under 18 years old at the time of the offence, more loudly. At the same time, a contrary movement began to take place as retentionist countries worked with a concerted strategy to block the attempts of putting abolition of the death penalty in the spotlight. These antagonistic movements have characterised the debate around the death penalty,

in which retentionists argue that it is a sovereign issue concerning criminal law and abolitionists that it has evolved into an international human right of its own. The UN efforts in the field of capital punishment are the first in history to be made in an international forum in a concerted manner and, at the same time, having, at least potentially, a universal reach.

1 The Right to Life and the Death Penalty

"A right to life that allowed exceptions was of little value, yet the logical consequence of a right to life without exceptions, that is, abolition of the death penalty, was too radical for jurists of the time."[18]

This is a succinct overview of the compromise that was established with article 3 of the UDHR. This document was actually preceded by the American Declaration of the Rights and Duties of Man which was signed in April 1948.[19] In this document "all men are born free and equal, in dignity and in rights" and the right to life is recognised in its article 1 where no reference is made to the death penalty.[20] It was with the UDHR that the great debate regarding the death penalty took place, as this document drew from national constitutions and fundamental documents as well as previous international attempts of establishing an international declaration of the rights of man.[21] If we look at the wording of both article 3 of the UDHR and article 1 of the American Declaration, the similarities are obvious.[22]

We also have to bear in mind the background against which these discussions took place, since some abolitionist movements were beginning to make their voices heard. These movements drew their strength from the extreme and massive use of the death penalty that was carried out by the totalitarian states of the 30s and in the Second World War. At the same time, looking at the post-1945 world very few countries were abolitionists. In fact, the overwhelming

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[18] William A. Schabas, op. cit., p. 13 and for a profound and exhaustive account of the creation of article 3 of the UDHR, see his chapter 1 ("The Universal Declaration of Human Rights and recognition of the right to life"), pp. 25-50.

[19] This Declaration was adopted at the Ninth International Conference of American States in Bogotá. It is divided into a preamble and two chapters, having 38 articles in all. The first chapter deals with rights and the second one with duties. Amongst the duties that are proclaimed in this Declaration we find, for example, the duty to vote or to pay taxes. This document is found at the Organisation of American States site at http://www.cidh.oas.org/Basicos/basic2.htm (last access 15th February 2005).

[20] In the first paragraph of the Preamble and article 1: "Every human being has the right to life, liberty and the security of his person."

[21] We find earlier preliminary efforts such as those promoted by the International Law Institute in 1929 and the *Academie Diplomatique Internationale* but none attained the importance of the UN. The domestic sources are undoubtedly the Magna Carta, the American Declaration of Independence and the French Declaration of the Rights of Man and of Citizen.

[22] See UDHR, article 3: Everyone has the right to life, liberty and security of person.

majority was indeed retentionist. In addition, the trial of war criminals contemplated the use of the death penalty which was in fact widely applied in most countries. This situation also had a bearing in the later formulation of the European Convention.

Article 3 was the outcome of two great debates, the first one at the Drafting Committee and the Commission on Human Rights and the second at the Third Committee of the General Assembly. Throughout the debates, three general approaches are clear: those who wished that there was an express recognition of the death penalty as a limitation or exception to the right of life, some who argued for the inclusion of a categorical abolition of the death penalty and the others who considered that a compromise had to be reached between these two approaches. The first ever specific mention of the issue of capital punishment in international human rights' law can be found in the draft presented in 1946 by the Inter-American Juridical Committee.[23] In the end, the compromise approach won the debate and called for the inclusion of a right to life in absolute terms, making no mention either in favour or against the death penalty.

The first approach can be found in the original draft of the UDHR prepared by John P. Humphrey, in early 1947, which recognised a right to life that "can be denied only to persons who have been convicted under general law of some crime to which the death penalty was attached."[24] This position was favoured by Britain[25] and strongly opposed by the Latin American countries that clearly aimed at the abolition of the death penalty. In fact, they were the first to proclaim openly the

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[23] Reference to the issue of capital punishment is found in article 1 of the Draft Declaration of the International Rights and Duties of Man presented on 31st December 1945 by the Inter-American Juridical Committee composed of Francisco Campos, F. Nieto del Rio, Charles G. Fenwick and A. Goméz Robledo. Article 1 reads: "Every person has the right to life. This right extends to the right to life from the moment of conception; to the right of incurables, imbeciles and the insane. It includes the right to sustenance and support in the case of those unable to support themselves by their own efforts; and it implies a duty of the state to see to it that such support is made available. The right to life may be denied by the state only on the ground of conviction of the gravest of crimes, to which the death penalty has been attached." Article 1 as well as the entire draft and its accompanying report are reproduced in *American Journal of International Law*, January/1946, Vol. 40, nº 1, Supplement of Documents, pp. 93-116.

[24] UN documents E/CN.4/AC.1/3, p. 2 and Add.1, p. 14 in which the article has the same wording but with an addition "(...) under general law of some crime *against society* to which (...).

[25] The British proposal (part II of article 8 of Britain's Draft Bill) for the same article read "It shall be unlawful to deprive any person of his life save in the execution of the sentence of a court following on his conviction of a crime for which this penalty is provided by law", in UN document E/CN.4/AC.1/3/Add.3 of 10th June 1947.

abolition of the death penalty in a written document.[26] The Chairperson of the Drafting Committee, Eleanor Roosevelt, was also of the opinion that it was better not to refer to the death penalty, since there were movements underway in some states to abolish it.[27] René Cassin reworked the draft and removed the reference to the death penalty[28] and this proposal found its way, almost unchanged, despite some subsequent attempts to return to the original proposal.[29] At the Commission, the first ("everyone has the right to life") as well as the second part of article 3 ("liberty and security of person") were adopted.

At the Third Committee in 1948, the debate between the three approaches carried on and it was a lengthy and heated one. But at the end, the draft article proposed by the Commission resisted attempts to change its content. The most discussed was the Soviet proposal calling for the abolition of the death penalty in peacetime.[30] Whilst some considered that it was a matter for penal legislation and not to be dealt by the Third Committee,[31] for others, namely Costa Rica,

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[26] See the 1947 proposals of Ecuador in UN document E/CN.4/32, p. 2 which called for total abolition and of Uruguay in UN document E/CN.4/SR.35 p. 13 that asked for the abolition for political offences. In the proposal made by Ecuador, the right to life appears as article 1: "There shall be no death penalty. Mutilation, flogging, and other tortures and degrading penalties are categorically forbidden, whether as penalties, corrective measures, or means of investigating offences. (...)" and in the Uruguayan amendment we find the following wording for the right to life: "(...) The death penalty shall never be applied to political offenders. With regard to criminal offenders, it shall only be applied after sentence rendered under existing laws after a trial with the necessary guarantees." These proposals are constitutionally safeguarded in both countries, in the case of Uruguay in its article 25 ("The penalty of death shall not be inflicted on any person (...) and in the case of Ecuador in article 187 ("the State shall guarantee to the inhabitants of Ecuador: (1) the sanctity of human life: there shall be no death penalty (...)"; both these articles are in UN document A/CN.4/AC.1/3/Add. 1, pp. 16 and 19.

[27] UN document E/CN.4/AC.1/SR.2, p. 10; "The Chairman read both articles [article 3 of the Secretariat Draft Outline and article 8 of Britain's draft] and remarked that she understood that there is a movement underway in some states to wipe out the death penalty completely. She suggested that it might be better not to use the phrase "death penalty." This view was supported by Chile, the SU and Britain in the following page; of special mention are the comments made by professor Koretsky of the SU in which "he remarked that the United Nations should not in any way signify approval of the death penalty. The Union of Soviet Socialist Republics, he said, has given up the death penalty."

[28] UN documents E/CN.4/AC.1/W.2/Rev. 1 ("everyone has the right to personal liberty") and Rev. 2 ("Every one has the right to life, to personal liberty and to personal security").

[29] See for instance the alternative wording proposed by New Zealand: "Everyone has the right to life, liberty and security of person and to protection by law of his life, liberty, personal security, property, reputation, privacy, home and correspondence, subject to deprivation only in cases prescribed by law and after due process; in UN document E/CN.4/82/Add.12, p. 24.

[30] The Soviet proposal of amendment read "Everyone has the right to life. The State should ensure the protection of each individual against criminal attempts on his person. It should also ensure conditions that obviate the danger of death by hunger and exhaustion. The death penalty should be abolished in time of peace", in UN document A/C.3/265 of 12th October 1948. See also footnote 27.

[31] This was the position of Brazil and Syria (UN document A/C.3/SR.103) and also of Egypt (UN document A/C.3/SR.107).

Venezuela, Panama and Uruguay, the Soviet proposal was not bold enough and still legitimised the death penalty in times of war. These countries maintained that the death penalty should be wholly abolished and not just in peace time.[32] This Soviet amendment was deemed controversial and was rejected.[33] René Cassin maintained that "the simple statement of the right to life, without anything further, would give the declaration more force."[34] Article 3 was voted on a whole at the Third Committee and in a roll-call vote, adopted by 36 votes in favour, none against and twelve abstentions.[35] It is clear from the *travaux préparatoires* that the death penalty was considered to be incompatible with the right to life, and that its abolition, although not immediately realisable, should be the goal of member states. If we take into consideration that the aim of the UDHR was not to cement the *status quo* but to establish aspirational standards, the fact that the right to life is stated in absolute terms, leads us to conclude that it has an abolitionist stance.[36]

Moreover, and just a few months later, the adoption of the Geneva Conventions regarding the protections of victims of war established another yardstick by which to measure the right to life against the death penalty. Because these conventions deal with humanitarian law which is applicable in the extreme conditions of wartime and, therefore, when they are most needed, it is interesting to note the limits that are set to the use of the death penalty. This is what we may consider the minimum level acceptable to international society with respect to the death penalty in times of war. This can be seen in article 3, which is common to the four Conventions and clearly develops this idea by stating that death penalties can only be carried out when they are the outcome of a previous judgment issued by a competent court that also affords all judicial guarantees "which are recognised as indispensable by civilised peoples." When these guarantees are not respected the death penalty and its execution is forbidden at any time and in any

[32] UN documents A/C.3/SR.105 (Costa Rica), A/C.3/SR.102 (Venezuela), and A/C.3/SR.107 (Panama and Uruguay).
[33] It was rejected by 21 votes, 9 in favour and 18 abstentions; see UN document A/C.3/SR. 107.
[34] See UN document A/C.3/SR. 103.
[35] The first part of the article "Everyone has the right to life" was adopted by 49 votes in favour, none against, and 2 abstentions, and the second part "liberty and security of person" by 47 in votes in favour, none against and 4 abstentions. In the voting of the article as a whole the countries which abstained were Byelorussia, Cuba, Czechoslovakia, Ecuador, Haiti, Lebanon, Pakistan, Panama, Poland, Ukraine, SU and Yugoslavia. See UN document A/C.3/SR.107, pp. 16-17.
[36] William A. Schabas, op. cit., pp. 48-50.

place. In addition, article 68 of Geneva IV, in its fourth paragraph, established that the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence, in any case. [37]

In line with this argument, within the UN another associated matter began to be discussed, namely corporal punishment. This was connected with the UN Trust territories. It was considered for the first time at the General Assembly in 1949 (resolution 324 (IV) and in 1950 (resolution 440 (V).[38] This was an 'issue' because it was understood that corporal punishments were incompatible with the obligations undertaken by the administrating authorities under the Charter and the UDHR. It was no longer *civilised* to apply corporal punishments, and this was reinforced with resolution 562 (VI) of 1951, that called for the enforcement of immediate legislation regarding the abolition of corporal punishment.[39]

The UDHR was also the normative source for other regional instruments regarding human rights from which the two best developed examples are the European and the American systems.[40] In addition, we have chosen to look at

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[37] The four Geneva Conventions focus on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (I), the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (II), the Treatment of Prisoners of War (III) and the Protection of Civilian Persons in Time of War (IV), respectively at http://www.unhchr.ch/html/menu3/b/q_genev1.htm (last access 25th October 2004), http://www.unhchr.ch/html/menu3/b/q_genev2.htm (last access 25th October 2004), http://www.unhchr.ch/html/menu3/b/91.htm (last access 25th October 2004), and http://www.unhchr.ch/html/menu3/b/92.htm (last access 25th October 2004). Hereafter simply cited as Geneva I, Geneva II, Geneva III and Geneva IV. Article 3 although adapted to the specificities of each Convention has the same wording regarding the application of the death penalty: (...) To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (...); (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (...)." This article is complemented by article 87 (III) which forbids the application of *ex post facto* law when dealing with capital punishment, article 100 (III) which halts the extension of the death penalty to new offences without the concurrence of the Power upon which the prisoners of war depend, articles 100 (III) and 75 (IV) which call for a period of six months before the sentence is carried out, and article 68 (IV) which limits the application of the death penalty to espionage, serious acts of sabotage or intentional offences which have caused the death of one or more persons, provided these offences were punishable by death under the law of the occupied territory in force before the occupation began. In addition, article 75 (IV) states that in no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve.

[38] In *Y. U. N. 1948-1949*, pp. 856-858 ("Social Advancement in Trust Territories") and *Y. U. N. 1950*, p. 791.

[39] In *Y. U. N. 1951*, pp. 786-787.

[40] There are other two regional systems: the African Charter of Human and People's Rights and the Arab Charter of Human Rights. Of these two, only the African instrument regarding human rights is in force (since 1984). It was adopted in 1981, has 68 articles and works within the African Unity framework (former Organisation for African Unity which was replaced by the Lomé Summit's Constitutive Act of the Union in 2000). It makes no mention of the death penalty as a limitation to the right to life in its article 4: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right," nevertheless in its article 60 it affirms that it will

these two regional systems because they have developed their own protocols and measures regarding the death penalty. They both refer to the UDHR in their Preambles and we think that the underlying idea of the relation between regional systems and the UN in the field of human rights is one of enlarging the extent of protection accorded to individuals, functioning in complementary and not competitive terms.[41] The existence of these regional settings offers another network of protection and promotion of human rights that benefits individuals. The American system is linked to the work of the Organisation of American States (OAS) as the European system is linked with the work of the Council of Europe (CE).

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was produced in 1950 and came into force in 1953.[42] It benefited from the signing of the UDHR as well as from the comparative analysis of the provisions in the constitutions, declarations of rights, statutes and customary laws of its member states.[43] In this sense, the Convention is the collective guarantee in the European context of a number of principles set out in the UDHR but supported by international judicial machinery which gives them

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draw inspiration from international instruments concerning human rights such as the UDHR amongst others; in http://www.africa-union.org/home/Welcome.htm (under official documents-treaties, conventions and protocols, last access 15 February 2005). The Arab Charter on Human Rights was adopted by the Council of the League of Arab States in Cairo and deals with the right to life in article 5: "Every individual has the right to life, liberty and security of person. These rights shall be protected by law." The death penalty is specifically dealt with in three articles that make this document clearly retentionist: article 10 "The death penalty may be imposed only for the most serious crimes and anyone sentenced to death shall have the right to seek pardon or commutation of the sentence"; article 11 "The death penalty shall under no circumstances be imposed for a political offence"; article 12 "The death penalty shall not be inflicted on a person under 18 years of age, on a pregnant woman prior to her delivery or on a nursing mother within two years from the date on which she gave birth"; See Harvard University site at http://humanrights.harvard.edu/resources/regionaldocs/arab_charter.html (last access 15th February 2005).

[41] See the superb work of A. A. Cançado Trindade, "Co-existence and co-ordination of mechanisms of international protection of human rights (at global and regional levels), in *Collected Courses/The Hague Academy of International Law*, Vol. 202, 1987/II, pp. 9-435.

[42] See Council of Europe, "Convention for the Protection of Human Rights and Fundamental Freedoms", 4th November 1950, in *European Treaty Series* nº 005 (including reservations and ratifications) at ahttp://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG (last access 23rd February 2005). Hereafter simply cited as ECHR.

[43] The literature regarding this matter is very extensive and the issue is well documented; for an introductory overview see Francis G. Jacobs and Robin C. A. White, *The European Convention on Human Rights*, Clarendon Press, Oxford, 1996 (1st ed. 1975), for the European Sources see P.-H. Teitgen, "Introduction to the European Convention on Human Rights", in R. St. J. Macdonald *et al* (eds.), *The European System for the Protection of Human Rights*, Kluwer Academic Publishers/Martinus Nijhoff Publishers, Dordrecht, Boston and London, 1993, pp. 3-14, and for the relation between the European Convention and the UDHR see Juan Antonio Carrillo Salcedo, "The place of the European Convention in international law", in R. St. J. Macdonald *et al* (eds.), op. cit, pp. 15-24.

teeth to bite. The aim of this Convention was to identify the rights and freedoms inherent in any democratic form of government. Furthermore, what is distinctive in the European Convention is not the set of rights and freedoms that it encompasses but the goal of organising their protection within the framework of the CE and, therefore, safeguarding a common heritage that had been shattered by the excesses of totalitarianism and the Second World War. The ECHR does not exhaust the spectrum of human rights but, instead, provides the minimum standard of protection below which no state may descend.[44] The creation of the ECHR is consonant with article 3 of the Statute of the CE, which establishes as necessary requirements for membership of states that they must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. This was reinforced by article 8, under which a state could be suspended and invited to withdraw, if it had seriously violated article 3.[45]

It provided for the establishment of two organs: the European Commission of Human Rights and the European Court of Human Rights. The former was set up in 1953 and consists of a number of members equal to that of state parties, elected by the Committee of Ministers of the CE for a six-year renewable period and sitting on the Commission in their individual capacity.[46] The latter was set up in 1959 and consists of a number of judges equal to that of the members of the CE, elected by the Consultative Assembly (after 1974 renamed Parliamentary Assembly) of the CE for a nine-year renewable period. The Committee of Ministers, also mentioned in the Convention, was in fact established by the Statute of the CE, thus antedating the Convention and being distinct from the two organs set up by the Convention.[47] These institutions were reformed in 1998, as we shall see later on.

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[44] J. H. H. Weiler, *The Constitution of Europe, "Do the New Clothes Have an Emperor?" and Other Essays on European Integration*, Cambridge University Press, Cambridge, 1999, p. 105.

[45] This was the case of Greece during 1969 (date of withdrawal) and 1974 (date of readmission); The Statute of the Council of Europe was adopted on 5th May 1949 and is in *European Treaty Series*, nº 1/6/7/8/11at http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG (last access 15th February 2005).

[46] For the historical evolution of the Commission and its role see Erik Fribergh and Mark E. Villiger, "The European Commission of Human Rights", in R. St. J. Macdonald *et al* (eds.), op. cit., pp. 605-620.

[47] For the evolution and analysis of the European Court's functions see Paul Mahoney and Soren Prebensen, "The European Court of Human Rights", in R. St. J. Macdonald *et al* (eds.), op. cit., pp. 621-643.

The right to life in the first draft that was presented, the Teitgen Report from the European Movement, was not explicitly stated. In its article 1 it asserted that "Every State a party to this Convention shall guarantee to all persons within its territory the following rights: a) security of the person and limb (...)."[48] In the final draft that was adopted in 1950, the right to life is affirmed in its article 2.[49] The first part of the article is concerned with the protection by law and the guarantee of not being intentionally deprived of the right to life. In addition, it recognises an exception to this right, namely the death penalty following a conviction of a crime and sentence of a court for which this penalty was provided by law. Here, the death penalty is understood as an exception to the right of not being intentionally deprived of the right to life. The second part of the article deals with three exceptions to this right resulting from the use of absolutely necessary force. We should also consider the fact, as we have already mentioned, that the wording of this article clearly reflects the post-war atmosphere in Europe resulting from the war trials and subsequent death sentences that were carried out. The death penalty is stated in very general terms, having only the two mentioned requisites and article 2 does not, in itself, restrict or limit the use of the death penalty.[50]

The next relevant step regarding the discussion of the death penalty took place with the drafting of the ICCPR and its article 6 concerning the right to life. This article was adopted between 13th and 25th November 1957 taking up most of the 12th session of the Third Committee of the General Assembly. When compared with the ECHR "it already shows the remarkable and rapid evolution of international law respecting the death penalty."[51] It has in common the fact that it makes an explicit reference to the death penalty but it goes further by asserting

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[48] P.-H. Teitgen, op. cit., pp. 6-8.

[49] See ECHR, article 2:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a) in defence of any person from unlawful violence;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) in action lawfully taken for the purpose of quelling a riot or insurrection.

[50] Torkel Opsahl, "The right to life", in R. St. J. Macdonald *et al* (eds.), op. cit., pp. 207-223, at p. 218.

[51] William A. Schabas, "International legal aspects", in Peter Hodgkinson and Andrew Rutherford (eds.), *Capital Punishment: Global Issues and Punishments*, Waterside Press, Winchester, 1996, pp. 17-44, at p. 19.

safeguards and restrictions on its implementation. The death penalty can only be applied to the most serious crimes, within procedural rules, without retroactive application and excluding from its application pregnant women and persons under 18 years of age. Unlike the ECHR, the wording of this article reflects the option of stating the right to life in general terms, and not listing exceptions to this right as article 2 (2) of its European counterpart does. Instead, only the death penalty is mentioned and dealt with. In addition, article 6 introduces a pioneering innovation, since it clearly manifests a trend towards abolition mainly in its 6th paragraph. In the drafting of this article two phases can be identified: the first one within the Commission between 1947 and 1954 and the second one between 1954 and 1957 within the Third Committee of the General Assembly.[52] Throughout the process, the three approaches identified earlier in regards to article 3 of the UDHR, persisted and even amplified their claims with respect to the death penalty.[53] When looking at article 6 as a whole, the Commission was responsible for most of paragraph 1, 4 and half of paragraph 2 and 5, and the work of the Third Committee is most visible in paragraphs 3, 6, and half of paragraph 2 and 5.

In the first phase, the right to life began to be discussed having as its starting point Britain's draft presented to the Drafting Committee that was adopted with minor amendments.[54] The first contentious issue was the consideration of the exceptions to the absolute right of life besides capital punishment. A list was compiled with the exceptions provided by the US and South Africa.[55] To this

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[52] For a masterly detailed research of the whole process of adoption of article 6 of the ICCPR see William A. Schabas, *The Abolition of the Death Penalty in International Law*, Grotius Publications Limited, Cambridge, 1993, pp. 51-135 (Chapter II: The International Covenant on Civil and Political Rights: towards abolition).

[53] An inestimable instrument of research are the *travaux préparatoires* of article 6, which were gathered by Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, Dordrecht, 1987, pp. 113-146. For a more succinct version see by the same author, "The Relevant "*Travaux Préparatoires*" of Article 6 of the International Covenant on Civil and Political Rights" as Appendix I of UN Document E/CN.4/Sub.2/1987/20, pp. 53-59.

[54] See the comparative outline between the British and the Secretariat drafts in UN document E/CN.4/AC.1/3/Add.3. See also New Zealand whose revised draft made no change to the article of life as presented by Britain in UN document E/CN.4/82/Add.12 p. 11.

[55] The list of possible exceptions to the right of life (then article 5) was compiled by the Drafting Committee in UN document of 1948 E/800, p. 17. The list amounted to suppression of rebellion or riots and killing in attempting to effect arrests for certain offences (both were presented by Union of South Africa), self-defence and defence of another (Union of South Africa and US), deprivation of life by the military or state officers in a national emergency, , killing by accident, killing for violation of honour, killing of persons caught in the commission of a felony, killing to prevent and escape, killing by medical operation in absence of gross negligence or malpractice, killing through a voluntary medical experiment, killing by officers of the law to prevent the commission of a crime, killing by officers of the law in a local emergency and killing by a

specific list, we could add the general support to the idea of an enumeration of possible exceptions that was preferred by the Western European and Commonwealth countries lead by the Britain. The previous European experience with article 2 of the ECHR contributed much to this position. This European precedent can also be seen in Britain's proposal to add the word "intentionally" rather than the use of "arbitrarily" which was preferred by the Americans.[56]

Therefore, an alternative text was proposed by Chile, who, in 1949, proposed an amendment that replaced the term "intentionally" with "arbitrarily".[57] In addition, it was considered that any enumeration of exceptions could never be complete and secondly the listing of exceptions "seemed intended rather to authorise killing than to safeguard the right to life."[58] The Chilean proposal was initially rejected and then proposed again by the SU, went through an amendment

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member of the military in time of war (all these exceptions were proposed by the US).

[56] The British proposals are in the 1949 UN documents E/CN.4/188 (16th May) and E/CN.4/W.21 (23rd May). In the first one the right to life was defined as:

"1. No one shall be deprived of his life intentionally save in the execution of the sentence of a Court following his conviction of a crime for which this penalty is provided by law

2. this article shall not apply to killings resulting

(a) from the use of force which is no more than necessary

(i) in defence of person or property from unlawful violence; (ii) in order to effect arrests for serious offences; (iii) in order to prevent an escape from lawful custody; (iv) in order to prevent the commission of a crime of violence; (v) in action lawfully taken for the purpose of quelling a riot or insurrection; or

(b) from the performance of lawful acts of war."

In the second document the right to life was slightly changed:

"1. No one shall be deprived of his life intentionally.

2. There shall be no exception to this rule save where the death results:

a) in those States where capital punishment is lawful, from the execution of such a penalty in accordance with the sentence of a Court;

b) from the use of force which is no more than absolutely necessary in case of danger to human life; (i) in defence of any from unlawful violence; (ii) in order to effect a lawful arrest or to prevent an escape from lawful custody; or (iii) in action lawfully taken for the purpose of quelling a riot or insurrection, or for prohibiting entry to a clearly defined place to which access is forbidden on grounds of national security;

c) from the performance of lawful acts of war."

See as well the French and Lebanese proposals which also opted for the inclusion of the word "intentionally" in UN documents E/CN.4/W.23 and E/CN.4/398. The American preference for the word "arbitrarily" is seen in UN document E/CN.4/365, p. 22.

[57] The Chilean proposal (UN document E/CN.4/W.22) of amendment had four paragraphs:

"No one may deprive another person of his life arbitrarily.

In countries where capital punishment exists, sentence of death may be imposed only as a penalty for the most serious crimes under ordinary law and never for political offences.

No one may be executed save in virtue of the sentence of a competent court and in accordance with a law in force and prior to the commission of the crime so punished.

Amnesty, pardon or commutation of the sentence of death may be granted in all cases."

[58] This was the opinion of Mrs. Roosevelt in UN document E/CN.4/SR.139, paragraphs 7-11. See also the comments made by the US in E/CN.4/365 p. 22 and E/CN.4/SR.152, paragraphs 4-6. It was an opinion shared by the SU in UN document E/CN.4/SR.98, pp 2-3 and p. 10.

by the US and Chile, and was finally adopted in 1952.[59] This proposal also included a reference to the UDHR as the normative guide for the respect of human rights. The main argument was that to mention "arbitrarily" would indicate that the right was not absolute and obviate the need to set out the possible exceptions in detail. Likewise, the UN was no stranger to the inclusion of the word "arbitrary", since it could be found in the UDHR.[60] The British counter-argued that "arbitrarily" was a confusing and ambiguous term, prone to several interpretations. This could becloud the fact that political and civil rights were of immediate application and, therefore, states should know the exact scope of their obligations.[61] The British opposition continued at the Third Committee but to no avail.[62] Less controversial was the adoption by the Commission of the second phrase of paragraph 1 which was reinforced, although with minor adjustments, by the Third Committee.[63] In our view, the rejection of an exhaustive enumeration of exceptions to the right of life was important, because it signified the option of asserting the death penalty as *the* exception to the right of life. Moreover, by stating the right of life in near absolute terms, albeit with the death penalty exception, it gave more strength to the right itself and not to its exceptions, whether of an intentional nature or not.

There was opposition to the idea that the death penalty be mentioned, since it could give the impression that the practice was sanctioned by the international society and some countries considered that abolition should, therefore, be

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[59] The Soviet proposal (UN document E/CN.4/L.122), amended by Chile and US, included the word "arbitrarily" (UN document E/CN.4/L.176) and, therefore, "filled a gap in the SU amendment" as it is stated in UN document E/CN.4/SR.309, p. 4. It was adopted in 1952 (UN document E/CN.4/SR.311, pp. 5-6).

[60] See UDHR, articles 9 (" No one shall be subjected to arbitrary arrest, detention or exile), 12 ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, not to attacks upon his honour and reputation.(...), 15 ("Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality") and 17 ("Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property").

[61] See UN documents E/CN.4/SR. 309, pp. 4-6 and E/CN.4/SR.310, pp 7-8 and p. 15.

[62] At the Third Committee, Britain and other countries maintained their argument that it was necessary to state more precisely the exceptional cases where life could be taken as well as the replacement of the word arbitrary; see Britain and the Netherlands in UN document A/C.3/SR.809, paragraphs 20 and 26, Iran in UN document A/C.3/SR.810, paragraph 5, and Denmark, in UN document A/C.3/SR.819, paragraph 14. Other countries such as Poland upheld the term "arbitrary" as meaning without due process of law in UN document A/C.3/SR.814, paragraphs 1-2. In the end, the term "arbitrarily" was reconfirmed by the Third Committee by a roll-call of 46 votes in favour, 12 against and 14 abstentions, see UN document A/C.3/SR.820, paragraph 11.

[63] The Commission adopted "Everyone's right to life shall be protected by law" which was changed into "This right shall be protected by law" by the Third Committee with 69 votes in favour, none against, and 1 abstention. See UN document A/C.3/SR.820, paragraph 10.

promoted.[64] In contrast, others felt that the death penalty existed in many countries and what should be promoted were adequate safeguards and guarantees so that this irreversible punishment would not be applied unjustly or capriciously. In the end, the Commission in its sixth and eight sessions (1950 and 1952) worked towards the establishment of guarantees connected with the application of the death penalty: only for the "most serious crimes,"[65] and "pursuant to the sentence of a competent court" with due process of law.[66] The reference to the UDHR and the Convention on Genocide were presented with the aim of providing a further yardstick to which national laws authorising the imposition of the death penalty should conform.[67] Additionally, it insisted on the fact that an individual's right to life cannot be safeguarded if the existence of the group to whom he belongs is faced with the threat of extinction.[68] Furthermore, the Commission, for humanitarian reasons and he interests of the unborn child, also sought to exclude pregnant women from the application of the death penalty.[69] Moreover, it adopted the right to seek pardon (complete release) and commutation (replacement of the death penalty with a usually lengthy term of imprisonment) whenever a death sentence was passed.[70] The Third Committee did not change a word of this paragraph and adopted it with a large majority.[71]

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[64] UN document A/2929, Chapter VI, paragraph 5.
[65] See US proposal of 1950 (UN document E/CN.4/393) adopted by 13 votes in favour, none against, and 1 abstention (UN document E/CN.4/SR.153, paragraph 12).
[66] *Idem, ibidem.*
[67] The reference to the Genocide Convention was presented by Yugoslavia (UN document E/CN.4/L.179) as an amendment to the proposal of Chile and US (UN document E/CN.4/L.176) and after the reference regarding the UDHR. See as well footnote 58.
[68] See *Y. U. N. 1957*, p. 201.
[69] In 1951, Yugoslavia presented a proposal concerning the exemption of pregnant women (UN document E/1992, annex III, A, article 3, paragraph 4, p. 92) and accepted the revision suggested by Egypt: "sentence of death shall not be put into effect where the sentence concerns a pregnant woman" in UN document E/CN.4/SR. 311, p. 6. This proposal was adopted (UN document E/CN.4/SR.311, p. 7).
[70] This was a Lebanese proposal (paragraph 5 of UN document E/CN.4/398) which was taken up by the SU (paragraph 4 of E/CN.4/L.122). This proposal also included the right to amnesty, which was later removed on a proposal of France. France considered that amnesty was not a right *per se*. It was something that the state could grant but not something that could be applied for; see UN document E/CN.4/L.160 (with Corr. 1). The amended Soviet proposal together with the French amendment was adopted as a whole with 13 votes in favour, 1 against, and 4 abstentions (E/CN.4/SR.311, p. 6). The adopted text became paragraph 4: "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."
[71] UN document A/C.3/SR. 820, paragraph 17.

In 1952, the article was voted on in the Commission as a whole and adopted by eleven votes in favour, four against and three abstentions.[72] This first phase is characterised with the laying down of the foundations of article 6, in which the procedural safeguards as well as the consideration of the death penalty as the exception to the right to life were secured, despite the ensuing attempts by Britain to include a broader list of exceptions. In the second phase, in the Third Committee, we find the continuation of the work of the Commission, but also the addition of new elements. Unlike article 3 of the UDHR, in which the contents of the Commission draft remained almost unchanged, the Third Committee made important contributions in the debate around article 6, changing its final outlook. It fulfilled the hope of representatives such as René Cassin who had voted against the "new article 3, feeling that the text, while appearing to safeguard the right to life, in fact permitted violations of that right. He hoped that the article would be changed subsequently."[73]

Its starting point was the text prepared by the Secretary-General, which aimed at understanding all the approaches involved in a summary of the comments about the Commission's draft text of the Covenants.[74] A Working Party was created in order to manage a compromise between all the approaches that were presented in the Third Committee, and it was decided to accept the draft of the Commission as the starting point.[75] The recurrent controversial issue of whether or not to include in article 6 a provision for the abolition of the death penalty gained new momentum with the amendment proposed by Colombia and Uruguay that had precisely the intention of proclaiming the abolition of capital punishment.[76] This amendment for the first time put the issue of abolition in a formal way, and inevitably prompted the debate. Several countries made

[72] UN document E/CN.4/SR.311, pp. 6-7.
[73] *Ibidem*, p. 7.
[74] UN document A/2929 with the title "Annotations of Text on the Drafts of the International Covenants on Human Rights" (the comments concerning article 6 and the right to life are in Chapter VI). See also the previous reports of 1951 (UN document E/1992, annex III, A, article 3) and 1952 (UN document E/2256, paragraphs 163-174).
[75] The members of the Working Party were Australia, Belgium, Brazil, El Salvador, France, Guatemala, Ireland, Israel, Japan, Mexico, the Netherlands, Panama, Peru, the Philippines and Poland.
[76] These countries proposed replacing the text of article 6 with the following "Every human being has the inherent right to life. The death penalty shall not be imposed on any person" (UN document A/C.3/L. 644). In 1950, Uruguay had already attempted to put abolition of the death penalty on the agenda, see UN document E/CN.4/SR.139, paragraphs 26-28.

suggestions with the aim of establishing a compromise between abolitionist and retentionist arguments, such as France and Ireland's proposals to add a clause in order to avoid the impression that the Covenant sanctioned the death penalty.[77] Some countries, such as Saudi Arabia, considered that "the Committee was not called upon to deal with the question of abolition, which was far too complex and involved the methods used in various countries to deal with criminal elements.[78] It was more important to ensure that the death penalty was not imposed unjustly.[79] Other states considered that if article 6 included a provision to abolish the death penalty as an obligation for states, it would hinder the ratification of the Covenant because the large majority of countries were retentionists and, therefore, unable to comply with such a provision.[80]

At the end of the discussions, it was decided to establish two references to the abolition of the death penalty, one in paragraph 2 which indicated not only the existence of abolitionist countries but also the direction that the evolution of criminal law should take, and another in paragraph 6 that established the abolition of the death penalty as a goal for all the parties to the Covenant.[81] Despite the fact that the ICCPR was to contain provisions which could be applied immediately, there was nothing against inserting provisions to be applied progressively; this was the case of the abolition of the death penalty, a progressive goal in a Covenant that contained immediately applicable rights.

This amendment to article 6 was adopted and it is noteworthy that the representatives Tejera and Zea Hernandez from Uruguay and Colombia voted against the inclusion of the new paragraphs because they considered that no

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[77] See, for instance, UN documents A/C.3/SR.811, paragraphs 26 and 27 (France) and A/C.3/SR.813, paragraph 41 (Ireland). The latter suggested that the following paragraph be added: "Nothing in this article shall be invoked to prevent or to retard any State Party to the Covenant from abolishing capital punishment, either wholly or in part, by constitutional means."

[78] See UN document A/C.3/SR.811, paragraph 20.

[79] See Indonesia in UN document A/C.3/SR.812, paragraph 30.

[80] See France in UN document A/C.3/SR.811, paragraph 26, Bulgaria in UN document A/C.3/SR.813, paragraph 39, Israel, Canada and New Zealand in UN document A/C.3/SR.814, paragraphs 22, 35 and 46.

[81] See UN document A/C.3/SR.816, paragraph 19. The Working Party made its suggestions to article 6 and the final wording of paragraph 2 was presented (UN document A/3764, paragraph 101); "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court"; and paragraph 6 (UN document A/3764, paragraph 105): "Nothing in this article shall be invoked to retard or to prevent any State party to the Covenant from abolishing capital punishment."

compromise was possible when dealing with the death penalty. [82] Despite the fact that they voted against this compromise proposal, it is fair to say that they achieved more than was foreseeable. The Committee recognised the need to include an abolitionist goal, despite the fact that it considered that it was a controversial issue and that it was "left for each state to resolve."[83] In the end, their initiative did bear fruit as they managed to change the contents of the adopted article.

The debates in the Third Committee also added another limit to the application of the death penalty, namely regarding juveniles. A Japanese proposal suggested that minors should be exempted from the application of the death penalty.[84] There was some debate as to where the age limit would be drawn and the Committee adopted, by a very narrow margin, the exemption of the death penalty to individuals under eighteen at the time of the commission of the crime. [85] In this regard, the UN followed the example set out by the IV Geneva Convention regarding civilians (article 68 (4)). This completed the final wording of paragraph 5 which was adopted as a whole.[86]

Furthermore, regarding paragraph 2, the Working Party of the Third Committee replaced the reference to the UDHR with one of the Covenant (because the UDHR was not a legally binding document) and replaced "principles" with "provisions." The reference to the UDHR was opposed on the ground that "the Declaration was a statement of ideals, necessarily somewhat broad and vague and lacking in legal precision."[87] Likewise, the insertion of the expression "law in force at the time" was also another way of reinforcing the idea that retroactive law

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[82] It is interesting to see that regarding paragraph 2, 46 countries voted in favour (including SU, Britain and France), 7 against (Iraq, Ireland, New Zealand, Uruguay, Venezuela, Colombia and Denmark) and 19 abstained (including Saudi Arabia and the US) and regarding paragraph 6 (no roll-call was requested), 54 countries voted in favour, 4 against and 14 abstained; see UN document A/C.3/SR.820 paragraphs 13 and 26 and A/3764 paragraphs 119 and 120.

[83] In paragraph 110 of UN document A/3764.

[84] UN document A/C.3/L.650.

[85] The final voting is in UN document A/C.3/SR.820 paragraphs 19 and 21; 21 countries voted in favour, 19 against and 28 abstained. In 1950, Egypt had already proposed an amendment to the Commission: "offenders under the age of 17 years old shall not be sentenced to death or to imprisonment with hard labour for life." This amendment was opposed by the Republic of China and US on the argument that it overloaded the draft covenant with details. See UN document E/CN.4/SR.149, paragraphs 68- 86.

[86] Paragraph 5 was adopted by 53 votes in favour, 5 against and 14 abstentions: "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." See UN document A/C.3/SR.820, paragraph 25.

[87] This was the British opinion (UN document E/CN.4/SR.140, paragraph 20) at the Commission.

was to be avoided. Despite the fact that article 15 of the Covenant already covered this issue (it actually goes further, since it also entitles the offender to benefit from any subsequent law providing for a lighter penalty), it was decided to maintain these words.[88] The reference to the Covenant is also important because it aims at reinforcing the procedural guarantees given by articles 14 and 15 when dealing with death penalty cases, as in capital cases these measures are even more important. The reference to the Genocide Convention was also reinforced with the introduction of a new paragraph.[89]

The article as a whole was voted on by roll-call at the request of Colombia and it was adopted by 55 votes in favour, none against and 17 abstentions.[90] The Western European countries abstained because they favoured the right to life to be articulated along the lines of article 2 of the ECHR, therefore, privileging a more rigid and detailed wording. The US abstained because it had earlier declared that it had no intention of ratifying the Covenants, an issue to which we will return later on. In contrast, Uruguay, Colombia and Venezuela also abstained because they could not accept the institutionalisation of the death penalty as an exception to the right to life.[91]

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[88] UN document A/C.3/SR.820, paragraph 12. *Cf.* Some delegations expressed their reservations concerning the articulation between articles 15 and 6 because of the fact that the issue was already covered by article 15. See Poland and Britain in UN document A/C.3/SR.817, paragraphs 13 and 16, Byelorussia in UN document A/C.3/SR.818, paragraph 9 and Denmark in UN document A/C.3/SR.819, paragraph 15.

[89] This was the result of an amendment proposed by Brazil, Panama, Peru and Poland (UN document A/C.3/L.649/Rev.1), which was revised by the Working Party (UN document A/3764, paragraph 102 and 108) and again revised by the four countries (UN document A/C.3/L.657) and the final paragraph as a whole was adopted by 49 votes in favour, 5 against and 18 abstentions (UN document A/C.3/SR. 820, paragraph 15): "When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide." *Cf.* Britain in UN document A/C.3/SR.812, paragraph 38.

[90] Yemen, Yugoslavia, Afghanistan, Albania, Argentina, Austria, Brazil, Bulgaria, Burma, Byelorussia, Cambodia, Ceylon, Chile, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, Ethiopia, Finland, France, Ghana, Greece, Guatemala, Haiti, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Japan, Jordan, Liberia, Mexico, Morocco, Nepal, Nicaragua, Norway, Pakistan, Panama, Peru, Philippines, Poland, Romania, Saudi Arabia, Spain, Sudan, Syria, Thailand, Tunisia, Turkey, Ukraine and the SU voted in favour, Australia, Belgium, Canada, Republic of China, Colombia, Denmark, Italy, Luxembourg, Federation of Malaya, Netherlands, New Zealand, Portugal, Sweden, Britain, US, Uruguay and Venezuela abstained; see UN document A/C.3/SR.820, paragraph 27.

[91] For the Uruguayan approach to the death penalty especially at the discussion of the International Covenant see Rodolfo Schurmann Pacheco, "The death penalty in Uruguay", in *Crime Prevention and Criminal Justice Newsletter*, Vols. 12 and 13/Special Combined Issue on Capital Punishment, November/1986, pp. 32-38. See also UN document A/C.3/SR.818, paragraph 11.

On balance, article 6 has a clear abolitionist look that took its form in the debates of the Third Committee and was, therefore, an important change as to how the issue of the death penalty was viewed in international society. This can also be seen in the placing of the word "inherent" in its first paragraph,[92] which derived from the Uruguayan and Colombian amendment's first sentence that aimed at the abolition of the death penalty. It was greeted with enthusiasm by other states, and found its place in the final wording of article 6.[93] It consolidates the perspective that rights are not conferred on an individual by society. Furthermore, it was society that had the duty to protect the individual's right to life: the state could not grant it, but could only take it away.[94]

Within the wider standard-setting of the right to life, we should also mention the adoption of the American Convention on Human Rights (ACHR) in 1969, which came into force in 1978.[95] The ACHR has eighty-two articles and established two organs: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The former antedates the Convention, since it was created in 1959 as one of the organs of the OAS itself and saw its role strengthened. It is based in Washington D.C. and composed of seven members, elected by the OAS General Assembly for a four-year renewable term of office and serving in a personal capacity. The latter consists of seven judges, who are nationals of OAS member states, elected in an individual capacity and by an absolute majority vote by state parties in the OAS General Assembly for a six-year renewable term. The Court is based in San José, Costa Rica.

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[92] Paragraph 1: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. The word "inherent" was also adopted by the Convention on the Rights of the Child that entered into force in 1990, in its article 6 (1): "States Parties recognise that every child has the inherent right to life"; the Convention is available at http://www.ohchr.org/english/law/crc.htm (last access 15th February 2005). Hereafter simply cited as CRC.

[93] Support was given by El Salvador, Britain and Pakistan; see UN documents A/C.3/SR.811, paragraphs 3 and 4, A/C.3/SR.815, paragraph 36, and A/C.3/SR.818, paragraph 13. It was inserted in article 6 (65 votes in favour, 3 against and 4 abstentions); see UN document A/C.3/SR.820, paragraph 8.

[94] See comments by France (UN document A/C.3/SR.810, paragraph 10), Israel (UN document A/C.3/SR.814, paragraph 21) and India (UN document A/C.3/SR.813, paragraph 35).
Cf comments made by Poland and Denmark in UN documents A/C.3/SR.817, paragraph 12, and A/C.3/SR.819, paragraph 14.

[95] Organisation of American States, "American Convention on Human Rights (Pact of San José, Costa Rica)", 22nd November 1969 at http://www.oas.org/juridico/english/Treaties/b-32.htm (last access 28th February 2005). Hereafter simply cited as ACHR.

The right to life is asserted in its article 4 and also establishes the death penalty as the exception to the right of life.[96] It follows the 'UN model' rather than the 'European form.' But it goes further in terms of guarantees and exclusion concerning the application of the death penalty. It mentions explicitly that states that have abolished the death penalty may not reintroduce it, as well as states that have the death penalty not being able to extend it to other types of offences. Likewise, it leaves out political crimes or related common crimes from being subject to the death penalty.[97] As to the categories of persons that are excluded from capital punishment besides pregnant women and persons under 18 years of age at the time of the offence, it adds persons over 70 years of age. Moreover, it touches on the issue of abortion in its first paragraph because it considers that the right to life begins from the moment of conception, although the extent to which this is an obligation for states remains unclear.[98]

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[96] See ACHR, article 4:
1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be re-established in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offences or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

[97] This was reinforced by the Advisory Opinion OC-3/83 of 8th September 1983 of the Inter-American Court of Human Rights, *Restrictions to the Death Penalty (Arts. 4 (2) and 4 (4) American Convention on Human Rights)* requested by the Inter-American Commission on Human Rights. The advisory opinion was centred on two questions: "May a Government apply the death penalty for crimes for which the domestic legislation did not provide such punishment at the time the American Convention on Human Rights entered into force for the said state?" and "May a government, on the basis of a reservation to Article 4 (4) of the Convention made at the time of ratification, adopt subsequent to the entry into force of the Convention a law imposing the death penalty for crimes not subject to this sanction at the moment of ratification?"; To these two questions, the Court answered unanimously "that the Convention imposes an absolute prohibition on the extension of the death penalty and that, consequently, the government of a State Party cannot apply the death penalty to crimes for which such penalty was not previously provided for under its domestic law" and "that a reservation restricted by its own wording to article 4 (4) of the Convention does not allow the government of a State Party to extend by subsequent legislation the application of the death penalty to crimes for which this penalty was not previously provided." See Inter-American Court of Human Rights official site at http://www.corteidh.or.cr/serieapdf_ing/seriea_03_ing.pdf (last access 15th February 2005).

[98] This was already present at the 1945 draft Declaration of the International Rights and Duties of Man presented by the Inter-American Juridical Committee as well as in the amendment proposed by Belgium, Brazil, El Salvador, Mexico and Morocco to include in paragraph 1 of article 6 the words "from the moment of conception" (UN document A/C.3/L.654). Later on, Mexico made an interpretative declaration regarding

The fact that both regional Conventions contain the right to petition of individuals is also noteworthy, in that the European Convention pioneered this process, which has been described as the "historical rescue of the individual as subject of the international law of human rights."[99] The requisites for application are quite similar to those contained in the ICCPR and its Optional Protocol. In addition, both regional Conventions contemplate derogations from human rights in temporary situations of emergency which are limited in time, and in accordance with the laws enacted for reasons of general interest. Nevertheless, and as in the ICCPR, there is a cluster of rights which are non-derogable and in which the right to life is included.[100]

In conclusion, the death penalty appeared as an issue for the first time within the larger framework of the right to life. As we have seen, within the UN system, it became the exception to this right and this first phase is also characterised by the first enunciations of persons to whom the death penalty was

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this matter at the time of its accession to the Convention in 1981 and "with respect to article 4, paragraph 1, the Government of Mexico considers that the expression "in general" does not constitute an obligation to keep in force legislation to protect life "from the moment of conception" since this matter falls within the domain reserved to the States." In http://www.oas.org/juridico/english/Sigs/b-32.html (last access 15 February 2005).

[99] In paragraph 22 of the Concurring Opinion by Judge Cançado-Trindade to the Advisory Opinion of the Inter-American Court of Human Rights, OC-17/2002 of 28th August 2002 entitled *Juridical Condition and Human Rights of the Child* requested by the Inter-American Commission on Human Rights at http://www.corteidh.or.cr/seriea_ing/vsa_cancado_17_ing.doc (last access 28th February 2005).

[100] In the ACHR we find it in articles 27-30 which state that certain fundamental rights and judicial guarantees are indispensable and under article 27, no derogation is possible from the right to recognition of juridical personality (article 3), the right to life (article 4), the right to humane treatment (article 5), freedom from slavery or servitude (article 6), freedom from *ex post facto* laws (article 9), freedom of conscience and religion (article 12), the right to protection of the family (article 17), the right to a name (article 18), rights of the child (article 19), the right to nationality (article 20) and political rights such as the right to participate in government (article 23). The ECHR contains a similar clause in paragraph 2 of article 15. It does not admit any derogation in respect of the right of life except in respect of deaths resulting from lawful acts of war (article 2), the right not to be subjected to torture or to inhuman or degrading treatment or punishment (article 3), the right not to be held in slavery or servitude (article 4 (1), the right not to be held guilty in retroactive application of penalties for criminal offences (article 7) and Protocol nº 7 (entered into force in 1988) added the right not to be tried or punished twice. We should note that the fact that deaths resulting from lawful acts of war are not unregulated because it is a matter covered by the Geneva Conventions. Furthermore, with the *Lawless v Ireland* case of 1961, the European Court itself expressly ruled that it was for the Court to determine whether the conditions laid down in article 15 for the exercise of the exceptional right of derogation from the Convention had been fulfilled, instead of leaving it solely for the state in question. This restricted even further the margin of manoeuvre of states to derogate from human rights and fundamental freedoms in times of public emergency; see *Lawless v Ireland*, Judgement on the Merits (especially paragraph 22 of the law), 1st July 1961, (Hudoc reference 00000103) The role of the Court in determining whether the conditions laid down by article 15 had been met was reinforced by its ruling in the case of *Ireland v. the United Kingdom*, Judgment of 18th January 1978, Series A, nº 25, (Hudoc reference 00000091) paragraph 207; both cases are at http://www.echr.coe.int/Eng/Judgments.htm (last access 15th February 2005).

not applicable, namely, pregnant women and persons less than 18 years of age at the time of the offence. Whilst article 3 of the UDHR was the outcome of the Commission's leading role, the final outlook of article 6 of the ICCPR was the result of the work of the Third Committee that left its mark on the draft article received from the Commission. The inclusion of the death penalty was also present at the European and American Conventions, although with some differences. In addition, both regional documents as well as the ICCPR, enunciate that the right to life is non-derogable in times of public emergency. Looking at the UDHR and the ICCPR, we can say that they have an abolitionist stance concerning capital punishment and this set the tone for the debates that were to follow in the subsequent decades.

2 Specific Standard-Setting towards the Abolition of the Death Penalty

"International treaties drawn up at the UN forums, even if drafted in the form of an "optional protocol", must be ones universally acceptable to the majority of states in the world. And in this case, as you all know, states that have already abolished the death penalty are still in a minority and even in those states where the death penalty has been discontinued, there are many people who advocate a return to capital punishment."[101]

The UN debate regarding the death penalty did not stop at the drafting and adoption of article 6 of the ICCPR. As we have seen, some countries considered the death penalty a domestic issue that should not be discussed either by the Commission on Human Rights or the Third Committee. This dual identity, both as a human rights and a domestic criminal law issue, is also present in the creation of the *Ad Hoc* Advisory Committee of Experts on Prevention of Crime and the Treatment of Offenders that took over the functions carried out by the International Penal and Penitentiary Commission.[102] It was also decided to convene an international congress, every five years, similar to those previously organised by the International Penal and Penitentiary Commission. The first one, under the title of UN Congress on the Prevention of Crime and the Treatment of Offenders, took place in Geneva in 1955.

This *Ad Hoc* Committee grew in importance as well as in membership, as can be see from its conversion into an Advisory Committee and then to a Committee, the Committee on Crime Prevention and Control.[103] Its importance was enhanced in 1991, when ECOSOC decided to upgrade the Committee to a Commission. The Commission on Crime Prevention and Criminal Justice is based in Vienna and has currently forty members. As the change of title indicates, there was an enlargement of its functions, since the Commission helps to tackle a

[101] Statement by Japan concerning the elaboration of the second optional protocol aiming at the abolition of the death penalty in UN document A/44/592, p. 25, paragraph 3.
[102] See General Assembly resolution 415 (V) and its Annex ("Plan prepared by the Secretary-General of the United Nations in consultation with the International Penal and Penitentiary Commission") of 1 December 1950, in *Y. U. N. 1950*, pp. 655-656.
[103] See ECOSOC resolutions 1086 (XXXIX (B) and 1584 (L) in *Y. U. N. 1965*, pp. 409-410 and *Y. U. N. 1971*, pp. 375-376.

broadened scope of UN interest in criminal justice policy and also to establish international standards in the field of crime control.

The issue of the death penalty, as either a criminal issue or a human right, was pursued within a thematic approach trying not to single out a country. It had the goal of enabling the broadest of consensus regarding such a controversial issue. This broadly characterised the UN action in this field, albeit with one exception, namely, South Africa. Already in 1963, the General Assembly expressed concern over the arbitrary use of the death penalty in this country as an instrument to eliminate political prisoners who resisted *apartheid*.[104] This country-specific strategy increased and, in 1969, the General Assembly ordered an inquiry into the question of capital punishment in southern Africa, namely in the Republic of South Africa, Southern Rhodesia and Southwest Africa (Namibia).[105] This approach continued within the broader framework of criticism of human rights' violations concerning racial discrimination and *apartheid*.

Already in 1957, Sweden had proposed that a study on capital punishment should take place. This happened two years later, when the General Assembly invited ECOSOC to initiate a study of the question of capital punishment, along with the laws and practices relating thereto and of the effects of the death penalty, and the abolition thereof, on the rates of criminality.[106] This invitation was taken up by ECOSOC which asked the Secretary-General to prepare such a report in consultation with the *Ad Hoc* Committee.[107] This partnership became standard procedure in the following studies and surveys. The outcome was the report presented by Marc Ancel, under the title "Capital Punishment."[108] It reviewed the years between 1956 and 1960 and was based on the replies given to two

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[104] We find this concern, for instance, in the Preamble of resolution 1881 (XVIII) that stated "considering reports to the effect that the government of South Africa is arranging the trial of a large number of political prisoners under arbitrary laws prescribing the death sentence", in *Y. U. N. 1963*, p. 21.

[105] Resolution 2394 (XXIII) of the General Assembly was adopted on 26th November 1968; in *Y. U. N. 1968*, pp. 606-607. In 1970, the Commission considered a report of the *Ad Hoc* Working Group of Experts which had in 1969 conducted an investigation on several matters including capital punishment in Southern Africa. This investigation was repeated in 1971.

[106] See Resolution 1396 (XIV) of 20th November 1959 under the title "Study of the Question of Capital Punishment", in *Y. U. N. 1959*, p. 252.

[107] Resolution 747 (XXIX) of 6th April 1960; see *Y. U. N. 1960*, p. 380.

[108] UN document ST/SOA/SD/9. This report was divided into three parts: the first one dealt with the legal problems, the second with the practical application of the death penalty and the third with the sociological and criminological problems such as deterrence and the reasons for retaining or abolishing such a punishment. Hereafter simply cited as Ancel Report.

questionnaires prepared by the Secretary-General. The first one requested information on the laws, regulations and practices in force concerning the death penalty from member states and some non-members, whilst the second asked for information on the deterrent effect of the death penalty and on the consequences of its abolition from national correspondents in the field of the prevention of crime and the treatment of offenders and some NGOs. The report also benefited from information gathered by Marc Ancel, as well as his work done for the CE in a similar report. To the Ancel report, 64 member states and five non-members responded.[109] Despite the observation by the Rapporteur that "this subject reflects, perhaps more than any other, differences in national institutions and traditions," he was able to reach some general indications.

The majority of the countries in the world were retentionist, but it was observed that the modern tendency was to drop the mandatory character of the death penalty and replace it with a discretionary application. It was noted that there was a backlash to the massive use of the death penalty in certain states, mainly due to the experience with authoritarian and totalitarian states. The mandatory nature of capital punishment was, nevertheless, retained for certain specific crimes and military offences. As a general rule, the death penalty was mandatory in cases of capital murder or crimes against the external security of the state.[110] Most countries recognised that some persons were not fit to be on trial, such as the insane, and some also considered the concept of diminished responsibility, such as in the case of recognised psychic deficiency.[111]

The existence of several degrees of capital punishment and the distinction between ordinary and aggravated forms of execution, the use of torture, accessory

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[109] These were Afghanistan, Argentina, Australia, Austria, Burma, Cambodia, Canada, Central African Republic, Ceylon, Chad, Chile, Republic of China, Colombia, Congo, Czechoslovakia, Dahomey, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Ghana, Greece, Guatemala, Iceland, India, Indonesia, Iran, Iraq, Italy, Ivory Coast, Japan, Laos, Lebanon, Luxembourg, Federation of Malaya, Morocco, the Netherlands (including colonial territories), New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Philippines, Poland, Portugal, Senegal, Somalia, Republic of South Africa, Spain, Sudan, Sweden, Syria, Tanganyika, Thailand, Togo, Turkey, SU, United Arab Republic, Britain (including territories for the administration of which it is responsible), US, Venezuela and Yugoslavia. The non-member states that replied were the Federal Republic of Germany, Holy See, San Marino, Switzerland and the Republic of Vietnam.

[110] See paragraphs 14 and 19 of the Ancel Report.

[111] See, for instance, the evolution of the insanity defence, beginning with the McNaughtan Rules until today, in England and Wales by Stephen White, "The insanity defence in England and Wales since 1843," in *Annals of the American Academy for Political and Social Sciences*, Vol. 477, January/1985, pp. 43-57.

ignominious penalties, such as forfeiture of property or exposition of the convict or enforced public confession, were being replaced. This narrowing down of the use of capital punishment could also be seen in the fact that, in general, a death sentence meant simply the deprivation of life.[112] In the majority of countries, there were two methods of carrying out a death sentence: in ordinary courts, by hanging, and in military courts, almost all by firing squad. Likewise, executions had been gradually removed from the public eye. The law of the majority of states made provision for appeal against a death sentence and, in most cases, there was a traditional exemption in favour of pregnant women, as well as minors and the insane. [113] In some countries, the exemption went further and included all women who frequently had their sentences commuted "sometimes by virtue of an almost binding custom", as well as aged persons.[114]

Capital crimes were still relatively numerous but it was also evident that the number of countries in which offences other than murder were punishable by death was declining. Despite this fact, there was also a reappearance of the death penalty for political crimes within the category of crimes against the state and, in some socialist countries, for crimes against property and economic crimes.[115] The Ancel Report also contained a detailed analysis of the issue of abolition. It was noted that, in some cases, abolition *de jure* was preceded by *de facto* abolition, such as the case of Portugal. In other cases, the death penalty was first limited to certain exceptional cases, before being finally abolished, as in the case of Venezuela. Traditionally, the death penalty was first abolished for political offences, and then for ordinary crimes. The Ancel report also cited 15 reasons from abolitionist countries as to why they had abolished such a punishment.[116] In

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[112] See paragraphs 44 and 57 of the Ancel Report.
[113] See *ibidem*, paragraphs 50, 63, and 69-71.
[114] See *ibidem*, paragraph 77.
[115] See *ibidem*, paragraphs 85 and 102-143.
[116] These arguments were stated in *ibidem*, paragraph 89: the value of the death penalty as a deterrent is not proved or is debatable; a large number of capital crimes are in fact committed by persons of unsound mind; uneven application of the death penalty either in that different courts apply different standards of severity or in that the application of the law is influenced by economic and sociological considerations; death penalty hampers the normal administration of criminal justice because courts would be reluctant to convict on a capital charge; whatever precautions existed there is always the possibility of error; the criminogenous character of death penalty whenever a death sentence is executed; life imprisonment is sufficient for the purpose of effective protection of society (as in the abolitionists countries of Latin America); combined efforts of individual abolitionists and leagues have put the issue of abolition in the agenda; public opinion considers that the death penalty has become a "somewhat sinister lottery" instead of an absolute penalty;

most of these countries, capital punishment had been replaced by life imprisonment. [117] In addition, the report stated that indications supported the experts who always held that, contrary to public opinion, the crimes which carry the death penalty are more often than not committed by first offenders, and that the information assembled confirms the opinion that the abolition or the suspension of the death penalty does not have an immediate effect of appreciably increasing the incidence of crime.[118]

The Ancel Report was considered by the *Ad Hoc* Committee and confirmed by ECOSOC in 1963.[119] In addition, it requested the Secretary-General to broaden the studies so far carried out and to prepare a report that should also include some consideration of the differences between civil and military courts, and the policy of the latter in regard to the death penalty. This was endorsed by the General Assembly as recommended by its Third Committee, to which was added the intervention of the Commission to this process.[120] The second report was carried out by Professor Norval Morris, "Capital Punishment: Developments 1961-1965."[121] The procedure for obtaining data was similar and 54 states responded, as well as five non-member states.[122] The conclusions that were reached by Professor Morris corroborated those found in the previous report.[123]

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even the most heinous criminal cannot be considered irreclaimable; the fact that executions became rare led to it ceased being a deterrent and also to guarantee equality in the application of penalties (Latin America and Portugal); desire to avoid using capital punishment for political purposes (Latin America); the abuse of the death penalty both as regards to the number of executions as well as the number of capital offences (Federal Republic of Germany); as a result of an electoral promise to abolish the death penalty (as in the case of New Zealand); the law proclaims that the human life is inviolable and therefore it is incompatible with the death penalty.

[117] In some countries however even life sentences were abolished as the case of Portugal in 1884; see *ibidem*, paragraphs 92 and 93.

[118] See *ibidem*, paragraphs 167, 192 and 231. The report also showed that the majority of the leading authorities in penal science favoured abolition.

[119] Resolution 934 (XXXV) of 9th April 1963; see *Y. U. N. 1963*, p. 312.

[120] Resolution 1918 (XVIII) 5th December 1963; see *Y. U. N. 1963*, p. 313.

[121] UN document ST/SOA/SD/10. Hereafter simply cited as Morris Report.

[122] These were Afghanistan, Algeria, Australia, Austria, Brazil, Central African Republic, Republic of China, Colombia, Cyprus, Czechoslovakia, Dahomey, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Gabon, Gambia, Ghana, Greece, Israel, Italy, Ivory Coast, Jamaica, Japan, Kuwait, Laos, Luxembourg, Malawi, Malaysia, Malta, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Poland, Portugal, Singapore, Somalia, Senegal, Sweden, Syrian Arab Republic, Trinidad and Tobago, Tunisia, Turkey, Ukraine, United Arab Republic, Britain (including territories for the administration of which it is responsible), US, Upper Volta, Venezuela, and Zambia. The non-member states that replied were the Federal Republic of Germany, San Marino, Switzerland, Monaco, and the Republic of Vietnam.

[123] The Morris Report concluded that there was an over-all tendency in the world towards fewer executions and for the removal of categories of offences for which it had been traditionally applied such as homicide. At

In addition, it was noted that all of the reporting states allowed recourse to a higher court for capital offenders, and there were a growing number of capital offenders who were spared through judicial processes or by executive clemency.[124] A tendency was observed regarding offenders who have had their sentences commuted to be placed in conditions similar to other prisoners and even to be included in mechanisms for their eventual release. It was also reaffirmed that, from the data contained in the replies, the majority of murderers were first offenders.[125] As for the influence of the abolition of the death penalty upon the incidence of murder, all the available data suggested that where the murder rate was increasing, abolition did not appear to hasten the increase, where the rate was decreasing, abolition did not appear to interrupt the decrease, and where the rate was stable, the presence of or absence of capital punishment did not appear to affect it.[126]

These two ground-breaking studies influenced the direction of the debate concerning capital punishment within the UN framework. The conclusion that the abolition of the death penalty was not followed by a notable rise in the incidence of the crime, no longer punishable by death, together with the fact that the death penalty was becoming discretionary rather than mandatory, mostly confined to exceptional offences, such as capital murder and crimes against the external security of the state and traditionally exempting pregnant women and juveniles, gave a new life to the abolitionist movement who believed these measures contributed to the respect for the right of life contained in article 3 of the UDHR. These ideas were presented by Sweden and Venezuela, in 1967, in a draft

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the same time, there was a contrary tendency in applying it to "new" offences connected with certain political and economic crimes. The death penalty was becoming increasingly a discretionary rather than a mandatory sanction and the latter was usually connected with cases of capital murder and of crimes against the external security or integrity of the state (paragraphs 19 and 25). Almost all countries had provisions of exclusion of certain offenders from the death penalty such as the insane, young offenders and pregnant women. In fact, the "practice of postponing the execution of pregnant women until after childbirth is nearly universal" (paragraph 79); as in the previous report it was observed that in most countries, the practice was not to execute women at all, and from the 2, 052 persons sentenced to death only 27 were women, and of the reported 552 executions, only 7 were of women (paragraph 67); the methods of execution were the same concerning military and civil offences and all with decreasing publicity (paragraphs 82, 83, 86 and 91).

[124] See *ibidem*, paragraph 58.

[125] See *ibidem*, paragraphs 104, 105 and 141.

[126] It also reinforced the idea that among the leading authorities in the penal and social sciences the majority favoured abolition and in contrast, politicians, judges and law enforcement agencies were in favour of the retention of the death penalty; see *ibidem*, paragraph 163.

resolution to the General Assembly inviting member states to adopt measures concerning the restriction of the death penalty. Furthermore, it requested information from member states as to their present attitude towards the death penalty and possible change in the future. The Secretary-General was also requested to submit a report on the matter to ECOSOC.[127] The General Assembly decided to defer the issue but requested ECOSOC to instruct the Commission to study the draft resolution.[128]

The Commission studied the issue of the death penalty, and reached a draft resolution along the lines of the one that had been submitted, and decided to transmit it to ECOSOC. The draft added the general concern regarding the need to ensure the most careful legal procedures and the greatest possible safeguards for persons accused of capital offences. This was endorsed by ECOSOC and the General Assembly.[129] It is noteworthy that two approaches were beginning to be discerned, on the one hand the increasing concern for narrowing down the application of the death penalty and ensuring the best safeguards as possible and, on the other, the monitoring of the death penalty by requesting states to transmit information on the number of death sentences and executions as well as their capital offences. The latter was carried out by the Secretary-General, who began to centralise the information received and report it. Moreover, it is interesting to observe that the issue of the death penalty was being linked with, albeit in a secondary manner, to article 5 of the UDHR which prohibits torture or any other cruel, inhuman or degrading treatment or punishment, and not just article 3.

The request that the Secretary-General submitted to ECOSOC, in 1971, a note summarising data received from Member States with regard to capital punishment was fulfilled. In this note, the Secretary-General reviewed legal safeguards provided in reporting countries for persons liable to capital punishment

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[127] These measures asked countries to amend their laws, in order to provide that a person sentenced to death would not be deprived of the right to appeal or petition to pardon and reprieve; to provide that no death sentence be carried out until all the appeals and pardon processes have been terminated and in any case, not until six months after the passing of the sentence by the court of first instance; and also asked states to notify the Secretary-General of any death sentences and executions as well as the crimes for which these sentences had been imposed. See resolution 1243 (XLII) of 6th June 1967; the draft resolution proposed by Sweden and Venezuela is annexed to the text of the resolution and both can be found at *Y. U. N. 1967*, pp. 545-546.

[128] Resolution 2334 (XXII) of 15th December 1967; see *Y. U. N. 1967*, pp. 546-547.

[129] Resolution 1337 (XLIV) of ECOSOC adopted on 31st May 1968 containing a draft resolution and General Assembly's resolution 2393 (XXIII) of 26th November 1968; both are in *Y. U. N. 1968*, pp. 604-606.

for ordinary crimes as well as for persons accused of offences against the State and certain other military and exceptional crimes. This note was endorsed by ECOSOC which affirmed that the main objective to be pursued was that of progressively restricting the number of offences for which capital punishment might be imposed, with a view to the desirability of abolishing this punishment in all countries so that the right to life, provided for in article 3 of the UDHR may be fully guaranteed. This approach set the tone for all the subsequent actions of the UN and was confirmed by the General Assembly.[130] This resolution also asked for the Secretary-General to prepare a report based on the material furnished by reporting states. This information should also include practices and statutory rules which governed the right of a person sentenced to death to petition for pardon, commutation or reprieve. In the following year, the Secretary-General was asked to prepare the report in such a way as to update the Ancel and Morris reports. It also invited the Council to analyse the current situation and trends regarding capital punishment.[131]

Table 1: Replies to the United Nations' Studies on Capital Punishment

Reports	Period covered	Replies from Member States
I (Ancel Report)	1956-1960	64
II (Morris Report)	1961-1965	54
III	1966-1972	84

In 1973, the Secretary-General presented his study to ECOSOC, which contained 84 replies from member states.[132] It was the report that received the greatest number of replies from member states, but still fell short considering the number of members of the UN. This situation became a pattern that remains until today and, in which, the level of responses to UN surveys concerning the death penalty is low, both in abolitionist and retentionist members. Consequently, reports

[130] See paragraph 3 of ECOSOC resolution 1574 (L) adopted on 20th May 1971 and paragraph 3 of the General Assembly's resolution 2857 (XXVI) of 20th December 1971; see *Y. U. N. 1971*, pp. 442-443. The latter was adopted with 59 votes in favour including the SU, France and Britain, 1 vote against (from Saudi Arabia) and 54 abstentions including the US.
[131] See ECOSOC resolution 1656 (LII) adopted on 1st June 1972 and especially paragraph 1 of resolution 3011 (XXVII) of the General Assembly of 18th December 1972, see *Y. U. N. 1972*, p. 477.
[132] UN document E/5242 (23rd February 1973) and Add.1 (19th March 1973).

could not base their conclusions entirely on the replies received, since these did not transmit a faithful description of the worldwide situation concerning the death penalty. The report, as well as the subsequent surveys, rested mainly on information gathered by the Secretariat and specialised personnel and professionals.

This report acknowledged the shift of the UN towards abolition, which received its moral guidance from the aspirational standard set out in article 3 (UDHR) concerning the right to life and, from the practical point of view, following the evidence so far made available regarding the non-deterrent character of capital punishment. Nevertheless, the report called attention to the fact that the published studies had derived from the developed and largely western world and thus provided a "misleading picture which has frequently given an unwarranted universality to values, theories or practices prevalent in the West." This situation led the Rapporteur to express doubts as to the assumptions considered in the previous reports when including a wide range of developing nations; namely the trend towards the restriction to fewer offences punishable by death, that the methods of executing were becoming more humane and that people accused of capital offences would benefit from legal safeguards.[133] It was observed that progress towards abolition had been slow and that the number of capital offences had been declining, when compared with the 19th century. If the trend towards removing traditional capital offences such as homicide continued, it was contradicted by the addition of crimes such as armed robbery and the fact that a rise in violent crimes had led to calls for the re-introduction of the death penalty, namely for hijacking, drug trafficking and currency dealing. Moreover, it was noted that harsher methods of execution had been introduced as an additional solution and these included beatings and torture before execution.[134]

The majority of the countries in the world were retentionist (100 out of 132) and there were only nine member states that were totally abolitionist.[135] The report also emphasised that there were countries claiming to be abolitionist, whilst

[133] See *ibidem*, paragraphs 23 and 24.
[134] See *ibidem*, paragraphs 26-29.
[135] These were Venezuela, Costa Rica, Ecuador, Uruguay, Colombia, Dominican Republic, Iceland, Austria and Finland.

retaining the death penalty for exceptional crimes. The most common 'exceptional crimes' punishable by death were treason and crimes related to the security of the state.[136] In fact, the abolition trend could be seen regarding ordinary crimes but not concerning political crimes and "the difference between an ordinary crime and a political crime is always left for the state to decide."[137] This could be partially explained due to the rise in terrorism and guerrilla warfare. The report also observed that, in most of the socialist countries, the separation of powers between the judiciary and the executive/legislative did not exist in practice as in western countries. Furthermore, the UN idea of a time-limit, *i. e.*, a lapse of time between the pronunciation of the death sentence and its execution was rejected by an overwhelming majority of states.[138] In general, although the law in most countries guaranteed the rights of the accused, the real problem was its implementation. The Rapporteur also concluded that there was much to be done towards the goal of promoting abolition. The majority of states were inclined to maintain this penalty whenever there was a crime wave, in the face of increasing political opposition, in socialist countries regarding economic crimes, as well as a way of tackling the recent increase in drug trafficking, terrorism and hijacking.

In the developed world, there appeared to be a tendency to reduce capital offences and executions rather than eliminating such a penalty from their penal codes. The abolition was rather in practice than in law. The Report also concluded that "the impression of a steadily abolitionist evolution is due to the importance given to trends in a few larger countries which happen to be in the spotlight of world politics, and which have joined in recent years the abolitionist group."[139] He also called for the need to increase the number of studies in more widely diversified cultures, so as to obtain a more accurate description of the death penalty worldwide. These conclusions influenced ECOSOC which reaffirmed the goal of progressively working towards the desirable goal of abolition and asked the

[136] There were 16 countries that were abolitionist for ordinary crimes only (Afghanistan, Argentina, Brazil, Denmark, Israel, Italy, Malta, Nepal, Netherlands, New Zealand, Norway, Panama, Peru, Portugal, Sweden and Britain) and three which were abolitionist by custom (Belgium, Luxembourg and Nicaragua).
[137] See UN document E/5242, and Add.1, paragraph 35.
[138] See *ibidem*, paragraphs 53 and 60.
[139] See *ibidem*, paragraph 76.

Secretary-General to submit analytical reports at five-year intervals, starting from 1975.[140]

The first of such reports was produced in 1975.[141] This resulted from a questionnaire with 14 simple questions addressing the issue of capital punishment among member states, and also from the comments issued by the Committee on Crime Prevention and Control.[142] There was a need to establish a more comprehensive and regular reporting procedure, so as to improve both the number and the quality of the replies received from member states, since only forty-nine replies were received. The worldwide situation was more or less the same as the one described in the previous report. There were eleven abolitionist states and the number of abolitionists by law for ordinary crimes was maintained, as was the number of abolitionists by custom.[143] Out of the 135 states considered, 104 were retentionist (including federated states divided on the issue) and this corroborated the conclusion of the report that it remained "extremely doubtful whether there is any progression towards the restriction of the use of the death penalty."[144]

In spite of these conclusions, ECOSOC reaffirmed its goal of the progressive restriction of the number of capital offences with a view to the desirability of abolition. It also called for the involvement of the Committee on Crime Prevention and Control, as well as the Social Defence Research Institute and other institutes, in order to achieve this goal.[145] This ECOSOC resolution was the result of a draft resolution sponsored by Austria, Ecuador, Italy, the Netherlands, Norway, and Venezuela which had been adopted by the Social Committee. The General Assembly called upon the Sixth UN Congress on Crime Prevention and Treatment of Offenders to be held in 1980, in Caracas, to debate the issue of the death penalty.[146] The Committee on Crime Prevention and

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[140] See paragraphs 1 and 5 of resolution 1745 (LIV) of ECOSOC adopted 16th May 1973 with 13 votes in favour, none against and 12 abstentions; see *Y. U. N. 1973*, pp. 575-576.
[141] UN documents E/5616 (12th February 1975), E/5616/Corr. 1 (7th April 1975), E/5616/Corr. 2 (10th April 1975) and E/5616/Add. 1 (18th April 1975).
[142] For the questionnaire see annex II of UN document E/5616.
[143] These were Venezuela, Costa Rica, Ecuador, Uruguay, Colombia, Dominican Republic, Iceland, Austria, Finland, Sweden and the Federal Republic of Germany. Guinea-Bissau replaced Sweden (abolished the death penalty in 1973) in the countries that are abolitionists for ordinary crimes only, thus leaving the total at the same number.
[144] See UN document E/5616, paragraph 48.
[145] See paragraph 2 of the resolution 1930 (LVIII) adopted on 6th May 1975; see *Y. U. N. 1975*, p. 697.
[146] Resolution 32/61 adopted without vote on 8th December 1977, which resulted from a recommendation by

Treatment of Offenders was entrusted with preparing this Congress and, in fact, capital punishment was more greatly debated than any other issue.

The Congress had the Second Five-Year Report of the Secretary-General as a starting point for the discussion, and capital punishment was agenda point nº 7 and debated within Committee I.[147] The association of the report and its presentation at the Congress became standard procedure in subsequent years.[148] The report concluded that, whilst there was a small increase in the number of countries which did not impose the death penalty, several retentionist countries had reintroduced an extensive use of such a penalty. In addition, concern was expressed regarding the increasing number of extra judicial executions that took place in retentionist, as well as abolitionist countries, in that most of them were politically motivated.[149] The Congress, as well as the Report, considered those that did not meet the standards set out by the relevant provisions of the ICCPR, namely articles 6, 14 and 15, extra-judicial, summary and arbitrary executions.[150] From the year in which it came into force, the ICCPR became the standard reference in most resolutions and decisions taken at the UN concerning the death penalty.

Seven European and Latin-American countries sponsored in the General Assembly's Third Committee, a draft resolution proposing measures aiming at the ultimate abolition of the death penalty through the adoption of a second optional protocol.[151] The General Assembly took note of this draft resolution under the title

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the Third Committee which had adopted a resolution sponsored by Austria, Canada, Costa Rica, Denmark, Ecuador, Finland, Honduras, Italy, Netherlands, New Zealand, Norway, Portugal, Senegal, Sweden and Venezuela; see *Y. U. N. 1977*, pp. 670-671. This concern was reaffirmed by ECOSOC in its resolution 1979/22 adopted on 9th May 1979 without vote along with the Committee on Crime Prevention and Treatment of Offenders' recommendation to the Secretary-General that the questionnaire used to gather information be simplified; see *Y. U. N. 1979*, p. 782.

[147] UN document E/1980/9 and Corr. 1, 2 and Add. 1 and Add. 1/Corr. 1 and Add. 2 and 3.

[148] See "Introduction: United Nations in the field of capital punishment" prepared by the Crime Prevention and Criminal Justice Branch, in *Crime Prevention and Criminal Justice Newsletter*, Vols. 12 and 13/Special Combined Issue on Capital Punishment, November/1986, pp. 2-4.

[149] See paragraph 84 of the report in UN document E/1980/9 and Corr. 1, 2 and Add. 1 and Add. 1/Corr. 1 and Add. 2 and 3.

[150] A Special Rapporteur was entrusted with the goal of examination of alleged extra-judicial, summary and arbitrary executions. The Special Rapporteur, S. Amos Wako from Kenya presented his first report in 1983 and subsequently one per year.

[151] Already at the UN Congress, some European and Latin American countries had sponsored a similar draft but it was withdrawn by the sponsors for lack of time. The seven countries were Austria, Costa Rica, the Dominican Republic, the Federal Republic of Germany, Italy, Portugal and Sweden. The draft resolution is UN document A/C.3/35/L.75. The Third Committee had also before it another draft resolution by thirteen

"Measures aiming at the ultimate abolition of capital punishment", in its decision 35/437, and decided to consider the idea of producing a draft of a second optional protocol to the ICCPR, in the following year.[152] This draft was annexed to the seven power draft resolution and was composed of nine articles. In 1981 and 1982, thirty-five governments responded to the General Assembly request for comments. The General Assembly also stressed the importance of receiving more comments from states, so that it would be possible to achieve a consensual draft regarding abolition of the death penalty.[153] At this time, the death penalty was in force in 115 countries and, as in the previous year, the General Assembly noted with concern the increasing number of politically motivated executions (initiative of the Sub-Commission).[154] The sponsors stressed the fact that the draft protocol was optional and that it did not intend to pass a legal or moral judgment on retentionist countries. It was only a supplementary tool for some countries to internationally declare their binding commitment to the abolition of capital punishment.[155] In 1982, the General Assembly requested the Commission on Human Rights to consider producing a draft of a second optional protocol.[156] In turn, the Commission invited the Sub-Commission to fulfil this task through resolution 1984/19.[157]

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countries in order for a moratorium to be recommended in the application of the death penalty which did not go through.

[152] Resolution 35/437 adopted in 15th December 1980; see *Y. U. N. 1980*, p. 789.

[153] In 1981, the General Assembly had reinforced the need to receive comments from states, in order to achieve a consensual draft concerning the abolition of the death penalty in resolution 36/59 adopted on 25th November 1981; see *Y. U. N. 1981*, p. 900. From the comments received eighteen were from abolitionist countries (Madagascar, Britain, Italy, Portugal, Austria, Federal Republic of Germany, Norway, Sweden, Netherlands, Denmark, Dominican Republic, Spain, Greece, Belgium, Cyprus, Ecuador, Switzerland and Finland) whilst seventeen were from retentionists (Algeria, Pakistan, Qatar, Togo, Yugoslavia, Barbados, Philippines, Botswana, Japan, Cameroon, Syria, Egypt, Senegal, Saint Vincent and the Grenadines, Zimbabwe, US and Guatemala); see UN documents A/36/441 and Add. 1 and 2 of 1981 and A/37/407 and Add. 1 of 1982.

[154] See resolutions 35/172 adopted on 15th December 1980 and 36/22 on 9th November 1981; see *Y. U. N. 1980*, p. 790 and *Y. U. N. 1981*, p. 899. To the increasing awareness of politically motivated executions, either legal or extra-legal, much contributed the notorious situations in Chile and Argentina.

[155] See especially the comments by Austria, the Federal Republic of Germany and Portugal that stressed that "however, the Government of Portugal is aware that different legal traditions, religious traditions and historical experiences lead many nations to adopt a different view. In supporting this initiative, the Government of Portugal knows that it pursues a long-term objective;" see footnote 151.

[156] Resolution 37/192 adopted on 18th December 1982 by 52 votes in favour, 23 against and 53 abstentions; see *Y. U. N. 1982*, p. 1078. The votes against came from Afghanistan, Iran, Iraq, Jordan, Kuwait, Libya, Oman, Nigeria, Philippines, Sierra Leone, Somalia, Sudan, Bahrain, Burundi, Guinea, Lebanon, Malaysia, Qatar, Saudi Arabia, Singapore, Syria, United Arab Emirates and Yemen.

[157] For a thorough and well documented track of the creation of the Second Optional Protocol see William A.

Meanwhile, the dual strategy of progressively achieving abolition and, at the same time, improving the safeguards and guarantees of those facing capital punishment was enhanced in 1984 with the drafting by the Committee on Crime Prevention and Control and later adoption by ECOSOC of the "Safeguards guaranteeing protection of the rights of those facing the death penalty".[158] These nine safeguards reinforced procedural guarantees and confined the death penalty to the "most serious crimes" equating them with "intentional crimes, with lethal or other extremely grave consequences." It enlarged the categories of persons to whom the death penalty should not be applied adding new mothers (following the 1979 Additional Protocols to the Geneva Conventions), and to persons who have become insane (third safeguard).[159] Moreover, and in connection with the historical evolution of capital punishment, the last safeguard called for the death penalty to be carried out so as to inflict the minimum possible suffering. It is obvious that these safeguards draw heavily from articles 6, 14 and 15 of the ICCPR.

In 1985, the Secretary-General submitted his third quinquennial report to ECOSOC based on information received from 64 states.[160] The information received indicated that there had been few significant changes in comparison with the previous reporting period, and that there had hardly been general progress in reducing the number and type of capital offences to "the most serious crimes".[161] Nevertheless, and despite the fact that 75 % of all countries were retentionists, an apparent decrease of the number of sentences and executions "made it possible

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Schabas's chapter 3 under the title "Genesis and adoption of the Second Optional Protocol abolishing the death penalty", op. cit., pp. 137-177.

[158] ECOSOC resolution 1984/50 of 25th May 1984 adopted without vote in *Y. U. N. 1984*, pp. 709-710. See Annex E.

[159] The two Additional Protocols to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) and to the Protection of Victims of Non-International Armed Conflicts (Protocol II) both have provisions excluding persons from the application of the death penalty, respectively at http://www.unhchr.ch/html/menu3/b/93.htm (last access 25th October 2004) and http://www.unhchr.ch/html/menu3/b/94.htm (last access 25th October 2004). Protocol I enlarged the categories to be excluded from application of the death penalty through its article 76 (3) concerning pregnant women and mothers having dependant infants. In addition, it reaffirms under article 77 (5) the exclusion of persons under 18 years of age at the time of offence. Protocol II establishes that under article 6 (4), pregnant women, persons under 18 years of age and mothers of young children are not to be executed.

[160] UN document E/1985/43 and Corr.1 and Add.1.

[161] See *ibidem*, paragraph 39.

to conclude that the movement towards abolition had progressed somewhat."[162] The report also stated that three factors seemed to have played a major role in countries that had abolished capital punishment: empirical evidence of effects on the crime rate, government concern with the protection of the right to life and public opinion.[163]

In 1985, a step towards abolition was taken by the CE with the coming into force of its Protocol nº 6 to the ECHR.[164] This Protocol abolished the death penalty in peacetime, affirming in its preamble that "considering that the evolution that has occurred in several member states of the Council of Europe expresses a general tendency in favour of the abolition of the death penalty."[165] The duty to abolish such a penalty was stated in the first sentence of article 1 and was complemented by the creation of a right for individuals in the second sentence. The Protocol did not permit derogations or reservations but the use of the death penalty in time of war or imminent threat of war was permitted, as long as it was notified to the Secretary-General of the CE and its use was still conditioned by the requirements laid down in law.[166]

In the same year, ECOSOC decided to entrust a Special Rapporteur, Marc Bossuyt with analysing the proposal submitted earlier of producing a second optional protocol aiming at the abolition of the death penalty within the framework of the Sub-Commission.[167] The Bossuyt Report was presented in 1987 to the Sub-Commission.[168] The Special Rapporteur took into consideration several international law provisions, namely article 6 of the ICCPR, article 2 of the ECHR and its 6th Protocol, article 4 of the ACHR and international humanitarian law. In

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[162] See *ibidem*, paragraph 107.
[163] See *ibidem*, paragraphs 76-83.
[164] See Erik Harremoes, "The Council of Europe and its efforts to promote the abolition of the death penalty", in *Crime Prevention and Criminal Justice Newsletter*, Vols. 12 and 13/Special Combined Issue on Capital Punishment, November/1986, pp. 62-64.
[165] Council of Europe, "Protocol 6 to Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty", 28th April 1983, in *European Treaty Series* nº 114 (including ratifications and reservations), lastly updated 5th October 2004 at http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG (last access 23rd February 2005). Hereafter simply cited as Protocol nº 6 to ECHR. See Annex B.
[166] For the work of the Parliamentary Assembly of the CE concerning the abolitions of the death penalty see Renate Wohlwend, "The efforts of the Parliamentary Assembly of the Council of Europe", in Council of Europe, *The Death Penalty Abolition in Europe*, Council of Europe Publishing, Strasbourg, 1999, pp. 55-68.
[167] Resolution 1985/41adopted without vote on 30th May 1985; see *Y. U. N. 1985*, p. 867.
[168] UN document E/CN.4/Sub.2/1987/20 (29th June 1987). Hereafter simply cited as Bossuyt Report.

addition, it also looked at the work of the Human Rights Committee, the Inter-American Court on Human Rights and the comments presented by states. These contributed to the better definition and understanding of articles 6 of the ICCPR and article 4 of the ACHR.

The starting point was the seven-power draft of 1980, which was amended by the Special Rapporteur and transformed into an eleven-article draft. The seven-power draft had left the space open for preambular paragraphs, which was filled in order to set the framework of the protocol. Five paragraphs were added, affirming that the protocol would contribute to the enhancing of human dignity, with references to article 3 of the UDHR and article 6 of the ICCPR as its normative foundations, and especially to the fact that the latter referred to abolition of the death penalty in terms which strongly suggested that abolition was desirable. Unlike the earlier draft, the Special Rapporteur preferred to express the right of the individual not to be executed in the first paragraph, and then the obligation of the state to abolish the death penalty. From his point of view, "in a convention on human rights the right of the individual is of prime concern. The first paragraph is confined to the essential object of the second optional protocol."[169] Furthermore, it followed the option of the European Protocol by allowing states to make a reservation in respect of acts committed in time of war or of imminent threat of war, whilst the 1980 draft did not contain any exception. This had two goals, one of enabling a greater number of states to adhere to the optional protocol and another of pragmatism, since it would be unrealistic to assume that states would "accept obligations in the framework of the UN which are substantially more extensive than those which they are willing to accept in the framework of a regional system for the protection of human rights."[170]

Nonetheless, the allowed reservation should be construed as an exception and within narrow terms and, therefore, limited to a most serious crime of a military nature committed during wartime. Not only has the reservation to be expressed at the time of ratification or adherence but it is also compulsory to notify the beginning and end of a state of war. As for the monitoring of the obligations under this protocol, they should be the same as with respect to the Covenant and the

[169] *Ibidem*, paragraph 160.
[170] *Ibidem*, paragraph 165.

First Optional Protocol. These included not only the reporting obligations but also the examination of the Human Rights Committee of inter-state and individual communications. Therefore, information would be included in the overall report presented to the Committee and, if a state did not wish to extend the possibility of inter-state and individual communications to this second optional protocol, a declaration made at the time of ratification or accession would enable that state to express its will. It reinforced the non-derogative character of these provisions, prohibiting any reservation under article 4 of the Covenant.

The Special Rapporteur concluded that the purpose of this draft was not to "press states to abolish capital punishment or to become parties to a second optional protocol." He considered that there was already a strong presumption, at the time of the drafting, that the Covenant was in favour of abolishing the death penalty, and this optional protocol was only a reflection of that assumption. Finally, there was no valid reason for states "not yet in a position to do so should try to put obstacles to the initiative of those states desirous to undertake that international commitment." A draft optional protocol was annexed to the report.[171]

In 1987, the General Assembly decided to continue to give consideration to the production of the second optional protocol, as recommended by the Third Committee.[172] In 1988, the Sub-Commission decided to transmit the draft to the Commission and, one year later, the Commission passed it onto the General Assembly and ECOSOC with the aim of asking the Secretary-General to draw the attention of member states to this issue, encouraging them to make the comments they deemed fit.[173] To this appeal, 28 member states responded and were reported by the Secretary-General in October.[174] The majority of the responses, namely twenty, came from abolitionists or abolitionists for ordinary crimes.

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[171] For the concluding remarks see *ibidem*, paragraphs 182-186 and for the draft see *ibidem*, Annex I.

[172] Decision 42/421 of 7th December 1987 adopted by a recorded vote of 64-15-57. France, Federal Republic Germany and Britain voted in favour, China, the US and the SU abstained and Bangladesh, Iran, Iraq, Jordan, Saudi Arabia, Kuwait, Yemen, Maldives, Oman, Pakistan, Senegal, Singapore, Somalia, Sudan and Syria, voted against; see *Y. U. N. 1987*, p. 760.

[173] See ECOSOC decision 1989/139 of 24th May 1989 adopted by a recorded vote of 27 votes in favour, 7 against and 15 abstentions; see *Y. U. N. 1989*, p. 483.

[174] For the first twenty-four comments see UN document A/44/592 (9th October 1989) and for the additional four see UN document A/44/592/Add. 1 (26th October 1989). Replies were received from Australia, Belgium, Costa Rica, Dominican Republic, Finland, France, Federal Republic of Germany, Italy, Netherlands, Norway, Panama, Philippines, Portugal, Spain, Switzerland, Uruguay, Venezuela, Austria, Czechoslovakia, Mexico, Indonesia, Botswana, China, Egypt, Democratic Republic of Germany, India, Japan and Qatar.

Germany presented the draft protocol to the Third Committee, which recommended the General Assembly to adopt it. It did so on 15th December, by recorded vote under the title: "Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty."[175] It is noteworthy that the draft proposed by the Special Rapporteur was adopted in its entirety.[176]

Table 2: Comparative Analysis of the Reports regarding the Death Penalty until 1985 [177]

Reports and Reporting Period	Number of Replies	Total of Countries and Territories	A	AO	ADF	R
1975* (1969-1973)	49	135	11	16	3	104
1980* (1974-1978)	74	152	21	14	1	116
1985 (1979-1983)	64	170	28	13	10	119

(A) Totally Abolitionist
(AO) Abolitionist by Law for Ordinary Crimes (countries whose laws provide for the exceptional use of the death penalty
(ADF) Abolitionist de facto (countries whose laws provide for the death penalty but, in practice, have not applied it in the last 10 years)
(R) Retentionist (countries which provide for the death penalty for ordinary crimes as well as federated countries which have both abolitionist and retentionist states)
* Canada suspended capital punishment from 1967-1977 as a trial period

Looking at the above table, we find that abolitionist countries were a minority but, despite resistance shown, the Commission's decision was adopted with consensus and the ECOSOC resolution was adopted by a large majority. At

[175] The recorded vote of resolution 44/128 was of 59-26-48 and it was preceded by the also recorded vote on 22nd November at the Third Committee of 55-28-45. In the General Assembly, France, UK, SU, Australia, Belgium, Costa Rica, Dominican Republic, Finland, Federal Republic of Germany, Italy, Netherlands, Norway, Panama, Philippines, Portugal, Spain, Uruguay, Venezuela, Austria, Argentina, Bolivia, Brazil, Bulgaria, Byelorussia, Canada, Cape Verde, Colombia, Cyprus, Czechoslovakia, Democratic Kampuchea, Denmark, Ecuador, El Salvador, German Democratic Republic, Greece, Granada, Guatemala, Haiti, Honduras, Hungary, Iceland, Ireland, Luxembourg, Malta, Mexico, Mongolia, Nepal, New Zealand, Paraguay, Peru, Poland, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sweden, Togo, Ukraine and Yugoslavia voted in favour whilst the US, China, Japan, Afghanistan, Bahrain, Bangladesh, Cameroon, Djibouti, Egypt, Indonesia, Iran, Iraq, Jordan, Kuwait, Maldives, Morocco, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Sierra Leone, Somalia, Syrian Arab Republic, United Republic of Tanzania and Yemen voted against and Algeria, Antigua and Barbuda, Bahamas, Barbados, Bhutan, Botswana, Brunei, Burkina Faso, Burundi, Chile, Congo, Côte d'Ivoire, Cuba, Democratic Yemen, Dominica, Ethiopia, Fiji, Gambia, Ghana, Guinea, Guyana, India, Israel, Jamaica, Kenya, Lebanon, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritius, Mozambique, Myanmar, Romania, Rwanda, Senegal, Singapore, Solomon Islands, Sri Lanka, Suriname, Trinidad and Tobago, Uganda, Vanuatu, Zambia, Zimbabwe and Turkey abstained; see *Y. U. N. 1989*, pp. 484-485.
[176] The Second Optional Protocol to the International Covenant on Civil and Political Human Rights, aiming at the Abolition of the Death Penalty is at http://www.ohchr.org/english/law/ccpr-death.htm (last access 28th February 2005). See Annex A.
[177] The categories are the same as the ones used in the Five Year Reports of 1990 onwards.

the General Assembly, Germany stated that "even though a considerable number of states disagree with this procedure, which they consider to be incompatible with their conception of national sovereignty, the international community did not refuse to elaborate this instrument and to give to those states which wanted to assume an international obligation the possibility to do so."[178] This strong resistance came mainly from Islamic countries and Japan. In our view, Japan described the situation very well by affirming "that it was inappropriate to create an international instrument which would not be applied uniformly throughout the world (...)."[179] But the key to the adoption of the second optional protocol lies with the majority of retentionist countries that abstained on the understanding that it did not affect them.

In addition, ECOSOC adopted a resolution with the title "Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty" in 1989 which, amongst other things, enlarged the exclusion of persons from the application of the death penalty by including the mentally handicapped (either at the stage of sentence or execution) and the elderly, following the ACHR lead, but without establishing an age limit.[180] Additionally, it called for the Five-Year Reports of the Secretary-General to include the monitoring of the implementation of the safeguards as well as the use of the death penalty. In 1990, the second regional protocol aiming at the abolition of the death penalty, namely the Protocol to the ACHR, was adopted.[181] It is written in similar terms to the UN Second Optional Protocol and the European Protocol, allowing for states that make a reservation upon accession or ratification the right to apply the death penalty in wartime, according to international law. Similarly, this four-article Protocol restricts the application of the death penalty for extremely serious breaches of military law, with all the procedural guarantees established by

[178] Statement by the Federal Republic of Germany concerning the elaboration of the second optional protocol concerning the abolition of the death penalty in 1989 in UN document A/44/592, p. 21, paragraph 6.
[179] In paragraph 95 of the Bossuyt Report.
[180] Safeguards 1 c) and d) of resolution 1989/64 of 24th May 1989 which was adopted without vote; see *Y. U. N. 1989*, p. 625. For the text of the "Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty" see Annex F.
[181] Organisation of American States, "Protocol to the American Convention on Human Rights to Abolish the Death Penalty", Asuncion, 6th August 1990, at http://www.oas.org/juridico/english/Treaties/a-53.htm (last access 23rd February 2005). See Annex C.

international law. Only one country made such a reservation, namely Brazil.[182] The aim of this Protocol is well established in its Preamble, whereby the states parties affirm their intention of progressively developing the ACHR, in that the "tendency among the American States is to be in favour of abolition of the death penalty."[183]

[182] The status of ratifications and the reservation made by Brazil are at http://www.oas.org/juridico/english/Sigs/a-53.html (last access 23rd February 2005).
[183] See third paragraph of the Preamble of the American Protocol in Annex C.

3 The United Nations and Capital Punishment: the Goal of Progressive Abolition

"The States Members of the United Nations have decided that abolition must be the right direction for human society to take though they do not say when. All the arguments for and against will presumably continue in the intervening period."[184]

In 1990, the Secretary-General presented ECOSOC with his Fourth Quinquennial Report on capital punishment.[185] This report was updated after a request from ECOSOC, and its revised version contained 60 responses in all.[186] The worldwide situation revealed that ninety-two countries retained the death penalty, thirty-nine were abolitionist, 17 were abolitionist for ordinary crimes and 21 were abolitionist de facto.[187] Additionally, it reinforced the recommendation that the report should also cover the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty.[188] Furthermore, the General Assembly continued to devote special attention to the application of the death penalty to persons below 18 years of age.[189] This concern can also be

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[184] Paragraph 77 ("Tasks for the Future") of the Third Report concerning death penalty in 1973; UN document E/5242, p. 21.

[185] UN document E/1990/38 & Corr. 1. This report contained 43 responses concerning the period between 1984 and 1988.

[186] Resolution 1990/29 of 24th May 1990; see *Y. U. N. 1990*, pp. 732-733. The revised report is in UN document E/1990/38/Rev. 1 & Rev. 1/Corr.1 and annexes. From the 60 responding states, 26 were totally abolitionist, 9 were abolitionist for ordinary crimes only, and 25 retained capital punishment, although five could be considered abolitionist de facto since no executions had taken place for a considerable time. There were overall 2 611 death sentences reported and 341 executions.

[187] The abolitionist countries were: Australia, Austria, Bolivia, Cambodia, Cape Verde, Colombia, Costa Rica, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Finland, France, Democratic Republic of Germany, Federal Republic of Germany, Haiti, Holy See, Honduras, Iceland, Kiribati, Liechtenstein, Luxembourg, Monaco, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Philippines, Portugal, Romania, San Marino, Solomon Islands, Sweden, Tuvalu, Uruguay, Vanuatu and Venezuela.

[188] Resolution 1990/51 of 24th July; see *Y. U. N. 1990*, pp. 733-734.

[189] Resolution 45/166 under the title "human rights in the administration of justice" was adopted without vote on 18th December 1990. In the first paragraph of its preamble it explicitly states the prohibition under article 6 of the Covenant of imposing the death penalty for crimes committed by persons below 18 years of age; see *Y. U. N. 1990*, pp. 572-573. This matter since the 1980s has been a recurrent concern within the United Nations various bodies; for instance, see the Report of the Special Rapporteur on Summary or Arbitrary Executions (UN document E/CN.4/1986/21). In 1987, the General Assembly adopted resolution 42/143 of 7th December under the same title "Human Rights in the Administration of Justice" and its fifth paragraph of the preamble raised the issue of application of death penalty to persons under 18 (see *Y. U. N. 1987*, pp. 752-753).

observed in the report presented by the Secretary-General to the Sub-Commission that dealt specifically with this issue.[190] The Second Optional Protocol came into force on 11th July 1991, with the ratification or accession of 10 states.[191] In 1995, the Secretary-General submitted his Fifth Quinquennial Report on capital punishment which, for the first time, also covered the implementation of safeguards guaranteeing the protection of the rights of those facing the death penalty.[192] It was recognised that the trend towards an increased pace of abolition continued, since now there were 58 abolitionist countries. Nonetheless, this expansion was not uniformly widespread and was more prevalent in Europe, including Eastern Europe, and South America.[193] In 1996, ECOSOC adopted another resolution concerning compliance with the safeguards for those that face capital punishment. It reiterated the need for a fair trial, right to appeal and to ask for clemency contained in the 1984 and 1989 safeguards and included in the case of defendants who do not understand the language used in court the right to translation or interpretation.[194]

In 1997, the Commission on an Italian initiative urged all states not to impose the death penalty for any but the most serious crimes, not on persons under the age of 18, to exclude pregnant women and to ensure the right to seek pardon or commutation of sentence.[195] Moreover, the Secretary-General was asked to submit a yearly supplement to his quinquennial report on capital punishment, containing information on the implementation of the 1984 safeguards.[196] This report was presented in 1998, and covered the last two years.

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[190] The report was submitted by the Secretary-General pursuant to resolution 1989/32 of the Sub-Commission entitled "Application of the death penalty to persons under 18 years of age" and it compiled responses received from thirty-seven governments as well as from the European Parliament, the International Committee of the Red Cross and several NGOs; see UN document E/CN.4/Sub.2/1990/26 &Add. 1 and 2.

[191] These were Australia, Finland, Iceland, the Netherlands, New Zealand, Norway, Portugal, Romania, Sweden and Spain.

[192] UN document E/1995/78. The report was based on replies from 57 governments and covering the period between 1989 and 1995. It was complemented on March 1996 with 12 additional replies from governments; see UN document E/CN.15/1996/19.

[193] See paragraphs 88 and 89 of UN document E/1995/78.

[194] Resolution 1996/15 was adopted without vote on 23rd July 1996 in *Y. U. N. 1996*, p. 1042. See Annex G.

[195] For some this resolution was possible because of the 1994 attempt (although without success) at the General Assembly. It paved the way because it put the issue on the spotlight and also because by being discussed at the Third Committee it was considered a human rights issue; see Roberto Toscano, "The United Nations and the abolition of the death penalty", in Council of Europe, *The Death Penalty Abolition in Europe*, Council of Europe Publishing, Strasbourg, 1999, pp. 91-104, at pp. 94-95.

[196] Resolution 1997/12 was adopted by a roll-call vote of 27-11-14. Moreover, in 1998, within the working

It stated that the trend previously observed towards abolition continued, since the number of totally abolitionist countries increased to 61. From the remaining countries, 90 were retentionists, 14 were abolitionists for ordinary crimes only and 27 were abolitionists de facto, in that they retained the death penalty for ordinary crimes but had not executed anyone in the last 10 years or more.[197] The Commission reinforced these findings and adopted a EU draft resolution that called on states to abide by treaties and not to execute persons under 18 years of age and pregnant women, to observe the 1984 safeguards and to establish a moratorium on executions.[198]

The EU has, since then, sponsored a Commission resolution regarding the death penalty. In 1999, this was carried out by Germany on behalf of the EU.[199] The draft resolution was adopted and affirmed the importance of progressing towards the abolition of the death penalty. The fact that it calls upon states to withdraw or not to make reservations concerning article 6 of the ICCPR, is also noteworthy, because it represents a minimum standard. It also appealed to states that had received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances that the death penalty would not be imposed.[200] The Sub-Commission also expressed its condemnation over the imposition and execution of the death penalty on those under 18 and, amongst other things, it called on states that retained such

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group on the administration of justice programme, a report on the evolution of the death penalty was prepared by El Hadji Guisse and the Sub-Commission through decision 1998/110 of 26th August decided that, from 1998 onwards, an annual report was to be prepared.

[197] UN document E/CN.4/1998/82.

[198] Resolution 1998/8 was adopted on 3rd April with 26 votes in favour, 13 against and 12 abstentions.

[199] UN document E/CN.4/1999/L.91.

[200] Resolution 1999/61 was adopted on 28th April with 30 votes in favour, 11 against and 12 abstentions, in UN document E/CN.4/1999/SR.58, paragraphs 60-62. See also the first European Union human rights report, Council of the European Union, *European Union Annual Report on Human Rights 1998-1999*, Office for the Official Publications of the European Communities, Luxembourg, 1999, p. 34. It was followed by Council of the European Union, *European Union Annual Report on Human Rights 1999-2000*, Office for the Official Publications of the European Communities, Luxembourg, 2000; Council of the European Union, *European Union Annual Report on Human Rights 2000-2001*, Office for the Official Publications of the European Communities, Luxembourg, 2001; Council of the European Union, *European Union Annual Report on Human Rights 2001-2002*, Office for the Official Publications of the European Communities, Luxembourg, 2002; Council of the European Union, *European Union Annual Report on Human Rights 2002-2003*, Office for the Official Publications of the European Communities, Luxembourg, 2003; Council of the European Union, *EU Annual Report on Human Rights 2003-2004*, Office for the Official Publications of the European Communities, Luxembourg, 2004 (they are also available at http://ue.eu.int/cms3_fo/showPage.asp?id=402&lang=en&mode=g (last access 15th February 2005). Hereafter simply cited by title and relevant pages.

punishment for refusal to undertake military service or for desertion, not to apply it if the action was the result of conscientious objection to such service.[201]

Parallel to the adoption of resolutions concerning the death penalty, there was a concerted resistance on the part of some retentionist countries. The 1998 and 1999 resolutions of the Commission were contested to the point that some states dissociated themselves from the adopted resolutions.[202] The same is true of the Sub-Commission resolution, in which some countries expressed concern that the recommendations in the Sub-Commission's resolution went beyond that body's mandate. [203] Nevertheless, in the next year, the Commission and the Sub-Commission expressed the same apprehension regarding the death penalty, as well as the need to carry on with the goal of progressive abolition.[204]

In 2001, there was a more confrontational environment at the Commission, mainly due to a new composition of its members along with the situation in the Middle East.[205] Notwithstanding and once again, the Commission adopted a resolution on the question of the death penalty taking special concern regarding offenders less than 18 years of age.[206] This was repeated in 2002, a resolution that also mentioned for the first time that capital punishment cannot be imposed for non-violent acts, including sexual relations between consenting adults.[207] In 2002, the intensification of the North-South divide was even more obvious in two situations: the election of Libya to chair the 2003 Commission on Human Rights,[208]

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[201] Resolution 1999/4 was adopted by a secret ballot vote of 14- 5-5 abstentions.

[202] In 1998, Singapore on behalf of 51 states transmitted to the President of the Council a joint statement on the question of the death penalty (UN document E/1998/95) to which three additional states became signatories (UN document E/1998/95/Add. 1). In 1999, a similar statement was made by fifty countries (UN document E/1999/113).

[203] UN document E/CN.4/Sub.2/1999/52 (27th August 1999).

[204] Resolution 2000/65 of the Commission resulted from a draft resolution sponsored by the EU and presented by Portugal (UN document E/CN.4/2000/L.81). It was adopted by a roll-call vote of 27-13-12 (UN document E/CN.4/2000/SR.66, paragraphs 29-31). Resolution 2000/17 of the Sub-Commission was adopted without vote.

[205] See *EU Human Rights Report 2001*, p. 33 and also annex 7 containing the Statement by Ms Anna Lindh, Minister for Foreign Affairs of Sweden, on behalf of the EU at the 57th session of the Commission on Human Rights, Geneva 20 March 2001, pp. 95-97.

[206] Resolution 2001/68 of the Commission resulted from an EU sponsored draft presented by Sweden (UN document E/CN.4/2001/L.93). It was adopted by 27 votes in favour, 18 against and 7 abstentions (UN document E/CN.4/2001/SR.78, paragraphs 16-18).

[207] Draft resolution E/CN.4/2002/L.104 became resolution 2002/77 of the Commission by a recorded vote of 25 in favor, 20 against and 8 abstentions, see UN document E/CN.4/2002/SR.56, pp. 15-17; nevertheless, and as in the previous year, due to the change of composition of the Commission the number of supporters to the EU draft diminished; see *EU Human Rights Report 2002*, p. 68.

[208] See Committee on Foreign Affairs, Human Rights, Common Security and Defence, *Explanatory*

and the non election of the US for the first time in the history of the Commission.[209] Other resolutions touched on the issue of capital punishment, namely on extrajudicial, summary and arbitrary executions, and of the human rights in the administration of justice and particular juvenile justice.[210] In the same year, the EU also sponsored the inclusion of an explicit reference to the non-application of the death penalty for minors at the final document of the special session of the UN on children "A world fit for children."[211]

In 1999, in the Third Committee, a European sponsored resolution against the death penalty was presented.[212] This had been previously attempted in 1994[213] and this 1999 EU-sponsored draft resolution followed the well-established CE policy of world-wide abolition of the death penalty. In order to be a member of this organisation, a country has to sign the ECHR, apply a moratorium to pending executions and then to ultimately abolish the death penalty.[214] In addition, the EU had adopted in 1998 ("Human Rights' Year") a set of guidelines concerning relations with third countries and the death penalty. In addition, the abolition of the death penalty was made a necessary requisite for membership. The guidelines are the expression that to work towards universal abolition of the death penalty is a strongly held policy view agreed by all EU member states. These guidelines include the call for progressive restriction of its use, that the death penalty is

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Statement of the Human Rights Report of 2002, EU document A5-0274/2003), report by Special Rapporteur Bob Van den Boos including motion for resolution and explanatory statement, p. 42. See also European Parliament "resolution on human rights in the world in 2002 and European Union's human rights policy", paragraph 50 (EU document P5_TA (2003)0375), in which it is categorically affirmed that it "regrets the UN Member States' election of Libya, a country hardly conspicuous for its respect for human freedoms and rights, to chair the 2003 session of the Commission on Human Rights."

[209] See Contemporary Practice of the US human rights, in *American Journal of International Law*, Vol. 95, n° 4, October/2001, pp. 877-878.

[210] See respectively resolutions 2002/36, paragraphs 7, 16 (f) and 23), and 2002/47 (paragraph 19). In relation to extrajudicial, summary and arbitrary executions, the focus is mainly on death sentences carried out outside the framework of article 6, 14 and 15; see resolutions 2001/45, paragraphs 8, 15 (f) and 21), and 2000/31, paragraphs 7, 12 (f) and 19).

[211] See resolution A/res/S-27/2 and Annex containing the final document, paragraph 8 of p. 15. This resulted from the *Report of the Ad Hoc Committee of the Whole of the Twenty-Seventh Special Session of the General Assembly* (UN document A/S-27/19/rev.1, paragraph 8 of p. 19); see also *EU Human Rights Report 2002*, p. 69.

[212] UN document A/C.3/54/L.8/Rev.1

[213] UN document A/C.3/49/L.32 (1st December 1994). Amendments were suggested by Egypt (UN document A/C.3/49/L.74 & Rev.1) and Singapore (UN document A/C.3/49/L.73 &Rev.1) and the Committee rejected the revised draft (UN document A/C.3/49/L.32/Rev. 1) by a recorded vote of 36-44-74 (UN document A/C.3/49/SR.61); see also *Y. U. N. 1994*, p. 1029.

[214] See Parliamentary Assembly, Resolution 1044 of 1994 entitled "On the Abolition of Capital Punishment", paragraph 6.

applied according to minimum standards, and also the application of moratoria on the executions. It also encompasses a framework for démarches and representations in multilateral for and towards third countries.[215] Likewise, the EU began to produce yearly reports on human rights containing not only its own actions but also the situation of human rights worldwide. In these, the abolition of the death penalty is affirmed and actively pursued, as well as the observance of safeguards and guarantees in countries where it is still in use.[216]

In this same year the CE, with the coming into force of Protocol 11, put in practice a reform of the organs in charge of protecting the ECHR. There had been previous additional protocols that changed not only procedures but also added more human rights to those established by the ECHR.[217] The Commission and the Court were replaced by a new permanent Court that handles both the admissibility and merit stages of all applications, as well as the efforts to reach friendly settlements. The role of the Committee of Ministers has been reduced to supervising the execution of the Court's judgements and requesting advisory opinions. The procedures concerning individual applications are now strengthened, since individuals now have a direct access to the Court.[218]

At the General Assembly, some retentionist countries led by Singapore and Egypt, fearing that the "delicate balance of the Third Committee shifted in favour of

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[215] The "Guidelines EU policy towards third countries on the death penalty" was adopted by the General Affairs Council in Luxembourg 29 June 1998; see http://europa.eu.int/comm/external_relations/human_rights/adp/guide_en.htm (last access 15th February 2005). See also the EU Guidelines on Human Rights Dialogues which includes supporting the abolition of the death penalty, in *EU Human Rights Report 2002*, Annex 15, pp. 256-262.

[216] See European Parliament "resolution on human rights in the world in 2002 and European Union's human rights policy", paragraphs 168-173 entitled "Death Penalty" (EU document P5_TA(2003)0375). It is based upon the report made by Bob Van Den Bos, op. cit, especially paragraphs 155-160 which deal with the death penalty.

[217] Besides Protocol 6, which we have already analysed, Protocol 1 (in force since 1954) added the rights to property, education and free elections, Protocol nº 4 (in force since 1988) added freedom of movement, freedom from exile, prohibition of compulsory expulsion of aliens and freedom from imprisonment for debt and Protocol nº 7 (in force since 1988) added five rights: no expulsion of aliens without due process of law, right to appeal in criminal cases, right to compensation for miscarriages of justice, immunity from double jeopardy and equality in marriage between spouses. As for the other Protocols they established procedural amendments: 3 (modified the procedure of the Commission by abolishing the system of sub-commissions which entered into force in 1970), 5 (dealt with the procedure for election of members of the Commission and the Court and in force since 1971), 8 (concerned with the procedure of the Commission and the Court and in force since 1990), 2 (granted the European Court of Human Rights a limited competence to provide advisory opinions and in force since 1970) and 9 (concerns the direct access to the Court by individuals that entered into force in 1994).

[218] See article 34 of the ECHR and European Court of Human Rights, Rules of Court (as in force since 1998), Strasbourg, 1999 at http://www.echr.coe.int/Eng/EDocs/RulesofCourt.html (last access 15th February 2005).

the abolitionist movement and consequently supported the existence of a customary or even a *jus cogens* norm, reacted fiercely to the proposed European resolution."[219] The draft had four goals, which fell along the lines of the resolutions adopted by the Commission: to call for the compliance with the safeguards concerning those facing the death penalty, to appeal for the ratification of the Second Optional Protocol, for the progressive restriction of the death penalty, to withdraw or not to make reservations concerning article 6 of the ICCPR and the establishment of a moratorium on the executions.

As in 1994, two substantial amendments to the draft resolution were proposed that completely changed the content of the European draft resolution. We find four different (albeit strongly linked) arguments in these amendments: the death penalty is not prohibited under international law and there is no consensus on the issue; it is a criminal justice issue linked to the sovereignty of each country and, therefore, falls under the domestic jurisdiction of article 2 (7) of the Charter; the diversity of socio-legal and economic conditions were determinant for each country to establish its own rules of application of criminal justice; and lastly that the issue of capital punishment should be brought forward at the Sixth (Legal Affairs) Committee and not the Third Committee, because it is not a human rights' issue.[220] The resistance that sprung from the European draft resolution determined its failure.[221]

The death penalty has also been a concern of the Human Rights Committee. In 1982, in its General Comment nº 6 entitled "The right to life" the Committee expressed its views regarding the death penalty, amongst other things. Not only was article 6 interpreted as referring generally to abolition in terms which "strongly suggest that abolition is desirable" but also that the application of the death penalty to the "most serious crimes" must be read restrictively, meaning that "the death penalty should be a quite exceptional measure."[222] It also reinforced the procedural guarantees such as "in accordance with the law in force" and those set out in articles 14 and 15. In addition, it considered that as article 6 is non-

[219] Ilias Bantekas and Peter Hodgkinson, "Capital punishment at the United Nations: recent developments", in *Criminal Law Forum*, Vol. 11, 2000, pp. 23-34, at p. 26.
[220] UN documents A/C.3/54/L.31 and L.32.
[221] See *EU Human Rights Report 2000*, pp. 38-39.
[222] See General Comment nº 6 by the Human Rights Committee of 30th April 1982.

derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15.[223]

The Human Rights Committee has been faced with numerous appeals from individuals from Jamaica and Trinidad and Tobago. In these situations, persons sentenced to death appeal to the Committee under article 6 of the ICCPR. While it is appreciating the issue, the Committee asks for the impending execution not to be carried out before it has the opportunity to examine the case. The main issue is not with the innocence of the sentenced individuals but rather with the requirements of a fair trial. For instance, the absence of representation of the accused is a good example, since for the Committee, the right to legal representation is axiomatic in a death penalty trial. All domestic remedies have to be exhausted, but they also have to be effective.

Another issue connected with the death penalty, and that has made its way to prominence, is the "death row phenomenon."[224] This modern phenomenon is characterised by execution taking place after prolonged delay under the harsh conditions of death row, thereby constituting cruel and inhuman treatment. It is not the death penalty that is being challenged but awaiting it for an enormous period of time.[225] The main contention is that waiting for ten or fifteen years on death row constitutes cruel, inhuman and degrading treatment and violates article 7 of the Covenant. It is the result of a paradox, since the length of time spent on death row is connected with the improvement of procedural safeguards and guarantees that allow the convicted person to appeal and to ask for a review of the case. This new phenomenon has been dealt with by several courts and also the Human Rights Committee. The latter has considered that although such delay is "disturbingly long", the fact remains that "even prolonged periods of detention under a severe custodial regime on death row cannot be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of

[223] See paragraph 15 of General Comment nº 29 concerning states of emergency (article 4); UN document CCPR/C/21/Rev.1/Add.11 of 11th August 2001.
[224] William A. Schabas, op. cit., pp. 127-134.
[225] Patrick Hudson, "Does the death row phenomenon violate a prisoner's human rights under international law?", in *European Journal of International Law*, nº 11, 2000, pp. 833-856.

appellate remedies."[226] The Privy Council, which is the final court of appeal for Caribbean countries, has analysed the death row phenomenon and considered that it is a degrading and inhumane punishment. It has gone even further by considering that the execution has to be carried out within a reasonable time, namely five years.[227] In contrast, the Human Rights Committee considers that only in particular circumstances, and this being not the length of time but the lack of imprisonment conditions, is the death row phenomenon an inhuman and degrading punishment. Nevertheless, it has been against fixing any set passing of time.[228]

The European Court of Human Rights has also analysed this issue in the case of *Soering vs. United Kingdom* in 1989.[229] In the opinion of the Court, the fact that the ECHR permits capital punishment under certain conditions, has to be measured against the fact that the Convention is a living instrument which must be interpreted in the light of present-day conditions. The Court observed that the death penalty had been abolished de facto, in times of peace, by the European countries that are contracting states of the Convention. Moreover, the manner and circumstances in which capital punishment was imposed or executed was important and, although the Court considered that some lapse of time was inevitable between sentence and execution, it was also "equally part of human nature that the person will cling to life by exploiting those safeguards to the fullest."[230]

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[226] In this specific case the delay was of ten years, namely in *Barrett and Sutcliffe v Jamaica*. See communications 270 and 271/1988 at the Human Rights Committee; see CCPR/C/44/271/1988, paragraph 8.4.

[227] Case of *Morgan and Pratt v Attorney-General of Jamaica* in which the defendants were on death row for 14 years. The subsequent interpretations are confusing and arbitrary; see Patrick Hudson, op. cit., pp. 848-851.

[228] Rosalyn Higgins, "Opinion: 10 years on the United Nations Human Rights Committee: Some thoughts upon parting", in *European Human Rights Law Review*, issue 6, 1996, pp. 570-582, at pp. 577-579.

[229] Mr. Jens Soering, a German national living in the US was charged with the capital murder of his girlfriend's parents in the state of Virginia. He was caught in Britain and the US asked for him to be extradited. Mr. Soering argued that his extradition to the US, despite the assurances given, would expose him to a serious likelihood of being sentenced to death. In Virginia, the average length of time between the sentence and the execution was of six to eight years. Mr Soering argued that during these years he would be subjected to the death row phenomenon as well as extreme physical violence and homosexual abuse due to his age, colour and nationality, from other inmates in death row; Judgment of 7th July 1989 of case nº 1/1989/161/217 by the European Court of Human Rights at http://www.echr.coe.int/Eng/Judgments.htm (last access 15th February 2005).

[230] See *ibidem*, paragraphs 102, 104 and 107.

The Court concluded that having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting the execution of the death penalty, and to the personal circumstances of the applicant, especially his age and his mental state at the time of the offence, extradition to the US would expose him to the real risk of treatment going beyond the threshold set by article 3 and, therefore, constituting a degrading and inhuman punishment.[231] The main contribution of the Court with this case was of extending article 3 beyond the scope of national jurisdiction. Not only are states prohibited within their jurisdictions from violating article 3 but they also have an associated obligation of not to putting a person in such a position where one would or could be subjected to violations outside their jurisdiction.[232]

In our view, where the test really applies regarding the commitment of the UN to abolish the death penalty is in the punishment given to human rights' violators, whether as perpetrators or accomplices of "unquestioning performance of questionable acts."[233] This is even truer in the case of crimes against humanity which stand at the apex of human rights' framework. The death penalty was the normal outcome for crimes against humanity, and accordingly, Sir Peter von Hagenbach was sentenced to death in 1474. Likewise, the International Military Tribunal for the Far East that had its permanent seat at Tokyo prescribed, in its article 16, that "the Tribunal shall have the power to impose upon the accused, on conviction, death, or such punishment as shall be determined by it to be just."[234] Of the twenty-five Class A defendants who were convicted, seven received the death sentence.[235] The defence attorneys filed motions with the US Supreme

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[231] Ibidem, paragraphs 110-111. Mr. Soering was 18 at the time of the commission of the crime, had no prior criminal record and had an immature mental condition. Moreover, there was the possibility of extradition to Germany which would both "remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row."

[232] On the articulation of article 2 (1) and article 3 of the ECHR and the effects of the *Soering Case* See D. J. Harris, M. O'Boyle and Colin Warbrick, "Article 2: the right to life", in *Law of the European Convention on Human Rights*, Butterworths, London, Dublin and Edinburgh, 1995, pp. 37-54.

[233] In the final report of the Special Rapporteur Gay J. McDougall concerning "Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like practices during armed conflict", UN Document E/CN.4/Sub. 2/1998/13, paragraph 83.

[234] Appendix C in John L. Ginn, *Sugamo Prison, Tokyo, An Account of the Trial and Sentencing of Japanese War Criminals in 1948, by a U. S. Participant*, McFarland & Company, Jefferson, North Carolina and London, 1992, pp. 261-266.

[235] *Idem, ibidem*. They were Generals Tojo, Itagaki, Doihara, Matsui, Muto, Kimura and one civilian ex-Ambassador Koki Hirota, in John L. Ginn, op. cit., pp. 121-123 and 136-137. The other defendants, namely

Court on behalf of the seven men who were sentenced to death by hanging. The Supreme Court did hear the case but, after three days of deliberation, it decided that it had no power in this case to review the judgements and the sentences. General MacArthur did not exercise his power of clemency and the sentences were carried out. In Class C defendants, fifty-three were given the death penalty and hanged. The first execution took place on April 26th 1946 and the last one on April 7th 1950.[236] As for class B defendants, some were sentenced to death, such as General Yamashita. He also appealed to the US Supreme Court but to no avail, since the Supreme Court decided that General Yamashita was given due process of law in his trial by a US Military Commission in the Philippines.[237]

As for the trial of major German war criminals, Control Council Law nº 10 in its article II, paragraph 3 a) established the death penalty as one of the penalties to be applicable to crimes against peace, war crimes, crimes against humanity and membership in categories of a criminal group or organisation. The Nuremberg Charter established in its 27th article that "the Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just." In Nuremberg, of the twenty-two defendants,[238] twelve were sentenced to death,[239] three were acquitted;[240] and the others

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Togo received 20 years; Mamoru Shigemitsu received 7 years and the remaining life sentences (these were Araki, Hashimoto, Hata, Hiranuma, Hoshino, Kaya, Kido, Koiso, Minami, Oka, Oshima, Sato, Shimada, Shiratori, Suzuki and Umezu).

[236] *Ibidem*, pp. 192-193.

[237] This decision was held with two dissenting opinions of Justices Murphy and Rutledge; Both Justices argued that the defendant was not given a fair trial (amongst other arguments, that the defence was given insufficient opportunity to present its case and objective and verifiable facts were not presented) and that the "command responsibility" offence was deeply flawed. Justice Murphy was particularly categorical and stated that "if we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness." For the text of the judgment and the two dissenting opinions see "Judicial Decisions, *in re* Yamashita by the Supreme Court of the United States, February 4th 1946", in *American Journal of International Law*, Vol. 40, nº 2, April/1946, pp. 432-480.

[238] Gustav Krupp von Bohlen und Halbach was considered too sick to be tried, Martin Bormann was not found and tried *in absentia*, Rudolf Hess was considered despite claims of loss of memory to be in condition to be tried, as was the case of Julius Streicher. Robert Ley committed suicide while in custody. See "International Military Tribunal (Nuremberg), Judgment and Sentences", in *American Journal of International Law*, Vol. 41, 1947, pp. 172-333, at p. 173.

[239] *Ibidem*, p. 331-333. These were Herman Göering (who committed suicide a few hours before the execution), Martin Bormann (not found and sentenced *in absentia*), Joachim von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Fritz Sauckel, Alfred Jodl and Arthur Seyss-Inquart.

[240] *Idem, ibidem*. These were Hjalmar Schacht, Franz von Papen and Hans Fritzsche.

received imprisonment ranging from ten years to life.[241] The appeals for clemency were, as in the Far East trial, not accepted and the executions took place on October 16th 1946. All the men that were sentenced to hang were found guilty, amongst other offences, of crimes against humanity.

The sensitive issues raised by the trial of persons convicted of crimes against humanity can be seen in the accusations made against Uruguay, when it objected to including the death penalty during the drafting of the Charter of the Nuremberg Tribunal. Uruguay, in line with its previously mentioned abolitionist convictions, was firmly opposed to the death penalty and was actually accused of having Nazi sympathies.[242] Likewise, Adolf Eichmann was sentenced to death by hanging by Israel on December 15th 1961 and executed on June 1st 1962.[243]

Unlike these situations, the UN has pursued an approach coherent with its goal of progressively abolishing the death penalty, as can be seen in the UN developed ICC, as well as in the *Ad Hoc* Tribunals for the former Yugoslavia and Rwanda.[244] The ICC may impose under article 77, and for all crimes within its jurisdiction, either an imprisonment for a specified number of years, which may not exceed a maximum of thirty years (paragraph 1 a) or a term of life imprisonment (paragraph 1 b). In addition, the Court may order a fine and/or a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties. As for the review concerning reduction of sentence, the Court alone shall have the right to decide any reduction

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[241] *Idem, ibidem*. These were Rudolf Hess (imprisonment for life), Walter Funk (imprisonment for life), Karl Dönitz (ten years imprisonment), Erich Raeder (imprisonment for life), Baldur von Schirach (twenty years imprisonment), Albert Speer (twenty years imprisonment) and Constantin von Neurath (fifteen years imprisonment).

[242] See UN document A/C.3/SR.811, paragraph 28. Mr. Tejera from Uruguay explained that "not only had capital punishment been abolished in Uruguay, but in 1946 his delegation had strongly opposed the application of the death penalty at the Nuremberg Trials. The attitude had aroused violent reactions and charges of sympathy with the Nazis and Fascists."

[243] In Israel, another person was accused of crimes against humanity in 1988, namely John Ivan Demjanjuk. His death sentence was overturned by the Supreme Court of Israel after the court examined newly discovered evidence at the appeals stage. It held that the evidence created the possibility of a reasonable doubt as to the identification of the defendant as Ivan the Terrible. See paragraph 76 of the Fifth Five Year Report by the Secretary-General on capital punishment in UN document E/1995/78.

[244] As was noted by the Special Rapporteur Gay McDougall in her final report of 1998 that "as the international community has committed itself to the progressive elimination of death sentences and other barbaric punishments, it would seem contrary to international principles and to the goals of promoting respect for human life and dignity to allow prosecutions of international crimes in jurisdictions which mandate the death sentence, unless the potential application of the death penalty is waived"; see UN document E/CN.4/Sub. 2/1998/13, paragraph 99.

of sentence and only after the person has served two thirds of the sentence or 25 years in the case of life imprisonment (article 110).[245]

The International Court for Former Yugoslavia establishes, under article 24, the limitation of penalties to imprisonment.[246] This followed the Secretary-General's recommendation in his 1993 report to the Security Council that the penalty to be imposed on a convicted person would be limited to imprisonment and that "the International Tribunal should not be empowered to impose the death penalty."[247] The same applies to the International Tribunal for Rwanda which, under article 23, is limited to the maximum sentence of life imprisonment.[248] Additionally, the Draft Code of Crimes against Peace and Security of Mankind also does not contemplate the death penalty for such offences. This was due to the fact that the majority of the members of the ILC considered that the "Commission should not seek to resist the worldwide trend towards the abolition of the death penalty, even for the most serious crimes, such as genocide. The move away from the death penalty had been evidenced in legal thinking since the Nuremberg and Tokyo Trials."[249] In addition, the UN assistance to Cambodia regarding the Khmer Rouge trials also entails, in its article 10, that the maximum penalty to be applied is life imprisonment.[250]

In 1999, the Secretary-General updated information received from states concerning the death penalty.[251] The trend towards abolition continued, since another four countries (now 65) were abolitionists whilst 88 countries remained retentionists. 16 were abolitionist for ordinary crimes and 26 were abolitionists de facto. In 2000, the Secretary-General presented his Sixth Quinquennial Report

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[245] Spain and Portugal issued reservations regarding the length of time imprisonment which under their national laws prohibits extradition to countries that have life sentences and capital punishment.
[246] The amended statute is http://www.ohchr.org/english/law/itfy.htm (last access 15th February 2005).
[247] See paragraphs 111 and 112 of UN document S/25704 and Add.1.
[248] The Statute of the Court is at http://www.ohchr.org/english/law/itr.htm (last access 15th February 2005) and can also be found at http://www.ictr.org/ENGLISH/Resolutions/955e.htm (last access 15th February 2005.)
[249] See the Report of the International Law Commission of 1991, UN document A/46/10, paragraphs 84-86, at paragraph 84.
[250] See resolutions of the General Assembly in 2003 concerning the Khmer Rouge trials in UN document A/RES/57/228/A and A/RES/57/228/B.
[251] UN document E/CN.4/1999/52 & Corr. 1 and updated by a March addendum which summarised information received from states and intergovernmental organisation in UN document E/CN.4/1999/52/Add. 1.

concerning the years between 1994 and 1998.[252] In this report, questionnaires were framed separately for abolitionist and abolitionist for ordinary crimes only and another for retentionist countries for the first time.[253] The major conclusion to be drawn was that the rate at which countries have embraced abolition has been sustained, and this is even more impressive when taking into consideration "that fewer new democratic states have come into existence in the latter period and that there is a smaller pool of retentionist countries and territories which may be assumed to be more resistant to change."[254] These conclusions were reinforced by the updated report presented in 2001 together with the Commission on Crime Prevention and Criminal Justice, as two more abolitionist countries were added.[255] In the yearly supplement report of 2003 (referring to the year of 2002) there were 77 abolitionists, 15 abolitionists for ordinary crimes only, 33 abolitionists de facto and 71 retentionist countries.[256] The trend towards abolition continued and there was also an increase in the number of countries which had ratified international instruments providing for the abolition of the death penalty.[257]

On February 9th 2000, the Committee of Ministers enunciated the goal of transforming the CE into a "Death Penalty-Free Area."[258] Moreover, in the same year the EU adopted a Charter of Fundamental Rights which was the result of thorough discussion led by Roman Herzog. This fifty-four article Charter advocates, in its article 2 concerning the right to life, the abolition of the death penalty in very clear terms.[259] The Council of Europe took one step further in the issue of abolition with the adoption of Protocol nº 13, which called for the total abolition of the death penalty in peace as well as wartime. The abolition of the death penalty also in times of war was first recommended in 1994, at the

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[252] UN document E/2000/3.
[253] Furthermore, the abolitionists de facto were for the first time considered more of a subcategory of retentionist countries. See *ibidem*, paragraph 40.
[254] *Ibidem*, paragraph 56.
[255] UN document E/CN.15/2001/10/Corr. 1.
[256] UN document E/CN.4/2003/106.
[257] See *ibidem*, paragraph 32.
[258] This was the consolidation of the work of the Parliamentary Assembly in 1999 expressed in its report (document 8340 revision 2) that led to resolution 1187 entitled "Europe: a Death Penalty-Free Continent."
[259] Article 2 "Right to life":
1. Everyone has a right to life.
2. No one shall be condemned to the death penalty, or executed;
See *Official Journal of the European Communities*, 2000/C 364/01 (22 pages), 18 December 2000.

Parliamentary Assembly following the "Franck Report", and the main argument was that it is in times of war that there is a higher risk of executing innocents due to a greater shortage of legal safeguards.[260] In order to pursue this goal, a dual strategy was needed: to draw up an additional protocol abolishing the death penalty in all circumstances obliging the signatories not to re-introduce it, and also the setting up of a control mechanism to follow up the situation regarding the death penalty.

The Parliamentary Assembly pursued the issue, taking into account all possible consequences and thoroughly debating it, putting pressure on the Committee of Ministers to carry on with the recommendations.[261] Nevertheless, the Committee considered that its political priority was to obtain and maintain moratoria on executions which would later on be consolidated by the complete abolition of the death penalty.[262] It bore fruit at the end of 2001, when the Committee decided to transmit to the Parliamentary Assembly and to request an opinion on the text of a draft protocol aiming at the total abolition of the death penalty with the intent of adopting it in 2002.[263]

The eight-article draft was reviewed favourably by the Assembly with only one recommendation for adding a sentence to article 5. In the view of the Assembly and in order to update the Convention, there was the need to delete paragraph 1 of the second article of the ECHR. In order for this to be possible, it was suggested that the Protocol should have a hybrid form. The Protocol would therefore start out as an additional protocol and become an amending Protocol when it came into force in all States Parties to the Convention.[264] The draft was

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[260] See Parliamentary Assembly, Recommendation 1246 of 1994, paragraph 5. It resulted from CE document 7154, the report presented by the Rapporteur Mr. Franck to the Committee on Legal Affairs and Human Rights.

[261] See the report by Mrs. Wohlwend, the Rapporteur who succeeded Mr. Hans Göran Franck, in 1996, CE document 7589 of 25th June 1996. It led to Parliamentary Assembly's resolution 1097, recommendation 1302, and Order 525 of 1996 and to Communication nº 7798 of 1997 by the Committee of Ministers.

[262] See Committee of Ministers, reply 8079 to the recommendations 1246 (1994) and 1302 (1996) of the Parliamentary Assembly, 21st April 1998.

[263] See CE document 9291 of 14th December 2001 entitled "European Convention on Human Rights- Draft Protocol nº 13 on abolition of the death penalty in all circumstances."

[264] In order for this to be possible it was suggested that, under article 5 (Relationship to the Convention), a second paragraph be added in the following terms: "When this Protocol has come into force in all State Parties to the Convention, the second sentence of article 2, paragraph 1 of the Convention shall be replaced with the text of article 1 of this Protocol, and in the first sentence of article 57 of the Convention, after the words "provision of the Convention" the words "except to article 2, paragraph 1" shall be added." See

sent to the Committee, which adopted the protocol on 21st February 2002 but without the recommendation concerning a hybrid protocol made by the Assembly.[265] The first article affirms the abolition of the death penalty in all circumstances and entails the obligation for states to abolish it, as well as underlining in its second sentence that the right guaranteed is a subjective right of the individual. It prohibits derogations of any kind and allows for no reservations. It came into force with the deposit of the tenth ratification on 1st July 2003.[266]

In 2003, the Commission adopted resolution 2003/67 concerning the issue of the death penalty. The resolution was sponsored by the EU, presented by Greece and attracted a record number of co-sponsors, namely 75 against the 68 of the previous year.[267] Once again, the fact that countries still applied the death penalty for persons under 18 years of age at the time of the offence was of great concern to the Commission, a concern that was reaffirmed in two other resolutions.[268] Furthermore, the Sub-Commission and its sessional working group on the administration of justice also considered the issue of the death penalty.[269] In its resolution, the Sub-Commission urged all states not to extradite persons to states where there are no guarantees that the death penalty shall not be imposed.[270] At the General Assembly, references to the death penalty were made

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paragraph 11 of the report of 15 of January of 2002 by the Rapporteur on the abolition of the death penalty (CE document 9316) entitled "Draft Protocol to the European Convention on Human Rights concerning the Abolition of the Death Penalty in All Circumstances" and paragraph 6 of Opinion nº 233

[265] Council of Europe, "Protocol nº 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances", Vilnius, 3rd May 2002 and Explanatory Report adopted by the Committee on 21st February 2002, in *European Treaty Series* nº 187, (including ratifications and signatures) at http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG (last access 23rd February 2005). Hereafter simply cited as Protocol nº 13 to the ECHR. See Annex D.

[266] The first ten countries were Denmark, Ireland, Liechtenstein, Malta, Switzerland, Andorra, Bulgaria, Croatia, Cyprus and Ukraine.

[267] In *EU Human Rights Report 2003* under 4.3.4 point entitled "Death Penalty."

[268] Resolution 2003/67 was the result of EU draft resolution (UN document E/CN.4/2003/L.93) and was adopted by a recorded vote of 24 in favour, 18 against and 10 abstentions (UN document E/CN.4/2003/SR.61, paragraphs 92-93). The other two resolutions were 2003/53 (paragraphs 6 and 19) concerning extrajudicial, summary or arbitrary executions, and 2003/86 regarding the rights of the child (paragraph 35 a). The former was the result of draft resolution UN document E/CN.4/2003/L.57/Rev.1.

[269] This has been a regular issue at the working group on the administration of justice, *e. g.*, in the 1993 report (paragraphs 27-33 of UN document E/CN.4/Sub.2/1993/22), 2001 report (paragraphs 10-16 of UN document E/CN.4/Sub.2/2001/7) and 2002 report (paragraphs 9-21 of UN document E/CN.4/Sub.2/2002/7).

[270] See paragraph 3 a) of the Sub-Commission resolution 2003/11 which resulted from draft resolution UN document E/CN.4/Sub.2/2003/L.35. The issue of extradition and impunity of criminals, as well as the wording of the paragraph in question, were not consensual and the resolution was firstly postponed (UN document E/CN.4/Sub.2/2003/SR.21/Add.1, paragraphs 33-48); see paragraph 23 of the report of the

concerning specific countries. In these, there was concern over public executions, death sentences without the adequate procedural safeguards and application of capital punishment for persons under 18 years of age.[271] At the end of 2002 at the Third Committee, the EU instead of its traditional country-specific statement opted for a thematic approach with the goal of highlighting its international priorities, and these were the abolition of the death penalty and the prevention of torture. This procedure was repeated at the end of 2003, in which the abolition of the death penalty once again was one of the priorities for the EU.[272]

The latest UN report presented in 2004, covering the whole year of 2003, concluded that the trend towards abolition continued and, very importantly, that the number of countries that had ratified international instruments aiming at the abolition of the death penalty had also increased. According to this report, from a total of 195 countries or areas, 66 were retentionist, 77 completely abolitionist, 15 abolitionist for ordinary crimes only and 37 abolitionist de facto.[273] The survey conducted by Amnesty International from a total of 196 countries or areas adds four more abolitionists, namely Samoa, Bhutan, Niue and Turkey, and 14 abolitionists for ordinary crimes only. As for the abolitionist de facto and retentionist countries, this survey lists 23 countries as abolitionist de facto and 78 retentionist.[274] NGOs, most notably Amnesty International, have kept the issue of the death penalty in the international agenda, for instance at the UN, and have campaigned actively in favour of its abolition.[275]

Chairperson of the Sub-Commission on Promotion and Protection of Human Rights in UN document E/CN.4/2004/83 of 12th December 2003; it was adopted at the next meeting on 13 August 2003 without vote, in UN document E/CN.4/2004/2-E/CN.4/Sub.2/2003/43, pp. 39-41.

[271] See resolutions A/RES/58/196 regarding the situation of human rights in the Democratic Republic of Congo (paragraph 3 b), A/RES/58/195 referring to the Islamic Republic of Iran (paragraph 2 c), A/RES/57/232 pertaining to Iraq (paragraph 4 d) and A/RES/57/230 to Sudan (paragraph 2 i).

[272] See *EU Human Rights Report 2003* under the 4.2.1 point entitled "57th Session of the UN General Assembly: the Third Committee"; see also the statements by the EU Presidency at the Third Committee on 4th November 2002 (EU Document PRES02-294EN) and on 6th November 2003 (EU Document PRES03-310EN). In 2003, the other priorities were the eradication of torture, the issue of impunity and democracy and human rights in the context of conflict prevention and struggle against terrorism; both EU statements are available at http://www.europa-eu-un.org/articles/articleslist_s9_en.htm (last access 15th February 2005).

[273] UN document E/CN.4/2004/86.

[274] Survey of Amnesty International regarding the Death Penalty – Abolitionist and Retentionist Countries at http://web.amnesty.org/pages/deathpenalty-countries-eng (last access 1st December 2004).

[275] Amnesty International is an NGO with special consultative status at the UN, see for instance UN document E/CN.4/2003/NGO/184 concerning the death penalty. Amnesty International has been a leading organisation in obtaining credible data and statistics regarding the use of the death penalty, a difficult task in many retentionist countries. Regarding other NGOS with special consultative status see for instance, National

As for the international instruments aiming at the abolition of the death penalty, the Second Optional Protocol has fulfilled in part the wish expressed by the Special Rapporteur that it becomes "a pole of attraction."[276] It has been ratified by fifty-four countries and another eight have signed it.[277] The European Protocol 6 has been ratified by forty-four of the forty-six state members of the CE (with the exception of Russia and Monaco which have only signed it).[278] The American Protocol has been ratified by eight states, and Chile has signed it but not yet ratified.[279] Lastly, the European Protocol nº 13 is currently in force in thirty countries of the CE, with only three member states having neither signed nor ratified the Protocol, namely Russia, Armenia and Azerbaijan.[280] The ratification of international instruments has been at a slow but steady pace.

Association of Criminal Defense Lawyers (UN document E/CN.4/2003/NGO/171), Human Rights Advocates (UN document E/CN.4/2004/NGO/98) concerning the death row phenomenon as one of the limits on the death penalty, Pax Romana and Franciscans International (this latter in general consultative status) regarding the cruelty of capital punishment and the risk of executing innocent people (UN document E/CN.4/Sub.2/2001/NGO/9).

[276] These were the wishes of the Special Rapporteur to the Draft Second Optional Protocol; see paragraph 148 of the Bossuyt Report.

[277] The fifty-four countries are Australia, Finland, Iceland, the Netherlands, New Zealand, Norway, Portugal, Romania, Sweden, Spain, Germany, Luxembourg, Austria, Ecuador, Ireland, Mozambique, Panama, Uruguay, Venezuela, Denmark, Hungary, Malta, Namibia, Seychelles, Slovenia, Switzerland, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Cape Verde, Colombia, Costa Rica, Croatia, Cyprus, Djibouti, Georgia, Greece, Italy, Liechtenstein, Lithuania, Monaco, Nepal, Serbia and Montenegro, Slovakia, South Africa, Macedonia, Turkmenistan, Timor Leste, Estonia, Paraguay, Britain, Czech Republic, and San Marino. The eight countries are Andorra, Chile, Guinea-Bissau, Honduras, Nicaragua, Poland, Sao Tome and Principe, and Turkey. This is the status as of 24th November 2004 at http://www.ohchr.org/english/countries/ratification/12.htm (last access 23rd February 2005).

[278] Protocol nº 6 to the ECHR (lastly updated 5th October 2004), op. cit.

[279] The eight countries are Brazil, Costa Rica, Ecuador, Nicaragua, Panama, Paraguay, Uruguay and Venezuela at http://www.oas.org/juridico/english/Sigs/a-53.html (last access 23rd February 2005).

[280] Protocol nº 13 to the ECHR, op. cit.

Table 3: Evolution of the Death Penalty Worldwide

UN Reports	Total of Countries and Territories	A	AO	ADF	R
1975*	135	11	16	3	104
1980	152	21	14	1	116
1985	170	28	13	10	119
1990	169	39	17	21	92
1998	192	61	14	27	90
2000	194	74	11	38	71
2004	195	77	15	37	66

(A) Totally Abolitionist
(AO) Abolitionist by Law for Ordinary Crimes (countries whose laws provide for the exceptional use of the death penalty
(ADF) Abolitionist de facto (countries whose laws provide for the death penalty but, in practice, have not applied it in the last 10 years)
(R) Retentionist (countries which provide for the death penalty for ordinary crimes as well as federated countries which have both abolitionist and retentionist states)
* Canada suspended capital punishment from 1967-1977 as a trial period

Looking at the historical evolution of the death penalty, we find that a tendency towards abolition has been taking place within "evolving standards of decency that mark the progress of a maturing society."[281] More recently as the above table shows, the number of countries that are completely abolitionist has increased in a stable way. In a first phase, abolitionist countries were European and South American, countries where we could find a tradition of abolition of the death penalty. In addition, two abolitionist countries namely Germany and Austria were, due to historical reasons, very committed to the cause of abolition.[282] The influence of the Austrian Minister of Justice, Christian Broda, was crucial to the development of the pioneering European Protocol. The same can be said of Germany (at the time, the Federal Republic of Germany), a country that was the driving force of the Second Optional Protocol. In this phase, the aim of abolition was achieved gradually, first by the abolition of ordinary crimes, leaving capital crimes of a military nature.[283] This strategy is reflected in the Second Optional

[281] Chief Justice Earl Warren of the United States Supreme Court in *Trop v. Dulles* in 1958, *cit in* William A. Schabas, "International legal aspects", in Peter Hodgkinson and Andrew Rutherford (eds.), *Capital Punishment: Global Issues and Prospects*, Waterside Press, Winchester, 1996, pp. 21 and 35.
[282] For the Austrian experience see Roland Miklau, "The death penalty: a decisive question", in *Crime Prevention and Criminal Justice Newsletter*, Vols. 12 and 13/Special Combined Issue on Capital Punishment, November/1986, pp. 39-42.
[283] The distinction between common criminal law and military criminal law can be seen regarding its

Protocol which, as we have seen, allows for reservations concerning the application of the death penalty in wartime. This strategy had the dual goal of adjusting to the European protocol and, at the same time, attempting to attract more supporters. The UN Protocol is also ineluctably linked with these European and South American countries, but we should also bear in mind that the drafting of the protocol took place at the Sub-Commission level, a body which is less constrained and more independent of state pressures.

Moreover, when looking at European and South American regional systems, we can safely say it has been the European side which has been able to match theory and practice in a better way. This gap between theory and practice in the case of Latin America is evident in the fact that the use of the death penalty is reduced to a minimum "while replaced by the more serious reality of constant violations of human rights, principally the right to life and the judicial rights and guarantees inherent in these rights."[284] The practice of illegal executions committed by security forces or paramilitary groups relying on governmental acquiescence fits well into this description. In Europe, the abolition of the death penalty has taken a core place within a wider framework of respect for human rights linked with the European project, either the CE or the EU. These institutions have played an important role after the end of the Cold War and in which the majority of the new or "ex-Communist" states have become abolitionists. It was a different wave and in which some countries, following the path of France earlier in 1981, abolished the death penalty altogether in a single blow. Once again, historical reasons connected to the massive use of executions led countries such as Cambodia and East Timor to abolish capital punishment. The abolition wave has also touched African soil, which now has eleven abolitionist countries mainly

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purpose. While the first is a means of fighting crime the second is, first and foremost, a means of national defence and only incidentally a means of fighting crime. In addition, and taking as example Switzerland, a country can have an abolitionist policy and retain the death penalty for certain rare and serious offences such as treason and espionage committed in time of war. This has a great advantage since it precludes that states in wartime adopt emergency legislation in the heat of the moment and, therefore, prone to radicalisation and error; this is the argument defended by P. H. Bolle, "Abolition of the death penalty: dream or reality?", in *Crime Prevention and Criminal Justice Newsletter*, Vols. 12 and 13/Special Combined Issue on Capital Punishment, November/1986, pp. 47-50. Nonetheless, in 1992, Switzerland abolished the death penalty for all offences.

[284] Ricardo Ulate, op. cit., p. 30.

in the central and southern region.[285] The defence of the death penalty is currently concentrated mainly in the Middle East, North Africa and the continent of Asia. In the Western hemisphere, the only retentionist countries are the US and countries of the English-speaking Caribbean. Nevertheless, it would be wrong to underestimate the level of support for capital punishment in many retentionist countries, and this has been present at the Commission and at the General Assembly.

Historically, there has been a movement towards the progressive abolition of the death penalty and this has been the consequence of many elements: the "rescue of the individual" after the Second World War, European and South American support in putting and keeping the issue on the agenda, the end of the Cold War and the influence of the regional institutions such as the CE and EU. All these elements converged and were promoted by the UN at several levels. In this organisation, the importance attached to the issue of abolishing the death penalty can be observed from the fact that it was included in the International Bill of Rights. Likewise, this goal was pursued through a very careful and gradual approach, as can be seen from the fact that it is an optional protocol. Additionally, it was excluded from the UN umbrella as a punishment for international crimes, thereby taking an important step for the legitimacy of abolishing the death penalty. Furthermore, the UN has pursued a two-track strategy, on the one hand fostering abolition and on the other, while not questioning the legitimacy of the death penalty *per se*, improving the safeguards and guarantees of persons who are sentenced to death and also limiting the range of its application. These efforts have not created new treaty norms but have developed certain standards that raise the question of the existence or not of customary international law relating to the application of the death penalty. To these we will now turn.

[285] The African abolitionist countries are Cape Verde (1981), Angola (1992), Cote d'Ivoire (2000), Djibouti (1995), Guinea-Bissau (1993), Namibia (1990), Mozambique (1990), Sao Tome and Principe (1990), South Africa (1997), Mauritius (1995) and Seychelles (1993).

CHAPTER VII

ABOLITION OF THE DEATH PENALTY, CUSTOMARY INTERNATIONAL LAW AND *JUS COGENS*

"It is of course not possible to assert that abolition is a customary norm of international law. (...) However, a strong argument can be made that some or all of its limitations on use of the death penalty enumerated in article 6 of the International Covenant have attained the status of customary law."[1]

It is clear from the previous chapter that the UN efforts to abolish the death penalty have been successful in framing an "abolitionist window of opportunity."[2] However, it still falls short of being a universally accepted norm as can be seen, for instance, in the approaches regarding the death penalty of the permanent members of the Security Council: two are retentionists, two abolitionists and one is an abolitionist de facto.[3] We will look into the existence of customary international norms concerning the death penalty as well as peremptory norms, and at the question raised by the obligations that human rights treaties raise, *i. e.* if they are *just* treaties or *special* treaties requiring a special treatment. Additionally, we will look into the question of the compatibility of non-derogable human rights and reservations to human rights' treaties.

We now return to the issue of customary international law and peremptory norms approached in the third chapter. The constituting elements of a customary international law are a continuation or repetition of a practice over a considerable period of time (duration), a practice that is required by or consistent with international law (uniformity and consistency of practice), in which a number of states concord (generality of practice) and which is practised with a sense of legal obligation (*opinio juris et necessitates*).[4] The evidence of a customary rule of

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[1] William A. Schabas, "International legal aspects", in Peter Hodgkinson and Andrew Rutherford (eds.), *Capital Punishment: Global Issues and Prospects*, Waterside Press, Winchester, 1996, pp. 17-44, at p. 23.
[2] Roberto Toscano, "The United Nations and the abolition of the death penalty", in Council of Europe, *The Death Penalty Abolition in Europe*, Council of Europe Publishing, Strasbourg, 1999, pp. 91-104, at p. 94.
[3] If we extend permanent membership to its most likely candidates, namely Germany and Japan, the result would still be the same since the former is abolitionist and the latter retentionist.
[4] Ian Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford, Sixth Edition/2003

international law requires widespread state practice and, because it rests on the consent of states, does not bind states which reject the practice upon which the norm is based. How many states need to engage in the state practice for it to acquire the authority of a customary norm has never been definitely established, but it is clear that while universal practice is not necessary, the practice must be common and widespread. For a norm of customary international law to be binding on a state which has protested the norm, it must have acquired the status of *jus cogens*.

Rules of *jus cogens* are differentiated from all others by their "relative indelibility in that they cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect."[5] They derive their status from fundamental values which bind the international community as a whole, irrespective of protest, recognition or acquiescence by individual members. They differ from the traditional bilateral pattern of reciprocity, consent and state sovereignty even if we consider that "absolute and total" consent does not exist; in other words, to what extent is it really possible to opt out of international society and its cardinal rule, namely equality of sovereignty.[6] In fact, it has been argued that states have to accept certain obligations as a consequence of the mere fact of being members of international society, whether they have consented or not. Legal commitments cannot, sometimes, easily be explained as validated through the consent given by the states concerned.[7]

As for peremptory norms, the definition of its content is still in an embryonic stage but "it would seem that there is no retreat possible" in this continuous process of interaction between bilateral and community interests.[8] Peremptory

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(1st Ed. 1966), pp. 6-12.

[5] *Ibidem*, pp. 488-490.

[6] See Christian Tomuschat, "Obligations arising for states without or against their will", in *Collected Courses/The Hague Academy of International Law*, Vol. 241, 1993/IV, pp. 195-374, especially at p. 305-306.

[7] *Ibidem*, pp. 248-257. The author gives the example of membership in the UN and the "blanket powers" given to the Security Council by the Charter of the UN since there is no definition of issues of "international peace and security"; when a state joins the UN it may in the future find that the Security Council has violated its sovereign rights, something from which there is no legal remedy at its disposal which it can set in motion individually.

[8] See Jochen A. Frowein, "Reactions by not directly affected states to breaches of public international law", in *Collected Courses/The Hague Academy of International Law*, Vol. 248, 1994/IV, pp. 345-438.
Cf. with the view that the basis for this new development of international law is still made in the traditional bilateralist pattern, it is community interest on a bilateralist grounding, B. Simma, "From bilateralism to community interest in international law", in *Collected Courses/The Hague Academy of International Law*,

norms have also been discussed within the ILC framework regarding the formulation of a draft treaty that deals with the responsibility of states for internationally wrongful acts. The crux of the matter regarding this project is to determine what particular conduct of an individual or a group of individuals is attributable to the state, and subject to what conditions. It also represents the extension of the principle of individual criminal responsibility to states, an extension that has been far from consensual. For some, it was unwise to draw an analogy between responsibilities for state crimes and crimes committed by individuals. For others, international crimes can be committed both by individuals and states and that the traditional view, based on the Nuremberg approach, is too narrow.[9] The most contentious article defined state crimes (adopted in 1976) and had a very similar concept to that of *jus cogens*, as defined in the Vienna Convention but without explicitly naming it. It was recommended that the concepts be revised and, in the 2001 draft, a compromise position appears to have been reached.[10]

The draft articles do not attempt to define the content of the international obligation breaches that give rise to responsibility, but rather focus on the general conditions under which a state may be considered responsible for wrongful actions or omissions, and the resultant legal consequences.[11] It, therefore, avoids the divisive issue of which norms raise different obligations.[12] Nonetheless, it confirms that there is a certain hierarchy of norms and that a few basic substantive norms are recognised not only as having a higher degree of importance, but as being of a different kind.[13] In article 26, it exempts peremptory norms from certain circumstances that preclude wrongfulness such as consent, self-defence, countermeasures, *force majeure*, distress and necessity. As to *jus cogens* norms, it follows the line drawn by the ICJ in its judgements: the outlawing of acts of

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Vol. 250, 1994/VI, pp. 217-384, at pp. 230-249.

[9] See paragraphs 273-321of the *Report of the International Law Commission on the work of its fiftieth session, 1998*, in UN document A/53/10, chapter VII.

[10] See "Draft articles on responsibility of states for internationally wrongful acts", in *Report of the International Law Commission on the work of its 53rd session (2001)*, UN document A/56/10, pp. 43-58.

[11] See "Commentaries to the draft articles on responsibility of states for internationally wrongful acts", in *Report of the International Law Commission on the work of its 53rd session (2001)*, UN document A/56/10, pp. 58-365.

[12] *Ibidem*, paragraph 77 (1).

[13] Julio Barboza, "International criminal law", in *Collected Courses/The Hague Academy of International Law*, Vol. 278, 1999, pp. 9-200, at p. 94.

aggression, genocide, racial discrimination and *apartheid*, slavery, piracy, crimes against humanity, torture and the right to self-determination.[14] It recognises that while there is room for discussion as to whether or not peremptory norms and obligations to the international community as a whole are aspects of a single basic idea, "there is at very least substantial overlap between them."[15] The ILC also recognised that there is at least a difference in their emphasis: while *jus cogens* norms focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of *erga omnes* obligations is essentially on the legal interest of all states in compliance, and in being entitled to invoke the responsibility of any state in breach. Therefore, whilst breaches of obligations arising under *jus cogens* norms can attract additional consequences, not only for the responsible state but for all other states, all states are entitled to invoke responsibility for breaches of obligations *erga omnes*.[16]

Regarding the former, it established that breaches of peremptory norms have to be serious in nature and "intolerable because of the threat it presents to the survival of states and their peoples and the most basic values" as well as having a gross or systematic character.[17] In addition, states have an obligation to co-operate in order to end the breach through lawful means, whether or not they are individually affected by the serious breach. States also have a duty of abstention which encompasses two elements: not to recognise as lawful the situation that resulted from the breach and not to render aid or assistance to

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[14] See "Commentaries to the draft articles on responsibility of states for internationally wrongful acts", op. cit., pp. 206-209 concerning the commentary on article 26 which reads as follows: "Nothing in this chapter precludes the wrongfulness of any act of a state which is not in conformity with an obligation arising under a peremptory norm of general international law". See also the ICJ Judgments and Advisory Opinions referred in our third chapter regarding *jus cogens* and obligations *erga omnes*. In addition, see as well the paragraph 83 of the *Advisory Opinion concerning the Legality of the Threat or Use of Nuclear Weapons* delivered in 1996, in which the question under consideration was not whether there was a prohibition in peremptory terms of nuclear weapons specifically so mentioned, but whether there were basic principles of a *jus cogens* nature which are violated by nuclear weapons, at http://www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm (last access 15th February 2005).

[15] In the general commentary to chapter III of Part Two which is entitled "Serious breaches of obligations under peremptory norms of general international law", in "Commentaries to the draft articles on responsibility of states for internationally wrongful acts", op. cit., p. 281.

[16] *Ibidem*, pp. 277-282.

[17] *Ibidem*, pp. 282-286 regarding the commentary to article 40 which reads: "1. This chapter applies to the international responsibility which is entailed by a serious breach by a state of an obligation arising under a peremptory norm of general international law 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible state to fulfil the obligation."

maintain the situation.[18] As for the latter, *i. e.*, the consequences of violating obligations *erga omnes* in which a state, in invoking responsibility, is not acting in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of states to which the obligation is owed (obligations *erga omnes partes*) or, indeed, as a member of the international community as a whole (obligations *erga omnes*); it may seek cessation of the breach, assurance that it will not be repeated, as well as performance of the obligation of reparation.[19] The reaction of third parties to gross violations of international law can be made collectively or unilaterally, and it has been argued that although the former are preferable, there is a certain need for the latter, due to the decentralised structure of international law.[20] Nevertheless, to avoid the danger that the unilateral act degenerates into self-interest, there is a need to judge the lawfulness of these actions and it has been suggested that this task could be performed by the UN, namely by the Security Council and the General Assembly.[21]

Notwithstanding, countermeasures by states have limits and they cannot impair certain obligations such as: the obligation to refrain from the threat or use of force as embodied in the Charter of the UN, obligations for the protection of fundamental human rights, obligations of a humanitarian character prohibiting reprisals, and other obligations under peremptory norms of general international law that allow further recognition of peremptory norms.[22] In other words, these

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[18] *Ibidem*, pp. 286-292 concerning article 41 entitled "Particular consequences of a serious breach of an obligation under this chapter: 1. states shall cooperate to bring an end through lawful means any serious breach within the meaning of article 40 2. no state shall recognise as lawful the situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation 3. this article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law."

[19] *Ibidem*, pp. 318-324 regarding the comments to article 48 entitled "Invocation of responsibility by a state other than an injured state: 1. any state other than an injured state is entitled to invoke the responsibility of another state in accordance with paragraph 2 if: a) the obligation breached is owed to a group of states including that state, and is established for the protection of a collective interest of the group; or b) the obligation breached is owed to the international community as a whole (...)."

[20] Jochen A. Frowein, op. cit., pp. 423-433.

[21] *Idem, ibidem.*
Cf. Christian Tomuschat considers that at the apex of the hierarchy of the enforcement mechanisms we find the Security Council that deals with states in breach of their international obligations regarding peace and security but the protection of fundamental interests of the international community depends upon the interpretation that is given to breaches of international peace and security; if we adopt a restrictive approach equating these breaches with conflicts between states arising from the threat or use of force, then the Security Council is inadequate to protect community interest and a new international mechanism has to be envisaged, although in recent crises the Security Council has gone beyond the restrictive approach, op. cit., pp. 365-369.

[22] See "Commentaries to the draft articles on responsibility of states for internationally wrongful acts", op.

obligations must not be subject to countermeasures at all as, for example, concerning civilians in the rules of humanitarian law which have been considered as "intransgressible principles of international customary law."[23] The inclusion of human rights is linked with the establishment of relevant international human rights' treaties that have recognised the non-derogable character of some rights in all circumstances. In fact, this door was "opened" by the ruling of the ICJ concerning the *Barcelona Traction* case in 1970, which included in the norms that raised *erga omnes* obligations "(...) the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character."[24] If, on the one hand, this was a pioneering assertion, on the other, it was where the plot thickened.

As we have previously seen, the content of *jus cogens* beyond what we have already described has not been easy to ascertain. It makes sense that, if we consider that human rights treaties include peremptory norms, we should look for them in what are considered the core rights, namely non-derogable rights. Their non-derogative character derives from the fact that their deprivation does not enable an individual to enjoy his/her basic human rights. In fact, these can be considered a cluster of rights, an irreducible core which are, at least, universally recognisable. Notwithstanding, although slavery was one of the first to achieve the status of peremptory norm and has actually enhanced its scope by embracing

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cit., pp. 333-340 regarding comments on article 50 which deal with the obligations that cannot be affected by countermeasures taken by states.

[23] Following the ICJ which delivered this statement in its *Advisory Opinion concerning the Legality of the Threat or Use of Nuclear Weapons*, op. cit, paragraph 79. In international humanitarian law, customary international law fulfils the crucial role of bridging the gaps in the application of treaty law, gaps due to lack of ratification but also due to lack of substantive coverage. Despite the fact that in the area of international humanitarian law, treaty law is well developed its application is limited to States who have ratified the treaties in question, and to armed opposition groups within those States. The content of customary rules of international humanitarian law, on the other hand, is less clear because those rules are nowhere written down as such and therefore it is very important to know which rules of customary international humanitarian law apply; see International Committee of the Red Cross, *Customary International Humanitarian Law*, 28th International Conference of the Red Cross and Red Crescent (2nd - 6th December 2003), Document 03/IC/14, Geneva, 01.10.2003. The direct link to the report is at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5VLL65/$File/CustomaryIHL_FINAL_ANG.pdf (last access 15th February 2005.)

[24] In Judgment of the Case concerning the *Barcelona Traction, Light and Power Co. Ltd, Belgium v. Spain*, Second Phase, 1970, paragraph 34, *cit in* Theodor Meron, "On a hierarchy of international human rights", in *American Journal of International Law*, Vol. 80, nº 1, January/1986, pp. 1-23, at p. 10.

slavery-like practices,[25] the difficulty in equating *jus cogens* norms with non-derogable rights has been recognised by the Human Rights Committee.[26] The Committee understood that "the enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights' obligations bear the nature of peremptory norms of international law." It is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (*e. g.* articles 6 and 7). [27]

In contrast, on the remaining articles namely, 11, 15, 16 and 18 consensus has not yet been achieved as to their status as peremptory norms. Article 15 prohibiting *ex post facto* law seems to be the most consensual (contrasting with article 11) but the same could be said of article 16 and 14.[28] This is due to the fact that these three articles ensure procedural safeguards that allow for non-derogable rights to be respected, for example, in a capital trial.[29] Likewise, we also have to look beyond article 4 to assess the legitimate derogation from the Covenant; one criterion can be found in the definition of certain human rights violations as crimes against humanity, for instance the prohibition of genocide.[30] Additionally, the obligation under article 2 (3) of a state party to the Covenant to provide remedies for any violation of the provisions of the Covenant has to be considered non-derogable, since it constitutes a treaty obligation inherent in the Covenant as a whole.

In contrast, the two examples given by the Human Rights Committee as having a *jus cogens* nature, namely the right to be free from torture and the right to life, have been increasingly accepted as having that status.[31] Notwithstanding, the

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[25] See for instance, the case of sexual slavery in paragraphs 8, 28 and 30 of the final report of the Special Rapporteur Gay J. McDougall concerning "Contemporary forms of slavery, systematic rape, sexual slavery and slavery-like practices during armed conflict" (UN document E/CN.4/Sub. 2/1998/13).

[26] See also Theodor Meron, op. cit., p. 4.

[27] See paragraph 11 of General Comment nº 29 regarding states of emergency (article 4), UN document CCPR/C/21/Rev.1/Add.11, paragraph 11.

[28] Theodor Meron, op. cit., pp. 15-16.

[29] UN document CCPR/C/21/Rev.1/Add.11, paragraphs 14 and 15.

[30] *Ibidem*, paragraphs 12 and 13. For example, this would encompass article 10 (all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of human person), article 12 (in the case of deportation or forcible transfer of population without grounds and article 20 (in the case of war propaganda and advocacy of national, racial or religious hatred).

[31] See, for instance, paragraph 19 of the Annex of the Final Report by J. Oloka-Onyango and Deepika Udagama, under the title "Economic, social and cultural rights, globalization and its impact on the full enjoyment of human rights" (UN document E/CN.4/Sub.2/2003/14).

right to life is viewed not from an absolute but rather "minimal position" in which the death penalty may be imposed under certain circumstances, and with respect to certain individuals.[32] The emphasis is put on the prohibition of *arbitrary* loss of life. To go further, as a large number of states have done, that is to proclaim the abolition of the death penalty as a norm of customary law, remains prescriptive but not descriptive of reality.

Of the permanent five, France was the first to abolish the death penalty in all circumstances, but it was a punishment present in its history until recently.[33] It was not abolished with the Declaration of the Rights of Man and, in fact, after the invention of the guillotine, it was included in the Criminal Code of 1791 under article 3 stating that "every condemned person shall be beheaded."[34] As is well known, it was extensively used and only in 1810 with the new Criminal Code was it restricted to thirty-six capital offences. A restriction enhanced in 1832 with the criminal reform that removed some capital offences and added some mitigating circumstances. In 1848, France abolished the death penalty for political offences and confirmed it in 1853, although the definition of what constituted a political crime was left untouched. Nevertheless, executions were public until 1939, when a botched execution forced the move indoors. Throughout the 19th and 20th centuries, the maintenance of such a punishment did not attain consensus,[35] especially during the Vichy Republic that not only increased the number of executions but also broke a century old tradition of not executing women. Notwithstanding, the death penalty continued to be applied until 1980, when the newly elected President François Mitterrand, fulfilling a promise made in his campaign, initiated the proceedings for abolishing the death penalty, which were carried out by his Minister of Justice, Robert Badinter. The last execution had taken place in 1977. France ratified the ICCPR on 1980, the Optional Protocol in 1984 and Protocol nº 6 to the ECHR in 1986. In addition, it has only signed (in

[32] William A. Schabas, op. cit., p. 17.
[33] See Michel Forst, "The abolition of the death penalty", in Council of Europe, op. cit., pp. 105-116.
[34] *Idem, ibidem.*
[35] *E. g.* in the 20th century we find Albert Camus and his *Reflections on the Guillotine* which was published in 1957 and is reproduced in Barry O. Jones (ed.), *The Penalty is Death, Capital Punishment in the Twentieth Century, Retentionist and Abolitionist Arguments with Special Reference to Australia*, Sun Books in association with the Anti-Hanging Council for Victoria, Melbourne, 1968, pp. 131-152.

2002) Protocol nº 13 to the ECHR and has not signed the Second Optional Protocol.

In Britain, the abolition campaign began in the 19th century, most notably with Sir Samuel Romilly. The first appeals were included in a wider call for reform of criminal law in Britain where there were more than 200 capital offences. This led to unforeseen consequences, especially regarding lesser offences such as theft, and in which very often, judges would avoid giving a capital sentence and preferred to absolve a guilty defendant because they considered that the penalty was disproportionate to the offence. From the 1840s onwards, the reform of the criminal code reduced capital offences to murder, in which it was a mandatory sentence. The Royal Commission of 1864-1866 recommended that there should be differentiation as to the types of murder and, in 1869, public executions ended. The abolition campaign gained a new life with the creation, by Roy Calvert, of the National Council for the Abolition of the Death Penalty, in 1925. In 1929 and 1930, the Select Committee recommended abolition for a trial period, which took place in 1948. After the war, the Royal Commission on Capital Punishment, also known as the Gowers' Commission (1949-1953) studied the issue of the death penalty but did not recommend its abolition.

In 1956, the House of Commons carried, by a majority, a resolution calling on the government to introduce legislation for abolition or suspension of the death penalty. This Bill failed in the House of Lords in 1957, but in this same year, the Homicide Act, limiting capital punishment to just six types of murder, was passed. Despite its noble intentions, it led to absurdities and incoherences which were heightened by the murder of an innocent man and the execution of mentally backward persons.[36] The last execution took place in 1964 and, in the following year, the Murder (Abolition of the Death Penalty) Act abolished murder as a capital offence in peacetime. The death penalty was still provided for in cases of treason, acts of piracy involving violence and arson in Her Majesty's dockyards and offences specific to military law. The Crime and Disorder Act of 1998 abolished the

[36] *E. g* Timothy Evans was hanged in 1949 and later found to be innocent. He was granted a posthumous pardon in 1966. He was also mentally backward as was Derek Bentley who was hanged in 1953. In 1964, two persons that were also mentally defective were hanged. See Barry O. Jones, "The decline and fall of the death penalty in the English-speaking world", in Barry O. Jones (ed.), op. cit., pp. 244-284, at pp. 244-254.

death penalty for the remaining civilian offences and the 1998 Human Rights' Act removed the death penalty for military offences in peace and wartime. Britain ratified Protocol nº 6 to the ECHR in the following year and Protocol nº 13 to the ECHR in 2003. As to the UN, Britain has ratified ICCPR in 1976 but has not signed the Optional Protocol. The Second Optional Protocol was ratified in 1999.

The Russian Federation (Russia) has been retentionist until very recently. Its predecessor, the SU, throughout its history maintained and applied the death penalty (albeit there is an absence of figures concerning the exact scope of its application), as well as the right of the security police to carry on summary executions. If Marx was reluctant to include the death penalty, Lenin was not and before as well as after the Revolution, defended capital punishment as an efficient weapon in the class struggle. The Criminal Code of 1922 set the tone for the following Codes and the death penalty was provided for "until its abolition."[37] Although it is not possible to know its scope, it is a fact that the practice of summary executions increased during the purges and collectivisation campaign. In the 60s, the death penalty was extended to include economic crimes and, in the 70s, hijacking also became a capital offence. The death penalty was discretionary and applied to four types of offences: political, economic, crimes against the person and military crimes. During the Khrushchev period, the number of death sentences for economic crimes was higher than in the Brezhnev period, whilst in the latter, death sentences prevailed for crimes of a military nature. To this, the military expansion of the SU worldwide contributed much. Noteworthy was the prevailing opinion among political leadership that criminality was a phenomenon foreign to socialism. The SU acceded to the ICCPR, as well as to its economic, social and cultural counterpart in 1973. Russia became a party to the Optional Protocol in 1991 and it has signed but not ratified Protocol nº 6 to the ECHR in 1997. It has not signed the UN Second Optional Protocol or Protocol nº 13 either. It has applied a moratorium on death row prisoners and is considered a de facto abolitionist country.

The remaining permanent members of the Security Council, US and China, are both retentionists. China ratified the ICESCR in 2001, and has only signed the

[37] See Ger P. van den Berg, "The Soviet Union and the death penalty", in *Soviet Studies*, Vol. XXXV, nº 2, April/1983, pp. 154-174.

ICCPR in 1998. It is the leading retentionist country both in sentences and executions worldwide, as we shall see later on.[38] The US has an 'inverted approach' to the International Covenants: it ratified the ICCPR in 1992, but has only signed the ICESCR. Nevertheless, they have the fact that neither is a party to both UN Optional Protocols in common.

In the American regional system, the US is a founding member of the OAS and a signatory of the 1948 American Declaration of the Rights and Duties of Man. But it is not a party to either the ACHR[39] or the American Protocol aiming at the abolition of the death penalty. Capital punishment is enshrined in the American Bill of Rights, namely in the Fifth Amendment which establishes criminal law rights and guarantees including cases of capital offences, and it was constitutionally extended to states' law by the Fourteenth Amendment.[40] When we look at the death penalty in the US over the past 200 years, we can say that there has been an "incremental, slow, unidirectional, and multidimensional movement away from execution."[41] We can identify six periods, in that the first goes from the colonial times until the adoption of the Constitution and Independence.[42] The first

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[38] See Roger Hood, *The Death Penalty, A Worldwide Perspective*, Oxford University Press, Oxford, 2002, p. 92.

[39] The US signed the American Convention on Human Rights in 1977 but has yet to ratify it.

[40] The Fifth Amendment reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
It is part of the American Bill of Rights which added 10 amendments on 1789 to the American Constitution. The Constitution was proclaimed on 17th September 1787 by the 55 delegates to the Constitutional Convention. The US Constitution has seven articles and currently twenty-seven amendments being that the last occurred in 1992; The Fourteenth Amendment was ratified in 1868 and its Section 1 reads as "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Constitution is at U. S. National Archives and Record Administration http://www.archives.gov/national_archives_experience/charters/constitution.html (last access 15th February 2005) as well as the American Bill of Rights at http://www.archives.gov/national_archives_experience/charters/bill_of_rights.html (last access 15th February 2005).

[41] Christopher Z. Mooney and Mei-Hsien Lee, "Morality policy reinvention: state death penalties", in *Annals of the American Academy of Political and Social Sciences*, Vol. 566, November 1999, pp. 80-92, at pp. 84-85.

[42] This time division is taken from Hugo Adam Bedau, "Background and developments", in Hugo Adam Bedau (ed.), *The Death Penalty in America, Current Controversies*, Oxford University Press, New York and Oxford, 1997, pp. 3-25.

European to be sentenced to death and hanged was George Kendall in 1608, and this period is characterised by the fact that all colonies had the death penalty as a mandatory punishment for various crimes against the state, the person and property. The second period runs from the adoption of the Eighth Amendment to the Federal Constitution into the Civil War. In this period, the adoption of the Eighth Amendment prohibiting "cruel and unusual punishment" had the effect of banishing severe ways of executing a death sentence, such as crucifixion and burning at the stake. In addition, the establishment of the penitentiary system in the late 18th century was the first step in the development of alternatives to the death penalty for people who had committed severe crimes. Furthermore, the differentiation between different degrees of murder, which began in Pennsylvania in 1793, was important in reducing the number of capital offences and, in 1835, New York removed executions from the public eye. Likewise important was the adoption of legislation that allowed both jury and judge the discretion to apply the death penalty, and this was first adopted in Tennessee and Alabama. During this period, we also observe the first abolitionist declarations by states such as Michigan in 1847 (despite retaining it for treason it was, in fact, never used), Rhode Island in 1852 and Wisconsin in 1853.

In the third period, which runs until the 1910s, executions were centralised under the control of the state (in detriment of public lynching), which began in Maine in 1864. Additionally, authorities began searching for more humane ways to execute capital offenders, and in this regard, the invention of the electric chair applied in New York in 1888, is included in this search. The fourth period takes place between the First World War and the post-Second World War years. In this period, a second abolitionist wave took place but was followed by the highest levels of executions in the years preceding the Second World War, as well as during the world conflict. This was the consequence of a very high crime wave connected with the Great Depression (1929-1940) and the Prohibition (1916-1932). The search for a more humane method of execution continued, and lethal gas was for the first time authorised and used in Nevada in 1923. The fifth period is concerned with the 1950s until 1976, where the third wave of the death penalty abolition began in 1957. In this period, there was a decline in executions and an

increase in time served on the death row, as well as challenges to the constitutionality of the death penalty. This challenge happened in the famous 1972 decision of the US Supreme Court in the *Furman* v. *Georgia* case. The Supreme Court did not rule that the death penalty was unconstitutional but that its application was. This had several consequences, such as the re-sentence of all persons on death row, no more mandatory death penalties, the restriction of the death penalty to some kind of criminal homicide and no more executions without review of sentence and underlying criminal conviction. Furthermore, mandatory death penalties were once again considered to be unconstitutional under the decision of *Woodson v. North Carolina* in 1976, as well as disproportionate to the offence, namely in the case of rape (*Coker v Georgia* in 1977) and kidnapping (*Eberheart v. Georgia* in 1977).[43]

The last period begins in 1976 when, following the guidelines of the US Supreme Court, several states changed their death penalty statutes so as to fulfil the lacunae that were identified. In this year, the statutes of the state of Georgia were upheld in the *Gregg v. Georgia* decision, and the death penalty was not as such, an unconstitutionally "cruel and unusual punishment."[44] It has been argued that the 1972 decision backfired, since it cut short a gradual movement that was taking place towards fewer and fewer executions and in fact inverted this tendency.[45] This period is characterised by the increasing support for the death penalty and the politicisation of this issue.[46] Furthermore, there was a decline in the use of executive clemency, and an increase in the complexity and cost of capital trials and executions. In this period, the regionalisation of the death penalty is more marked and three areas can be identified.[47] The first one is a northern tier from Maine to Alaska, in which the death penalty is either abolished or plays a very minor role. In the second area raging from Pennsylvania to California, capital punishment plays a more elevated role but in which the debate is very intense resulting in fewer executions, despite large numbers of death row inmates. This is

[43] *Idem, ibidem.*
[44] See Roger Hood, op. cit., pp. 63-66.
[45] Christopher Z. Mooney and Mei-Hsien Lee, op. cit., pp. 88-89.
[46] This happened in the presidential campaign of Richard Nixon and the government campaign of Ronald Reagan in the state of California. Later, the death penalty issue was used against Michael Dukakis in the presidential campaign with George Bush.
[47] See Hugo Adam Bedau, op. cit., pp. 21-23.

especially true when compared with the third tier of states going from Virginia and North and South Carolina through Texas to Arizona. In this region, the death penalty is widely used and represents two thirds of the total of executions in the US. In 2002, all the executions took place by lethal injection with the exception of one by electrocution. The average time between the death sentence and the execution was 10 years and seven months.[48] The leading execution state was Texas followed by Oklahoma, Missouri, Georgia and Virginia.[49] The majority of capital offences in state statutes concerned murder.[50] In 2003, Texas and Oklahoma continued to be the leading execution states, with 24 and 14 respectively, in a national total of 65 executions. [51] If we look at the death penalty in the US from 1939-2003, we can say that it has been declining. [52] Likewise, there has not been a military execution (it is carried out by lethal injection) since 1961, although there are 15 capital offences. Nonetheless, it is a situation that might change due to the Military Commission Order nº 1 (which established military commissions to prosecute persons currently detained at Guantanamo), since capital punishment is part of the range of penalty options.[53]

The controversy in the US around the death penalty is great and in many ways possible because the US is a retentionist country which has a transparent system of releasing death penalty information and numbers. The abolitionist finds three types of criticism regarding capital punishment: in practice, in principle/moralist and utilitarian. The first one concerns the flaws within the

[48] See *Bulletin Capital Punishment, 2002* of the Bureau of Justice Statistics, November 2003, pp. 1-17, at p. 1, at http://www.ojp.usdoj.gov/bjs/pub/pdf/cp02.pdf (last access 15th February 2005).
[49] *Idem, ibidem*. In 2002, Texas executed 33 capital defendants, Oklahoma 7, Missouri 6, Georgia and Virginia 4 each, Florida, South Carolina and Ohio 3 each, Alabama, Mississippi and North Carolina 2 each and Louisiana and California 1 each.
[50] *Ibidem*, p. 2 for "Table 1 (Capital Offences by State, 2002)".
[51] *Ibidem*, p. 11 for the advance total of executions from January 1st 2003 to December 31st 2003.
[52] The peak was reached in the years between 1930 and 1951, followed by a decline that reached 7 executions in 1965, 1 in 1966, 2 in 1967 and none in 1968-1972, a situation that was continued *via* the Furman decision until 1977. In this year, Gary Gilmour was executed in Utah by firing squad. The execution rate remained low until 1984, increased to a peak in 1999 of 98 executions, fell to 85 in 2000, 66 executions were carried out in 2001, slightly increased to 71in 2002, and declined in 2003 to 65 executions. See "table of Number of Persons executed in the United States, 1930-2003" of the Bureau of Justice Statistics of the United States Department of Justice in http://www.ojp.usdoj.gov/bjs/glance/tables/exetab.htm (last access 1st December 2004) and see *Capital Punishment Statistics* by the Bureau of Justice Statistics of the United States Department of Justice in http://www.ojp.usdoj.gov/bjs/cp.htm (last access 1 December 2004).
[53] Department of Defense, Military Commission Order nº 1 is entitled "Procedures for trials by military commissions of certain non-United States citizens in the war against terrorism" and was issued on March, 21 2002, part 6 (G. Sentence); in http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf (last access 15 February 2005).

criminal justice system which is never perfect: there is always the possibility and reality of executing innocents. There is also the fact that, in practice, the death penalty is biased, in the sense that it is inflicted on the poorer and less educated members of society.[54] In principle, capital punishment is criticisable because it violates the basic right of the right to life. Morally, it is contradictory because it upholds life by taking lives and denies the sanctity of life. By defending the abolition of the death penalty, the state inculcates the approach that human life should be reverend and, therefore, it functions as an examples for all citizens and their behaviour. The utilitarian approach argues that it serves no purpose and there are alternatives. The death penalty is neither a credible nor an effective deterrent.

The retentionist also finds the same type of arguments. In practice, it is true that criminal law is never perfect but there are more and more safeguards and guarantees that reduce the hypothesis of convicting innocent people. From a moralist perspective, capital punishment reassures society that the victims suffering is a tragedy and shall not go unpunished and sends a message of the community's abhorrence regarding certain crimes. This retributivist argument upholds that the death penalty is the just and proportionate punishment for certain types of crimes. From a utilitarian perspective, capital punishment is a means to an end, in the sense that it is an efficient deterrent regarding potential murderers who will refrain from their behaviour. Underlying this argument is the notion that men are rational beings and, at all costs, desire to protect their lives.

The debate between abolitionists and retentionist is very lively.[55] On the one hand, abolitionists argue that statistics show that there is no appreciable risk that a

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[54] Governor Ryan of Illinois issued a moratorium on executions and commuted the death sentences of every one of the 171 inmates on death row, in that four were completely pardoned based on their innocence. It once again brought attention to the fact that, despite all the safeguards and guarantees, innocent people still get convicted of capital offences. In 2003, other six defendants on death row were exonerated because they were found innocent. The number of death row inmates that were exonerated on the grounds that they were innocent is over a hundred according to The Death Penalty Information Center, *The Death Penalty in 2003: Year End Report*, December 2003, p. 4, in http://www.deathpenaltyinfo.org/YER-03-F.pdf (last access 15th February 2005). For instance, the 100th death row inmate to be found innocent was Ray Krone in 2002 in Arizona, in *The Economist*, "The death penalty. Eighty-five ways to stay alive. Can death penalty verdicts be made less prone to error", April 20th 2002, p. 51.

[55] If we move away from the US, this issue is even more problematic, especially in developing countries. In these countries, there are no structures in place to avoid that not only innocent but also insane persons being convicted. In most countries, the financial resources that are allocated to criminal investigation police are scarce and there are no adequate services of psychiatric assistance and evaluation.

convicted murder will kill again, because most murders are acts of passion between angry or frustrated people who know or are related to one another, and are sometimes under the influence of drugs and alcohol. Most murderers, and particularly those who reach death row, do not fit the model of the calculating killer.[56] Furthermore, abolitionists argue that if capital punishment is meant to be a deterrent then, following this line of reasoning, executions should be public.

On the other hand, retentionists argue that there is no satisfactory alternative and, in fact, life imprisonment may well be a more vindictive punishment than the death penalty. In addition, there is also the belief that the economic costs associated with protracted imprisonment, not only in keeping the prisoner alive but also with the security measures that have to be taken, are unbearable for the state's finances. Another argument is that public opinion is largely in favour of retaining capital punishment and abolitionists must prove their case in order for the death penalty to be abolished. For abolitionists, this argument does not hold water because to think in terms of economic costs when we are dealing with people's lives is unacceptable, and the same goes for the role played by public opinion. Public opinion is largely uninformed that the death penalty cannot be administered without an unacceptable degree of arbitrariness, inequity and discrimination.[57] The burden rests upon those who advocate it to justify its morality and social utility.[58]

Within this debate, the majority of the penologists and criminologists are in favour of abolition, a tendency that is followed in most countries. The role of public opinion as to its support of the death penalty is normally connected with rising

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[56] See Günther Kaiser, "Capital punishment in a criminological perspective", in *Crime Prevention and Criminal Justice Newsletter*, Vols. 12 and 13/Special Combined Issue on Capital Punishment, November/1986, pp. 10-18.

[57] For an authoritative account of all the issues involved in the administration of capital punishment, the deterrence argument and the role of the public opinion, see Roger Hood, op. cit., chapter 5 ("Protecting the innocent"), pp. 131-171, chapter 6 ("Questions of equality and fairness in the administration of capital punishment"), pp. 172-207, chapter 7 ("The question of deterrence"), pp. 208-232 and chapter 8 ("A question of opinion or a question of principle?"), pp. 233-245.

[58] These arguments are based in the summary of the main arguments contained in the report of the Royal Commission on Capital Punishment in Ceylon in 1959 which was chaired by Prof. Norval Morris, in Barry O. Jones (ed.), op. cit., pp. 285-289. See also Darren J. O'Byrne, *Human Rights: an Introduction*, Prentice Hall/Pearson Education Limited, Harlow and London, 2003, pp. 198-240 and Jeffrey H. Reiman, "Justice, civilisation and the death penalty: answering van den Haag", Stephen Nathanson, "Does it matter if the death penalty is arbitrarily administered?", and Ernest van den Haag, "Refuting Reiman and Nathanson", in *Philosophy and Public Affairs*, Vol. 14, nº 2, spring/1985, respectively pp. 115-148, 149-164 and 165-176.

crime rates, an increase in brutal and violent offences as well as dissatisfaction with new forms of punishment that, in many cases, proved unable to reduce criminality but cost a lot of money.[59] The core issue is to whether to follow or to enlighten public opinion, and we find examples of countries that have abolished or maintained the death penalty despite public opinion.[60] The link between rising crime rates and the deterrent effect of the death penalty has also been questioned. For some, good political governance and good economic policies can actually lower homicide rates rather than relying on the use of capital punishment. It is suggested that economic growth, higher income levels, respect for human rights, and the abolition of the death penalty are all associated with lower homicide rates, and the same is true for states at "high levels of democracy."[61] Canada is usually compared with the US because it has abolished the death penalty, and its crime rate has not increased. The bottom line is the belief or disbelief that all persons, even the worst criminal, are potentially rehabilitatable. In other words, "to believe that capital punishment is too severe for any act, one must believe that there can be no act horrible enough to deserve death" and, for some, people like Hitler or Stalin deserve to die.[62]

Currently in the US, there are forty jurisdictions that have death penalty statutes, namely thirty-eight states, the federal government and the military.[63] At the federal level, the reaction to the *Furman* ruling was slower and the first modern capital punishment statute only came into being in 1988, with the Anti-Drug Abuse

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[59] Günther Kaiser, op. cit., p. 15.

[60] For instance, in Germany, before and shortly after the abolition of the death penalty, an overwhelming majority of the population was in favour of such punishment, see Hans-Jörg Albrecht, "The death penalty in China from a European perspective", in *Max Planck Institute for Foreign and International Criminal Law*, Freiburg, Vol. 8, 1998, pp. 1-19, at p. 16 in http://www.iuscrim.mpg.de/info/aktuell/projekte/deathprc.pdf (last access 5th December 2004). Austria maintained the abolition of the death penalty despite the fact that a considerable segment of the population still somewhat favoured it, see Roland Miklau, "The death penalty: a decisive question", in *Crime Prevention and Criminal Justice Newsletter*, Vols. 12 and 13/Special Combined Issue on Capital Punishment, November/1986, pp. 39-42, at p. 39.

[61] See Eric Neumayer, "Good policy can lower violent crime: evidence from a cross-national panel of homicide rates", in *Journal of Peace Research*, Vol. 40, nº 6, pp. 619-640.

[62] See Ernest van den Haag, "The death penalty once more", in Hugo Adam Bedau (ed.), op. cit., pp. 445-456.

[63] The jurisdictions without the death penalty are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin and District of Columbia. See also John F. Galliher, Larry W. Koch, David Patrick Keys and Teresa J. Guess, *America without the Death Penalty, States leading the Way*, North eastern University Press, Boston, 2002. See also the facts and figures by the National Coalition to Abolish the Death Penalty in http://www.ncadp.org/facts_figures.html (last access 15 February 2005).

Act of 1988 which contained the Drug Kingpin Act. This provided the death penalty for certain drug-related offences. In addition, capital offences in federal criminal cases have also expanded with the Violent Crime Control and Law Enforcement Act of 1994, within which we find the Federal Death Penalty Act. This increase was reinforced by the Antiterrorism and Effective Death Penalty Act of 1996. The majority of capital offences involve homicide but a few offences, such as espionage and treason do not.[64]

Parallel to the expansion of capital offences, the federal system has put into practice, since 1995, what is known as the "death penalty protocol", under which US Attorneys are required to submit for review all cases in which a defendant is charged with a capital-eligible offence, regardless of whether the US Attorney intends to seek the death penalty. These are considered by the Review Committee on Capital Cases, which makes an independent recommendation to the Attorney General. The Review Committee is a permanent advisory panel that was created in 1995 and receives all the underlying materials including those from the defence counsel.

Moreover, the decision by the Attorney General to seek the death penalty is always subject to reconsideration until the jury has returned a sentencing verdict, either because new facts or new arguments have been considered. A capital case is divided into two phases: "guilt" and "sentence." In the former, the jury must decide unanimously whether the prosecution proved beyond a reasonable doubt that the defendant has committed the capital offence. Then, if the jury finds the defendant guilty, the case proceeds to the sentencing phase. In this phase, the prosecution must prove beyond a reasonable doubt that the defendant committed the crime with a certain level of intent and prove at least one aggravating factor. In parallel, there are mitigating factors that can be considered, such as the defendant's background, impaired capacity, duress, minor participation, lack of criminal record or mental and emotional disturbance. Both the mitigating and aggravating factors are listed in the statutes. The jury considers at least two sentencing options, namely the death penalty and life in prison without any possibility of release, and the verdict has to be unanimous.

[64] See "Appendix Table 1: federal laws providing for the death penalty, 2002", in *Bulletin Capital Punishment, 2002*, op. cit., p. 13.

After sentencing, there are two types of reviews: the direct and the collateral. In the first, the defendant seeks review of the conviction and the sentence, and in federal capital cases the appellate court is required to review the entire record and to address specific issues including the death sentence. If the sentence is upheld, the defendant may file a petition in the US Supreme Court for a *writ of certiorari*. The collateral review enables the defendant to review the case by filling a motion to vacate, set aside or correct the sentence. If the death sentence is upheld on both direct and collateral review, the execution date is set. A defendant may also petition the President for a grant of executive clemency, which is left entirely to the President's discretion.[65]

It is noteworthy that, despite the increase of the availability of capital offences at a federal level, federal executions are a drop in the ocean. There was no federal execution from 1963 until 2001 and the executions of Timothy McVeigh and Juan Raoul Garza. Between 1930 and 1999, the US federal government carried out 33 executions, whilst at state level over 4,400 persons were executed. The state level process is essentially there is less control and more discretionary power. This situation has led some to conclude that the post-Furman initiatives were just "cosmetic reforms."[66] Unlike at federal level, in which the death penalty may only be sought with the written authorisation of the Attorney-General; at state level, prosecutors have the discretionary power to pursue capital punishment or not. There is legal counsel for indigent defendants at trials and for appeals, and the concept of a bifurcated trial is the same as at federal level. There are also statutory guidelines to assist juries in choosing between a death sentence or life imprisonment, and there is an automatic review of the case in state appellate courts. In spite of this, the jury selection for a capital trial has remained controversial because those who are opposed to capital punishment are likely to be taken off the panel of prospective jurors. This contradicts the view that the jury system is intended to represent the community as a whole.

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[65] See the report prepared by the United States Department of Justice, *The Federal Death Penalty System: a Statistical Survey (1988-2000)*, Washington, D. C., September 12, 2000 at http://www.usdoj.gov/dag/pubdoc/_dp_survey_final.pdf (last access 28th February 2005) and the update to this report, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review*, Washington, D. C., June 6, 2001 in http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm (last access 15th February 2005).

[66] Hugo Adam Bedau, "A reply to van den Haag", in Hugo Adam Bedau (ed.), op. cit., pp. 457-469.

This was one of the concerns expressed by the Special Rapporteur on extrajudicial, summary or arbitrary executions who visited the US between 21st September and 8th October 1997 with the goal of reviewing the application of the death penalty.[67] He concluded that the safeguards as well as restrictions were not being fully respected, there was lack of adequate counsel and legal representation, capital punishment was marked by arbitrary factors such as race, ethnic origin and economic status,[68] and the politics behind the death penalty raised doubts as to the objectivity of its imposition. In addition, the impact of defunding resource centres after the 1996 Anti-Terrorism and Effective Death Penalty Act led to lack of right to counsel at post conviction review. In addition, the 1996 Act limited severely federal review of state court convictions.[69] The debate around capital punishment remains strong and lively, which is also due to the work of international and national NGOs whose goal is to keep the abolition of the death penalty in the political agenda.[70]

The permanent five mirror well the reality of the controversial nature of the abolition of the death penalty which, unlike the prohibition of genocide or slavery, is not universally condemned. We can say that the scale is slightly tipped in favour of the abolitionist side with the fact that Russia is an abolitionist de facto and has pledged to ratify Protocol nº 6. It also shows that universal acceptance of abolition is not a reality and that we can find a homogenous region where that happens, namely Europe. Within this homogeneous area, the death penalty is approached from two perspectives: as a breach of the right to life and also as a violation of the right to be free from cruel, inhuman or degrading punishment. On balance, abolition of the death penalty is neither a peremptory norm nor a customary international law norm.

Notwithstanding, some of the categories of persons that have been exempted from the application of the death penalty have challenged their status in international law. As we have seen in the previous chapter, there are categories of

[67] The Special Rapporteur, Bacre Waly Ndiaye, also aimed at examining reports of deaths in custody and deaths due to excessive use of force by law enforcement officials, UN document E/CN.4/1998/68/Add. 3.
[68] *Ibidem*, paragraphs 62-66.
[69] *Ibidem*, paragraphs 140-156 regarding the conclusions and recommendations.
[70] Besides Amnesty International and its US delegations, there are other NGOs which deal specifically with the abolition of the death penalty, *e. g.* the Death Penalty Information Center, the National Center for Wrongful Convictions or the Illinois Coalition against the Death Penalty.

persons to whom the death penalty is not (or should not be) applicable, namely pregnant women, persons below 18 at the time of the commission of the offence, the insane, new mothers and mothers with dependant infants, the mentally handicapped and the aged.[71] From the two exceptions included in the ICCPR, the more prone to different understandings was the issue of pregnant women. The intention of the Covenant drafters was inspired by humanitarian considerations and by consideration for the interests of the unborn child, and that the death sentence, if it concerned a pregnant woman, should not be carried out at all. It was pointed out, however, that the provision in paragraph 5, in its present formulation, might be interpreted as applying solely to the period preceding childbirth.[72] In the Third Committee discussions, some were of the opinion that the clause sought to prevent the carrying out of the sentence of death before the child was born;[73] others considered that the clause was construed in a manner that the death sentence should not be carried out at all if it concerned a pregnant woman.[74] For some, this was because the normal development of the unborn child might be affected if the mother were to live in constant fear that, after giving birth, the death sentence would be carried out.[75] In practice, this exception is generally applicable and it is somewhat extended to women in general, since very few women are actually executed and most of them usually have their sentences commuted. In fact, it confirms the historical tendency observed in the Ancel and Morris Reports, and some countries go further and actually prohibit the execution of women in their criminal laws.[76]

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[71] See also articles 10 paragraph 2 that states that "special protection should be accorded to mothers during a reasonable period before and after childbirth (...)" and 12 (2) a) that calls for "the provision for the reduction of the still-birth-rate and of infant mortality and for the healthy development of the child" of the ICESCR.

[72] See Belgian comment at the time of the discussion of paragraph 5 of article 6 of the ICCPR (UN document E/CN.4/SR.311, p. 7): "Mr Nisot (Belgium) pointed out that the amendment could be taken literally or as applying solely to the period preceding child-birth." Later, Belgium raised the question as to whether the provision which was designed to protect the life of an unborn child whose mother had been sentenced to death was sufficient or whether such protection should be extended to all unborn children, in UN document A/C.3/SR.810, paragraph 2.

[73] See the comments by Iran in UN document A/C.3/SR.810, paragraph 7, Indonesia in UN document A/C.3/SR.812, paragraph 32 and Canada in UN document A/C.3/SR.814, paragraph 42.

[74] See comment by Republic of China in paragraph 27 of UN document A/C.3/SR.809.

[75] See comments by Peru in UN document A/C.3/SR.810, paragraph 14 and Saudi Arabia in UN document A/C.3/SR.811, paragraph 24.

[76] This is the case of Albania, Belarus, Kazakhstan, Kyrgyzstan, Latvia, Russia, Tajikistan and Uzbekistan; see Office for Democratic Institutions and Human Rights of the OSCE, Background Paper 2003/1 for the Human Dimension Implementation Meeting (October 2003), *The Death Penalty in the OSCE Area*, Warsaw,

For instance, in the US, pregnant women cannot be executed under federal, state or military law and, in fact, women are rarely executed.[77] As for the mentally retarded, the US Supreme Court has ruled that the execution of these persons violated the Eighth Amendment ban on cruel and unusual punishment.[78] In this matter, the Supreme Court followed the Federal government which had already established this exception regarding capital punishment in the 1988 and 1994 Federal Acts. The same reasoning regarding the Eight Amendment had already driven the US Supreme Court to exclude the insane from capital punishment although it fell short as to defining insanity.[79]

In our view, it is the exception concerning persons who were below 18 at the time of commission of the offence that has grown into a customary international norm. In fact, a strong case can be made that it has acquired a status of *jus cogens*. It is safeguarded in the Fourth Geneva Convention, and in the two additional protocols which establish the minimum standard of respect of human rights. Therefore, in wartime no person below 18 years of age can be sentenced to death. Currently, the Geneva Conventions are ratified by 192 states.[80] As for peacetime, it was adopted by a very narrow margin at the Third Committee in 1957,[81] but since then it has been consistently upheld by the UN framework, especially by the Commission on Human Rights and its Sub-Commission as well

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2003.

[77] The most notorious federal executions of women were of Mary Surratt who was hanged for her role in the assassination of President Abraham Lincoln and Ethel Rosenberg convicted of espionage in favour of the SU and was electrocuted.

[78] The Eighth Amendment is applicable to the federal government and reads as following "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment" and through the Fourteenth Amendment it was made also applicable to the states. This was the reasoning by the Supreme Court in case nº 00-8452, *Daryl Renard Atkins, Petitioner v. Virginia 536 US____ (2002).* Mr. Atkins has an IQ of 59.

[79] In the case *Ford v. Wainwright, Secretary of Florida Department of Corrections 477 US 399 (1986).* A five member majority of the US Supreme Court held that the Eighth Amendment's cruel and unusual punishment clause prohibits states from inflicting the death penalty upon a prisoner who is insane. Justice Marshall who delivered the opinion stated that "Whether the aim is to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment." Although insanity was not defined, persons must be aware of the punishment they are about to suffer and they must understand why they are going to suffer it.

[80] See International Committee Red Cross, *Status of Ratifications regarding Treaties of Humanitarian International Law* lastly updated on 1 June 2004 at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf (last access 25th October 2004).

[81] The voting was of 21 countries in favour, 19 against and 28 abstentions; see UN document A/C.3/SR.820 paragraphs 19 and 21.

as ECOSOC and the General Assembly.[82] Additionally, the UN Standard Minimum Rules for the Administration of Juvenile Justice also known as "the Beijing Rules" prohibit the imposition of capital punishment on juveniles.[83] The Human Rights Committee in its general comment nº 17 under the title "Rights of the Child (article 24) stated that "thus, as far as the right to life is concerned, the death penalty cannot be imposed for crimes committed by persons below 18 years of age."[84] This was the age limit followed by the drafters of the Convention Rights of the Child in its article 37 paragraph a).[85] It represents the extension of the recognition and protection of the rights of the human person in all stages including as a child.[86] It is the most ratified UN Convention, and all states are parties with the exception of Somalia and the US.[87] This high level of ratification shows a broad international consensus, which is reaffirmed by regional frameworks such as the European and American human rights' frameworks, and extending to Africa and the Arab world.[88]

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[82] In 1998, the Special Rapporteur on extrajudicial, summary and arbitrary executions expressed that death penalties and executions of juveniles violated international law, in paragraphs 49-56 and 145 of UN document E/CN.4/1998/68/Add.3. The Sub-Commission approved, for the first time, an appeal on 8th August 2002 for the US to stay the execution and re-examine the case of a Mexican national Mr. Javier Medina who had been denied proper consular assistance. He had been on death row for 13 years. Despite the fact that the state of Texas carried out the execution on 14th August it was an innovative effort and one which was adopted without vote. See paragraph 11 of the Report by the Chairperson of the Sub-Commission on the Promotion and Protection of Human Rights (54th Session), UN document E/CN.4/2003/94.

[83] Rule 17.2 states that "Capital Punishment shall not be imposed for any crime committed by juveniles"; the Beijing Rules were adopted by the General Assembly resolution 40/33 of 29th November 1985, in *Y. U. N. 1985*, pp. 746-756.

[84] In UN document CCPR/General Comment nº 17 of the CCPR of 7th April 1989, paragraph 2 of the

[85] According to William A. Schabas it resulted from a Canadian proposal, *The Abolition of the Death Penalty in International Law*, Grotius Publications Limited, Cambridge, 1993, p. 125. See CRC, article 37 states in paragraph a) "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

[86] Paragraph 65 of the Concurring Opinion of Judge Cançado-Trindade to Advisory Opinion OC-17/2002 of 28th August 2002 of the Inter-American Court of Human Rights entitled *Juridical Condition and Human Rights of the Child* requested by the Inter-American Commission on Human Rights at http://www.corteidh.or.cr/seriea_ing/vsa_cancado_17_ing.doc (last access 28th February 2005).

[87] Somalia has signed it in 2002 and the US in 1995. France and Russia ratified the Convention in 1990 and the United Kingdom and China in 1992. See also the African Charter on the Rights and Welfare of the Child which affirms in its article 5 (3) "the death sentence shall not be pronounced for crimes committed by children" being that under article 2 a child is defined as every human being below the age of 18 years. This regional convention has been ratified by 33 countries and none has issued a reservation concerning this matter; the Charter has 48 articles and came into force on 29th November 1999, http://www.africa-union.org (under official documents/treaties, last access 15 February 2005). See also article 12 of the Arab Charter on Human Rights adopted in 1997 by the League of Arab States which explicitly prohibits the use of the death penalty for persons below 18 at the time of the offence, at footnote 40 of the previous chapter.

[88] See paragraph 29 of the Advisory Opinion OC-17/2002 of the Inter-American Court of Human Rights, entitled *Juridical Condition and Human Rights of the Child* requested by the Inter-American Commission on Human Rights at http://www.corteidh.or.cr/serieapdf_ing/seriea_17_ing.pdf (last access 15th February 2005).

Since 1990, there have been documented cases of child executions in eight countries: China, the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Yemen and the US.[89] From all these countries, and even if we take into consideration that these are the documented cases (the reality, in some of these countries, is difficult to ascertain) the greatest number of recorded executions is carried out in the US. Outside the US, most executions that have taken place were not in accordance with national criminal law and not seen in any way as a rejection of international agreements forbidding such executions. In fact, the tendency in these countries is either to enact laws forbidding juvenile executions or to commutate the death sentences.[90] In contrast, the US has stated that it has a right to execute child offenders and has fiercely contested that the exclusion of child offenders from capital punishment is a customary norm, let alone *jus cogens*. In the history of the US, juvenile executions have been few in number since the hanging of sixteen year old Thomas Graunger in Massachusetts in 1642.[91] More recently, since 1976, twenty-two juvenile offenders have been executed, with Texas being the state with the highest juvenile offender rate.[92]

In 1990, the US Government responded to the enquiry of the Secretary-General regarding the application of the death penalty to persons below 18 years of age by stating that capital punishment is largely a state and not a federal matter.[93] Furthermore, "the US notes that general international law does not prohibit the execution of those committing capital crimes prior to the age of 18, provided that adequate due process guarantees are provided. Although a number

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[89] According to Amnesty International the total is of 37 recorded executions of child offenders since 1990 at http://web.amnesty.org/pages/deathpenalty-children-stats-eng (last access 2nd September 2004).
[90] See Amnesty International, *Execution of Child Offenders: Updated Summary of Cases*, 16th February 2004, at http://news.amnesty.org/mav/index/ENGPOL300062004 (last access 15th February 2005).
[91] See Victor L. Streib, "Affidavit on the cruelty of Pennsylvania's death penalty for juvenile offenders at http://www.abanet.org/crimjust/juvjus/Streib%20affidavit%20PDF.pdf (last access 15th February 2005).
[92] According to the American Bar Association of the twenty-two juvenile offenders that were executed in the US since 1976, thirteen were in Texas; see http://www.abanet.org/crimjust/juvjus/resources.html (last access 15th February 2005). For instance, in 2002, three juveniles were executed, namely Napolean Beazley, T. J. Jones and Toronto Patterson all aged 17 at the time of the crime and, in 2003, Scott Hain who was also 17 at the time of the offence was executed in Oklahoma. According to Amnesty International, since 1990, the juveniles who were executed were all 17 at the time of the crime with the exception of one death row inmate who was 16. See Amnesty International, executions of child offenders since 1990 until 30 June 2004 at http://web.amnesty.org/pages/deathpenalty-children-stats-eng (last access 2nd September 2004); See also Death Penalty Information Center, *The Death Penalty in 2003: Year End Report*, December 2003, p. 3, in http://www.deathpenaltyinfo.org/YER-03-F.pdf (last access 15th February 2005).
[93] UN document E/CN.4/Sub.2/1990/26/Add. 1 of 23rd July 1990, pp. 9-11.

of nations do not provide for the execution of such offenders, the practice of those states lacks the uniformity and *opinio juris* necessary to create a norm of customary international law." The US also considered that treaty law did not prohibit it from applying the death penalty to such offenders since, at the time, it was neither a party to the ICCPR or to the ACHR. In addition, the US argued that although it is a party to the Geneva 1949 Conventions (but not to the Additional Protocols), article 68 (4) of the Fourth Convention applies only to times of international conflicts and to protected persons in occupied territory which was not the case.[94]

The US position was reinforced by the fact that the US Supreme Court in 1988 overturned a death sentence imposed on a defendant convicted of murder committed at age 15 establishing the age limit at 16.[95] In the next year, in two cases where the defendants were 17 and 16 at the time of the crime, the Supreme Court considered that "we discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment.[96] In 2002, the Supreme Court on two occasions refused to visit its 1989 decision as to whether the execution of a person who was under the age of 18 at the time of the crime would be unconstitutional.[97] It is worth noting that even at the Supreme Court, there is not unanimity over this issue. The 1989 decision was not consensual and four Justices lead by Justice Brennan dissented. They considered that it is in fact prohibited by the Eighth Amendment since persons below 18 years of age are not matured and responsible as an adult and that,

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[94] *Ibidem*, paragraphs 6, 7 and 8. The US' reservation to article 68 asserts that "The United States reserve the right to impose the death penalty in accordance with the provisions of Article 68, paragraph, without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins"; See the status of reservations and declarations either by Treaty or State International Committee Red Cross at http://www.icrc.org/ihl (last access 28th February 2005).

[95] In the case *Thompson v. Oklahoma, 487 U. S. 815 (1988)* Justice Stevens delivered the opinion that the execution of a 15 year old was considered to be "abhorrent to the conscience of mankind."

[96] The cases were *Stanford v. Kentucky* and *Wilkins v. Missouri, 492 U. S. 361 (1989)*. Kevin Stanford was 17 years at the time of the crime and Heath Wilkins was 16. Justice Scalia delivered the opinion that "the imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age does not constitute cruel and unusual punishment under the Eighth Amendment."

[97] In the cases of *Re Toronto M. Patterson, 536 U. S. ___ (2002)* decided on 28th August and *Re Kevin Nigel Stanford, 537 US ___ (2002)* decided on 21st October.

therefore, the imposition of capital punishment is excessive and unconstitutional. Likewise, 18 is the age limit ("the dividing line that society has generally drawn") for persons to be able to exercise most of their civil rights, then it is not coherent to consider that a person can only vote at 18 but for capital punishment purposes he/she is considered an adult.[98] In 2002, Justice Stevens dissented from the opinion delivered in *Re Toronto M Patterson* and in *Re Kevin Nigel Stanford* he was followed by three Justices. Their opinion stated that to impose capital punishment to persons below 18 years of age is "a relic of the past and is inconsistent with evolving standards of decency in a civilised society. We should put an end to this shameful practice." In addition, they considered that the reasons that supported the *Atkins v. Virginia* ruling to exclude the mentally retarded from capital punishment are also applicable to the case of juveniles. The analogy between this US Supreme Court ruling and juvenile capital punishment was also at the heart of the decision of the Missouri Supreme Court to re-sentence Christopher Simmons (17 at the time of the offence) to life without parole. This decision was contested by the State of Missouri Attorney-General who rejected the analogy made by the Court. The American Bar Association, although not taking a stance on capital punishment, adopted, in 1983, a policy of opposition to capital punishment upon any person for an offence committed while under the age of eighteen.[99] Later, in 1997, it also recommended the application of a moratorium until there were higher safeguards that the death penalty was applied fairly and impartially, to reduce the risk of innocent persons being executed, and to prevent persons under 18 from being executed. It extended the same concerns to the execution of mentally retarded persons. [100] The *Simmons* case is now before the US Supreme Court which has overturned its earlier rulings and decided to re-visit the constitutionality of executing young offenders.[101] It is an issue that remains contentious within the US. The federal system and the military as well as 19 states

[98] In *Stanford v. Kentucky* and *Wilkins v. Missouri, 492 U. S. 361 (1989).*
[99] See recommendation in the Report of the Section of Criminal Justice in http://www.abanet.org/crimjust/juvjus/jdppolicy.html (last access 15th February 2005).
[100] Annex of UN document E/CN.4/1998/68/Add.3. For an analysis of Pennsylvania policy concerning juvenile death penalty (last execution of a juvenile took place in 1916) and its comparison with other states such as Texas, see the article by Victor L. Streib, op. cit.
[101] See US Supreme Court Case nº 03-633 *Donald P. Roper v. Christopher Simmons*. This is one of the cases that the American Bar Association has kept on watch at http://www.abanet.org/crimjust/juvjus/juvcases.html (last access 15th February 2005).

require a minimum age of 18.[102] 14 states set the limit at 16 and the remaining 5 set 17 as the minimum age for the application of the death penalty.[103]

It is true that the US has consistently voted against the consideration that the imposition of the death penalty on persons below 18 years of age violated international law. At the UN, the US voted against the Second Optional Protocol as well as the resolutions on the death penalty at the Commission on Human Rights. In the latter, the US has consistently voted against, because it understands that the death penalty violates neither international law nor any of the treaties to which the US is a party.[104] In 2003, the US was the only country to vote against the resolution of the General Assembly concerning the rights of the child, while 164 countries voted in favour. This was mainly due to the paragraph on the death penalty for juvenile offenders, which repeated the resolution adopted at the Commission on Human Rights. Nonetheless, it did not vote against the 1984 Safeguards adopted by consensus at ECOSOC or its endorsement by the General Assembly, as well as the Beijing Rules.

In our view, there has been an evolution as to the character of the norm regarding offenders below 18 years of age. Executions of juveniles are few when compared with the total number, but "their significance goes beyond their number and calls into question the commitment of the executing states to respect international law."[105] This can be traced to the decisions of the Inter-American Commission on the question. In 1987, the Inter-American Commission, in its resolution nº 3/87, found that the US was guilty of violating the right to life under articles I and II of the American Declaration of the Rights and Duties of Man when

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[102] These are California, Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, Washington, Wyoming and South Dakota.

[103] The states where the minimum age is 16 are Alabama, Arizona, Arkansas, Delaware, Idaho, Kentucky, Louisiana, Mississippi, Nevada, Oklahoma, Pennsylvania, South Carolina, Utah, and Virginia. The states where the age limit is set at 17 are Florida, Georgia, New Hampshire, North Carolina and Texas; see Table 2 concerning the minimum death penalty age by Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-September 30, 2004*, Issue nº 75, pp. 1-32, at p. 7, available at http://www.law.onu.edu/faculty/streib/documents/JuvDeathSept302004.pdf (last access 25th October 2004).

[104] In 1999, see UN document E/CN.4/1999/SR. 58, paragraphs 49, 50 and 60-62; in 2000 see UN document E/CN.4/2000/SR.66, paragraphs 23-24, and 29-31; in 2001 see UN document E/CN.4/2001/SR.78, paragraphs 11, and 16-18; in 2003 see UN document E/CN.4/ 2003/SR.61, paragraphs 82-84 and 92-93.

[105] In Amnesty International, "Executions of child offenders since 1990 until 30 June 2004"at http://web.amnesty.org/pages/deathpenalty-children-stats-eng (last access 2nd September 2004).

it executed two juvenile offenders.[106] This was based on the fact that, due to the diversity of state practice in the US, the application of the death penalty was made subject to the fortuitous element of where the crime took place. In the Commission's opinion, this resulted in a pattern of legislative arbitrariness throughout the US and, consequently, in the arbitrary deprivation of the right to life as well as in inequality before the law. It also argued that an important matter such as capital punishment should be established by the federal government. At the same time, the Commission considered that there was an international norm prohibiting the execution of children, but that there was no consensus as to the age of majority.[107]

However, in 2002 the Inter-American Commission concluded that, in light of all the developments that had occurred since its 1987 resolution, there existed an international *jus cogens* norm as to the prohibition of execution of persons below 18 years of age.[108] It based its decision on all the developments that we have already seen, either at the UN or at regional level, and article 68 of the Fourth Geneva Convention, but mostly on the adoption of the Convention on the Rights of the Child and its near universal ratification. It went further by stating that, in the Commission's view, "the US stands alone amongst the traditional developed world nations and those of the Inter-American system, and has also become increasingly isolated within the entire global community. A community that considers that the prohibition of the execution of offenders aged below 18 years of age at the time of their offence has achieved a sufficiently indelible nature to now constitute a norm of *jus cogens*."[109] The US responded that customary international law does not prohibit the execution of juvenile offenders and, "as if waving a magic wand," the

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[106] Resolution nº 3/87 of the Inter-American Commission on Human Rights, *Case 9647 United States*, decided on 22nd September 1987. The petitioners, James Terry Roach and Jay Pinkerton, were both seventeen at the time they committed capital offences (in South Carolina and Texas) for which they were found guilty and executed in 1986. These were represented by David Weissbrodt and Mary McClymont with co-sponsoring of the American Civil Liberties Union and International Human Rights Law Group; in http://www.cidh.org/annualrep/86.87eng/EUU9647.htm (last access 15th February 2005).

[107] *Ibidem*, paragraphs 56-65.

[108] In Report nº 62/02 Merits *Case 12.285 Michael Domingues v United States*, 22nd October 2002. This report was preceded by report 116/01 which set forth the analysis of the record, findings and recommendations on the matter. The petition was filed on behalf of Michael Domingues who is on death row in the state of Nevada for a capital offence which he committed at the age of 16, in http://www.cidh.org/annualrep/2002eng/USA.12285.htm (last access 15th February 2005).

[109] *Ibidem*, paragraphs 84-87.

Commission had declared it a *jus cogens* norm.[110] In addition, it stated that even if a norm of customary international law had evolved since the Commission's resolution of 1987, which it has not, the US was not bound to such rule, given its status as a persistent objector even regarding the ICCPR. In fact, the US objection led to a formulation of a reservation to article 6 concerning this specific matter, in line with the practice regarding the signature of the ACHR.[111]

This leads us to the relation between human rights' treaties and reservations. In human rights' treaties, the two elements of form and function seem to be at odds with each other. If we consider that the form - being a treaty – prevails, we place these treaties on the same footing as all the others; while if we give more preponderance to its function and content - inherent rights - we disregard the element of consent and reciprocity (and sovereignty) that characterises treaties in international law.[112] The main challenge that human rights' treaties pose to international law is one of fragmentation, that is, of claiming to be different from "ordinary" treaties and, therefore, requiring a special regime. This may set a precedent that can be claimed by other areas of international law, *e. g.* protection of the environment. Taken to its full consequences, this precedent can lead to the disintegration of the homogeneity and the stability of international law. This is the view of the 'traditionalist' approach, which also emphasises that the Vienna Convention did not recognise any special feature to human rights' treaties and is mainly concerned with the form rather than the teleological element of the obligations that are raised by treaties.

Nevertheless, the Vienna Convention does open a door in its article 60 (5) by stating that provisions relating to suspension following material breach do not apply to provisions relating to the protection of the person contained in treaties of a humanitarian character. In other words, if a state breaches human rights' treaties,

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[110] See argument II of the *Observations of the United States Government on the report of the Inter-American Commission made on October, 15 2001, Re. Case nº 12.185 Michael Domingues* in http://www.cidh.org/respuestas/usa.12185.htm (last access 15th February 2005).

[111] When in 1977 the US government signed the ACHR and then passed it to the Senate, it did so with the suggestion that the Senate considered the following reservation to article 4: "United States adherence to article 4 is subject to the Constitution and other law of the United States." See *United States Department of State Publication 8961*, General Foreign Policy Series 310, Letters of Transmittal and Submittal, with suggested reservations, understandings, and declarations, November 1978; *cit in* paragraph 53 of Resolution nº 3/87 of the Inter-American Commission on Human Rights, op. cit.

[112] See Matthew Craven, "Legal differentiation and the concept of the human rights treaty in international law", in *European Journal of International Law*, Vol. 11, nº 3, pp. 489-519.

the violation itself does not allow the other or other parties to correspond in the same manner. This is a partial recognition of the element of non-reciprocity of human rights' treaties. It also recognised the development of the Geneva and The Hague law, which can also serve to describe the increasing attention paid to human rights' treaties in general. Not only have human rights' treaties proliferated, over-stretching many areas, but they have also been dynamically interpreted revealing an evolutionary character. When speaking of the distinctiveness of human rights' treaties one characteristic springs to mind: the lack of reciprocity. In other words, they raise obligations owed to all which transcend the individual interests of contracting parties, unlike the classical view which sees reciprocity as the logical legal framework of the contract. It is the expression of a mutual, but conditional, exchange of legal obligations in which the possession of rights and obligations of one party are linked to those of the other party.

The issue of lack of reciprocity has been at the core of the reasoning behind responses to the challenges raised by regional human rights' conventions.[113] In the American context, the Inter-American Court on Human Rights concluded that

[113] With special reference to the American system see the Advisory Opinions of the Inter-American Court of Human Rights, 24th September 1982 and 8th September 1983 entitled *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (articles 74 and 75)*, OC-2/82 (series A, nº 2), and *Restrictions to the Death Penalty (Articles 4 (2) and 4 (4) American Convention on Human Rights)*, at respectively http://www.corteidh.or.cr/serieapdf_ing/seriea_02_ing.pdf (last access 15th February 2005) and http://www.corteidh.or.cr/serieapdf_ing/seriea_03_ing.pdf (last access 15th February 2005); see especially paragraphs 22, 27-40 of the former and paragraphs 61-65 of the latter. In the European system, we find the ruling concerning the *Pfunders* case (*Austria v Italy*), in 1961, in which the Commission decided that the complaint filed by Austria concerning irregularities in a murder trial (Application nº 788/60) was admissible. Italy had questioned the validity of the complaint because it argued that although Italy was a party to the ECHR at the time of the commission of the crime (murder of Falqui, an Italian Customs officer, by six Austrian nationals in 1956), Austria had only joined the Convention in 1958 and, therefore, could not file a complaint to the Commission of any alleged violations occurring prior to the date of its own ratification. The Commission concluded otherwise because it considered that a state by becoming a party of the ECHR aimed at establishing the ideals of the CE and not to pursuit national interests. Therefore, Italy, which had already signed the Convention, undertook to respect all individuals regardless of their nationality or status. In this respect, the complaint filed by Austria was therefore admissible because Italy was obliged to secure rights and freedoms enshrined in the ECHR to everyone within its jurisdiction and without any exception. Of all the remaining arguments for the admissibility of the complaint only one failed to convince the Commission, namely the exhaustion of national remedies; see European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights*, Fourth series/1961, Martinus Nijhoff, The Hague, 1962, pp. 116-182. The Court reaffirmed the nature of the obligations that states have under the ECHR stating that "unlike treaties of the classical kind, the Convention comprises more than mere reciprocal engagements between contracting states. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement", in paragraph 239 of the case of *Ireland vs. United Kingdom*, Judgment of 18 January 1978, Series A, nº 25, (Hudoc reference 00000091) at http://www.echr.coe.int/Eng/Judgments.htm (last access 15th February 2005).

the object and purpose of human rights' treaties is the protection of the basic rights of individual human beings irrespective of their nationality. The contracting states, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction.[114] In Europe, the Commission stated that the purpose of the ECHR was not to concede to each state party reciprocal rights and obligations in pursuance of their individual national interests, but to realise the aims and ideals of the CE. This entailed the goal of establishing a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideas, freedom and the rule of law. A state party to the ECHR undertakes to secure these rights and guarantees to everyone within its jurisdiction without any exception.[115] Additionally, these obligations are "essentially of an objective character"[116] and are not based, as are most other treaties, on reciprocity, and do not involve a mutual exchange of rights and obligations by the Contracting Parties. Its object is to set up an independent legal order for the protection of individuals.[117] Therefore, when a state party to the ECHR files a complaint of an alleged breach of the Convention, it does so not with the aim of enforcing its own rights, "(...) but rather as bringing before the Commission an alleged violation of the public order of Europe."[118] The nature of these obligations as obligations *erga omnes partes* is even better illustrated by the unveiling of the mechanism that enables every member state of the Convention to present an inter-state case when there is a violation of the Convention by another state member.[119] The first such case was made by the Scandinavian countries and the Netherlands against Greece during the Colonels' regime and, in 1985, France and these countries brought a case against Turkey

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[114] See paragraph 29 of Advisory Opinion of the Inter-American Court of Human Rights, September 24, 1982, OC-2/82 (series A, nº 2), entitled *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (articles 74 and 75)*, op. cit.
[115] See *Pfunders* case, op. cit, p. 138.
[116] *Ibidem*, p. 140.
[117] See Francis G. Jacobs and Robin C. A. White, *The European Convention on Human Rights*, Clarendon Press, Oxford, 1996 (1st ed. 1975), p. 20.
[118] See the *Pfunders* case, op. cit., p. 140.
[119] This is now article 33 (former article 24): Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

after the military take over.[120] In these two situations, states that presented the case did not have a "direct" interest at all.

The issue of reciprocity, therefore, appears to be the "key to unlocking the puzzle of human rights' treaties" although not all can be included. Some are dependent upon other considerations such as nationality, *e. g.* European Social Charter or the Migrant Workers' Convention or upon a mutual acceptance of obligations on the part of states concerned, *e. g.* Geneva Conventions of 1949 and the Additional Protocols. When speaking of non-reciprocity as the distinctiveness of human rights' treaties, we can limit the category of treaties to those whose purpose is to recognise and protect individual human rights in a way that is independent of the question of nationality, or of the acceptance of similar obligations by any other particular state party.[121] This is not to say that a human rights' treaty does not have synallagmatic provisions but rather that non-reciprocal provisions prevail. For instance, the ICCPR, under its article 41, provides for inter-state complaint but based on reciprocity.

A *via media* between the formalist and purposive approaches has focused on the constructive element of human rights treaties. These embody certain collective values which both define and transcend individual states' legal interests.[122] In other words, when ratifying human rights treaties states assume obligations to all other parties as a collective rather than as a mutual exchange between individual states. States set up a network which is constitutive of the nature and identity of those states and to which they are entirely bounded by and constituted within the interests of the regime as a whole, and exist insofar as they correspond with that of the collective. In this approach, it is for the institutions envisaged in the agreed framework to play a more active role by determining the treaty's application and effect.

All these three approaches have their merits but none is fully explanatory of the challenges posed by human rights' treaties. On the one hand, to state that human rights' treaties are just treaties is to leave out the crucial importance of non-

[120] *E. g.* European Commission and Court of Human Rights, *Yearbook of the European Convention on Human Rights*, Vol. 13 of 1970, application nº 4448/70, Martinus Nijhoff, The Hague, 1972, pp. 108-136, for the case against Greece.
[121] Matthew Craven, op. cit., p. 499.
[122] *Ibidem*, pp. 515-516.

reciprocal obligations assumed by states. On the other hand, to consider them has having a uniqueness that requires specificity in all its facets, because directed at individuals, is to neglect the reality of the state as the core institution in international law. As for the constructive approach, it fails to explain the resistance to the increasing role of treaty monitoring bodies such as the Human Rights Committee. This situation is even more pertinent when we consider the issue of reservations which were defined by the Vienna Convention of 1969: a reservation "means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[123] It also established limits to reservations that states may formulate either upon signature, ratification, acceptance, approval or accession.[124] Additionally, a state by signing a treaty creates an obligation in the period until its ratification, acceptance or approval, to refrain in good faith from acts that would defeat the object and purpose of the treaty.[125] Reservations can be objected by other state parties within the period of 12 months.[126]

The Vienna Convention laid the main framework regarding treaties in general, without developing the specificity of international human rights' treaties. The concept of human rights' treaties being more than *just* treaties is even more pertinent when these are faced with reservations. This issue prompted the General Assembly to request an advisory opinion from the ICJ as to effect of reservations

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[123] See article 2 (1) d) of the Vienna Convention.

[124] See Article 19 of the Vienna Convention: Formulation of reservations
A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
(a) the reservation is prohibited by the treaty;
(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

[125] See Article 18 of the Vienna Convention: Obligation not to defeat the object and purpose of a treaty prior to its entry into force
A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

[126] See articles 20 and 21 of the Vienna Convention.

on the Convention against Genocide.[127] The Court, in its advisory opinion, highlighted two important facets of the relation between reservations on the one hand, and international human rights' treaties on the other. Firstly, it considered that the Convention on Genocide had special characteristics because its "purpose is purely humanitarian and civilising. The contracting states do not have any individual advantages or disadvantages nor interests of their own, but merely a common interest."[128] Secondly, it recognised that there was a need to balance the integrity of the convention with the securing of as wide a participation of states as possible. Reservations that sacrificed the very object of the Convention could not be accepted, nor could states be refrained from stating a specific understanding without which they would not be able to become parties of the Convention. The Court considered that the *via media* between these two legitimate concerns was the compatibility of a reservation with the object and purpose of the Convention. This criterion laid down by the Court was endorsed by the General Assembly and was recommended as guidance for future reservations.[129]

From the five US reservations made to the ICCPR, three were placed upon non-derogable rights.[130] The most controversial were those by which "the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment of crimes committed by persons below 18 years of age" and the "United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual

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[127] Resolution 478 (V) of 16th November 1950 in *Y. U. N. 1950*, p. 879 and *Y. U. N. 1951*, p. 820.

[128] See Advisory Opinion of 28th May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, at http://www.icj-cij.org/icjwww/idecisions/isummaries/ippcgsummary510528.htm (last access 15th February 2005). See also *Y. U. N. 1951*, pp. 820-832.

[129] Resolution 598 (VI) in *Y. U. N. 1951*, p. 832.

[130] The US entered five reservations when it ratified the ICCPR on 8th September 1992. See the "Ratification of the Covenant by the U. S. Senate", in UN document CCPR/C/81/Add.4, Annex III and also http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (last access 15th February 2005). Norway and Ireland also placed reservations but both were not of a substantive character: In 1972, Norway placed a reservation because its legislation did not conform to 6 (4). Its military courts could rule that a death sentence to be carried out irrespective of a right to appeal. In practice, Norway had not had executions since trials of Second World War criminals and in 1979 withdrew its reservation following its abolition of the death penalty in peace and wartime. Ireland stated that its legislation was inconsistent with the Covenant but if a fact arose, Ireland would take into account its obligations under the ICCPR.

treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."[131] The remaining reservation upon a non-derogable right concerns paragraph 1 of article 15.[132]

The provision concerning juvenile executions was objected to by eleven European states on the grounds that it was incompatible with the object and purpose of the ICCPR.[133] Some of these countries also objected to the reservation concerning article 7 because they are both made against human rights that are not derogable from under any circumstance.[134] The scope of these reservations was also made clearer with the first American report under the Optional protocol of the ICCPR. In general terms, albeit giving mostly a description of the federal government reality, the document was considered to be a "vast and admirably prepared report".[135] The report was presented in 1994, and the US described the application of the death penalty in general terms, stating that "the majority of citizens through their freely elected officials have chosen to retain the death penalty for the most serious crimes, a policy which appears to represent the majority sentiment of the country."[136] The reason for the reservation is due to the fact that approximately half of the states have such provisions in their legislation, and also because the Supreme Court has upheld the constitutionality of such laws.[137] The relation between racial discrimination (both race of victim as well as defendant) and the application of the death penalty is mentioned under article 2 (equal protection of rights in the Covenant) but without much detail, stating solely that it remains currently under study.[138]

The death penalty is also mentioned again in general terms concerning the death row phenomenon (under article 7).[139] The US explained that its reservation

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[131] *Idem, ibidem.*
[132] *Idem, ibidem.* The other two reservations concern freedom of speech and article 20, paragraph 1, and the right to treat juveniles as adults in the criminal justice system which affect paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14.
[133] These were Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain and Sweden, in http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (last access 15th February 2005).
[134] See Denmark, Finland, Netherlands, Norway, Portugal, Spain, and Sweden.
[135] Rosalyn Higgins, "Opinion: 10 years on the United Nations Human Rights Committee: some thoughts upon parting", in *European Human Rights Law Review*, Issue 6, 1996, pp. 570-582, at p. 572.
[136] See UN document CCPR/C/81/Add.4 (29th July 1994), paragraph 139. The description of the application of the death penalty is in paragraphs 131-148.
[137] *Ibidem*, paragraphs 147-148.
[138] *Ibidem*, paragraph 86 c).
[139] *Ibidem*, paragraphs 166-169.

to article 7 of the Covenant was because the extent of its constitutional provisions is arguably narrower in some respects than the article's scope. This is the view adopted by the Human Rights Committee, stating that "prolonged judicial proceedings in cases involving capital punishment might constitute cruel, inhuman or degrading treatment or punishment in contravention of this standard."[140] These proceedings and practices have repeatedly withstood judicial review of their constitutionality in the US, and this is the main reason for issuing a reservation that ensures uniformity with a similar reservation attached to the US acceptance of the UN Convention against Torture and other Cruel, Inhuman or Degrading Punishment.[141] Furthermore, the issue of the application of the death penalty and the death row phenomenon was also the object of a Senate understanding, under which the United States infers that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty."[142] Moreover, the reservation placed upon article 7 was also linked with the use of gas chamber as a method of execution of capital offenders and, in fact, in the same year as the US ratified the Covenant, such was the destiny of a capital offender in Arizona. The Human Rights Committee had considered that the gas chamber was a "technique which the Committee considered to be torture or inhuman treatment."[143] Nevertheless, the states in question offered the possibility of death by lethal injection and in fact the latter has become standard practice in the US. Furthermore, in some states, capital offenders can choose between the 'old' (whether gas chamber, firing squad, hanging or electric chair) or 'new' method of

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[140] *Ibidem,* paragraphs 176-177.

[141] *Idem, ibidem.* The reservation to the UN Convention against Torture and other Cruel, Inhuman or Degrading Punishment reads as follows "Reservations: I. The Senate's advice and consent is subject to the following reservations: (1) That the United States considers itself bound by the obligation under article 16 to prevent `cruel, inhuman or degrading treatment or punishment', only insofar as the term `cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States; in http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm (last access 15th February 2005).

[142] *Idem, ibidem.*

[143] *Cit in* Roger Hood, op. cit., pp. 99-100.

execution (lethal injection) and only Nebraska contemplates the electric chair as the sole means of execution.[144]

Additionally, the US, in ratifying the Covenant, declared that the provisions of articles 1 through 27 were not self-executing. In the report, the US explained that this declaration did not limit the American international obligations under the Covenant; rather it meant that the Covenant did not, itself, create private rights directly enforceable in US courts, because the "fundamental rights and freedoms protected by the Covenant were already guaranteed as a matter of US law, either by virtue of constitutional protections or enacted statutes" and for this reason it was not considered necessary to adopt special implementation legislation."[145] The different understandings concerning certain articles can be seen concerning article 20 (prohibition of propaganda relating to war or racial, national, or religious hatred), which also required that the US made a reservation. The US considered that article 20 infringed upon the First Amendment's protection of freedom of speech. The absolute defence of the freedom of speech can, nonetheless, be restricted through other constitutional devices, as long as the restriction is not based upon the content of the message itself.[146] Another example can be seen concerning article 15. While the Constitution prohibits *ex post facto* law, it does not require that offenders benefit from less onerous laws passed after the commission of the crime; "in other words, new laws that are less onerous do not raise *ex post facto* concerns" and this is the reasoning behind the reservation made to the third clause of paragraph 1 of article 15.[147]

The application of capital punishment to foreigners has also raised controversy in the bilateral relation with Germany and Mexico.[148] Both situations

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[144] See Table 2 "Method of Execution, by State, 2002", in *Bulletin Capital Punishment, 2002*, op. cit., p. 4.
[145] See paragraph 8 of UN document CCPR/C/81/Add.4 of 29th July 1994. See also declarations made by the US at the Human Rights Committee concerning the report, UN document CCPR/C/SR.1401, paragraphs 12-14. The US also made a declaration to the UN Convention against Torture and other Cruel, Inhuman or Degrading Punishment: "III. The Senate's advice and consent is subject to the following declarations: (1) That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing" at http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm (last access 15th February 2005).
[146] UN document CCPR/C/81/Add.4 of 29th July 1994, paragraphs 596-612. See also the comments concerning article 19 (freedom of opinion and expression) in paragraphs 580-595.
[147] *Ibidem*, paragraph 511-512.
[148] See *LaGrand* (Germany v. United States of America), Judgment of 27th June 2001(nº 104 general list) and *Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgement of 31st March 2004 (nº 128 general list). When the Court rendered its Judgment in LaGrand the two German nationals (Karl and

reached the ICJ, in which Germany and Mexico claimed that under article 36 (1) of the Vienna Convention on Consular Relations, there is an international legal obligation to inform, without delay, the persons arrested of their right to consular notification and access. All the cases presented by Mexico and Germany concerned persons sentenced to death.[149] Mexico argued that a defendant's rights (when a foreigner) include the right to consular notification in addition to the customary Miranda rights. The ICJ concluded that in both cases there had been a breach of consular assistance and that the US should ensure implementation of consular assistance preventing future cases.[150] This was confirmed by the Inter-American Court of Human Rights. The Court delivered an advisory opinion in which it held that failure to respect the right to consular assistance established by article 36 (1) (b) of the Vienna Convention would prejudice the due process rights of foreign nationals, and that the imposition of capital punishment under such circumstances would violate the human right not to be deprived of life arbitrarily.[151] This has also been a concern at the UN and, since 1999, the Commission's resolution on the death penalty includes the respect for the Vienna Convention on Consular Relations as part of the safeguards that are essential in capital cases and from 2002, it has include an explicit reference to article 36.[152]

In 1994, the Human Rights Committee had recommended that reservations should be specific and transparent, compatible with the Covenant's object and purpose and withdrawn at the earliest possible moment.[153] Reservations that

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Walter LaGrand) had been executed whilst the Mexican defendants are still on death row; both judgments are at the ICJ website as http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm (last access 15th February 2005) and http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm (last access 15th February 2005).

[149] Mexico presented over 50 capital cases concerning Mexican nationals. This is a recurrent issue in the bilateral relation of these neighbours and has prompted Mexico, and abolitionist for ordinary crimes only, to establish the Mexican Capital Legal Assistance Program, which as the title indicates is designed to assist Mexicans charged with a capital offence.

[150] See paragraph 95 of the Judgment concerning *Avena and Other Mexican Nationals*, op. cit., in which the US affirms that two central factors had prevented it from complying with the Order issued by the ICJ and asking for the stay of the execution of Karl LaGrand: one was the extraordinarily short time between issuance of the order and the date of the execution and the second was "the character of the United States of America as a federal republic of divided powers."

[151] Inter-American Court of Human Rights Advisory Opinion OC-16/99 of 1 October 1999 (Series A nº 16) entitled *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law* http://www.corteidh.or.cr/serieapdf_ing/seriea_16_ing.pdf (last access 15th February 2005).

[152] See, for instance, the resolution of 2003, namely 2003/67, paragraph 4 (f) which establishes that the right to consular assistance as stated in article 36 of the Vienna Convention on Consular Relations is part of the safeguards in capital cases.

[153] General Comment nº 24 entitled "Issues relating to reservations made upon ratification or accession to the

offend peremptory norms would not be compatible with the object and purpose of the Covenant including a reservation in order to enable execution of pregnant women and children. In addition, the Committee concluded that some non-derogable rights, such as those contained in article 6 and 7, in any event cannot be reserved because of their status as peremptory norms.[154] In this line of reasoning, in the discussions at the Committee concerning the American report, which took place in 1995, the reservation placed upon article 6 (5) and 7 was contentious to say the least.[155]

The US recognised that the most significant reservation concerning the criminal justice system was the one made to article 6 (5) and maintained the arguments presented at the report.[156] Members of the Committee repeatedly expressed concern not only over this reservation, but also over reservation made to article 7. The greatest cause for apprehension, however, was the declaration that the provisions set in articles 1 to 27 were not self-executing, "which reflected a philosophy underlying its accession to the Covenant, namely, that it would comply with the Covenant so long as such compliance did not require any changes in federal or state laws."[157] This reluctance can also be seen in the reservation made by the US to the Convention on the Prevention and Punishment of the Crime of Genocide, which the US ratified in 1988.[158] Several countries objected to the

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Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant"; see UN document CCPR/C/21/Rev.1/Add.6 of 1994.

[154] *Ibidem*, paragraphs 8 and 10. Thailand issued an interpretative declaration stating that regarding article 6 paragraph 5 in which "though in theory, sentence of death may be imposed for crimes committed by persons below eighteen years, but not below seventeen years of age, the Court always exercises its discretion under Section 75 to reduce the said scale of punishment, and in practice the death penalty has not been imposed upon any persons below eighteen years of age. Consequently, Thailand considers that in real terms it has already complied with the principles enshrined herein."

[155] See UN documents CCPR/C/SR.1401, CCPR/C/SR.1402, and CCPR/C/SR.1406.

[156] In UN documents CCPR/C/SR.1401, paragraph 15.

[157] This was a comment made by Mr. Kretzmer; see UN document CCPR/C/SR.1402. These were also the conclusions of the Special Rapporteur which further considered that there was an absence of active enforcement mechanisms to ensure the ICCPR implementation at state level. The Special Rapporteur also concluded that there was a serious gap in the relations between federal and state governments particularly when it comes to international obligations undertaken by the US government, in paragraph 108 of UN document E/CN.4/1998/68/Add. 3. These situations are also covered by article 27 of the 1969 Vienna Convention which forbids the invocation of domestic law to justify non-compliance of an international obligation and article 31 by which a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their contest and in light of its object and purpose.

[158] The reservation affirmed "that nothing in the Convention requires or authorises legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

American reservation in which it invoked the provisions of its domestic law as justification for failure to perform a treaty.[159]

In the concluding observations, the Committee considered that the reservation was incompatible with the object and purpose of the Covenant.[160] it recommended that the US review its reservations with a view to withdrawing them, in particular those made to article 6 (5) and 7, and also to revise its federal and state laws in order to take the appropriate steps to comply with the Covenant.[161] In addition, regarding the application of the death penalty to persons below 18 years of age and the Convention on Rights of the Child, the US being a signatory, and under the Vienna Convention, more specifically its article 18 obliging a signatory country to refrain from acts which would defeat the object and purpose of a treaty after signature, the US should comply with article 37. Moreover, although the US is not a state party to the Vienna Convention (signed in 1995), it has recognised Convention as the authoritative guide to current treaty law and procedure.[162]

But the crucial issue is to determine who has the competence to make determinations as to whether specific reservations are compatible with the object and purpose: the state, the ICJ or the Human Rights Committee. The latter considered that it "necessary falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant (...) and in part because it is a task that the Committee cannot avoid in the performance of its functions"; for the Committee, such reservations will generally be severable, in the sense that the Covenant will be operative for the reserving party without the benefit of the reservation.[163] Furthermore, so that reservations do not lead to a perpetual non-attainment of international human rights' standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law."[164]

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[159] Objections were made by Denmark, Estonia, Finland, Greece, Ireland, Italy, Netherlands, Norway, Spain, Sweden and United Kingdom.
[160] UN document A/50/40, paragraphs 266-304 (also in UN document CCPR/C/79/Add. 50).
[161] See paragraphs 292 and 296 of UN document A/50/40.
[162] This is one of the arguments presented to the US Supreme Court by the EU and CE members along with Canada, Mexico and New Zealand in the brief concerning the case of *Donald P. Roper v. Christopher Simmons* http://www.internationaljusticeproject.org/juvSimmonsEUamicus.pdf (last access 15th February 2005).
[163] UN document CCPR/C/21/Rev.1/Add.6 of 1994, paragraph 18.
[164] *Ibidem*, paragraph 19.

In addition, according to the Committee, international law did not permit a state party to the Covenant to denounce or withdraw from it (following a notification from the Democratic People's Republic of Korea purporting to denounce the Covenant).[165] This follows on the fact that the International Bill of Rights does not have the temporary character typical of treaties.[166] In contrast, the Optional Protocol, under its article 12 (1) permits denunciation which takes effect three months after the date of receipt of notification by the Secretary-General. The challenges that reservations pose to human rights' treaties have also been the focus of the recommendation of the Sub-Commission that an effort to consult with the ILC be made, in order to avoid inconsistency with the Human Rights Committee's General Comment on the matter.[167]

This followed on the adoption of the preliminary conclusions regarding reservations to treaties by the ILC presented in 1997.[168] In its turn, these preliminary conclusions were the result of work by the Special Rapporteur, Alain Pellet on this matter, where we can see a predominance of the "formalist" approach that we have identified earlier on. The Rapporteur concluded that although human rights' treaties had their own characteristics of a most striking non-synallagmatic nature, it did not amount to a specificity that required an exception to the general regime established by the Vienna Convention. Additionally, the Rapporteur considered that a treaty was rarely entirely normative or synallagmatic. In most cases, including human rights' treaties, a treaty contained both contractual clauses recognising reciprocal rights and obligations and "normative" clauses; a normative treaty was simply a treaty in which the

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[165] Human Rights Committee General Comment nº 26 entitled "Continuity of Obligations" of 8 December 1997.

[166] *Ibidem*, paragraph 3; see also articles 54 a) and b) as well as 56 of the Vienna Convention concerning withdrawal and denunciation from treaties.

[167] See Sub-Commission resolution 1997/41; see also the subsequent resolutions by the Commission on Human Rights (2000/108, 2001/113 and 2002/111) and the Sub-Commission (decision 1998/113, 1999/27, 2000/26, and 2001/17). See also paragraph 26 of chapter I and paragraph 5 of chapter II.A, paragraph 39 of chapter II.B.3 (regarding Convention on Elimination of All Forms of Discriminations against Women) and paragraph 46 of chapter II.B.4 (regarding Convention on Rights of the Child) of the Vienna Declaration and Programme of Action in 1993 (Report of the World Conference on Human Rights
Report of the Secretary-General, UN document A/CONF.157/24/Part I, chapter III) as well as paragraph 14 of UN document A/53/372 entitled "Follow-Up to the World Conference on Human Rights: report of the UN High Commissioner for Human Rights" which expressed concern regarding recent ratifications that were accompanied by substantive reservations as well as the fact that few reservations made previously had been withdrawn.

[168] Report of the ILC of 1997, UN document A/52/10, chapter V ("Reservations to treaties).

normative provisions predominated.[169] Moreover, the Vienna Convention did have lacunae and ambiguities which needed to be built upon since the increasing activity of treaty bodies, such as the Human Rights Committee, made it a necessity. Nonetheless, there was no need to create a specific regime. The Vienna Convention was to be applied universally and without exception.

As to the competence to determine the compatibility of a reservation, this should continue to be carried out by the monitoring bodies. Nevertheless, their decision-making powers stopped there and a state could, after having examined in good faith the comments made by the treaty body, maintain its reservation, withdraw, "regularise" or renounce being party to the treaty. The role of the Human Rights Committee as the sole judge of the permissibility of reservations, exercising a monopoly, was excessive.[170] In addition, to consider a reservation severable and that the Covenant will be operative for the reserving party without the benefit of the reservation, is to surpass the fact that reservations are conditions which states attach to that consent. In the debate that followed at the ILC, these findings prevailed, reinforcing the idea that the Vienna Convention was not entirely satisfactory but it seemed difficult to devise a better system. These conclusions were put together in the following reports with the discussion of a set of guidelines (a guide to practice) to be grafted onto the existing provisions, filling the lacunae of the Vienna Convention.[171] The General Assembly took note of the ILC findings and of the invitation to all treaty bodies as well as states, to express their views regarding the preliminary conclusions.[172]

In the following year, the six human rights' treaty bodies expressed their views and stated that, by virtue of the subject-matter and the role they recognised for individuals, human rights' treaties could not be placed on the same footing as other treaties. The capacity of a monitoring body to perform its function could not

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[169] *Ibidem*, paragraphs 67-69.

[170] *Ibidem*, paragraphs 78-87. See comments by France, the US and United Kingdom which criticised the fact that a monitoring body can determine for itself that the invalid reservation can simply be severed rather than the reserving state. In the opinion of these three countries only the state in question can determine whether a reservation is or not an essential condition of its ratification; see UN documents CCPR A/51/40, pp. 104-106 (France) and CCPR A/50/40/Vol.1, pp. 126-134 (United Kingdom and US).

[171] See ILC Report of 1998, UN document A/53/10, chapter 9, especially paragraphs 482-488. See also the subsequent reports of 1999 (UN document, A/54/10, chapter 6), 2000 (UN document, A/55/10, chapter 7), and 2001(UN document, A/56/10, chapter 6).

[172] See resolution 52/156 of 15th December 1997 in *Y. U. N. 1997*, pp. 1334-1335.

be done in an effective way if it was precluded from exercising a similar function in relation to reservations.[173] The Sub-Commission invited a Special Rapporteur to prepare a working paper on reservations to human rights' treaties in 1999.[174] The Rapporteur concluded that the Vienna 1969 Convention on the Law of Treaties was partly responsible for the difficulties posed by reservations, since it did not contemplate the possibility of independent enforcement/monitoring bodies taking a view on the validity of reservations.[175] That competence, however, necessarily flows from their functions. The subject matter of human rights' treaties, especially but not only non-derogable provisions, also contributed significantly to the nature and scale of the problem. In the Rapporteur's opinion, even if these do not have a special character *per se*, the subject matter of at least some human rights' law and its object and purpose make it more than usually likely that reservations to the norms themselves will be found incompatible with the object and purpose of the treaty.[176] There was a need for a comprehensive review of the reservations across different human rights' treaties. In her final report, presented in 2002, the Special Rapporteur concluded that the biggest difficulty was in ascertaining whether a reservation was compatible with the object and purpose of the treaty: who has the authority to make such determination and what is the effect of finding that a reservation is incompatible.[177]

Not only is there no mechanism, but neither is it clear what constitutes a decisive determination of the question: general comments and final observations of a treaty body are not binding on a state party. This is also the case for the conclusions of the Human Rights Committee and judgments of the ICJ, which only bind parties to the litigation.[178] The Rapporteur also concluded that in human rights' treaties, the question of the compatibility of a reservation is not solely a matter for the parties *inter se*, since it is not principally a question of a particular or

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[173] In report of the Secretary-General concerning the views of the main treaty bodies in 1998 (UN document E/CN.4/Sub.2/1998/25). Furthermore, the ILC emphasised that these preliminary conclusions were without prejudice to the practices and rules developed by regional monitoring bodies *without* including universal monitoring bodies such as the Human Rights Committee, in paragraph 12 of UN document A/52/10.
[174] The working paper of Mrs. Françoise Jane Hampson was presented in 1999 (UN document E/CN.4/Sub.2/1999/28 & Corr. 1).
[175] *Ibidem*, paragraphs 24 and 31.
[176] *Ibidem*, paragraph 19.
[177] UN document E/CN.4/Sub.2/2003/WP.2.
[178] *Ibidem*, paragraph 18.

bilateral interest and, therefore, a human rights' treaty body has the jurisdiction to determine the validity of a reservation. This is even more pertinent when a reservation is placed upon a non-derogable right which belongs to the core content of the treaty and, therefore, a reservation to the principle, as opposed to application of the principle, would be likely to be incompatible with the object and purpose of the treaty as a whole.[179] When the conclusion is one of incompatibility, the reserving state can either withdraw the reservation, modify it as to make it compatible or denounce the treaty. A monitoring body cannot be expected to give effect to a reservation it has found incompatible, in that the result is the application of the treaty without the reservation.[180]

The ILC has made a more cautious path as to the role of treaty monitoring bodies. It has been a debated issue but there seems to be a consensus that the conclusions of a treaty monitoring body on the status or consequences of a particular reservation are not determinative unless the treaty provides otherwise, which is not the case of the ICCPR.[181] The ILC has signalled the intention of resuming the debate on reservations to normative multilateral treaties, including human rights' treaties.[182] On balance, the positions of the ILC and Human Rights Committee reflect two divergent views regarding reservations to human rights'

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[179] *Ibidem*, paragraph 51.

[180] *Ibidem*, pp. 18-19 referring to the final conclusions and recommendations.

[181] In 2002, the draft guideline concerning the withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty was withdrawn. The draft Guideline 2.5.X stated that "the fact that a reservation is found impermissible by a body monitoring the implementation of a treaty to which the reservation relates does not constitute the withdrawal of that reservation. Following such a finding, the reserving state or international organization must take action accordingly. It may fulfil its obligations in that respect by totally or partially withdrawing the reservation"; in *Report of the International Law Commission of its fifty-fourth session in 2002* (UN document A/57/10, chapter 4), see also Topical Summary of the discussions held in the Sixth Committee of the General Assembly during its fifty-seventh session prepared by the Secretariat in UN document A/CN.4/529, paragraphs 50-105. This withdrawal was due to the fact that some members considered that the first paragraph stated the obvious whilst the second implied that the findings of monitoring bodies had a binding effect; see paragraph 5 of UN document A/CN.4/535. In 2003, the issue was not considered in the latest report (eighth) presented by the Special Rapporteur of the International Law Commission and in the debate that followed at the Sixth Committee it was maintained that the depositary should not express a view on the impermissibility of reservations, in UN document A/CN.4/535 and Add.1; see also the *Report of the International Law Commission of its fifty-fifth session in 2003* (UN document A/58/10, chapter 8) and the adopted draft resolution by the Sixth Committee following the presentation of the report by the International Law Commission which recommended that the Commission continue its work on the topics under consideration, UN document A/C.6/58/L.25.

[182] See the model letter addressed to the chairpersons of human rights bodies, Chairman of the Sub-Commission and Ms. Françoise Hampson that were sent on August 2002 in UN document A/CN.4/535. Until the issuance of the eighth report by Mr. Alain Pellet only the Chairman of the Committee on the Elimination of Racial Discrimination had responded.

treaties. The traditional approach considers that consent remains the governing principle of the existing regime of reservations and that, therefore, state parties to treaties have the discretionary power to determine the admissibility and validity of reservations to treaties. On the other hand, the Human Rights Committee considers that, due to the special feature of human rights' treaties, a different regime of reservations should be applicable to these treaties. This would imply that treaty monitoring bodies should be competent to decide on the admissibility of reservations and the consequences thereof. As we have seen, the Human Rights Committee considers that an inadmissible reservation will be severable although the state remains a party to the Covenant. The traditional view argues that a reservation is a condition attached to the consent of a state to be bound by a treaty and is, therefore, not severable. It is the state that in good faith should decide as to the fate of the reservation and take whatever action it deems appropriate. In our view, there is one argument that validates the enhancement of treaty bodies monitoring powers and that is the necessity of determining *objectively* the compatibility test of a reservation since, for instance, the Human Rights Committee members serve on their personal capacity. Additionally, the Committee is also very well placed to consider reservations in light of the dynamic nature of human rights' treaties, whose content may change over time.[183]

The controversy around these different approaches can be seen following Trinidad and Tobago and Guyana's denunciation and re-accession to the Optional Protocol of the ICCPR with a new reservation. In both cases, the reservation aimed at excluding from the right to petition, persons who were sentenced to death.[184] These reservations were objected to on two grounds: firstly, because

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[183] See Konstantin Korkelia, "New challenges to the regime of reservations under the International Covenant on Civil and Political Rights", in *European Journal of International Law,* Vol. 13, Issue nº 2, 2002, pp. 437-477, at pp. 456-457.

[184] Trinidad and Tobago acceded to the Optional Protocol in 1980, denounced it and re-acceded in 1998 and denounced it again in 2000. In 1998, it made the following reservation: "[...] Trinidad and Tobago re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith. Accepting the principle that States cannot use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, the Government of Trinidad and Tobago stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant, including its undertaking to respect and ensure to all individuals within the territory of Trinidad and Tobago and subject to its jurisdiction

they aimed at restricting rights granted by the Covenant to persons who were sentenced to death and secondly, because it was considered a violation of the principle of good faith to circumvent the prohibition of reservations after ratification.[185] Although both countries went to great lengths in stating that the Optional Protocol could not be used as a vehicle to enter reservations regarding the Covenant itself, doubts were raised not only by some states but also by the Human Rights Committee.[186] The latter enunciated its views in a communication concerning an individual case against Trinidad and Tobago that was filled after the denunciation and re-accession by this country in 1998.

One of the arguments used by the alleged victim was that the reservation was incompatible with the object and purpose of the Protocol, because the Protocol gives competence to the Committee to receive and consider communications from individuals subject to the jurisdiction of a state party of any of the rights set forth in the Covenant. In other words, "the state accepts a single obligation in relation to all of the rights enumerated in the Covenant and cannot by reservation exclude consideration of a violation of any particular right."[187] Trinidad and Tobago explained that such measures were taken after the ruling of the Privy Council in the case *Pratt and Morgan v. the Attorney General for Jamaica* establishing a timeframe respecting the constitutional standard of inhuman or degrading punishment or other treatment.[188] Furthermore, it had sought assurances from the Chairperson and Bureau of the Human Rights Committee that the death penalty cases would be dealt with within 8 months of registration to

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the rights recognised in the Covenant (in so far as not already reserved against) as set out in article 2 thereof, as well as its undertaking to report to the Human Rights Committee under the monitoring mechanism established by article 40 thereof." Guyana acceded in 1993, denounced and re-acceded in 1999 with a similar reservation; both reservations are found at http://www.unhchr.ch/html/menu3/b/treaty6_asp.htm (last access 15th February 2005).

[185] The reservation made by Guyana was objected by France, Germany, Netherlands, Spain and Poland and the one made by Trinidad and Tobago was objected by Denmark, Norway, Netherlands, Germany, Sweden, Ireland, Spain, France and Italy, in http://www.unhchr.ch/html/menu3/b/treaty6_asp.htm (last access 15th February 2005).

[186] See Communication nº 845/1999 concerning the case *Rawle Kennedy v. Trinidad and Tobago* of 31st December 1999 in UN document CCPR/C/67/D/845/1999.

[187] *Ibidem*, paragraphs 3.13-3.15.

[188] Additionally, Trinidad and Tobago made a similar reservation using the same process of denunciation and re-accession to the ACHR in 1998, in http://www.oas.org/juridico/english/Sigs/b-32.html (last access 15th February 2005).

enable Trinidad and Tobago to comply with the 5 year threshold. Since no assurance of this kind was possible, there was a need for such a reservation.[189]

The Committee noted that the Optional Protocol itself does not govern the permissibility of reservations to its provisions and, in accordance with article 19 of the Vienna Convention, reservations can be made, as long as they are compatible with the object and purpose of the treaty. Relying on General Comment nº 24, the Committee concluded that a reservation that seeks to exclude the competence of the Committee under the Optional Protocol with respect to certain provisions of the Covenant could not be considered valid. The Committee considered that it could not accept a reservation that singles out one group of persons for lesser procedural protection than the rest of the population because it is discriminatory and runs counter to some of the basic principles of the Covenant.[190] This decision was not consensual within the Committee, and four members dissented because they considered that the communication was inadmissible. They argued that instead of focusing on discrimination, because the Committee has consistently held that not every differentiation between individuals amounts to discrimination, we should see if there is any difference between communications submitted by persons under sentence of death and the remaining communications.[191] It is clear that the former have different results "because of the constitutional constraints of the state party, the mere submission of a communication by a person under sentence of death may prevent the state party from carrying out the sentence imposed, even if it transpires that the state party has complied with its obligations under the Covenant."[192] By the mere fact of submitting a communication, a state party may be in contravention of its constitutional standards and, additionally, a state party that has chosen to follow the Privy Council view on the death row phenomenon does not violate its obligations under the Covenant. Furthermore, it is clear that the only reason why Trinidad and Tobago denounced and re-acceded to the Optional Protocol was precisely to make this reservation, leading to the conclusion that the reservation was a condition for its participation in the Optional

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[189] See paragraph 6.3 of the UN document CCPR/C/67/D/845/1999.
[190] *Ibidem*, paragraphs 6.4-6.7.
[191] See the Dissenting Opinion by Committee members Nisuke Ando, Prafulachandra N. Bhagwati, Eckart Klein and David Kretzmer, UN document CCPR/C/67/D/845/1999, Appendix.
[192] *Ibidem*, paragraph 10.

Protocol and, therefore, could not be severed. Instead, it would have been more appropriate not to regard Trinidad and Tobago as a party to the Optional Protocol.[193]

The application of the death penalty, as permitted by the Second Optional Protocol, has also been the object of a reservation by Azerbaijan that aimed at enlarging the scope of the application of the death penalty to grave crimes committed in condition of the threat of war, as well as not limiting it to crimes of a military nature.[194] It was objected to by France, Finland, Germany, Sweden and the Netherlands, and Azerbaijan later "corrected" the scope of its reservation by limiting it to wartime.[195] Article 37 (a) or article 37 as a whole of the Convention on the Rights of the Child were the object of reservations that had a very general wording, stating that these provisions would only apply if they were in conformity with the national laws.[196] The undefined character and unlimited scope of these reservations raised doubts and was objected to by several countries because it was incompatible with the object and purpose of the Convention and, under article 51, not permitted.[197] Other reservations and declarations regarding article 37 concern paragraph c), which calls for the separate detention of children from adults unless it is considered in the child's best interest not to do so. Doubts have been raised here as to its being either appropriate or feasible.[198]

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[193] See Konstantin Korkelia, op. cit., pp. 472-474.

[194] The reservation was stated in the following terms: "the Republic of Azerbaijan, adopting the [said Protocol], in exceptional cases, adopting the special law, allows for the application of the death penalty for the grave crimes, committed during the war or in condition of the threat of war", in http://www.unhchr.ch/html/menu3/b/treaty19_asp.htm (last access 15th February 2005).

[195] In September 2000, it was changed into: "It is provided for the application of the death penalty in time of war pursuant to a conviction of a person for a most serious crime of a military nature committed during wartime", in http://www.unhchr.ch/html/menu3/b/treaty19_asp.htm (last access 15 February 2005).

[196] This is the case of Malaysia, Myanmar and Singapore.

[197] See the objections to the Malaysian reservation by Austria, Finland, Germany, Ireland, Netherlands, Norway, Portugal and Sweden; to the Singaporean reservation by Belgium, Finland, Germany, Italy, Netherlands, Norway, Sweden and Portugal; and to the reservation by Myanmar by Germany, Ireland, Portugal and Sweden. Myanmar later withdrew its reservation.

[198] See reservations made by Australia, Canada, Cook Islands, Iceland, Japan, Netherlands, New Zealand, Switzerland, United Kingdom of Great Britain and Northern Ireland and the Chinese Hong Kong Special Administrative Region. The majority of the declarations and reservations concerning this Convention are made by Islamic countries and the need to take into account the Sharia and also countries disagreeing with article 8 which sets the minimum age of fifteen for children to be recruited and to take part in armed conflicts. All declarations and reservations are at http://www.unhchr.ch/html/menu2/6/crc/treaties/declare-crc.htm (last access 15 February 2005).

It is interesting to note that the International Criminal Court does not allow for reservations under its article 120.[199] Nonetheless, the interpretative declaration of Uruguay was objected to by some countries because they considered that it not only constituted, in substance, a reservation but also that internal provisions could not be invoked as justification for failure to perform a treaty.[200] Most of the declarations that were made to the Statute deal with article 8 and the question of whether it is applicable to nuclear weapons. Egypt, New Zealand and Sweden think so and consider that these weapons should be included because they are indiscriminate in nature and cause unnecessary damage, in contravention of international humanitarian law.[201] France has a contrasting view of this matter, because it considers that article 8 is only applicable to conventional weapons. The reaction of the permanent members of the Security Council to the ICC has not been consensual: France and Britain have ratified the statute; Russia signed it on 13th September 2000 but has yet to ratify it; China has not signed the Statute; and the US signed it on 31st December 2000 but decided later not to ratify.[202]

At present, the abolition of the death penalty can be said to be a "regional" *jus cogens* in Europe which, although a contradiction in terms, because the very existence of an imperative norm is the acceptance of the "international community as a whole", describes the worldwide situation well. Europe has made the abolition of the death penalty an internal/"national" matter no longer, but the touchstone of

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[199] Despite the fact that the Court does not allow for reservations, it does permit to states pursuant to article 124 to declare that they do not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory for a period of seven years. This declaration was made by France and Colombia. See status of ratifications and signatures as well as declarations, interpretative declarations, objections, notifications and notes that can be found at Multilateral Treaties deposited with the Secretary-General http://untreaty.un.org/English/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (last access 28th February 2005).

[200] The interpretative declaration stated that Uruguay "shall ensure its application insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic" raised several objections. The countries that objected were Finland, Germany, the Netherlands and Sweden and notes from the United Kingdom, Ireland, Denmark and Norway.

[201] These countries rely on the ICJ which, amongst other things, considered that to consider that humanitarian law did not apply to nuclear weapons "would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future." See paragraph 85-87 and 40-2 of the Advisory Opinion of the ICJ on the *Legality of the Threat or Use of Nuclear Weapons*, op. cit.

[202] France signed it on 18th July 1998 and ratified it on 9th June 2000 and Britain signed on 30th November 1998 and ratified it on 4th October 2001.

acceptable national standards of respect for human rights."[203] The abolition of the death penalty, as well as the issue of torture, has highlighted an aspect of Europe as a "normative power."[204] This different kind of power entails two dimensions: leading by example by having human rights' standards that match its theory, as well as acting as a socialiser of its core norms. This also reflects that international politics is more than simply an anarchical system and that it does have a societal quality attached, as we will see in the next chapter. Internally, the reforms that have been carried out in the EU have reinforced the abolition of the death penalty as a core norm which was included in the association agreements with post-Communist countries in 1990, and in the Copenhagen conditions for membership.[205] Internationally, it has been at the centre of a unified strategy at the UN as well as in the relations with retentionist countries, either bilaterally such as the US or multilaterally such as the Cotonou Agreement with the African, Caribbean and Pacific (ACP) countries.

The EU has benefited immensely from the work developed by the CE in asserting a coherent body of human rights and fundamental freedoms contained in

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[203] Roger Hood, "Introduction-the importance of abolishing the death penalty", in Council of Europe, *The Death Penalty Abolition in Europe*, Council of Europe Publishing, Strasbourg, 1999, p. 11.

[204] See the role of Jean-Jacques Gautier regarding the abolition of torture and the establishment of the European Committee for the prevention of torture and inhuman or degrading treatment or punishment in 1987 within the framework of the CE.

[205] The association agreements stated that there was a need for evidence of their commitment to the rule of law, respect for human rights, establishment of multiparty system with free and fair elections and economic liberalisation with a view to introducing market economies. The Copenhagen criteria were established in 1990 and are: achievement of stable institutions that permit, democracy, rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union and lastly the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union; For the Copenhagen criteria see annex 4 of the *EU Human Rights Report 2000*, p. 65. The abolition of the death penalty is a part of a stronger recognition of human rights, democracy and the rule of law. In the Treaty of Nice which entered into force on 1 February 2003 human rights were reinforced as one of the indispensable requisites to enter and to be a part of the EU. It has supplemented the procedure under article 7, which enables the Council to declare the existence of a serious and persistent breach of fundamental human rights, with a preventive instrument. It is possible upon a proposal of one-third of the member states, the Parliament or the Commission, the Council, acting by a four-fifths majority of its member states and with the assent of the European Parliament, to declare that a clear danger exists of a Member State committing a serious breach of fundamental rights and address to that member state appropriate recommendations. These fundamental rights are stated in article 6 and they are the principles of liberty, democracy, respect for human rights and fundamental freedoms as guaranteed by the ECHR and the rule of law, principles which are common to the Member States. In addition, if the violation occurs the state member can have its rights suspended (such as voting rights). Furthermore, the Common Foreign and Security Policy has, under its article 11, as one of its goals, to develop and consolidate democracy and the rule of law, respect for human rights and fundamental freedoms. See consolidated version of the Treaty on European Union as well as the Protocols adopted at Nice, in *Official Journal of the European Communities*, C 325 (181 pages), 24 December 2002.

the ECHR. In fact, for some, the inexistence of an EU "bill of rights" which has been partly met with the adoption of its Charter, is evidence that the EU's record regarding human rights is far from perfect. Other critiques extend to the fact that there is not a guide for action regarding human rights as well as a Commissioner on Human Rights.[206] Leading by example also entails the effective tackling of the increase of racism and xenophobia, the enhancing of 'fortress Europe' regarding asylum seekers and refugees and inhumane conditions of detention.[207] Regarding the death penalty, even if internationally a concerted strategy has not always been perfectly pursued, we can consider that it has been successful.[208] The goal of

[206] The respective roles of the EU institutions in promotion and protection of human rights in the EU's external policy vary according to the three pillars of the EU, namely, the European Community, the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA). The roles of the Commission, the European Parliament and the Court of Justice are stronger when Community matters are involved. EU policies on CFSP and JHA rest primarily with the member states and are more associated with the Council and the Commission. Within the Council of the EU, human rights issues arising in the EU's external relations through the CFSP or the European Community Trade or development policies are dealt with by the General Affairs and External Relations Council whilst the Justice and Home Affairs Council deals with third country-related human rights issues. In addition, we find the thematic Working Party on Human Rights (COHOM) within the Council. At the Commission human rights are dealt by the external relations commissioner and the Commission is part of the troika that represents the EU externally. In addition, the Commission manages the support for human rights projects under the EU budget. Within the budget and under the initiatives B7-7, projects that aim at the abolition of the death penalty or in ameliorating the conditions they are carried out, were chosen as one of the priority thematic areas. The Parliament also plays a role regarding human rights with its annual report on human rights in the world and the EU's human rights policy. There is also the Sakharov Prize for Freedom of Thought which is awarded to an individual or an organisation. There are sometimes discrepancies between the EU institutions as to the road to take regarding human rights policies. For instance, the European Parliament is sometimes highly critical affirming that the interaction with the Council was far from satisfactory and also that human rights suffer from the inconsistency of diverging political agendas under the successive presidencies and that this could only be avoided if this policy is based on a long-term agenda. See paragraphs 68-85 of the European Parliament "resolution on human rights in the world in 2002 and European Union's human rights policy", EU document P5_TA(2003)0375. Conditionality clauses sometimes appear to be guided by political and economic rather than legal grounds and making a very gradual and slow appearance, see Manfred Nowak, "Human rights 'conditionality' in relation to entry to, and full participation in, the EU", in Philip Alston (ed.), *The EU and Human Rights*, Academy of European Law/European University Institute and Oxford University Press, Oxford, 1999, pp. 687-698. For instance, regarding the ACP countries only in 1989, under article 5 of the Lomé IV Convention (replaced in 2000 by the Cotonou agreement) was a human rights clause inserted and only in 1990 was the European Parliament successful in inserting a similar clause in treaties with non-ACP countries, see Eibe Riedel and Martin Will, "Human rights clauses in external agreements of the EC", in Philip Alston (ed.), op. cit., pp. 723-754. See also Andrew Clapham, "Where is the EU's human rights common foreign policy, and how is it manifested in multilateral fora?", in Philip Alston (ed.), op cit, pp. 627-683. For a critical view of the work of the EU see Philip Alston and J. H. H. Weiler, "Introduction: an 'ever closer Union' in need of human rights policy: the European Union and human rights", in Philip Alston (ed.), op. cit., pp. 3-66.

[207] See Antonio Cassese, *Inhuman States, Imprisonment, Detention and Torture in Europe Today*, Polity Press, Cambridge, 1996. These were the conclusions reached by the *Comité de Sages* consisting of Antonio Cassese, Catherine Lalumière, Peter Leuprecht and Mary Robinson , *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000*, reproduced in Philip Alston (ed.), op. cit., pp. 921-927.

[208] The diverging national agendas and the dispute to lead the abolitionist agenda in the EU were seen in the rushed Italian draft resolution in 1994 and the discussion surrounding the 1998 draft that led to its withdrawal. For some, it was the "very public nature of their disagreement and disarray" that encouraged

universal abolition of the death penalty also shows that the "West and the developed world" are not to be perceived as a monolithic bloc and that there are different understandings as to which human rights are part of the core of fundamental rights.[209] In the relationship with the US, the EU has made individual pleas for mercy for persons convicted of capital offences and also adopted an "EU memorandum on the death penalty" in February of 2000.[210] This memorandum aims to persuade the US to adopt a moratorium on executions and, therefore, to become a paradigm encouraging other countries to follow suit. Within the area of the application of the death penalty, the issue of capital offenders below 18 years of age has been of particular concern to the EU; concerns which are also voiced in the twice yearly meeting between the EU and the US, prior to the Commission on Human Rights and the General Assembly sessions.[211] The issue of extradition has also been present in the relations between Europeans and Americans as the *Soering* case showed. In this case, only after the reassurance was given that the death penalty would not be applicable, was the extradition carried out. In 2001, the Canadian Supreme Court in the case of *United States v. Burns* decided that the unconditional surrender of the accused without assurance that the death penalty would not be sought violated his fundamental rights.[212] As in the *Soering* case,

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retentionist gathering around Singapore and Egypt, see Ilias Bantekas and Peter Hodgkinson, "Capital punishment at the United Nations: recent developments", in *Criminal Law Forum*, Vol. 11, 2000, pp. 33-34.

[209] For some, the (...) common ground in the West is the very agreement to differ, the critical spirit, the tradition to question." See Martin Wight, "Western values in international relations", in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations, Essays in the Theory of International Politics*, Allen and Unwin, London, 1966, pp. 89-131. at pp. 89-90.

[210] European Union, *European Union Memorandum on the Death Penalty*, 25th February 2000, at http://www.eurunion.org/legislat/deathpenalty/eumemorandum.htm (last access 15th February 2005).

[211] Other issues where the US and the EU do not agree such as the ICC are also discussed. See *EU Human Rights Report 2002*, p. 45.

[212] Supreme Court of Canada, 2001 SCC 7. File No.: 26129 concerning Glen Sebastian Burns and Atif Ahmad Rafay, both Canadian nationals in connection with a triple murder committed in the US; "International experience, particularly in the past decade, has shown the death penalty to raise many complex problems of both a philosophic and pragmatic nature. While there remains the fundamental issue of whether the state can ever be justified in taking the life of a human being within its power, the present debate goes beyond arguments over the effectiveness of deterrence and the appropriateness of vengeance and retribution. It strikes at the very ability of the criminal justice system to obtain a uniformly correct result even where death hangs in the balance. International experience thus confirms the validity of concerns expressed in the Canadian Parliament about capital punishment. It also shows that a rule requiring that assurances be obtained prior to extradition in death penalty cases not only accords with Canada's principled advocacy on the international level, but is also consistent with the practice of other countries with whom Canada generally invites comparison, apart from the retentionist jurisdictions in the United States", in paragraphs 127 and 128. In the decision of the Court other factors such as the increasing number of abolitionist countries in the last decade, the death row phenomenon as well as the disclosure of innocents who were convicted of a capital

after the state in question (in this case Washington) had given this assurance, the accused were handed over to face trial in the US.

The different views regarding the death penalty can also be observed at the CE, where the concern over the abolition of the death penalty also extended to the observer states of the CE. The CE has granted observer status to Canada, Mexico, US and Japan, with only the last two retaining and using the death penalty.[213] In 2001, the Parliamentary Assembly adopted a resolution requiring that these two states institute a moratorium on the executions as well as to improve the conditions on death row with a view to alleviating the "death row phenomenon." Despite the fact that when Japan and US were granted observer status the CE's position on the death penalty was already clear but not assumed by all its members, it considered that these countries' position on the death penalty was against the *raison d'être* of the Council.[214] It also deplored the fundamental difference in values regarding this issue between the CE and these two countries, and urged them "to make a serious effort to bridge this widening gap." For instance, despite the fact that Japan has a very low execution rate (in 2000, three persons were executed), capital offenders spend many years on death row and there have been cases where after decades, the guilty verdict was turned around. Likewise, there is much secrecy surrounding the executions and the conditions on death row are extremely harsh.[215]

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offence in the US, had a bearing in the reversing of a previous decision of 1991 in which the Court had decided that it was not unconstitutional to extradite a person accused of capital murder; see William A. Schabas, "Note on *Kindler v. Canada (Minister of Justice)*", in *American Journal of International Law*, Vol. 87, nº 1, 1993, pp. 128-133.

[213] The Committee of Ministers granted Canada, US and Japan in 1996 and Mexico in 1999 observer status with the CE. The Parliamentary Assembly has also granted observer status to the parliaments of Israel, Canada and Mexico.

[214] The Council considered that there was a violation of Statutory Resolution (93) 26 on Observer Status which was adopted on 1993 and more specifically of its first article: "any states willing to accept the principles of democracy, the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and wishing to co-operate with the Council of Europe may be granted by the Committee of Ministers, after consulting the Parliamentary Assembly, observer status with the Organisation"; this statutory resolution was adopted by the Committee of Ministers on 14th May 1993 at its 92nd Session and incorporated into the Statute of the Council of Europe, in *European Treaty Series*, Nº 1/6/7/8/11, p. 23.

[215] In 1983, Mr. Sakae Menda was acquitted after having spent 33 years on death row and Mr. Masao Akahori was acquitted in 1989 after being on death row for 34 years; For a description of the situation in Japan as well as the number of execution from 1993-2000, see paragraphs 12-23 of the "Report on the abolition of the death penalty in Council of Europe observer states" (document nº 9115).

The CE decided to call into question the status of observer states if, by 2003, no significant progress in the implementation of this resolution took place.[216] Additionally, this resolution established the logical extension of the abolition of the death penalty as a condition *sine qua non* to future observer states.[217] Furthermore, the death penalty was reaffirmed not only as a violation of the right to life but also as inhuman and degrading punishment. The follow up in 2003 recognised a mixed success in which, although Japan had not abolished the death penalty, the dialogue had been fruitful; whilst the transatlantic talk had largely failed.[218] Once again, Japan and the US were found to be in violation of their fundamental obligations to respect human rights due to their continued application of the death penalty and both countries were asked to make more of an effort to take the necessary steps towards abolishing such punishment.[219]

At the CE, and regarding member states, the issue of the death penalty has been raised in the case of some of the former Communist countries.[220] Russia entered the CE in 1996, signed the ECHR in 1996 and ratified it in 1998. All the 25 member states of the EU are part of the CE and have ratified the ECHR. The youngest 10 members, with the exception of Cyprus and Malta, all signed and ratified the ECHR after the fall of the Berlin Wall.[221] None of the 45 parties to the ECHR have issued a reservation concerning article 2. Russia had committed itself in 1996 to signing within one year and, ratifying within three, Protocol nº 6 of the ECHR, also agreeing to establish a moratorium on the carrying out of death sentences. The Criminal Code of 1997 reduced the scope of the death penalty

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[216] See resolution 1253, especially paragraphs 8-10 by the Parliamentary Assembly of 2001 and also Order nº 574 of the same year instructing the Committee to carry on dialogue with parliamentarians from Japan and the US.

[217] See paragraph 11 of resolution 1253 of 2001 and also recommendation 1522 also of 2001 entitled "Abolition of the death penalty in Council of Europe observer states."

[218] Report of the Committee on Legal Affairs and Human Rights of 2003 (document nº 9908).

[219] See resolution 1349 and recommendation 1627 of 1st October 2003.

[220] From the 46 members of the CE only Monaco (joined in 5th October 2004) has signed but not yet ratified the ECHR. The remaining members are Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine and the United Kingdom.

[221] The ECHR entered into force in Malta and Cyprus in 1967 and 1962 respectively; the same happened regarding Hungary in 1992, followed by Poland, Slovakia and the Czech Republic in 1993, Slovenia in 1994, Lithuania in 1995, Estonia in 1996 and Latvia in 1997.

from twenty-eight to five offences but the executions continued. In this situation, it was argued that it met the demand of the public opinion in the face of huge crime rates with the belief that it functioned as a deterrent, as well as the perception that to abolish the death penalty in favour of life imprisonment would be too expensive.[222] This situation led to the opening of a procedure by the Committee on Legal Affairs and Human Rights in 1995 in order to obtain information on how Russia was dealing with its commitment.[223] This situation worsened in 1997, when information was received that in 1996 executions had taken place both in Ukraine and Russia.[224] The number of executions steadily diminished to eighteen in 1997 and, in 1998, only one execution took place in Russia, namely in Chechnya and as a consequence of a fundamentalist interpretation of the Charia. This situation of a nearly execution-free zone contributed to the goal of pursuing a death penalty free area in Europe.[225]

Another regional organisation, namely the OSCE, has also developed commitments concerning the death penalty which are of a political binding nature but do not require the abolition of the death penalty.[226] Instead, member states have committed themselves to applying the death penalty for the most serious crimes and in a manner not contrary to their international commitments.[227] From its 55 members, five are retentionist, three are partly abolitionist and three are abolitionist de facto.[228] In our view, a good example of the influence and persuasiveness of the European (both the EU and the CE) goal of abolishing the

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[222] Latvia, Lithuania, Ukraine and Russia were referenced in the report as not keeping up with its obligations concerning the death penalty. See the report by the Rapporteur who succeed Mr. Hans Göran Franck, Mrs. Wohlwend in 1996; document 7589 of 25 June 1996.

[223] See order nº 508 of 1995.

[224] See resolution 1111 concerning Russia and 1112 regarding Ukraine by the Parliamentary Assembly in 1997. In the case of Russia information was received that fifty-three persons had been executed and in the Ukraine the same situation encompassed eighty-nine persons.

[225] In 1997, thirteen executions took place in Ukraine and five in Chechnya; see paragraph 2 and 5 of the report by the Rapporteur on the death penalty (document nº 8340 revision 2) and resolution 1187 of 1999.

[226] See paragraph 24 of the Concluding Document of the 1989 Vienna Follow-Up Meeting ("Questions relating to security in Europe"), paragraph 17 of the Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the OSCE, paragraph 36 of the Document of the 1991 Moscow Meeting of the Conference on the Human Dimension of the OSCE, paragraph 58 of the Concluding Document of the 1992 Helsinki Summit and paragraph 19 of the Concluding Document of the 1994 Budapest Summit, in Office for Democratic Institutions and Human Rights of the OSCE, op. cit., Annex 1 (OSCE Commitments on the Death Penalty).

[227] *Ibidem*, pp. 8-9.

[228] *Ibidem*, pp. 5-6. The five retentionist countries are the US, Belarus, Kazakhstan, Tajikistan, and Uzbekistan, the three that are partly abolitionist are Albania, Greece, and Latvia and the three that are abolitionist de facto are the Russian Federation, Kyrgyzstan and Armenia.

death penalty can be seen with the case of Turkey. Turkey signed the ECHR in 1950 and ratified it in 1954, and signed an association agreement in 1963 with the then European Economic Community that had an explicit reference to accession as a future goal. It applied for membership in 1987, was recognised as a candidate for membership in 1999 but has not yet been admitted to the accession process which is due to be considered at the end of 2004.[229]

Since 1984, Turkey has applied a moratorium on executions.[230] It is interesting that the application of the moratorium was parallel to a regular increase and enlargement of laws concerning the death penalty.[231] The pressure from the EU increased after Turkey was accepted as an applicant state for membership.[232] A notable example was the highly publicised judgment of the leader of the Workers' Party of Kurdistan (known as the PKK), which ended with the imposition of a death sentence. The death penalty verdict and the fairness of the trial, amongst other elements, were challenged at the European Court of Human Rights. In its judgment, the Court reaffirmed the findings of the *Soering* case that the ECHR is a living instrument which must be interpreted in the light of present-day conditions and that the increasingly high standard being required in the area of the protection of human rights and fundamental freedoms was linked to the developments and commonly accepted standards in the penal policy of the member states of the CE in this field.[233] What is more, the Court found that since the *Soering* case, the concepts of inhuman and degrading treatment had evolved considerably.[234] The Court considered that the sentencing to death of the defendant following an unfair trial which was not compatible with the strict standards of fairness required in capital cases, amounted to inhuman treatment in

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[229] Michael J. Baun, *A Wider Europe: the Process and Politics of European Union Enlargement*, Rowman & Littlefield Publishers, Lanham 2000, p. 31.
[230] Paragraph 35 of the Fourth Five-Year Report by the Secretary-General regarding capital punishment in UN document E/1990/38/Rev. 1 and paragraph 28 of the Fifth Five-Year Report in UN document E/1995/78.
[231] For a thorough and incisive account of the evolution of the death penalty in Turkey from 1920 to 2001 see Mehmet Semih Gemalmaz, "The death penalty in Turkey (1920-2001): facts, truths and illusions", in *Criminal Law Forum*, Vol. 13, 2002, pp. 91-122.
[232] *Ibidem*, p. 112. See also resolutions by the Parliamentary Assembly of the CE nº 860 (1986), 985 (1992), and 1529 (2001) regarding Turkey.
[233] See paragraphs 193-194 of the case of *Öcalan v. Turkey*, Judgment of the European Court of Human Rights in 12th March 2003, Hudoc reference 00004133, at http://www.echr.coe.int/Eng/Judgments.htm (last access 15th February 2005).
[234] *Ibidem*, paragraph 194.

violation of article 3.[235] It was added that despite the fact that there had been a moratorium on carrying out death sentences since 1984, the very fact that the defendant was Turkey's most wanted person, and was sentenced due to terrorist offences, made the risk of execution real.[236] He had been caught and tried in 1999 and, in the same year, the Court of Cassation had reviewed and confirmed the judgment. Since then, he had been on death row. In fact, the defendant benefited from Law nº 4771 of August 2002 that abolished the death penalty in peacetime and consequently had his sentence commuted to life imprisonment.[237] In 2003, Turkey ratified Protocol nº 6 to the ECHR and the ICCPR. In 2004, not only did Turkey sign the UN Second Optional Protocol, the Optional Protocol and Protocol nº 13 to the ECHR, but in May 2004 passed a law banning the death penalty for all crimes. Turkey is now an abolitionist country.

In our view, where the test of coherence to the commitment of abolishing the death penalty can be seen is in the European response to the challenge of terrorism. Terrorism poses special challenges in many regards and in particular to human rights due to the nature of its threat, mainly because it has no respect for human life. The recent increase in terrorist activities is frightening both quantitatively as well as qualitatively. The fight against terrorism has manly two dimensions: one of prevention and one of protection. In the former, the main goal is to tackle the conditions that engender terrorism and their root causes, a task that touches social, economic and political factors and that bears fruit in the long run.[238] It is the latter that has more potential of infringing upon human rights and freedoms, since there is always the danger that terrorism is used as an excuse to

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[235] *Ibidem*, paragraphs 204-213. Paragraph 207 states that "In the Court's view, to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, have given that human life is at stakes, becomes unlawful under the Convention."

[236] *Cf.* Partly Dissenting Opinion of Judge Türmen who argued, amongst other elements, that there was never a real and immediate risk of execution; see conclusion 2 (d) in *idem*, *ibidem*.

[237] Nevertheless, two trade unions appealed because they consider that terrorist activities carried out by the PKK are akin to war and, therefore, fall outside the scope of Law nº 4771 of August 2002 abolishing the death penalty in peacetime. In their view, the death sentence should be carried out.

[238] See Office for Democratic Institutions and Human Rights/OSCE, *Preventing and Combating Terrorism: the Human Dimension*, Discussion Paper, Warsaw, September 2003 (also available at http://www.osce.org/documents/odihr/2003/10/687_en.pdf?PHPSESSID=46b35bfbb8c5a5cedc97d4de116918bb last access 28th February 2005).

suppress legitimate expressions of dissent and limit fundamental freedoms such as freedom of expression, assembly or thought. This is evident on the object of resolutions in the UN, which have changed from "human rights and terrorism" to "protecting human rights and fundamental freedoms while countering terrorism" at the General Assembly.[239] It has also been a concern of the Commission on Human Rights and the Sub-Commission.[240] Likewise, the UN Special Rapporteur on terrorism and human rights has drawn attention to the dangers of counter-terrorism measures curtailing some human rights in the administration of justice *e. g.* the right to a fair trial, freedom from arbitrary detention, the prohibition of torture, or inhuman and degrading treatment.[241]

In Europe, the adoption of Protocol nº 13, establishing the abolition of the death penalty on all circumstances, took place after the terrorist attacks on the US. The CE and the EU have since then highlighted the danger of combating terrorism at the expense of human rights, and within this wider framework the will to support the abolition of the death penalty is reinforced. The Charter of the Fundamental Rights of the EU prohibits the extradition to a country where the death penalty or torture can be applied.[242] This approach to the death penalty was reaffirmed with the adoption of the CE Guidelines on Human Rights and the Fight against Terrorism in 2002.[243] The EU has also reaffirmed the fact that it fully recognises

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[239] See resolutions A/res/57/219 of 2002 and 2003/68 of 2003 of the General Assembly.

[240] See preamble of resolution 2001/37 and resolutions 2003/37 entitled "Human Rights and Terrorism" and 2003/68 under the title of "Protection of Human Rights and Fundamental Freedoms while Countering Terrorism." The latter was the first resolution to explicitly focus on this issue to go through since the 2002 Mexican proposal was withdrawn. See as well resolution AG/RES. 1906 (XXXII-O/02) of the General Assembly of the Organisation of American States regarding human rights and terrorism.

[241] The latest report prepared by the Special Rapporteur, Ms. Kalliopi K. Koufa, is in UN documents E/CN.4/Sub.2/2003/WP.1 and E/CN.4/Sub.2/2003/WP.1/Add. 1. These documents were endorsed by the Sub-Commission through resolution 2003/6 which was adopted without vote. See as well the special Report "Human rights and terrorism" of the Inter-American Commission on Human Rights and especially paragraphs 81-97 concerning the right to life, document OEA/Ser.L/V/II.116 Doc. 5 Rev. 1 Corr of 22nd October 2002, also available at http://www.cidh.oas.org/Terrorism/Eng/toc.htm (last access 28th February 2005). For instance, regarding the counter-terrorist measures taken by the US, there have been concerns expressed over the range of the USA PATRIOT Act, an Act of Congress that was enacted on 26th October 2001. USA PATRIOT is an acronym and stands for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism." The USA PATRIOT Act was passed 98-1 in the Senate and 357-66 in the House of Representatives. See also the arguments that were given by the US in response to the findings of the Special Rapporteur on extrajudicial, summary and arbitrary executions in UN document E/CN.4/2003/G/80.

[242] In its article 19 (Protection in the event of removal, expulsion or extradition), paragraph 2: "No one shall be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

[243] See article X (Penalties incurred) paragraph 2: "Under no circumstances may a person convicted of

the existence of a list of rights that shall not be infringed under any circumstances and in which the right to life is included.[244] The CE guidelines state that "in their fight against terrorism, States may never act in breach of peremptory norms of international law or in breach of international humanitarian law, where applicable."[245] This approach can be seen regarding the 'Guantanamo detainees' regarding whom the US has agreed not to seek the death penalty for citizens of Britain and Australia.[246]

On balance, looking back over the last two hundred years, the historical evolution of the death penalty has been towards restriction. Nonetheless, we consider that the consensus that is shown around the issue of capital juvenile executions has not spilled-over to the abolition of the death penalty. Even if a more optimistic view could be enhanced and "the day when abolition of the death penalty becomes a universal norm, entrenched not only by convention but also by custom and qualified as an imperative rule of *jus cogens*, is undeniably in the foreseeable future,"[247] the fact remains that it awaits construction.

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terrorist activities be sentenced to the death penalty; in the event of such a sentence being imposed, it may not be carried out"; and also articles XII (asylum, return and expulsion) and XIII (extradition) especially paragraph 2 "the extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that: (i) the person whose extradition has been requested will not be sentenced to death; or (ii) in the event of such a sentence being imposed, it will not be carried out"; in CE document H(2002)004 along with the texts of reference (36 pages).

[244] In *Human Rights Report 2003*, pp. 15-16; see also the EU Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), in *Official Journal of the European Communities*, 22 June 2002, L 164/3 (7 pages) and Council Framework Decision of 13 June 2002 on the arrest warrant and the surrender procedures between member states which in its Preamble (paragraph 13) establishes "No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment", EU document 2002/584/JHA.

[245] Article XVI of the CE Guidelines on Human Rights and the Fight against Terrorism on 2002, op. cit.

[246] In Office for Democratic Institutions and Human Rights of the OSCE, Background Paper 2003/1 for the Human Dimension Implementation Meeting (October 2003), *The Death Penalty in the OSCE Area*, Warsaw, 2003, p. 59.

[247] William A. Schabas, op. cit., 1993, p. 2.

CHAPTER VIII

THE STANDARD OF CIVILISATION AND THE ABOLITION OF THE DEATH PENALTY

"Thus the different existence, the different norms, and the different policies which the EU pursues are really part of redefining what *can* be 'normal' in international relations. Rather than being a contradiction in terms, the ability to define what passes for 'normal' in world politics is, ultimately, the greatest power of all."[1]

Norms have been a resilient element of international politics. In the 19th century what was considered to be normal was materialised in the standard of civilisation. Later on, the content of the standard of civilisation was contested by non-western countries claiming the fulfilment of national self-determination and racial equality. Nevertheless, the standard of civilisation *per se*, *i. e.,* the general characteristics considered as acceptable and granting a country admission into international society, has continued. The main task has been to re-define its content, while taking into account the new features of the post-1945 international society. At the heart of what means to be civilised in international society is the debate regarding human rights, highlighting the relationship between individual and community which has been at the centre of the establishment of what is 'normal'. Here 'normal' is used in the sense of what is acceptable regarding the conduct of states. In this respect, to set what is 'normal' can also be viewed as part of the establishment of a homogeneous framework within which all members of international society work. We consider that the promotion of the progressive abolition of the death penalty belongs to the attempt of establishing a new standard of civilisation that focuses on the accountability of states concerning their human rights' practices. Nonetheless, the promotion of such a modern standard has been far from consensual and has generated controversy and resistance from countries that retain capital punishment.

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[1] Ian Manners, "Normative Power Europe: A Contradiction in Terms?", in *Journal of Common Market Studies*, Vol. 40, nº 2, 2002, pp. 235-258, at p. 253.

1 Death Penalty, Norms and International Society

"It might take some time, but in the long run public opinion would favour abolition of the death penalty just as it had favoured the abolition of slavery and had condemned racial discrimination." [2]

The international abolition of the death penalty in international relations is *per se* a community element, as are international human rights. It highlights very well the appeal of world society in which all human beings are central because they are human and not just citizens. It also illustrates the fact that the state is more than just government and that it has an administrative-social dimension. In fact, "administrative, legal, extractive, and coercive organisations are the core of any state.[3] The use of the death penalty also tells us about the nature of the state and the place that the individual occupies within society. The relationship between community and individual is at the core of the different approaches to the death penalty either as a criminal law penalty aimed at safeguarding the community or as going against international human rights. Additionally, we consider that the analysis of the evolution of the death penalty has shown that interests and norms are compatible, contrasting with the traditional view of 'moral absolutisms.'[4] This is to say that states have mixed motives for carrying out their foreign policy and that to pursue an ethical foreign policy is not equating it to absolutely pure motives untainted by self-interest.[5] Moreover, to include ethical elements in the making of foreign policy is not a recipe for disaster or a utopian revival of the interwars' years as realists would argue. It is possible to reconcile the national interest with the

[2] Portuguese comment made at the Third Committee at the time of the discussion of the seven power draft in 1982, UN document A/C.3/37/SR.56, paragraph 6.
[3] Theda Skocpol, "Bringing the state back in: strategies of analysis in current research", in Peter B. Evans, Dietrich Rueschemeyer and Theda Skocpol (eds.), *Bringing the State Back in*, Cambridge University Press, Cambridge, 1997 (1st Ed. 1985), pp. 3-43, at p. 7. Andrew Linklater considers that the modern state has monopoly powers which are unique: monopoly of the control of violence, right of taxation (intertwined with the duty to health, welfare and education of its citizens), shaping political identity (against different visions of culture and community) and determining how legal disputes between citizens will be resolved, "Citizenship and sovereignty in the post-Westphalian state", in *European Journal of International Relations*, Vol. 2, nº 1, 1996, pp. 77-103, at pp. 82-84.
[4] Chris Brown, "Ethics, interests and foreign policy", in Karen E. Smith and Margot Light (eds.), *Ethics and Foreign Policy*, Cambridge University Press, Cambridge, 2001, pp. 15-32.
[5] *Ibidem*, pp. 22-23.

norms of international society. In fact, it was E. H. Carr who stated that we cannot "find a resting place in pure realism", since any sound political thought must be based on elements of both utopia and reality.[6] Norms are linked to the concept of legitimacy, which is a collective judgment of international society about its rightful membership. What is more, a norm is an "authoritative standard, a principle of right action binding upon the members of a group and serving to guide, control or regulate proper and acceptable behaviour", and thus normal is something "according with, constituting, or not deviating from a norm, rule or principle."[7] For us, norms are understood as part of a two-way process of adaptation to change within international relations, and this is very well captured by the norm of sovereignty. The English School stresses that although states are ontologically prior to the European society of states, *i. e.*, they were not created by the international society, at the same time membership of this international society, especially *via* standard of civilisation, entailed the change somewhat of the character of the state. In this sense, states and society are co-constituted and the emphasis on what it means to be part of international society, as well as which norms matter and are accepted by its members, reveals a constructivist concern.[8] Martin Wight emphasised that in order for the institutions of international society to work, an "international social consciousness" was presupposed.[9] There is a "duality of international society as a political construct" in which states are the constitutive community, but as they comply with the norms of international society they simultaneously reaffirm their identity as sovereign states and reconstitute the structure of the society of states.[10] The mutual recognition of sovereignty by

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[6] The dichotomy between the world 'that is' and the one 'that ought to be' was best captured by E. H. Carr, *The Twenty Years' crisis: 1919-1939, An introduction to the Study of International Relations,* Macmillan Press, London, 1981(1st ed. 1939), pp. 11-12, 84 and 87.

[7] The definitions of "norm" and "normal" were taken from *Merriam-Webster's Online Dictionary and Encyclopaedia Britannica*, Encyclopaedia Britannica (UK) Ltd, 2002 Edition, at http://www.britannica.com (last access 15th February 2005).

[8] Chris Brown, "World society and the English School: an 'international society' perspective on world society", in *European Journal of International Relations*, Vol. 7, nº 4, December/2001, pp. 423-441, at pp. 434-435 and Ronald L. Jepperson, Alexander Went and Peter J. Katzenstein, "Norms, identity, and culture in national security", in Peter J. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics*, Columbia University Press, New York, 1996, pp. 33-75, at p. 45.

[9] Martin Wight, "Western values in international relations", in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations*, Allen and Unwin, London, 1966, pp. 89-131, at pp. 96-97.

[10] Timothy Dunne, "The social construction of international society, in *European Journal of International Relations*, Vol. 1, nº 3, 1995, pp. 367-389, at p. 379.

European states in 1648 constituted each as a distinct subject with certain rights, but also constituted them collectively as members of the 'society of states' bound by certain rules, and willing to defend those rules jointly against non-members.[11]

Social constructivism is not a substantive theory but rather an approach to social enquiry and has the following core claims: states are the main units of analysis for international political theory, the key structures are inter-subjective, rather than material, and state identities and interests are an important part constructed by these social structures, rather than given exogenously to the system by human nature or domestic politics.[12] This contrasts with the realist (and neo-liberal) assumption of interests as givens in which the goals and priorities of states are unproblematic and rationally deducible from the objective conditions and characteristics of states. We consider that to look at behaviour as well as discourse is helpful to understand international politics (if states justify actions by identifying and emphasising the importance of the norm or principle).[13] We consider that norms and interests are important but should be complemented with a critical reflection of what constitutes these interests and the ends to which and the means by which power will be used. In fact, norms shape both co-operation and conflict.

In this sense, international relations are socially constructed and constructivism emphasises the process of interaction between agents and structures where the ontology is one of mutual constitution, thereby opening the black-box of interest and identity formation.[14] The international is still anarchical but the condition of anarchy is not a barrier to the development of highly co-operative forms of behaviour. Anarchy and society are constructed by states and international and domestic environments form state identities. International structures have not fallen from heaven but instead were created by states and

[11] Alexander Wendt, "Why a world state is inevitable", in *European Journal of International Relations*, Vol. 9, nº 4, 2003, pp. 491-542, at pp. 511-512.
[12] Timothy Dunne, op. cit., at footnote 4 (p. 385) and Ronald L. Jepperson, Alexander Went and Peter J. Katzenstein, op. cit., pp. 33-75.
[13] Martha Finnemore, *National Interests in International Society*, Cornell University Press, Ithaca and New York, 1996, p. 140.
[14] Joseph Jupille, James A. Caporaso and Jeffrey T. Checkel, "Integrating institutions, Rationalism, Constructivism, and the study of the European Union", in *Comparative Political Studies*, Vol. 36, nº 1/2, February/March 2003, pp. 7-40, at p. 14.

their interactions. The identity of actors is also constituted by ideas and norms, and this affects how actors shape their interests.[15]

We argue that whilst states are the primary agents of international politics, international institutions also have a constructive function. Contrary to the idea that the learning impetus lies inside states (although states learn from other states and international institutions), states are not only teachers of norms but students as well. International organisations help to set the agenda, define tasks and influence the interests of states. In this sense, international institutions were created by states but the learning/teaching process goes both ways, as they reconstruct states' interests. The international is constitutive and generative and this learning/teaching process is evident in the UN framework. For instance, the UN body for education, science and culture affairs (UNESCO) taught states that a science bureaucracy was a necessary component of the modern state. In the beginning, scientific research was highly connected with the military structure and this was reflected in the UNESCO structure until 1954. Thereafter, it began to focus its attention on helping states to organise, direct, and expand their own domestic science establishments.[16] This was especially the case of developing countries that were taught to view scientific capacity or potential as a national resource and as a component of their sovereignty. In fact, UNESCO was teaching what it had learned from powerful states, mainly the US with its National Science Foundation (creation of the atomic bomb and military competitiveness) and Britain which, as early as 1915, created the Department of Scientific and Industrial Research in the midst of the First World War. In other words, it was advantageous for all states and for scientific research *per se* that the promotion of scientific resources was taken seriously. Other organisations such as the International Committee of the Red Cross (ICRC) were important in a normative way. It has

[15] See Alexander Wendt, *Social Theory of International Politics*, Cambridge University Press, Cambridge, 1999. For a constructivist approach that includes the idea that democracies do not go to war with each other, see Thomas Risse-Kappen, "Democratic peace-warlike democracies? A social constructivist interpretation of the liberal argument", in *European Journal of International Relations*, Vol. 1, nº 4, 1995, pp. 491-517, at p. 502. This author also argues that the idea that democracies do not go to war with each other but are aggressive towards non-democratic countries can be refined from a social-constructivist perspective; democracies to a large degree create their enemies and their friends by inferring either aggressive or defensive motives from the domestic structures of their counterparts, at p. 492.

[16] Martha Finnemore, "International Organisations as teachers of norms: the UNESCO and science policy", in *International Organisation*, Vol. 47, nº 4, autumn/1993, pp. 565-597.

been crucial in promoting awareness of the humanitarian limits to the conduct of war with its Geneva Conventions. It has also promoted the idea that it is in the interest of the state, as part of an international society, to behave in war within the *civilised* limits established by the Geneva law.[17]

We regard norms as important as power politics and deem that they are both part of the national interest.[18] Unlike conventional wisdom, which argues that normative factors are essentially epiphenomenal and mere rationalisations of structures of power, human rights norms are in fact a qualitative shift in the normative dimension of international society and they signal a change in prevailing principles of legitimacy.[19] The normative context frames policies choices as can be seen in the decolonisation process. This was not just a utilitarian but also a deeply normative procedure and the same can be said for colonialism itself. It is true that both superpowers were not interested in maintaining colonialism and instead were keener on maximising supporters from developing countries. Nevertheless, the utilitarian costs of maintaining a colonial empire were not that high and it was, in fact, the legitimacy of ideas of equality and national-self determination that made the difference as decolonisation was also an international change of the ideas about legitimacy regarding membership in the international society. The fact that they were western ideas did help in bringing the decolonisation course of action

[17] The case-studies of UNESCO and the ICRC as well as the role of the World Bank under the leadership of Robert McNamara (that changed the notion of development by including distributional concerns) are further developed by Martha Finnemore in *National Interests in International Society*, Cornell University Press, Ithaca and New York, 1996.

[18] For the study of norms in international relations see *e. g.* Jeffrey W. Legro regarding war-fighting culture of military bureaucracy during Second World War, "Which norms matter? Revisiting the "failure" of internationalism", in *International Organisation*, Vol. 51, nº 1, winter/1997, pp. 31-63; Andrew P. Cortell and James W. Davis Jr on how international rules and norms can affect state behaviour through actions of domestic political actors which appeal to international rules to foster their objectives, "How do international institutions matter? The domestic impact of international rules and norms", in *International Studies Quarterly*, Vol. 40, 1996, pp. 451-478; and J. Samuel Barkin and Bruce Cronin, "The State and the Nation: changing Norms and the Rules of Sovereignty in International Relations", in *International Organisation*, Vol. 48, nº 1, winter/1994, pp. 107-130. The latter analyses the legitimisation of the nation-state in international relations along with the tension between state sovereignty and national sovereignty. In order for us to understand these two issues, we have to go beyond the nature of states and the distribution of its capabilities, and into the principles around which the winning coalition during the Second World War (as well as in its aftermath) constructed a new international order.

[19] John Gerard Ruggie, "Human rights and the future international community", in *Daedalus*, Vol. 112, 1993, pp. 93-110.

about faster since you could not easily justify colonialism without denying core values of the Western civilisation already written into the UDHR.[20]

The very issue of legitimacy was also at stake during *apartheid* South Africa. Even if it is "difficult to be sure how the hierarchy of human wickedness should be arranged", South Africa's violation of human rights was on top of the list.[21] Notwithstanding, the relationship between South Africa and the US was always maintained on the grounds that not only was South Africa a bulwark against Communism but also decisive for the national interest due to its strategic minerals such as chromium and platinum.[22] In addition, there were strong economic interests in this bilateral relationship. The immunity of South Africa from ethical non-considerations in the conduct of American foreign policy began to change during the Reagan presidency in the mid-80s. This change was not the result of the executive's actions which, in fact, defended quite the opposite, namely constructive engagement since internationally, the US and the SU were engaged in the second Cold War. What helped to change the 'traditional bilateral US-South Africa' relationship was the existence of a global norm of racial equality which redefined American interests through transnational mobilisation, rather than through inter-governmental bargaining or shifts in structural material conditions.[23] The existence of a transnational anti-*apartheid* movement was crucial for the co-ordination of efforts with the American civil rights' movement which also benefited from a UN consensus on racial equality. In 1984, when the racial conflict in South Africa escalated, the harmonisation of efforts was evident as it was able to transform a black/white issue into a matter of injustice *versus* justice and right *versus* wrong. All these situations functioned as a lever for the American public to pressure for change in its foreign policy, and in 1986 Congress began to discuss the Comprehensive Anti-Apartheid Act. The Act managed to override the

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[20] Robert H. Jackson, "The weight of ideas in decolonisation: normative change in international relations", in Judith Goldstein and Robert O. Keohane (eds.), *Ideas and Foreign Policy, Beliefs, Institutions and Political Change*, Cornell University Press, Ithaca and London, 1993, pp. 111-138.

[21] Hedley Bull used the examples of Pol Pot and Idi Amin in "The West and South Africa", in *Daedalus*, Vol. 111, nº 2, spring/1982, pp. 255-270, at p. 265.

[22] See as well the Byrd Amendment of 1971 that called for the importation of chrome ore from Southern Rhodesia in blatant disregard for the boycott established by UN Security Council resolution 232 of 1966. The Byrd Amendment was only repealed in 1979.

[23] Audie Klotz, "Norms reconstituting interests: global racial equality and U. S. sanctions against South Africa", in *International Organisation*, Vol. 49, nº 3, summer/1995, pp. 451-478.

presidential veto (of a very popular president) and sanctions were applied until 1991.[24]

Another example of how norms, identities, and social realities are helpful is the case of military culture and, more specifically, the 'modern' aversion to nuclear and chemical weapons.[25] The avoidance of wars between great powers can be attributed to the existence of nuclear weapons that make the potential costs of wars unacceptable on more rational, self-interested grounds. The concept of Mutual Assured Destruction functions as a rational dissuader because the costs of a nuclear war are intolerably high. In our view, this is an incomplete picture since the technological evolution has been accompanied by an increasing perception that *jus in bello* has limits.[26] Nuclear and chemical weapons were, on many occasions, a possibility and were not used in most cases. This was due more to the normative concern of its disproportionate destruction of civilians and environmental costs rather than the fear of retaliation. In other words, the process of delegitimation of these weapons constrains the practice of self-help in international relations and it is included in the larger explanation concerning the rise of international society and efforts to regulate the destructiveness of warfare among "civilised" states.[27] Norms also help us to understand humanitarian intervention, since it is linked to the social construction about who is human and deserving of protection as well as notions of legitimate intervention.[28] In the 19th century, 'human' was much linked to the Christian 'civilised' members of the international society. The social construction of who is 'human' has been enlarged since then and this is seen in the different humanitarian interventions of the 19th and the 20th centuries and especially after the end of the Cold War. Furthermore, norms were indispensable to understand the nature of the enemy during the Cold

[24] *Ibidem*, pp. 470-478. The Presidential veto was overridden by 313 votes in favour and 83 against at the House and 78 in favour and 21 against at the Senate.
[25] See Peter J. Katzenstein, "Introduction: alternative perspectives on national security" and Paul Kowert and Jeffrey Legro, "Norms, identity, and their limits: a theoretical reprise", both in Peter J. Katzenstein (ed.), op. cit., pp. 1-32 and pp. 451-497.
[26] See James Lee Ray, "The abolition of slavery and the end of international war", in *International Organisation*, Vol. 43, nº 3, summer/1989, pp. 405-439.
[27] The taboo concerning the use of nuclear and chemical weapons is brilliantly analysed by Richard Price and Nina Tannenwald, "Norms and deterrence: the nuclear and chemical weapons taboos", in Peter J. Katzenstein (eds.), op. cit., pp. 114-152.
[28] Martha Finnemore, "Constructing norms of humanitarian intervention", in Peter J. Katzenstein (ed.), op. cit., pp. 153-185.

War. Both blocs constructed their enemy in a way that went beyond the military sphere making it a multi-dimensional (economic, military and social) enemy that was 'evil'.

There are many examples of the role that norms play in international relations and, in our view, the evolution of the issue of the death penalty is one that can be added to the list. The UN has fostered the approach that the abolition of the death penalty is in accordance with the aspirational standards set out both in the UDHR and the ICCPR. The same approach has been taken by the European framework where, on the matter of the abolition of the death penalty, the activities of the CE and the EU have gone hand in hand. In our view, the UN has been crucial in 'internationalising' the issue of abolition overcoming the necessarily limited territorial scope of the European framework. It is true that historically, there has been a movement towards the progressive restriction of the death penalty and today the number of abolitionist countries is greater than that of retentionists. In the majority of countries the death penalty has become more humane as to the forms of execution and has moved indoors. Additionally, there has been increasing groups of persons who are exempted from capital punishment. The UN 'octopus' strategy of monitoring the application of the death penalty as well as increasing restrictions and limits to its use, has gradually evolved into a process where the number of actors as well as its scope was enlarged, *e. g.* the appeal not to extradite offenders who face capital punishment without the guarantee that the sentence will not be applied. In our view, the UN has also provided an exemplary match of its theory by excluding the death penalty from the UN sponsored ICC and *ad hoc* International Tribunals.

The abolition of the death penalty is at the centre of the EU and CE framework and the European input at the UN is plain to see. The most evident step of the European strategy was the presentation of the draft resolution in order to establish an optional protocol aiming at the abolition of the death penalty in 1980. The seven power draft was presented by five European countries (Austria, the Federal Republic of Germany, Italy, Portugal and Sweden) along with Costa Rica and the Dominican Republic. Nevertheless, the European impetus to put this issue in the international agenda was felt much earlier as can be seen by the

Swedish initiative of 1957 that called for a study regarding the death penalty (resulting in the Ancel and Norris reports) and the Swedish and Venezuelan draft resolution of 1967. The emphasis on capital punishment and the 'Europeanisation' of the issue led to the conclusion in the third UN report that further studies outside the West should be made in order to avert a misleading picture of values, theories or practices prevalent in the West as universal. The European leadership of the issue of the abolition of the death penalty is also very visible at the Commission on Human Rights, where a draft resolution since 1997 has been proposed and adopted. Moreover, the EU co-sponsors the resolution regarding the rights of the child which includes the call for the non-application of the death penalty to children, *i. e.*, below 18 years of age.

The European underpinning of the international human right of abolition of the death penalty is that despite the fact that the criminal justice system of a country reflects its traditions and history, the EU considers that the death penalty is above all political, legal or criminal considerations and is a question of humanity.[29] The identification of Europe with the abolition of the death penalty has led to its inclusion in the wider theme of the communitarian and cosmopolitan debate linking abolitionism with democracy and rule of law. The link between democracy and abolition of the death penalty was recognised by the UN Rapporteur at the 2000 Five-Year report,[30] as well as by the Canadian Supreme Court.[31] Indeed, when we look at the countries that have been included in the latest UN report concerning the death penalty there is, in fact, a predominance of democratic abolitionist countries.[32] Nonetheless, we consider that it is premature

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[29] European Union, *European Union Memorandum on the Death Penalty*, 25th February 2000, at http://www.eurunion.org/legislat/deathpenalty/eumemorandum.htm (last access 15th February 2005).

[30] See UN document E/2000/3, paragraph 56.

[31] Supreme Court of Canada, *United States v. Burns*, 2001 SCC 7. File No.: 26129, paragraphs 91, 92 and 128. Paragraph 92 is particularly telling: "the existence of an international trend against the death penalty is useful in testing our values against those of comparable jurisdictions. This trend against the death penalty supports some relevant conclusions. First, criminal justice, according to international standards, is moving in the direction of abolition of the death penalty. Second, the trend is more pronounced among democratic states with systems of criminal justice comparable to our own. The United States (or those parts of it that have retained the death penalty) is the exception, although of course it is an important exception. Third, the trend to abolition in the democracies, particularly the Western democracies, mirrors and perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada."

[32] For a full list of abolitionist countries see Annex H. Bertil Dunér and Hanna Geurtsen discuss the link between the evolution of the abolition of the death penalty, existence of democracies/authoritarian states, war and the terrorist challenge and consider that the abolitionist strategy is approaching a step very difficult to

to conclude that, similar to the democratic peace thesis, democratic states are inclined to be abolitionist. We think that this approach does not provide us with the whole picture since in countries such as Germany, Cambodia and East Timor the decision to abolish the death penalty is inextricably linked to their history. Furthermore, in Africa where there are now eleven countries that have abolished the death penalty and the democratic credentials in some of these countries are theoretical rather than in practice. Additionally, established democracies such as India, Japan and the US are retentionists. To claim that abolitionism can be equated with a particular virtue of democracy is, in our opinion, not descriptive of reality.

In our view, the abolition of the death penalty is part of the setting of a new standard of civilisation linked to the respect of human rights and the consequent definition of the role of the state. The developments of a new standard of civilisation within international society have not achieved a universal consensus, and the same goes for democracy, and they reveal the embryonic stage of a global international society as it adapts to the post-1945 reality. In the process of accommodation between the Westphalian and the UN Charter models, there is room for challenge and resilience.[33] The classic formulation of the standard of civilisation went beyond power and control over territory and the undertaking of international legal obligations and participation in European diplomatic practices, and encompassed the need to respect the laws of war, to protect the rights of foreigners to life, property, freedom of commerce and religion and, lastly, the prohibition of uncivilised practices such as slavery and piracy just to name a few. Here civilisation was used to institutionalise differences which were very difficult to overcome, as Japan quickly learned. The normative element of the standard of civilisation depended on the power and ability to use the force of those countries that propounded themselves as bearers of the standard. The link between theories of international morality that reflect the values of the dominant countries and are, therefore, favourable to the maintenance of the *status quo* was observed by E. H.

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climb, "The death penalty and war", in *International Journal of Human Rights*, Vol. 6, nº 4, winter/2002, pp. 1-28.

[33] See Jack Donnelly, "Human rights: a new standard of civilisation?", in *International Affairs*, Vol. 74, nº 1, 1993, pp. 1-23 and Thomas M. Franck, "The emerging right to democratic governance", in *American Journal of International Law*, Vol. 86, nº 1, 1992, pp. 46-91.

Carr regarding the international society of the interwars' period.[34] It is, of course, not difficult to understand why the rejection of such a standard was so fierce on part of the new comers to international society after the end of the Second World War and sovereignty also functioned as a buffer against the civilisational mission of the great powers.

Internationally recognised human rights have become very much like a new standard of civilisation and are, like its classical counterpart, European in origin. Nevertheless, unlike the standard of the late 19th century, respect for human rights has not been established by force, exception made to the worst cases where the violation of human rights is so massive and systematic that leads to intervention. Instead, and even if we can question the link between economic and financial performance and development of human rights made by international organisations such as the World Bank and the International Monetary Fund, the bulk of the establishment of a modern standard takes place at the UN. The very existence of an International Bill of Human Rights is worthy of note and what is taking place in international society is the cataloguing of which rights should be given pride of place. Today, the idea of pursuing human rights' concerns in foreign policy is relatively uncontroversial and the pioneering effort was the British campaign to abolish the slave trade, a successful example of how human rights can be achieved by foreign policy without sacrifice of national interest.[35] There are many recipes for a human rights' or an ethical foreign policy, but most of them stress the need to make sure that human rights stay on top of the agenda and achieve a common floor regarding basic human rights to which all states adhere. They also highlight the need for multilateral action involving states and UN in order to avoid "moral imperialism" from one nation.[36] The idea of pursuing an ethical

[34] E. H. Carr stated that "theories of social morality are always the product of a dominant group which identifies itself with the community as a whole, and which possesses facilities denied to subordinated groups or individuals for imposing its views of life on the community. Theories of international morality are, for the same reason and in virtue of the same process, the product of dominant nations or groups of nations," op. cit., p. 74.

[35] Charles H. Fairbanks, Jr. with Eli Nathans, "The British campaign against the slave trade," in Marc F. Plattner (ed.), *Human Rights in Our Time: Essays in Honor of Victor Baras*, Boulder/Colorado and London, Westview Press, 1984, pp. 30-68, at pp. 30-32.

[36] See *e. g.* Stanley Hoffman, *Janus and Minerva, Essays in the Theory and Practice of International Politics*, Westview Press, Boulder, Colorado, 1987, chapter 17 entitled "Reaching for the most difficult: human rights as a foreign policy goal", pp. 370-393 and Evan Luard, "Human rights and foreign policy", in *International Affairs*, Vol. 56, nº 4, 1980, pp. 579-606.

foreign policy, in which it is understood that it is in the national interest to act according to the norms of international society, has also gained a renewed interest. As we have seen, the EU elaborates annual human rights' reports and monitors violations. Individually countries such as the US, Britain or the Netherlands also issue annual human rights' papers and include respect for human rights in their foreign policy considerations that go beyond aid or economic considerations.

Respect for human rights places limits on states regarding the way they treat their citizens, and this relationship is at the core of the institutionalisation of the norm regarding the abolition of the death penalty and in which "the underlying issue is the extent of power of the state to the right to take the life of its citizens."[37] The death penalty issue has also been included in the larger discourse concerning political and civil human rights: on the one hand, some argue that human rights, as recognised in the International Bill of Human Rights, are not only universal but also indivisible and inter-dependent; on the other hand, others see it as a device that enables the West to impose on non-western countries standards that are antagonistic to the communities that they represent. In other words, civil and political human rights function as a Trojan horse for democracy, market economy and the rule of law. This debate can be defined in very simple terms and it is centred on the relation between the individual and the community/state. As we have already stated, civil and political rights in its modern discourse were born in the West, as were economic and social rights, but they were not the result of an enlightened vision of human society. Quite the contrary, they were a western response to problems such as the excesses of the state and the injustice of modern markets.[38] In these countries, the tension between individual and community/state was resolved *via* the democratic institution and its respect for the rule of law and human rights.

The emphasis on this function of democracies has led some to argue that humanitarian intervention should be used to promote democratic institutions.[39]

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[37] Statement by France in 1989 regarding the elaboration of the second optional protocol aiming at the abolition of the death penalty in UN document A/44/592, p. 18, paragraph 10.
[38] John Vincent, "Modernity and Universal Human Rights", in Anthony G. McGrew, Paul G. Lewis *et al*, *Global Politics, Globalisation and the Nation-State*, Polity Press, Oxford, 1995, pp. 269-292.
[39] Mervyn Frost argues that humanitarian intervention is best understood as an act directed towards

Others have warned that democracy is not just about procedures but also about processes. The former is characterised by constitutional and electoral arrangements, voting procedures, laws, institutions and legal instruments to bolster civil liberties; and these can be exported. The latter consist of norms, expectations, agreements between citizens and authorities on the limits that those authorities must observe, as well as on the obligations that those over whom they have authority must accept. These processes are established by law but most arise within society itself and are not easily exported since they depend on culture, habit, informal networks, and on the existence of social capital and social trust.[40] In addition, for other countries, the culture, history and religion of a community may be such that authoritarian regimes reflect a widely shared world view or way of life.[41]

We have also identified a belief, manifested on a number of occasions by abolitionist countries, that the abolition of the death penalty is part of the moral progress of international society exemplified by the prohibition of slavery and racial discrimination. Abolitionist countries often make the comparison with the case of the demise of slavery, in which the presence of an element of moral progress in international relations is found: an evolutionary process in which it was no longer acceptable and *civilised* to practice slavery. If slavery was the usual fate for those that lost wars in Ancient Greece, nowadays its prohibition is a peremptory norm of international law.[42] In fact, the abolition of the slave trade resulted from a very lengthy process in which one great power (at the time, *the* great power) took a leading interest, namely Britain. The motives behind this humanitarian foreign

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upholding the non-intervention norm of civil society which protects an area of freedom for individuals and not as a breach of the norm of non-intervention that holds between sovereign states. He discusses the compatibility between being civilians (members of civil society with a global discourse on human rights) and citizens (in the society of democratic and democratising states), and he concludes that these are complementary since citizenship is worthless unless citizens are simultaneously constituted as civilians; the goal of a humanitarian intervention is to repair civil society so that the people might proceed to build democracies for themselves within which they may enjoy the rights of citizenship, in "The ethics of humanitarian intervention: protecting civilians to make democratic citizenship possible", in Karen E. Smith and Margot Light (eds.), op. cit., pp. 33-54.

[40] Margot Light, "Exporting democracy", in Karen E. Smith and Margot Light (eds.), op. cit., pp. 75-92, at pp. 89-90.

[41] Michael Walzer, "The moral standing of states: a response to four critics", in *International Ethics*, edited by Charles R. Beitz, Marshall Cohen, Thomas Scanlon and A. John Simmons, Philosophy and Public Affairs Reader, Princeton University Press, Princeton, 1990 (1st Ed. 1985), pp. 217-237.

[42] See James Lee Ray, op. cit., pp. 405-439.

policy are complex and can be summarised in the following: the beginning of the movement to abolish slavery with the charismatic leadership of William Wilberforce, as well as the influence of the Quakers; the fact that the abolition of the slave trade was included in a wider concern for human rights' violations;[43] the successful rebellion of American colonies stimulating the consequent interest of Britain in stopping the slave trade in terms of Spain, France and Portugal and its American colonies; the conquest of India, which provided for a cheaper workforce without resorting to slavery; and the legislative union with Ireland in 1800 which gave seats in Parliament to Irishmen who had no commercial interest in the slave-trade.[44] Whether we place the economic, political or humanitarian goals at the centre of our analysis one thing remains true, that the demise of slavery was a lengthy process that can be divided into two phases: the ending of the Atlantic slave trade and of the slave trade from Zanzibar to Arabia. In the Atlantic, the main importers of slaves were Brazil and Cuba. Britain developed a slow strategy, focusing on the abolition of the slave trade and not the "evil itself", and for some this was the key to success, since it set the stage for the abolition of slavery.[45] Britain officially prohibited the slave trade in 1807, and legally ended slavery in territories under its control in 1833. This country used international law backed by force which resulted in controversy, especially regarding the right to search foreign vessels suspected of slave trade by invoking the general law of nations or that existing by convention.[46] These contemplated the first bilateral "search" conventions, (some countries were in fact coerced into signing these conventions)

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[43] Edmund Burke pointed out that very pertinently that the rights of man proclaimed in France were incoherently not applied to its colonies: "The colonies assert to themselves an independent constitution and a free trade. They must be contained by troops. In what chapter of your code of the rights of men are they able to read, that it is a part of the rights of men to have their commerce monopolised and restrained for the benefit of others." See *Reflections on the Revolution in France including Letter to a Member of the National Assembly of 1791*, Edition with an Introduction and notes by L. G. Mitchell, Collection of Oxford World's Classics, Oxford University Press, Oxford, 1999 (the original is from 1790 and this is the ninth edition of 1791), p. 223.

[44] See Antonio Cassese, *International Law in a Divided World*, Clarendon Press, Oxford, 1992 (1st Ed. 1986), pp. 52-54. Other authors, place the emphasis on the fact that the overthrow of colonial slavery was made in places where it became politically untenable and this was due to the intense political and military struggles within and between the leading Atlantic powers. This created conditions in which slavery could be successfully challenged, *e. g.* Robin Blackburn, *The Overthrow of Colonial Slavery*, Verso, London and New York, 2000 (first published in 1988).

[45] Charles H. Fairbanks, Jr. with Eli Nathans, op. cit., pp. 30-68.

[46] For the role played by international law in the strategy of Britain aiming at the demise of the slave-trade see Howard Hazen Wilson, "Some principal aspects of British efforts to crush the African slave trade, 1807-1929", in *American Journal of International Law*, Vol. 44, nº 3, 1950, pp. 505-526.

and the inclusion of "Equipment Articles". From 1839 onwards, the will and means of enforcing the ban on the slave trade increased and the 1850 decision to instruct British cruisers to seize Brazilian slavers in Brazilian territorial waters had a great impact. Viscount Palmerston, a visceral defender of abolishing the slave trade, contributed much to this decision. Cuba was more difficult because of the support of the US which lasted until 1865,[47] when the US officially ended slavery. The last holdouts in the western hemisphere, Cuba and Brazil, abolished it in 1886 and 1888. After 1865, and until 1929, Britain concentrated on the suppression of the Arab trade, an area in which Britain (and France) were increasing their territorial expansion. The abolition of the slave trade benefited also from an increasing international consensus against the slave trade which enabled its abolition and the spill-over to slavery and slavery-like practices. This evolution can be seen in the 19th Acts such as the Berlin African conference of 1885 and the General Act of the Brussels' conference of 1889-1890, which declared that the slave trade was contrary to general international law. As we have seen, the convention to suppress slavery was signed only in 1926, and it was brought into the UN framework through the Amending Protocol of 1953. In 1956, a Supplementary Convention enlarged the area of action by aiming at the abolition of slavery, the slave trade and institutions and practices similar to slavery.

In our view, the success of the abolition of the death penalty is linked to its norm institutionalisation, a process by which norms become embedded in international organisations and institutions, and that enhances the power and creation of the normative claims.[48] The UN has benefited immensely from the standpoint regarding the death penalty by European and Latin American countries as well as from the work carried out within the European system. Additionally, the UN has contributed actively to the socialisation of member states and the shift towards the promotion of progressive abolition resulted from the aspirational standards included in the International Bill and, from the practical point of view, through the evidence that questions the deterrent value of capital punishment. It has been successful in framing an abolitionist 'window of opportunity', but the

[47] *Idem, ibidem.*
[48] Martha Finnemore, op. cit., p. 161.

process of institutionalisation favouring the abolitionist norm has been challenged by countries that retain capital punishment.

2 Norm Institutionalisation regarding Abolition of Capital Punishment at the United Nations: Challenge and Resilience

"There is good evidence to support the view that abolition of capital punishment is linked to the development of political rights that emphasise 'human rights', and it is probable therefore that many countries that face this challenge shelter behind the fact that the government of the United States, a government which regards itself as a champion of human rights, continues to support and practise capital punishment."[49]

This is one of the arguments asserted by countries that retain the death penalty, namely that it is not prohibited under international law and there is no international consensus as to the need or desire to abolish it.[50] What is more, different cultures have radically different conceptions of justice/punishment and, therefore, it is arrogant to presume that one's own system is the same as other countries'. The diversity of socio-legal and economic conditions are determinant for each country to establish its own rules of application of criminal justice. Furthermore, capital punishment is a criminal justice issue linked to the sovereignty of each country (and, therefore, falling under the domestic jurisdiction of article 2 (7) of the Charter) and not a human right. The real issue is to ensure that the death penalty is not applied unjustly.[51] The retentionist approach fits well into the realist tradition (the death penalty is not an international relations' issue and the same goes for human rights) or to the pluralist spectrum of international society that we have described earlier (although there are agreed principles in international society the abolition of the death penalty is not one of them) and to pursue such a goal is disruptive of international order.[52]

Likewise, the association of abolishing the death penalty with international moral progress, as in the case of the demise of slavery and racial discrimination is also disputed. There are some problems in placing these matters in the same

[49] Roger Hood, *The Death Penalty, A Worldwide Perspective*, Oxford University Press, Oxford, 2002, p. 22.
[50] See UN document E/CN.4/2004/G/54.
[51] See comments made by Saudi Arabia in UN document A/C.3/SR.811, paragraph 20 and Indonesia in UN document A/C.3/SR.812, paragraph 30.
[52] For a list of all retentionist countries see Annex I.

basket. Unlike the 'innocent victims' of modern slavery and racial discrimination who were denied their freedom by force just because they had a different colour or belonged to a different group, the death penalty (at least in principle) is a punishment for a crime that a person has committed. Even if in practice, innocence is not always easy to ascertain, the basic premise underlying capital punishment is the fact that it is a punishment for a wrong action, a crime that the community finds unacceptable. Abolitionists argue that there is always the risk of innocents being executed and believe that this is reason enough for stopping the use of the death penalty and that, ultimately, all persons are redeemable. This line of reasoning can be rebutted by taking into account the rights of the victims, the safety of the community and the fact that certain crimes deserve capital punishment. We have already covered the main arguments for and against capital punishment but we believe that the abolition of slavery and the fight against racial discrimination cannot be placed on the same footing as the abolition of the death penalty. It is true that abolition of slavery has in common with the death penalty the fact, that from a historical point of view, we observe a trend towards reduction and the placing of limits. But moral arguments can be made on both sides of the abolition/retention debate unlike *apartheid* and slavery, which are not morally defensible at all.

The challenge to the institutionalisation of the norm regarding abolition of the death penalty can be divided into two categories: those that oppose the abolition of the death penalty *per se* and those that, in addition, do not conform to (and even repudiate) the safeguards and procedural guarantees regarding those who face capital punishment. Membership of the two groups is highly heterogeneous and overlapping, in that the latter includes countries such as the US and its frontal dismissal of the non-application of capital punishment for juvenile offenders; and other states where the application of criminal law is far from being transparent and, in many cases, procedural guarantees are not safeguarded (whether capital or not). In fact, in some countries that retain the death penalty, secrecy surrounds the sentencing and executing, and there are no statistics or available information. Regarding juvenile capital punishment, the US stands alone and there are currently 72 persons on death row under death

sentences received for crimes committed under 18 years of age (2% of the total death row population).[53] The American dissent was once again shown at the discussion of the resolution concerning the rights of the child at the last session of the Commission on Human Rights. The draft resolution was introduced by the EU and the Group of Latin American countries, and adopted by a recorded vote of 52 in favour (including Nigeria, Pakistan and Saudi Arabia) and the vote against of the US.[54] It includes, in paragraph 35 a), the appeal to states to comply with their assumed international obligations regarding the abolition of the death penalty to persons below 18 years of age.[55] The EU and the Latin American countries spared no effort to reach a consensus on the text of the draft resolution, but they were unwilling to do so at the expense of the achieved results from previous sessions.[56] It is the very fact that the US is on the same footing regarding capital punishment for young offenders with countries such as the Democratic Republic of Congo or Iran that has raised concern among former US diplomats, who have also filed a brief to the Supreme Court on behalf of Christopher Simmons.[57] They argue that, from their experience, the persistence of this practice allows allies and adversaries alike to challenge the US' claim to moral authority in the domain of international human rights. They consider that the practice is not only inconsistent with minimum standards of decency but that it offends evolving American standards of decency, isolating and straining diplomatic relations with US' close allies.

As to the first group, countries that oppose the abolition of the death penalty *per se*, their dissent at the UN can be divided into two phases which overlap. The first one runs until mid-90s and is characterised by a rather reactive action as to the proposals regarding capital punishment, *e. g.* in the adoption of General Assembly Resolution 2857 (XXVI) in 1971 by 59 votes in favour, 1 vote against (from Saudi Arabia) and 54 abstentions. In the protocol aiming at the abolition of

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[53] See Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-September 30, 2004*, Issue nº 75, pp. 1-32, at p. 11, available at http://www.law.onu.edu/faculty/streib/documents/JuvDeathSept302004.pdf (last access 25th October 2004).
[54] UN document E/CN.4/2004/SR.56, paragraphs 36-37.
[55] Commission on Human Rights, UN document E/CN.4/2004/L.11/Add.5, resolution 2004/48 entitled "Rights of the child", pp. 17-37. This was one of the reasons for voting against the resolution, along with the fact that the Convention on the Rights of the Child conflicted with the authority of parents and other provisions of state and local law in the US, see UN document E/CN.4/2004/SR.56, paragraph 27.
[56] *Ibidem*, paragraphs 31-34.
[57] See http://www.abanet.org/crimjust/juvjus/simmons/diplomats.pdf (last access 15th February 2005).

the death penalty, the recorded vote was 59-26-48 and was preceded by the vote (also recorded) at the Third Committee of 55-28-45. In these situations, despite the resistance from some retentionist countries, the majority either abstained on the understanding that it did not affect them (adoption of the Second Optional Protocol or resolution 2857 of 1971) or went along with the adoption of documents such as ECOSOC safeguards of 1984, 1989 and 1996, because they focus on the guarantees regarding the application of the death penalty and not its abolition. In this phase, we may characterise the reaction of countries that retain the death penalty as one of general complacence regarding the efforts of abolitionist countries.

In contrast, the second phase, which began in 1994 was characterised by a more active stance both at the General Assembly and the Commission regarding capital punishment on both retentionist and abolitionist sides. In 1994, Singapore recognised that although it accepted the inclusion of the subject of capital punishment it "strongly opposed efforts by certain states to use the United Nations to impose their own values and system of justice on other countries."[58] The co-ordination of the efforts of countries that retain the death penalty against the normalisation of the abolitionist norm is evident from their efforts at the General Assembly. In the same year, the opposition to the EU draft was made through the amendments of Egypt[59] and Singapore[60] while the 1999 EU draft resolution was rebutted by two amendments of 71 and 72 countries each that were fostered by these same countries.[61] The same evolution can be observed at the Commission where, as we have seen, the EU has successfully sponsored a resolution on the question of the death penalty since 1997. We consider that the adoption of such a resolution is a novelty worthy of note, but the voting of all the resolutions shows the lack of consensus regarding this issue. A lack of consensus that was repeated at the 2004 session of the Commission, where the resolution on the question of the death penalty, worded in similar terms as the previous ones, was adopted by a recorded vote of 29 in favour, 19 against and 5 abstentions.[62] The countries that

[58] UN document A/C.3/49/SR.33, paragraph 23, p. 6.
[59] UN documents A/C.3/49/L.74 and Rev. 1.
[60] UN documents A/C.3/49/L.73 and Rev.1.
[61] UN documents A/C.3/54/L.31 (72 sponsors) and A/C.3/54/L.32 (seventy-one sponsors).
[62] See Commission on Human Rights, UN document E/CN.4/2004/L.11/Add.6, resolution 2004/67, pp. 32-

voted against the resolution had very different backgrounds, such as the US, Japan, India, Egypt and Saudi Arabia. In fact, the table below presents a clear picture of the resistance shown to the issue of the death penalty at the Commission.

Table 4: United Nations' Commission on Human Rights' Resolutions on the question of the death penalty

Resolution	In Favour	Against	Abstention
1997/12	27	11	14
1998/ 8	26	13	12
1999/61	30	11	12
2000/65	27	13	12
2001/68	27	18	7
2002/77	25	20	8
2003/67	24	18	10
2004/67	29	19	5

If, on the one hand, the concerted strategy of the European countries has been successful and the issue of the death penalty in all its facets has become part of the routine of the annual session of the Commission, on the other hand the reactions of countries that retain the death penalty become more noticeable. What is more, some member states have gone further and expressed their dissent either from the draft resolutions presented by EU or from the resolutions adopted by the Commission. As the table below shows, the number of countries has been steadily rising but does not include the US and India. In fact, the greatest number of countries dissociating themselves from the resolution adopted by the Commission on the issue of the death penalty took place regarding the 2004 resolution.[63] In

36. The countries that voted against were the US, China, Japan, Eritrea, Mauritania, Bahrain, Egypt, Ethiopia, India, Indonesia, Nigeria, Saudi Arabia, Pakistan, Qatar, Sierra Leone, Sudan, Togo, Uganda and Zimbabwe, in favour were Argentina, Armenia, Australia, Austria, Bhutan, Brazil, Chile, Congo, Costa Rica, Croatia, Dominican Republic, France, Gabon, Germany, Honduras, Hungary, Ireland, Italy, Mexico, Nepal, the Netherlands, Paraguay, Peru, Russia, South Africa, Swaziland, Sweden, Ukraine and the United Kingdom, while Burkina Faso, Cuba, Sri Lanka, Guatemala and Republic of Korea abstained, in UN document E/CN.4/2004/SR.57, paragraphs 90-91.

[63] The sixty-four co-signatories of the joint-statement on the question of the death penalty are Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Botswana, Brunei, China, Comoros, Democratic Republic of Congo, Dominica, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Ghana, Grenada, Guyana, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, North Korea, Kuwait, Laos, Lebanon, Libya, Malawi, Malaysia, Maldives, Mauritania, Mongolia, Myanmar, Nauru, Niger, Nigeria, Oman, Papua New Guinea, Philippines, Qatar, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saudi Arabia, Sierra Leone, Singapore,

addition, we should also take into account the dissent expressed by twenty-six countries regarding the Sub-Commission resolution 1999/8, which focused particularly on the application of the death penalty for juvenile offenders.[64]

Table 5: Dissociation Statements from the United Nations' Commission on Human Rights' Resolutions on the Question of the Death Penalty

Resolution	Dissociation Joint-Statements	Total of Co-Sponsoring Countries
1997/12	E/1997/106	31
1998/ 8	E/1998/95 & Add. 1	54
1999/61	E/1999/113	50
2000/65	E/CN.4/2000/162	51
2001/68	E/CN.4/2001/161 & Corr.1	61
2002/77	E/CN.4/2002/198	62
2003/67	E/CN.4/2003/G/84	63
2004/67	E/CN.4/2004/G/54	64

The debate around the abolition of the death penalty offers us the reality that there are different priorities as to human rights either domestically and internationally. In this respect, the image of the West as has been depicted in the communitarian discourses, reacting against universal/western human rights does not work. This is more evident in the approaches taken by the EU countries and the US, where we find three main differences: the death penalty, the understanding of the bill of rights and the reaction to international monitoring of human rights. As we have already seen, the two sides are opposed regarding the death penalty, as the US does support capital punishment including offenders who were below 18 at the time of the offence. In order for us to understand the American approach to the death penalty, we have to look at the domestic relation between the federal government and the states. The developments in state constitutional law, as they affect the death penalty, point to the single continuing challenge posed by capital punishment in the US.[65] For instance, since the 1989

Somalia, Sudan, Swaziland, Syria, Tajikistan, Tanzania, Thailand, Togo, Tonga, Trinidad and Tobago, Uganda, United Arab Emirates, Uzbekistan, Vietnam, Yemen and Zimbabwe.

[64] UN document E/CN.4/Sub.2/1999/52.

[65] This is the conclusion reached by Professor Hugo Adam Bedau after reviewing developments in state constitutional law in the US, "The death penalty and state constitutional rights in the USA", in *Crime*

Stanford v. Kentucky decision, seven states have set the minimum age at 18, with South Dakota and Wyoming doing so in 2004.[66] The age limit of 18 is now the norm in twenty-one of the forty jurisdictions in the US.

Human rights entered foreign policy debates in Europe and the US at the same time, namely after 1945. Although there is an agreed nucleus, the paths of Europe and the US are different.[67] In Europe, the commitment to a human rights' foreign policy increased parallel to the strengthening of regional arrangements with a focus on multilateral policies as well as legal instruments. In Europe, the second generation as well as the first generation rights are implemented. In our view, the level of protection reached in Europe is due to the historical tragic past that made Europe more aware of the need to protect human rights. In addition, the SU threat led to greater cohesiveness and to the express recognition of which human rights deserved to be protected. This protection includes the monitoring of human rights' policies, which is made essentially by the European Court of Human Rights of the CE but the European Court of Justice of the EU also plays a role. In contrast, the US has had an uneasy relationship with a human rights foreign policy, despite the fact that it was the first country to place natural rights at the heart of its national self-definition. Some would say that this was due to a superior virtue, whilst others consider that it was mainly due to the relatively flexible class structure.[68] US human rights' foreign policy since the end of the Second World War can be characterised as being highly selective and extremely reluctant to open itself to international scrutiny. Additionally, the US has been struggling with the very place that human rights should occupy in foreign policy and the attention given to the need to pay "decent respect to the opinions of mankind".[69]

Prevention and Criminal Justice Newsletter, Vols. 12 and 13/Special Combined Issue on Capital Punishment, November/1986, pp. 19-24.

[66] These are Washington (1993), Kansas (1994), New York (1995), Montana (1999), Indiana (2002), South Dakota and Wyoming (2004).

[67] Kathryn Sikkink, "The power of principled ideas: human rights policies in the United States and Western Europe", in Judith Goldstein and Robert O. Keohane (eds.), op. cit., pp. 139-170.

[68] Jack Donnelly lists three factors that have fostered the relatively flexible class structure, namely lack of hereditary nobility, massive immigration and vast supply of 'vacant' land, "An overview", in David P. Forsythe (ed.), *Human Rights and Comparative Foreign Policy*, United Nations University Press, Tokyo, New York and Paris, 2000, pp. 310-334. See as well Jack Donnelly, "Post-Cold War reflections on the study of international human rights", in *Ethics and International Affairs*, Vol. 8, 1994, pp. 97-117.

[69] In the first paragraph of "The Unanimous Declaration of the Thirteen United States of America" adopted by Congress on July 4th 1776 at at U. S. National Archives and Record Administration http://www.archives.gov/national_archives_experience/charters/declaration.html (last access 15th February

The selective policy can be seen in the obvious preference for civil and political over economic, social and cultural rights, despite the previous inroads made by the "New Deal" regarding social and economic guarantees.[70] This is of course partially explained by the Cold War and the nature of the SU threat, with its focus on economic and social rights but to date the US has only ratified the ICCPR and not the ICESCR. Selectiveness is also seen in the countries that were a target/recipient of the human rights' foreign policy, where the application was one of double-standards. In the Cold War, human rights were used as one of the tools of the ideological struggle.[71] This prompted the US to act as a socialiser, in promoting the advancement of political and civil rights, whether directly or indirectly. The resilience in opening itself to international monitoring began in 1953 when the US, after having made so many contributions to the draft UN Covenants, announced that it did not intend to sign any of the conventions on human rights. It was the outcome of a domestic compromise after the blocking of the Bricker Amendment. The Amendment proposed by Senator John Bricker from Ohio aimed at protecting states' rights against treaties authorising any international organisation to supervise, control, or adjudicate rights of American citizens. The support for this Amendment came from cold warriors, conservatives, traditional isolationists and segregationist southern states that feared that the Covenants would give federal government the authority to impose civil rights' standards on states. Internationally, the US began pursuing initiatives concerning the extension of the programme of human rights within the Commission on Human Rights as well as the means to carry it on as an alternative to the Covenants.[72] The preference for low-key international instruments and bilateral relations was maintained throughout the Cold War and even during the Carter presidency. The

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[70] For an excellent overview of the US' human rights foreign and domestic policy see David P. Forsythe, *Human Rights in International Relations*, Cambridge University Press, Cambridge, 2000, pp. 33-43 and 141-149.

[71] Antonio Cassese, *International Law in a Divided World*, Clarendon Press, Oxford, 1992 (1st Ed. 1986), pp. 289-300.

[72] Resolution 739 (VIII) 28th November 1953 of the General Assembly called for the Commission to take into account the American proposals and to provide recommendations on these matters, in *Y. U. N. 1953*, p. 389. The proposals included a programme of annual reports on developments in the field of human rights by Member governments and their review by the Commission, the initiation by the Commission of a series of studies on specific aspects of human rights on a world-wide basis with the assistance of expert advisers to be appointed by the Secretary-General, and the establishment of advisory services in the field of human rights.

innovation in this period was the adoption of an external human rights' policy which, despite some controversy, did put human rights in US foreign policy. Even President Reagan who, in 1981, declared that the combat against international terrorism would replace human rights as a priority concern of American foreign policy was, in the end, unable to remove human rights from its agenda.

In our opinion, the uneasy American relationship with international human rights' law is extendable to the relation with international law in general. The classical positions of monism and dualism can provide us with referential points. Monism is characterised by the fact the legal system of every state is a single system consisting of international law and the state's own domestic law with international law supreme. In contrast, dualism considers that national and international laws are two distinct legal systems and where international law operates wholly between states and on state level. States are only bound by international law to the extent that they give their agreement and, in this sense, international law creates obligations for states *inter se*; and each state determines for itself how it will carry out these obligations and will do so as determined by domestic law. In general terms, to move away from dualism means a greater commitment to the community element of international relations, whilst dualism is evidently more linked with the notion of international system. Furthermore, dualism is more inclined to positivism and monism to natural law.

No state is either strictly monist or wholly dualist and the US is no exception. It is a hybrid system but near the dualist end of the spectrum.[73] International law has the same status as federal law but in the hierarchy of federal law it ranks below the Constitution, since treaties are subject to the Constitution and will not be given effect as law by courts or by executive if they are not consistent with the Constitution. Article VI of the Constitution places treaties on an equal footing with statutes but procedurally the statute carries more weight, since it is the result of the interventions by the House of Representatives, Senate and the President, while a treaty involves only the last two. In addition, whenever there is a conflict between federal law and international law, the later-in-time rule prevails, therefore, allowing the possibility that federal law may override treaty provisions.

[73] Louis Henkin, "General course on public international law", in *Collected Courses/The Hague Academy of International Law*, Vol. 216, 1989/IV, pp. 9-416, at pp. 89-103.

Nonetheless, we should bear in mind the custom of favouring the interpretation of statutes so as to not override treaty obligations in a *pacta sunt servanda* spirit within the *Murray v. Schooner Charming Betsy* tradition.[74] This tradition, which began in 1804, asserts that later statutes should be interpreted so as to not override prior treaties recognising that the US interests and honour bind it even when its internal law does not.[75]

As for the ICCPR, as we have seen, American reservations have been met with apprehension since the Human Rights Committee considered particularly distressing the reservation regarding the non-executing character of articles 1 to 27. Even if in the American tradition some treaties are not self-executing and require further congressional action (treaties that establish payments to foreign states or parties), its application to the ICCPR leaves us with the impression of double-standards. The matters relating to the relationship between international and domestic jurisdiction were hotly debated during the set up of the ICC. The Statute of the Court was adopted by 120 in favour, 7 against and 21 abstentions and, although the vote remains unrecorded, the US was one of the countries that voted against.[76] Despite having signed it, all the negotiations and checks and balances that were made in order to establish a compromise between internationalism and state sovereignty were not enough for the US, which later decided that it would not ratify the Statute.[77] The way in which the hyperpower[78] relates to international law, the UN and the international human rights' framework is important and should not be overlooked, but we consider that international

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[74] Detlev F. Vagts, "The United States and international treaties: observance and breach", in *American Journal of International Law*, Vol. 95, nº 2, April/2001, pp. 313-334.
[75] *Ibidem*, p. 334.
[76] See David Forsythe, op. cit., chapter 4 entitled "International Criminal Courts", pp. 84-109 (the voting regarding the Statute of the ICC is in page 103) and Spyros Economides, "The International Criminal Court", in Karen E. Smith and Margot Light (eds.), op. cit., pp. 112-128, at p. 117.
[77] The US stated four reasons: it undermined the role of the Security Council in maintaining peace and security, it created a prosecutorial system that is an unchecked power, it purports to assert jurisdiction over nationals of states that have not ratified the Statute and it is therefore built on a flawed foundation. See "Contemporary practice of the US human rights", in *American Journal of International Law*, Vol. 96, nº 3, July/2002, pp. 724-729. For a good overview of the negotiations as well as the checks and balances that were created to adjust to state sovereignty, see Spyros Economides, op. cit.
[78] The term hyperpower (*hyperpuissance*) was used by the former French foreign minister Védrine, *cit in* Robert Kagan, "Power and weakness", in *Policy Review*, nº 113, 2002, p. 5, web edition at http://www.policyreview.org/JUN02/kagan.html (last access 15th February 2004).

society has withstood many challenges and has proven to be much more resilient than we might expect.

The setting of the abolition of the death penalty at the centre of the EU and CE frameworks results from an internal characteristic which also reinforces its distinctive international identity, in contrast to other members of international society. We may understand the international role of the EU in terms of 'empire', where the place that a state occupies is linked to its self-identification with common interests and values as well as the acceptance of rules and institutions that emanate from the centre. Traditionally, such a promotion of values and interests of the European international and world societies has been termed "civilian power" Europe.[79] A civilian power is characterised by the centrality of economic power to achieve national goals; primacy of diplomatic co-operation to solve international problems and the willingness to use legally-binding supranational institutions to achieve international progress.[80] The concepts of civilian and military power and the correspondent ability to sue civilian and military instruments in order to exert influence on international politics are not enough to understand the EU ideational impact of its international identity/role.[81] The EU is pre-disposed to act in a normative way exhibiting 'normative power' in which it promotes norms which displace the state as the centre of concern and, therefore, go beyond the military/civilian dichotomy and tries to assert what is 'normal' in international relations.[82] In this case, the EU is trying to be a changer of norms in international relations because it considers that it should act to extend them. The concept that the death penalty is not a sovereign issue of criminal justice but an international issue of human rights became the norm. In the European project, we find a world society idea that stems from a particular society of states and where

[79] The term "civilian power" Europe was originally coined by François Duchêne in 1973 and is developed along with the concepts of international and world society and empire by Thomas Diez and Richard Whitman, "Analysing European integration: reflection on the English School-scenarios for an encounter", in *Journal of Common Market Studies*, Vol. 40, nº 1, March/2002, pp. 43-67.

[80] Ian Manners, op. cit., pp. 236-237.

[81] *Ibidem*, pp. 235-258.

[82] Ian Manners identifies five core norms (peace, liberty, democracy, rule of law and respect for human rights) and four minor norms (social solidarity, anti-discrimination, sustainable development and good governance) which constitute the normative basis of the EU. The diffusion of these norms can be through, and is shaped by, contagion, informational, procedural, transference, overt diffusion and cultural filter, in *ibidem*, pp. 240-245. The author discusses the cases of Cyprus, Poland, Albania, Ukraine, Azerbaijan, Turkmenistan, Turkey and Russia.

the world society discourse, despite enabling the deepening of European international society is, at the same time, seen as threatening to the very foundation of international society, namely state sovereignty. We can describe the EU future as a debate between international and world societies.[83]

The issue of the death penalty has been raised in the bilateral relationship between the EU and the US. The main point is how far it will be an *issue* spilling-over to other areas of this bilateral relationship. In the CE, the observer status of the US and Japan has been discussed and resulted in an advertence written in strong words. Nonetheless, it ended up not questioning the observer status. As we have seen in the previous chapter, the abolition of the death penalty was strengthened in the EU framework after the terrorist attacks on the US and in contrast, the US has considered capital punishment as one of the possible penalties for the Guantanamo detainees. In our opinion, a real test of this relationship would be the arrest of terrorists in Europe and their extradition to the US only upon the condition that the death penalty will not be imposed as it has been the case of other persons accused of capital offences.

The EU continues to file briefs on behalf of the offenders as *amici curiae* of the court.[84] The European efforts are especially directed at the cases of the mentally retarded and offenders below the age of 18 at the time of the offence who have been or face a capital sentence. As we have seen, the former were excluded from the application of the death penalty in 2002 on the grounds that it amounted to cruel and unusual punishment and, therefore, violated the Eighth Amendment.[85] The European approach can be understood as a direct challenge to the *moral* leadership of the U S.[86] The EU and CE members filed a brief along with other

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[83] Andrew Linklater, op. cit., pp. 77-103. For a more sceptic view of the post-Westphalian Europe evolution into a "neo-Mediaeval order of overlapping sovereignties and jurisdictions", see Hedley Bull, "The state's positive role in world affairs", in *Daedalus*, Vol. 108, nº 4, pp. 111-123, at p. 114 and *The Anarchical Society: A Study of Order in World Politics,* Macmillan, London, 2nd Ed. 1995 (1st Ed. 1977), pp. 254-266.

[84] For the demarches in American capital cases by the European Union see http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActiononUSDeathRowCases (last access 15th February 2005).

[85] See the US Supreme Court, *Daryl Renard Atkins, Petitioner v. Virginia 536 US____ (2002)*

[86] *Cf.* Robert Kagan who considers that the differences and even diverging perspectives between the US and European countries reveal a broader divergence as to the efficacy, morality and desirability of power as well as major strategic and international questions. In other words, due to the power gap between a weak Europe and a powerful US, Europe tends to a greater reliance on diplomacy and international law, multilateral institutions such as the UN, commercial institutions, preferring a multilateral approach rather than a unilateral with use of force. Americans, on the other hand, favour a more unilateralist foreign policy with use of force,

abolitionist countries as *amici curiae* on behalf of Christopher Simmons.[87] They believe that two analogies can be made regarding the *Atkins* opinion and the case of juvenile offenders. The first one is that mentally retarded persons and young offenders, although on different levels, do not have the discerning ability and maturity of an adult and, therefore, have a lesser level of moral culpability. The second has to do with one of the factors that lend further support to the conclusion reached by the Court, namely that there is a consensus in the world community against the execution of mentally retarded persons. In 2002, the Court concluded that "moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[88] This is also the understanding of the European and abolitionist countries regarding the execution of persons under 18 at the time of the offence. Nonetheless, we should point out that the *Atkins* decision was taken by a six-three vote. The justices who voted against issued two dissenting opinions which based their disagreement precisely on the arguments of "consistency of change" nationwide, and the fact that the Court relied on outside examples to add legitimacy to the decision.[89]

Europe's civilisational mission regarding the abolition of the death penalty highlights its normative power (that it should act in a certain way) which is constitutive as well as regulative of its international image and stand in world politics. Here the abolition of the death penalty is a central element, and one that exemplifies the role of norms in foreign policy. At country level, for instance, Britain

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op. cit.

[87] The brief was filed by European countries along with Canada, Mexico and New Zealand at http://www.internationaljusticeproject.org/juvSimmonsEUamicus.pdf (last access 15th February 2005).

[88] US Supreme Court, Case nº 00-8452, *Daryl Renard Atkins, Petitioner v. Virginia 536 US____ (2002)*, footnote 21.

[89] *Ibidem*, dissenting opinion by Justice Scalia joined by Chief Justice Rehnquist and Justice Thomas and dissenting opinion by Chief Justice Rehnquist joined by Justices Scalia and Thomas. Justices argue that looking at prior decisions of the Court, the first among objective factors of ascertaining evolving standards of decency is legislation enacted by the country's legislatures. In their view, this was a criterion that the court's decision failed to accept because only 18 states had recently passed laws limiting the death eligibility based on mental retardation alone, leaving the remaining 19 which have not acted upon this issue. It was argued that no extrapolation to a national consensus could be made from this number. In addition, it was dangerous to place weight on foreign laws, views of professional and religious organisations and opinion polls as relevant sources for the Court's decisions, not only was there little support concerning Constitutional precedents as well being antithetical to considerations of federalism. The real source was the work product of legislatures and sentencing jury determinations and if we are looking for national consensus then the viewpoints of other countries are simply not relevant.

has, since 1997, explicit human rights goals (in addition to an annual report on human rights) calling for an ethical foreign policy in which coherence between human rights' observance at home and abroad is important and one of its core issues is the abolition of the death penalty.[90] The establishment of human rights' standards, which include the abolition of the death penalty has created a benchmark by which the British government can be judged and although it has been criticised for failing to live up to the expectations raised on some occasions, the very existence of standards is worthy of note.[91] In the post-Cold War world, both Europe and US are searching for their place and image in international relations but, in order for Europe to establish the abolition of the death penalty as normal in international politics because it believes that it is the right thing to do, it still relies on its power vis-à-vis other members of the international society. This is to say, its ability to normalise abolition into the discourse of international society is also dependant on its capacity to influence others. As we have seen, both the CE and the EU have managed to do so within Europe and its near borders. Nonetheless, their ability to export this concept beyond its borders and into countries that are not part (nor want to be) of the European project and instead pursue their own agenda in this matter, renders the 'universal' export of the abolitionist norm problematic.

The inclusion of the abolition of the death penalty is part of a European standard of civilisation where states are judged according to the way they govern themselves including whether they administer the death penalty within their domestic criminal systems. The international movement for the abolition of the death penalty also allows us to understand the importance of great power will or at least acquiescence in the emerging of customary international law.[92] Great powers

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[90] See Foreign and Commonwealth Office at http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1028302591712 (last access 28th February 2005).

[91] Tim Dunne and Nicholas J. Wheeler, "Blair's Britain: a force for good in the world?", in Karen E. Smith and Margot Light (eds.), op. cit., pp. 167-184.

[92] This was beautifully put by Charles de Visscher who wrote that "Among the users are always some who mark the soil more deeply then others, either because of their weight, which is to say their power in the world, or because their interests bring them more frequently this way. (...) Their role, which was always decisive in the formation of customary international law, is to confer upon usages that degree of effectiveness without which the legal conviction, condition of general assent, would find no sufficient basis in social reality"; in *Theory and Reality in Public International Law*, translated by P. E. Corbett, Center of International Studies/Princeton University, Princeton, 1968 Revised Edition, (1st Ed. 1957), p. 155.

have been decisive in transforming usage into custom, as can be seen in the abolition of the slave trade and then slavery itself. If we compare the demise of slavery and the abolition of the death penalty, we find two main differences: as to the abolition of the death penalty, there is no international consensus among the great powers, (albeit, from a historical point of view, a growing tendency to favour abolition) and the leading great power, namely the US, is not abolitionist. The inclusion of the abolition of the death penalty within a new standard of civilisation that deals with respect for human rights is not consensual and, unlike the classic standard of civilisation, does not benefit from the agreement of the great powers.

We consider that the UN approach can be included within the solidarist framework approach, in which progressive abolition with state consent is seen as a means to further compatibility between justice and order, and enhancing socialisation. The abolition of the death penalty is clearly a community building block and faces the challenge of working within a societal framework of international relations. Some of the members of international society that retain capital punishment push the issue towards the pluralist end of the spectrum. It remains to be seen if, regarding juvenile capital punishment, international society will be able to influence the domestic framework of the US. Other members of the UN clearly point towards the solidarist or communitarian approach, namely its European members and other abolitionists such as Canada, Costa Rica and Uruguay. The institutionalisation of the abolition of the death penalty is taking its first steps. The future of this process is contingent upon the ability of the UN and abolitionist countries to maintain their commitment as well as the reactions and challenges posed by retentionist countries. In fact, the greatest hurdle for the UN is to promote socialisation of the norm regarding abolition of the death penalty beyond the 'usual suspects' and into the realm of the pluralist approaches of great powers that retain capital punishment such as China.

CHAPTER IX

CHINA AND HUMAN RIGHTS: INTERNATIONAL BILL, SOVEREIGNTY AND THE RIGHT TO SUBSISTENCE

"Yet by virtue of publishing such a document [White Paper on Human Rights in 1991] the PRC appeared to give legitimacy to international human rights standards and concerns; thus it represented and effort by Peking to push its own views of human rights rather than simply opposing any and all foreign criticism."[1]

In 2003, executions took place in twenty-eight countries and death sentences were passed in sixty-three (total of 2 756). From a total of 1 146 reported executions worldwide, China was the leading executioner with 726. Iran, in a distant second place, executed 108 persons, and was followed by the US with 65 and Vietnam with 64.[2] In fact, China has consistently been the leader in terms of executions, with 2003 being no exception to the rule. The reality of the death penalty in China (either in terms of sentences and executions) is very difficult to ascertain, and the numbers above are from reported sentences and executions found in the Chinese media and gathered by Amnesty International. Therefore, we should make a cautious reading of the numbers, since it is believed that the reported cases are only the tip of the iceberg. Nonetheless, the secrecy and lack of publicity that surround this issue show us that it is a sensitive matter for the Chinese government. In this particular area, the UN efforts and its death penalty framework are of the utmost importance, since it is the only international organisation with worldwide scope where the issue is addressed by Chinese representatives, either directly or indirectly. Therefore, we should first try to assess to what extent is the UN *per se* important to China and, secondly, consider the place that the UN human rights' framework occupies in Chinese foreign policy. In our view, the relationship between the UN and China has been dominated by two

[1] John F. Copper, "Peking's post-Tiananmen foreign policy: the human rights factor", in *Issues and Studies, A Journal of Chinese Studies and International Affairs*, Vol. 30, nº 10, October/1994, pp. 49-73, at p. 67.
[2] These are the cases known to Amnesty International at http://web.amnesty.org/pages/deathpenalty-sentences-eng (last access 2nd September 2004) and http://web.amnesty.org/pages/deathpenalty-facts-eng (last access 2nd September 2004).

themes: the 'China recognition' problem and human rights. The former was dominant for obvious reasons, until 1971, but it produced effects that were felt until the mid-80s, whilst the latter has been present, albeit with different specific issues, since 1989. Chinese interaction with the UN human rights' framework, and especially its Commission on Human Rights, enables us to understand to what degree China has been socialised, *i. e.*, how far it has internalised not only human rights' procedures but norms and values as well. We will look into the Chinese perspective on the International Bill of Human Rights, giving special attention to capital punishment. From the perspective of Chinese participation, the International Bill of Human Rights can be divided into three parts: the UDHR signed before 1949, the Covenants and the First Optional Protocol signed by Taipei after Communist China came to life, and the Second Optional Protocol that was elaborated after 1971.

1. The Chinese Approach to International Law and United Nations

"As a latecomer to the world community, the PRC has had no part in the making and development of traditional international law. As a professed Marxist-Leninist state, China would have been expected to make an ideological assault on "bourgeois" international law. Yet in a curiously opportunistic manner, China, without saying so, has embraced the sovereignty-centered system of the Westphalia legal order."[3]

The humiliations suffered during the 19th and mid-20th centuries at the hands of the "self-invited guests of the Middle Empire"[4] immensely influenced Chinese foreign policy. Its attempts to roll back foreign encroachment, regain independence and achieve international equality were made with the perception that power prevailed over international law. Even if a new member observed international law and the principle of *pacta sunt servanda*, and fulfilled the standard of civilisation, admission into international society was not a given. In fact, not only was international law overridden by domestic law and national interest, but the fulfilment of the standard of civilisation did not mean the renouncement of the unequal treaties and extraterritoriality systems. We can observe the former in the Chinese reactions to the controversy over the conflict between the US-China treaty of 1880 and the Chinese Immigration Statute of California of 1888. Regarding this dispute, the US Supreme Court's decision that the later-in-time rule should prevail was met with disappointment: "(...) whereby your government could release itself from treaty obligations without consultation with or the consent of the other party to what we had been accustomed to regard as a sacred instrument."[5] As to the latter, the examples of Japan and the Ottomans revealed the need to join force and power to the fulfilment of the

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[3] Samuel S. Kim, *China, the United Nations, and the World Order,* Princeton University Press, Princeton, 1979, p. 465.

[4] Th. Th. Martens, "Europe and China" (originally written in 1900), in *Chinese Social and Political Science Review*, Vol. XVI, nº 2, 1932, pp. 307-318, at p. 318.

[5] Letter from Chang Yen Hoon, Minister Plenipotentiary of China to James G. Blaine, American Secretary of State, 8th July 1889 at the time of the infamous Chinese Exclusion Case (*Chae Chan Ping v US*), *cit in* Detlev F. Vagts, "The United States and international treaties: observance and breach", in *American Journal of International Law*, Vol. 95, nº 2, April/2001, pp. 313-334, at p. 318.

standard of civilisation. At the end of the First World War, the victorious powers sought to re-impose the Capitulations through the Treaty of Sevres on the Ottomans. This was resisted and just three years later, through the Treaty of Lausanne, Turkey saw its full rights restored not because of the fulfilment of the standard of civilisation but rather due to the victory of Mustafa Kemal, also known as Kemal Ataturk (father of the Turks) and the proclamation of independence on 29 October 1923.[6] As we have seen, Chinese foreign policy at the 1919 peace treaties and the Washington Conference was assertive, and tried to restore rather than expand Chinese sovereignty. It reiterated international equality and how China was being denied its place in international society especially when compared with other countries. The perception of the meaning of equality was different and whilst "Germany and Japan insist[ed] on equality of armament and colonial rights, France and the US insist[ed] upon equality of security, China desires the termination of her unequal treaties."[7] At the Dumbarton Oaks Conference, China proposed that the principle of equality of all states and all races be included.[8] The end of extraterritoriality in 1943 was a hallmark in Chinese foreign policy, and symbolises the recognition that China had a place in international society. This status was further enhanced by its role in the UN framework as one of the permanent members of the Security Council. Even if this resulted from American pressure rather than from a consensual Allied approach, the fact that China was accorded great power status when reality indicated otherwise, gave greater legitimacy to the new international organisation and its universal aspirations.[9] China embraced this opportunity and participated fully in all the aspects of the UN, where it had the chance of making its voice heard on many important issues.

In our view, the relationship between the UN and China has been dominated by two themes: the recognition of the legitimate representative of the Chinese people and human rights. The former is evidently predominant until 1971,

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[6] Yongjin Zhang, "China's entry into international society: beyond the standard of civilisation", in *Review of International Studies*, Vol. 17, 1991, pp. 3-16.
[7] Shih-Tsai Chen, "The equality of states in Ancient China", in *American Journal of International Law*, Vol. 35, 1941, pp. 641-650, at p. 641.
[8] John Humphrey, *No Distant Millennium: the International Law of Human Rights*, 1989, UNESCO, Paris, p. 60.
[9] Yongjin Zhang, op. cit., p. 8.

where this issue was a thorn for the Chinese as well as for the UN. Although it was resolved in 1971, it continued to have a bearing in the way China was perceived until the mid-80s. The second matter concerns human rights, a theme that in our opinion has dominated the agenda especially since 1989. In general terms, the initial Chinese perception of the UN was one of a genuine belief in the Charter as the basis for an international legal order. This belief, displayed until 1958, was met with disillusionment and from then onwards we can observe a hardening of its conceptualisation of international legal order. This resulted in the leaning towards the dualist conception of international law emphasising sovereignty and consent. It was followed by a period (1965-1969) where lack of interest and the victimisation of China by the international society were heightened by the 'purification' goal of the Cultural Revolution.[10]

In 1949, the proclamation of the People's Republic of China (PRC) beclouded the issue of Chinese international representation and showed the impact of both international and domestic factors. Victory belonged to a Communist movement, which along with the increase of the Cold War tension and the majority displayed by western countries at the UN, resulted in the continuity of the representation of China by the Republic of China (ROC). At this time, the relationship between China and international law was characterised by the principles of sovereignty, non-interference, peaceful coexistence and socialist internationalism. For the Chinese, power prevailed over international legal norms as the main regulatory mechanism in the international legal system. This perception resulted not only from the foreign incursions into Chinese sovereignty but also from the Marxist approach that international law was a tool for great powers to maintain a highly favourable *status quo*.[11] It embraced fully the idea of sovereignty asserting that "it is the core of all fundamental principles of international law. The principles of non-intervention in internal affairs, mutual non

[10] Samuel S. Kim, op. cit., pp. 408-414 and see as well "The People's Republic of China and the Charter-based international legal order", in *American Journal of International Law*, Vol. 72, nº 2, 1978, pp. 317-349.
[11] Suzanne Ogden, "The approach of the Chinese Communists to the study of international law, state sovereignty and the international system", in *The China Quarterly*, Vol. 70, June/1977, pp. 315-337, at pp. 316-317.

aggression, equality and mutual benefit, and so forth, are all based on the principle of mutual respect for sovereignty."[12] China had finally stood up.

The Chinese recognition problem is a story that cannot be told without taking into account the role of the superpowers and the Cold War, as well as its domestic revolutionary approach. Additionally, it raised the issue of the elements needed for the recognition of a country or a new government, making the political prevail over the legal aspects. In 1949, the PRC not only controlled almost all of its territory but also exercised its government and administration in a stable way.[13] Furthermore, it did so with the support of the majority of the Chinese population and affirmed the will and the ability to perform its international obligations, as well as being a peace-loving nation thereby fulfilling the UN's criteria for admission. It also expressed desire to participate in the work of the UN.[14]

The perception that the post-war legacy was going to be based on good faith and the maintenance of the Great Alliance,[15] perpetuated in the institutional framework of the UN, did not materialise. Tensions escalated between the US and the SU in Iran and Azerbaijan, Czechoslovakia, Turkey, during the Greek Civil War and especially, in the first Berlin Blockade. In response to this, the Vandenberg Resolution permitted the US to establish its first alliance in peace time, in the shape of the North Atlantic Treaty Organization (NATO) in 1949. The 'Truman Doctrine' and the Marshall Plan helped the Americans to counterbalance the Soviet pressure in Europe. In Chinese affairs, the US had clearly supported the Guomindang and Washington's policy towards the Chinese Communist Party (CCP) went from indifference to profound hostility. The actions of the Dixie Mission of 1944, which favoured support for the CCP, were chimerically against

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[12] Yang Hsin and Ch'en Chien, "Expose and criticize the imperialists' fallacy concerning the question of state sovereignty" published in 1964 and reproduced in Jerome Alan Cohen and Hungdah Chiu, *People's China and International Law, A Documentary Study*, Vol. I, Princeton University Press, Princeton, 1974, pp. 110-118, at p. 110.

[13] See Kenneth Lieberthal, *Governing China, from Revolution through Reform*, W. W. Norton & Co., New York and London, 1995 and Jack Gray, *Rebellions and Revolutions, China from the 1800s to the 1980s*, Oxford University Press, Oxford, 1990.

[14] See Rosemary Foot's chapter entitled "United States hegemony and international legitimacy: the Chinese representation issue at the UN", in her book *The Practice of Power, U. S. Relations with China since 1949*, Clarendon Press, Oxford, 1997, pp. 22-51.

[15] Melvyn P. Leffler, "National Security and US Foreign Policy", in Melvin P. Leffler and David S. Painter (eds.), *Origins of the Cold War, An International History,* Routledge, London and New York, 1994, pp. 15-52, at p. 17.

President's Truman General Order number 1, which implied the surrender of Japanese forces in China only to the Guomindang. The CCP's victory in the Chinese Civil War launched the discussion about the "lost chance" in China.[16] In other words, if a different American foreign policy could have prevented the alignment of the 'new China' with the Soviet bloc, or on the contrary, due to the ideological element such a goal was simply out of reach.

The birth of the PRC was explained by the "China White Paper", in which it was stressed that the US had done all it could, and that the defeat of the Guomindang forces lay in its decadence, corruption and incompetence. The way China was perceived in terms of foreign policy was associated with the attempts to define the best way to fight Communism and the Soviet threat. Within the US, there were those, such as George Kennan who defended the strategy of focusing on the containment of the Soviet threat rather than Communism as a whole. Within this line of thinking, he considered that it was vital for the US to determine key areas in which to act, since not only were resources limited but a universal role of the US was against the American national interest. Kennan privileged a selective foreign policy based on what he called "strong points" that were crucial for the defence of US. In his view, Japan was the strongest anchor of American interests in Asia and the US should avoid entangling China.[17] Nevertheless, the potential offered by China was present in the fact that the Communist bloc was not monolithic. This perception stemmed from the approach of Tito who favoured a nationalist approach to Communism rather than embracing Soviet leadership, and his actions resulted in the expulsion of Yugoslavia from the Cominform and the removal of its headquarters from Belgrade. The Yugoslavian example was particularly pertinent because it resembled the Chinese revolution, since both had been successful on their own rather than led by the Red Army. Most of Kennan's

[16] See Michael Schaller, *The United States and China in the Twentieth Century,* Oxford University Press, New York and Oxford, 1979, especially Chapter 6 entitled "The red and yellow perils", pp. 123-145, Okabe Tatsumi, "The Cold War and China", in Yonosuke Nagai and Akira Iriye (eds.), *The Origins of the Cold War in Asia*, Tokyo University Press, Tokyo, 1979, pp. 224-251, and Immanuel Hsü, *The Rise of Modern China*, Oxford University Press, Oxford and New York, 1995 (5th Ed.), chapter 25 entitled "The Civil War, 1945-1949", pp. 619-644.

[17] On the general issue of containment strategies see John Lewis Gaddis, *Strategies of Containment, A Critical Appraisal of Post War American National Security Policy*, Oxford University Press, Oxford, 1982.

views were shared by Dean Acheson, who was prepared to recognize the PRC.[18] Despite this initial approach, and within the atmosphere of witch-hunting launched by Senator McCarthy, a major change was made in the priorities of American foreign policy and the way to fight Communism. The original concept of George Kennan's containment was broadened by the NSC-68 document privileging the image of communism as a coherent bloc, and China as a subordinate of Moscow. To this shift, much contributed the fact that the US had lost nuclear monopoly in August 1949; the signature of the Sino-Soviet alliance in February 1950 and the pressure of Congress and public opinion.[19] This document "(...) disallowed any grey areas. It hardly distinguished between Soviet expansion, national communist movements, or insurgents fighting in strictly local conflicts."[20] All these elements were heightened with the Korean incident in June 1950 and the war that followed. The invasion of South Korea by the North Koreans was seen as orchestrated by the Kremlin. It is now known that "contrary to some belief, the Chinese communist leadership did not enter the Korean War either full of self-assertive confidence or for primarily expansionist reasons."[21] The reaction of the PRC was more reactive than active, and "China's warnings were outweighed by the optimism resulting from MacArthur's initial military success."[22] Furthermore, the PRC was deeply involved in the land reform and its economic recovery from the chaos originated by a devastating Japanese occupation and civil war.[23] In order to fulfil this economic priority and to relieve inflationary pressures, the PRC reduced its military budget and focused on regaining Taiwan and Tibet, as well as the resolution of the problems raised by minorities.[24] The US responded with the unconditional support for South Korea within a UN multinational force and sent the seventh fleet to patrol the Taiwan Strait. After the Korean War, the Americans were more committed to military assistance to Southeast Asia (including Taiwan), bilateral and multilateral

[18] Warren Cohen, "The United States and China since 1945", in Warren Cohen (ed.), *New Frontiers in American-East Asian Relations, Essays Presented to Dorothy Borg*, Columbia University Press, New York, 1983, pp. 129-167, at p. 137.
[19] *Idem, ibidem.*
[20] Michael Schaller, op. cit., p. 131.
[21] Allen Whiting, *China Crosses the Yalu River, the Decision to Enter the Korean War*, Stanford University Press, Stanford, 1968 (1st Ed. 1960), p. 159.
[22] Michael Schaller, op. cit., p. 135.
[23] Jack Gray, op. cit., pp. 288-289.
[24] Allen Whiting, op. cit., p. 45.

alliances, and massive armament build up. In 1953, Congress adopted a resolution opposing the representation of Communist China.[25]

For China, the Korean War meant the failure to get the economic recovery programme starting, that Taiwan was now an even harder issue to resolve since *rapprochement* with the US and Japan was impossible, and it created some resentment against the SU. This was due to the fact that Soviet aid was not only expensive but late. In a sense, the Korean War was started by Stalin's SU and ended by Mao's China.[26] The Korean War was the event that began to crack the "honeymoon period" between the SU and China and although China had no wish for war, the strategy of General MacArthur left it with no choice, and bearing all the expenses of the war effort.[27] The relationship between the SU and China was far from linear. In fact, Mao Zedong's victory in the Chinese Civil War was a surprise. After a gruelling twenty-eight years of struggle, China had become the world's most populous Communist nation. Although sharing the same ideological approach to reality with the SU, Mao Zedong did not just import Marxism-Leninism but adapted it to Chinese reality. Karl Marx thought that "(...) the peasant, (...)" is not "(...) revolutionary, but conservative" and he considered them to be "(...) reactionary, for they try to roll back the wheel of history."[28] The starting point of Mao Zedong was the opposite. Mao, as early as 1927, was facing a mainly agrarian country and, to him, the countryside and the peasantry were the engine of the revolution. His strategy for guerrilla war was based on the countryside which would then spill-over to the rest of the Chinese territory if only because the Guomindang dominated the urban regions. The "sinicisation" of Marxism-Leninism made by Mao Zedong caused some distrust in Stalin, and the Soviet attitudes towards the CCP during the Civil War and after 1949 were mixed. Despite the Karakhan Declaration of 1919, in which Lenin gave up all the privileges in China, especially in Manchuria and Outer Mongolia resulting from the unequal czarist treaties, the SU clearly supported the GMD. Mao's leadership was only

[25] Quincy Wright, "The Chinese recognition problem", in *American Journal of International Law*, Vol. 49, nº 3, 1955, pp. 320-338 at p. 335.
[26] See Nakajima Nimeo, "Sino-Soviet confrontation in historical perspective", in Yonosuke Nagai and Akira Iriye (eds.), op. cit., pp. 203-223.
[27] Lowell Dittmer, *Sino-Soviet Normalization and its International Implications, 1945-1990*, University of Washington Press, Seattle and London, 1992, p. 22.
[28] Karl Marx and Friedrich Engels, *The Communist Manifesto*, Penguin Classics, London, 1985, p. 91.

consolidated after the struggle for power with Zhang Guotao, the "Long March" of 1934-1935 and the speech of Zunyi.[29] Furthermore, Mao rejected the strategy of the Komintern, which he considered to be inadequate and reacted against the idea backed by Stalin of a "second united front from above" during 1937-1945. In practical terms, it meant that the war efforts against the Japanese would be directed by the Guomindang. Furthermore, Stalin signed a non-aggression Pact with the Guomindang and a Treaty in 1945. [30] Only after April 1949 did the SU's attitude towards the CCP begin to change and, in February 1950, the SU and the PRC signed a Treaty of Friendship, Alliance and Mutual Assistance.

Moreover, in these years Mao Zedong made some strategic considerations which have led some to argue that these were the fundamental reasons why the Sino-Soviet alliance was made.[31] First of all, it was too risky to make a positive approach to the US because the Cold War had already begun, and Europe was the centre of superpower rivalry. Secondly, an alliance with the fatherland of Communism would only consolidate Mao's internal leadership within the CCP. Thirdly, the SU was an enormous threat to the PRC because it was a neighbour state with strong and expansionist characteristics and a treaty could address these issues. In the treaty of 1950, Mao Zedong had to concede on several aspects, such as the recognition of the "independence" of Outer Mongolia, Sino-Soviet joint-stock companies for the exploration of natural resources in Xinjiang, joint-ownership of the Chinese Eastern and Southern Manchurian Railway and the continuation of the use of Port Arthur by the SU. However, the Soviets sent both economic aid and experts in order to assist Chinese modernisation. Moreover, Mao Zedong was expecting to assume with Stalin the leadership of the world Communist movement and help consolidate the proletarian internationalism. In 1936, he said that "We are certainly not fighting for an emancipated China in order

[29] See Michael H. Hunt, *The Genesis of Chinese Communist Foreign Policy*, Columbia University Press, New York, 1996, especially pp. 125-158 entitled "Mao Zedong takes command".
[30] Jack Gray, op. cit., pp. 273-274.
[31] Nakajima Nimeo, "Foreign relations: from the Korean War to the Bandung line", in Roderick MacFarquhar and John K. Fairbank (eds.), *The Cambridge History of China, Emergence of Revolutionary China: the Search for a Chinese Road*, Vol. 14, Part 2, General Editors Denis Twitchett and John King Fairbank, Cambridge University Press, Cambridge and New York, 1995, (1st Ed.1987), pp. 259-289, at pp. 264-265.

to turn the country over to Moscow!"[32] To sign the Sino-Soviet alliance meant Soviet predominance (but not dominance) mainly due to the charisma of Stalin. The desire for independence was not just a formality but essentially a moral concept arising deep from the Chinese experience over the previous 150 years, and containing regeneration and mobilisation of the Chinese people themselves. It also encompassed a national strain which emphasised the uniqueness of being Chinese and how, under harsh conditions, the Chinese had been able to overturn the odds and become independent, also known as the 'Yenan Syndrome.'[33] The message to other revolutionary projects was that the main factors are the internal ones rather than the external, which are in fact secondary to success.

Internationally, the recognition of the PRC as the legitimate government of China had already been made by the countries belonging to the Communist bloc but also by Denmark, Israel, the Netherlands, Norway, Sweden, and Britain, and developing countries such as India.[34] At the UN, the existence of a *de facto* government of Chinese territory by the PRC raised the issue of the Chinese representation. In the beginning, Taipei counter-argued that the Beijing government resulted from Soviet aggression and not popular support. This line of reasoning did not hold water, and the issue of Chinese representation was placed on the table both at the General Assembly and the Security Council resulting in the establishment of a Special Committee to study the question of Chinese representation.[35] In the following years, it was taken up at the General Assembly and the Security Council by the SU and its allies asking for the expulsion of the ROC representatives and their replacement by the PRC.[36]

In spite of the origins of the Korean War and the misperceptions on the American and Chinese sides, the fact remains that China was considered to be an "aggressor" state by the UN. In addition, President Eisenhower and John Foster Dulles hardened their policy of containment towards the PRC. Not only was a treaty signed with Taiwan but after the first Taiwan Straits' crisis, the Formosa

[32] Stuart Schram, *The Political Thought of Mao Tse-Tung*, Cambridge University Press, Cambridge, 1989, p. 419.
[33] Michael B. Yahuda, "Moral precepts in Chinese foreign policy: the concept of independence", in R. Pettman (ed.), *Moral Claims in World Affairs*, Croom and Helm, London, 1979, pp. 147-169.
[34] Quincy Wright, op. cit., p. 322.
[35] See *Y. U. N. 1950*, pp. 381-385 and pp. 421-435.
[36] *E. g.* in 1951 it was Poland which suggested the issue in *Y. U. N. 1951*, pp. 265-266.

Resolution of 1955 was approved. It enabled the US to assist not only the islands of Taiwan and Pescadores, but also Quemoy and Matsu, which were targets of Chinese bombings. This tougher foreign policy, rhetorical or not, was symbolised by the refusal of Dulles to shake hands with Zhou Enlai at the Geneva Conference, in 1954.[37] Despite the 1955-1957 signals from the Chinese leadership of improved relations, including the release of imprisoned Americans, invitations to journalists, students and cultural groups, and a softening of the anti-American propaganda, the bilateral relationship did not improve. In 1958, another crisis in the Taiwan Straits broke out, partially due to the US decision to install Matador missiles in Taiwan.

Likewise, the Chinese relationship with the other superpower was not fulfilling expectations and culminated in the Sino-Soviet split. This split had enormous repercussions, not only in the Communist bloc, but also in the whole course of the Cold War. The fact that the two largest Communist states claimed to be following the *true* path of Communism weakened its universal claims. The picture got worse when, in the late 70s, the PRC, Vietnam and Cambodia were all fighting each other, without even trying "(...) to justify the bloodshed in terms of a recognizable *Marxist* theoretical perspective."[38] The idea of a monolithic Communist bloc was buried. Furthermore, the Sino-Soviet split virtually isolated the PRC in the world (perhaps with the exception of Albania) and facing an enormous security threat from the SU. This led however to the *rapprochement* with the US, in 1969, changing the bipolar logic of the Cold War. From all the elements of this conflict, we believe that the most important one was the ideological struggle. There is not a consensus as to when the split began, but 1958 seems to be the first year when it took on a systematized form and was ranked a priority in the Chinese foreign policy agenda.[39] Others trace the Sino-Soviet split to 1950,

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[37] The legacy of the Eisenhower and Dulles strategy towards the PRC has not been consensual. Some authors stress the hard-line policy while others see it as much more pragmatic and flexible. For an excellent overview of the literature regarding this issue see Warren Cohen, op. cit., pp. 129-167 and Nancy B. Tucker, "Continuing controversies in the literature of US-China Relations since 1945, in Warren Cohen (ed.), *Pacific Passage-The Study of American-East Asian Relations on the Eve of the Twentieth- First Century,* Columbia University Press, New York, 1996, pp. 213-246.

[38] Benedict Anderson, *Imagined Communities, Reflections on the Origin and Spread of Nationalism,* Verso, London and New York, 1991, p. 1.

[39] Allen Whiting, "The Sino-Soviet split", in Roderick MacFarquhar and John K. Fairbank (eds.), op. cit., 478-538.

arguing that the signs of ideological dispute were already indelible due to the concessions that Mao had to make to Stalin.[40] In our view, in order to understand the reasons for this dispute we have to add to the Korean War and the aggressive American foreign policy, the death of Stalin and the ascendancy of Nikita Khrushchev. Nevertheless, the struggle for power in the SU enabled the PRC to play a major role at the Geneva Conference of 1954.

In the same year, the PRC and India enunciated the five principles of foreign policy: mutual respect for each other's territorial integrity and sovereignty, mutual non-aggression, mutual non-interference in each other's internal affairs, equality and mutual benefit, and peaceful co-existence.[41] These principles formed the backbone of the Joint Communiqué of the Bandung Conference and the Non-Aligned Movement of the following year, and represented a Chinese appeal for common ground between all the developing countries centred on the fight against colonialism.[42] This new foreign policy approach can be observed also at the UN, where it was India that from 1956 to 1959, although unsuccessfully, asked that the issue of Chinese representation be put on the agenda of the General Assembly.[43] At the same time, Zhou Enlai asserted China's independence by stating that "it is by the efforts of the Chinese people that the Chinese revolution has won its victory. It is certainly not imported from without."[44] The effort to gain greater equality with the SU was patent in the development of the idea of peaceful co-existence aiming at replacing 'socialist internationalism' or 'proletarian internationalism', which espoused Soviet supremacy.[45] Nikita Khrushchev had a very different way of looking at Communism. Within the Soviet bloc, his "secret speech" at the twentieth congress of the Communist Party of the Soviet Union

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[40] Immanuel Hsü, op. cit., p. 675.
[41] "Agreement between the Republic of India and People's Republic of China on Trade and Intercourse between Tibet Region of China and India", signed on 29th April 1954 and "Joint Statement by Chou En-lai and Nehru" issued on 28th June 1954 both reproduced in Jerome Alan Cohen and Hungdah Chiu, op. cit., pp. 119 and pp. 120.
[42] "Text of Premier Chou En-lai's Supplementary Speech at the Asian-African Conference", 19th April 1955 and "Joint Communiqué of Bandung Conference", 24th April 1955, reproduced in *ibidem*, pp. 120-123 and pp. 123-124.
[43] See *Y. U. N. 1956*, p. 138 (resolution 1108(XI), *Y. U. N. 1957*, pp. 97-98 (resolution 1135 (XII), *Y. U. N. 1958*, p. 91 (resolution 1239 (XIII) and *Y. U. N. 1959*, p. 78 (resolution 1351 (XIV).
[44] "Text of Premier Chou En-lai's Supplementary Speech at the Asian-African Conference", 19th April 1955, reproduced in Jerome Alan Cohen and Hungdah Chiu, op. cit., pp. 120-123, at p. 122.
[45] "Statement by the Government of the People's Republic of China on the Declaration by the Government of the Soviet Union on 30th October 1956" and "Guiding Principles" , in *ibidem*, pp. 136-138 and pp. 139-140.

(CPSU), in which he completely repudiated Stalin's legacy, had different interpretations. In Eastern Europe, this was misunderstood as total autonomy and resulted in the invasion of Hungary. Imre Nagy, unlike Gomulka, wanted Hungary out of the Warsaw Pact Organization. Parallel to this repression, Tito's Yugoslavia was rehabilitated from the 1948 accusation of 'ideological deviation' and, in 1955, the Soviet leader visited Belgrade.[46] In China, the demolition of Stalin's myth and the cult of his personality were understood quite differently. They were considered by Mao Zedong as a personal attack, adding to the lack of respect that he felt towards Khrushchev. It is clear that the personalities of the Soviet leaders and Mao influenced this bilateral relationship.[47]

Furthermore, to the Soviet leader the inevitable struggle between the East and the West could be avoided, because nuclear weapons had made war too costly and, ultimately, the economic socialist model would prevail. Similar considerations were made on the other side of the fence and, as a result, the superpowers met in Geneva in 1955. To Mao Zedong, the theory of 'Peaceful Co-Existence' with the West was totally unacceptable. It was even less understandable that the SU, after successfully launching the Sputnik and testing an inter-continental ballistic missile, should seek compromise with the US. At the time, Mao considered that the East wind was prevailing over the West wind.[48] 1958 was the year in which an already fragile alliance took the final blow, when Khrushchev proposed a nuclear test ban to the US. To the Chinese, this was seen as an attempt to prevent them from acquiring nuclear power and enforced the perception that they were being left behind. In 1958, in the secret Beijing meeting between Mao Zedong and Khrushchev, Chinese critiques of Yugoslavia were harsher than the Soviet ones. In the Warsaw Pact meeting, the Chinese leadership stressed once again the importance of the technological superiority of the Communist world and that in the case of nuclear war, "(...) China could survive the loss of half its population."[49] These resentments grew higher after the second

[46] Geir Lundestad, *East, West, North, South, Major Developments in International Politics, 1945-1996,* Scandinavian University Press, Oslo, 1997, pp. 224-268.
[47] See A. Doak Barnett, *China and the Major Powers in East Asia*, The Brookings Institution, Washington, D. C., 1977, especially his chapter on "China and the Soviet Union", pp. 20-87, at pp. 62-68.
[48] Stuart Schram, op. cit., pp. 407-408.
[49] Allen Whiting, op. cit., pp. 488-489.

Taiwan Straits' crisis, in which the Soviet response was not fulfilling. In addition, Khrushchev started to criticize the Great Leap Forward and the communes which, to Mao, after the failure of the Soviet-influenced First Five Year Plan, were the way to establish a distinctive Chinese path. We can see in this measure, not a deliberate challenge to the SU's leading role, but an implicit one by refusing the Soviet model.[50]

After these events, the Sino-Soviet split escalated to military clashes. In 1959, the SU abrogated the 1957 Treaty of nuclear assistance to China and, in 1960, withdrew all its experts and technicians from Chinese soil. Internationally, the US and the SU met at Camp-David and, in 1962, a nuclear test partial ban treaty was signed. During the same year, the world watched the Cuban missile crisis, which the Soviets handled without consulting the Chinese. Furthermore, the SU refused to support the PRC in their war against India in 1962. The ideological struggle between the SU and the PRC also had its effect on the remaining Communist members and the Soviets' biggest ally was Yugoslavia in the same way as Albania was for the Chinese. In 1964, the Chinese exploded their first atomic bomb and just two days after Brezhnev's coup, China also had its "paper tiger".[51] Notwithstanding, having achieved nuclear status was "(...) a cause for Chinese concern as well as pride."[52] The Sino-Soviet rift caused great impact in the PRC and the cultural revolution may be understood as "Mao's movement against the international "revisionism" by preventing it from disturbing the domestic scene."[53] In 1968, while China was going through this civil turmoil, the Soviets invaded Prague and declared the "Brezhnev Doctrine". This was the last straw for the Chinese, who thought an invasion was imminent, and it was the fuel for the military clashes on the Ussuri and Amur rivers and the Xinjiang border in 1969. During all this period, the ideological dispute was intense, and the SU was considered to be the 'social imperialist' and a 'revisionist' country.[54]

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[50] Lowell Dittmer, op. cit., p. 30.
[51] Stuart Schram, op. cit., p. 404.
[52] Allen Whiting, op. cit., p. 538.
[53] Steven M. Goldstein, "Nationalism and Internationalism: Sino-Soviet Relations", in Thomas Robinson and David Shambaugh (eds.), *Chinese Foreign Policy, Theory and Practice*, Clarendon Press, Oxford and New York, 1997, pp. 224-265, at p. 250.
[54] See Editorial Departments of *People's Daily* and *Red Flag*, "The leaders of the CPSU are the greatest splitters of our times", 4th February 1964, "Peaceful Coexistence-two diametrically opposed policies" of 12th

Nonetheless, the Sino-Soviet split only fully materialised at the UN from 1963 onwards, since the initiative to request that the issue of Chinese recognition be included in the agenda of the General Assembly was still made by the Soviets from 1960 to 1962. In fact, in 1961, and after a proposal of New Zealand to discuss the matter thoroughly, the Soviets proposed not just that the representation be discussed but added the restoration of the lawful rights of the PRC; an action that was repeated in 1962.[55] From then onwards, the SU's effort was taken up by Albania and other developing countries. In 1963, it was Albania which requested that the restoration of the lawful rights of the PRC be included in the agenda of the General Assembly, and co-sponsored the proposal along with Cambodia.[56] In 1964, this procedure was repeated by Cambodia which was followed by other countries.[57] In 1965, several developing countries took up the banner of restoration rights to the PRC and propounded a draft resolution.[58] On the other side of the fence, western countries proposed that the Assembly reaffirmed its 1961 procedural resolution that stated that "any proposal to change the representation of China is an important question" and, therefore, in accordance with article 18 of the Charter needed a two-thirds' majority.[59] This procedural draft resolution was adopted, rendering the resolution unsuccessful.[60] The situation remained until 1970, even though support for the PRC increased.[61]

December 1963, in Jerome Alan Cohen and Hungdah Chiu, op. cit., pp. 140-143 and pp. 143-153.

[55] See *Y. U. N. 1960*, pp. 170-173 (including resolution 1493 (XV), *Y. U. N. 1961*, pp. 124-129, and *Y. U. N. 1962*, pp. 114-117.

[56] See *Y. U. N. 1963*, pp. 31-34.

[57] Albania also wrote a letter requesting that this issue be included in the agenda. The Cambodian proposal was co-sponsored by Algeria, Congo Brazzaville, Guinea, Mali, Indonesia, Burundi, Cuba, Ghana and Romania; see *Y. U. N. 1964*, pp. 128-129.

[58] These were Albania, Algeria, Cambodia, Congo Brazzaville, Guinea, Mali, Burundi, Cuba, Syria, Ghana and Romania; this move was followed by the sponsorship of a resolution by all countries with the exception of Burundi which were joined by Somalia and Pakistan, in *Y. U. N. 1965*, pp. 176-180.

[59] Resolution 1668 (XVI) is in *Y. U. N. 1961*, pp. 128-129.

[60] Resolution 2025 (XX) was adopted by a roll-call of 56 to 49 with 11 abstentions; see *Y. U. N. 1965* p. 179.

[61] In 1966, Albania, Algeria, Cambodia, Congo Brazzaville, Guinea, Mali, Cuba, Syria, and Romania requested that the issue of the restoration of the PRC's rights at the UN be discussed; it resulted in a draft resolution sponsored by Albania, Algeria, Cambodia, Congo Brazzaville, Cuba, Guinea, Mali, Mauritania, Pakistan, Syria, and Romania that was defeated after the adoption of procedural resolution 2159 (XXI), in *Y. U. N. 1966*, pp. 137-138. In 1967, Albania, Algeria, Cambodia, Congo Brazzaville, Cuba, Guinea, Mali, Syria, and Romania requested the re-opening of the issue; it was followed by a draft resolution sponsored by Albania, Algeria, Cambodia, Congo Brazzaville, Cuba, Guinea, Mali, Mauritania, Pakistan, Romania, Sudan and Syria that ended in failure after the proposal for the reaffirmation of the procedural resolution was adopted as resolution 2271 (XXII), in *Y. U. N. 1967*, pp. 133-140. In 1968, Albania, Algeria, Cambodia, Congo Brazzaville, Cuba, Guinea, Mali, Mauritania, Romania, Syria, and Southern Yemen requested the inclusion of the issue; a draft proposal was proposed by Albania, Algeria, Cambodia, Congo Brazzaville,

Fundamental to the 1971 events was the change in the Sino-American relationship with the Nixon presidency. Instead of accepting the initiative of Leonid Brezhnev to launch a pre-emptive attack on the Chinese nuclear facilities, President Nixon engaged in diplomatic relations with the PRC.[62] Nixon's strategy was patent in his speech in 1969, known as the 'Guam or Nixon Doctrine' which called for a selective American commitment concerning Asia. The US would obviously continue to honour their bilateral and multilateral alliances, but there would be no more land forces to fight wars in Asia. In the case of non-nuclear aggressions, the nation directly threatened would have to assume the primary responsibility of providing the manpower for its defence. This idea was shared by George Kennan, when he urged for the strengthening of national movements, to avoid the direct military involvement of American forces. Along with the concept of selective security, President Nixon was making the way for what he called the 'Vietnamization of the Vietnam War' and the consequent withdrawal of the American troops.[63] He was looking for an honourable extrication from this war, which meant the maintenance of the territorial integrity of South Vietnam, not the capitulation required by the North Vietnamese.[64] President Nixon reversed two decades of aggressive foreign policy towards the PRC, and due to his virulent anti-Communist past, he was especially up to the task, and less susceptible to McCarthy-like accusations of selling the country to Communism or of neglecting American national interest.

Cuba, Guinea, Mali, Mauritania, Pakistan, Romania, Southern Yemen, Sudan, Syria, United Republic of Tanzania, Yemen and Zambia, but to no avail due to the adoption of the procedural resolution 2389 (XXIII), in *Y. U. N. 1968*, pp. 160-167. In 1969, the request was made by Albania, Algeria, Cambodia, Congo Brazzaville, Cuba, Guinea, Mali, Mauritania, Romania, Southern Yemen, Syria, United Republic of Tanzania, Yemen, and Zambia; it was followed by the seventeen-power draft of Albania, Algeria, Cambodia, Congo Brazzaville, Cuba, Guinea, Iraq, Mali, Mauritania, Pakistan, Romania, Southern Yemen, Sudan, Syria, United Republic of Tanzania, Yemen and Zambia which was defeated by procedural resolution 2500 (XXIV), in *Y. U. N. 1969*, pp. 153-158. In 1970, Albania, Algeria, Cuba, Guinea, Iraq, Mali, Mauritania, People's Republic of Congo, Romania, Syria, Southern Yemen, Yemen, Sudan, United Republic of Tanzania, and Zambia requested the inclusion of the restoration of the lawful rights to the PRC; a draft resolution was proposed by Albania, Algeria, Cuba, Guinea, Iraq, Mali, Mauritania, Pakistan, People's Republic of Congo, Romania, Somalia, Southern Yemen, Sudan, Syria, United Republic of Tanzania, Yemen, Yugoslavia, and Zambia; the eighteen power draft was defeated due to the adoption of the procedural resolution 2642 (XXV), in *Y. U. N. 1970*, pp. 194-200.

[62] Immanuel Hsü, op. cit., p. 684.

[63] Henry Kissinger, *Diplomacy,* Simon and Schuster, London and New York, 1995, chapter 27 entitled "Vietnam: the extrication: Nixon", pp. 674-702, at p. 681.

[64] *Ibidem*, p. 675.

From the Chinese side, there had been positive signals to the US in order to start conversations in the autumn of 1968, a change of attitude mainly due to the escalation of the Sino-Soviet split, the invasion of Czechoslovakia and the proclamation of the "Brezhnev Doctrine". The fear that what happened to the Czechoslovaks could happen to the Chinese made them look for a credible counterweight to the Soviet military threat and especially after the clashes on the common border in 1969. Furthermore, the escalation of the Vietnam War was also the object of great concern to the PRC, bearing in mind the 'Yalu river precedent' of the Korean War. After the secret visit of Henry Kissinger to Beijing, in 1971, followed by the visit of President Nixon, in 1972, the Shanghai Communiqué was signed.[65] Nixon had "(...) extended to Zhou the historic handshake, which Dulles had shunned at Geneva in 1954."[66] The *rapprochement* between the PRC and the SU added a tri-polar dimension to the Cold War, and "although China was not a global power it did affect the global balance."[67] To the Americans, the 'China Card' helped to counterbalance the SU and to achieve 'peace with honour' in the Vietnamese fields, although for some it just meant an American withdrawal.[68] It also helped to create the spirit of *detente* that enabled the two superpowers to sign arms reduction treaties in 1972: the Strategic Arms Limitation Talks and the Anti-Ballistic Missiles Treaty. Nixon's triangular diplomacy was able to link the Sino-American *rapprochement* with a positive effect on the American-Soviet relationship. This *rapprochement* was the final blow in the myth of monolithic Communism and brought an end to the reign of the 'Domino Theory.' To the PRC, American support against the social imperialist threat of a hegemonic SU was important, as was the signature of the Sino-Japanese Communiqué in 1972. It normalised this relationship reversing the "Yoshida Doctrine" and establishing diplomatic relations with the PRC. This bilateral relationship was furthered by the 1978 Sino-Japanese treaty of peace and friendship.[69] The PRC also expected an

[65] "Joint Communiqué between the People's Republic of China and the United States of America, February 27th 1972", reproduced in Harry Harding, *A Fragile Relationship, the United States and China since 1972*, The Brookings Institution, Washington, D. C., 1992, pp. 373-377.
[66] Immanuel Hsü, op. cit., p. 727.
[67] Michael Yahuda, *The International Politics of the Asia-Pacific, 1945-1995*, Routledge, London and New York, 1996, p. 202.
[68] Michael Schaller, op. cit., p. 179.
[69] See Akira Iriye, "Chinese-Japanese relations, 1945-1990" and Hidemori Ijiri, "Sino-Japanese controversy

increase in trade and technological exchanges, thereby helping its economy to get off the ground. In addition, regarding Taiwan, the Shanghai Communiqué recognised that there was only "one China, but not now". The PRC also agreed on the maintenance of American diplomatic and military presence on the island, at least for the time being. Despite the fact that the US broke diplomatic relations with Taiwan and abrogated the Treaty of Mutual Defence of 1954, in 1979, Congress approved the Taiwan Relations' Act. It had the aim of trying to safeguard some of Taiwan's prerogatives. At the same time, official diplomatic relations were formalized, and Deng Xiaoping visited the US.[70]

At the UN, on 25th October 1971, the General Assembly decided to restore all the rights to the PRC and recognise it as the only legitimate representative of China. It represented the pinnacle of all the diplomatic efforts made by China regarding the UN, which was incorporated as a specific goal of its foreign policy. There were different strategies used, such as the "banquet diplomacy", expanding people-to-people and state-to-state relations, media coverage, and increasing aid diplomacy to developing countries to gain support for the PRC cause.[71] The US tried through a procedural resolution to recognise the PRC (along with its seat as a permanent member of the Security Council) and, at the same time, to prevent the expulsion of the ROC. This procedural manoeuvre failed and the draft resolution was rejected by a roll-call of 59 against to 55 in favour and 15 abstentions, after which the representative of ROC decided not to take part in any further proceedings of the General Assembly. The restoration of the rights to the PRC and the expulsion of ROC were affirmed by resolution 2758 (XXVI) which resulted from a twenty-three country draft.[72] At the Security Council, the PRC took its seat on 23rd November 1971. The language of the resolution was very clear and

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since the 1972 diplomatic normalization", both in Christopher Howe (ed.), *China and Japan, History, Trends, and Prospects*, Clarendon Press, Oxford, 1996, pp. 46-59 and pp. 60-82 respectively.

[70] "Joint Communiqué on the establishment of diplomatic relations between the United States of America and the People's Republic of China, January 1st, 1979", in Harry Harding, op. cit., pp. 379-380.

[71] The authoritative account of the entry of China into the UN is Samuel S. Kim, *China, the United Nations, and the World Order,* Princeton University Press, Princeton, 1979. On this specific issue see pp. 102-104.

[72] The initial request that the issue be placed in the agenda was made by seventeen members: Albania, Algeria, the Congo, Cuba, Guinea, Iraq, Mali, Mauritania, People's Democratic Republic of Yemen, Romania, Somalia, Sudan, Syria, Yemen, United Republic of Tanzania, Yugoslavia, and Zambia. They were joined by Burma, Ceylon, Equatorial Guinea, Nepal, Pakistan, and Sierra Leone in the sponsorship of a draft resolution. This draft was turned into resolution 2758 (XXVI) by a roll-call vote of 76-35-17; for the debate, the procedural resolution and the text of the adopted resolution see *Y. U. N. 1971*, pp. 126-136.

acknowledged the PRC as the legitimate representative of Chinese people, stressed its status as one of the five permanent members of the Security Council, and expelled the representatives of ROC, adding that they had unlawfully occupied the seat at the UN.[73]

To the UN, it was important, since the claim of representing the world was now more credible. It had been quite difficult to claim universality, whilst not actually representing one-fifth of Humanity, and this enhanced its ability to deal with global problems.[74] The representation at the UN was very important for the PRC and that importance is reflected in the composition of its delegation, either at the Security Council led by Ambassador Huang Hua (vice-chairman and permanent representative to the UN) or at the General Assembly led by Ch'iao Kuan-hua (chairman of the delegation). They were considered to be a first rate professional team, with strategic access to key policy makers at home and with a correspondent size.[75] In addition, it adopted a low profile approach trying to understand and internalise the mechanics of the UN, and decided not to take part in most of the subsidiary bodies, commissions and committees.[76] In most areas the approach can be summarised as 'we are not ready yet.' In the Security Council, the same low profile approach was maintained, and especially regarding the use of veto.[77] At the UN, China centred its actions on the defence of developing countries and the opposition to colonialism, imperialism, racial discrimination and *apartheid*. These characteristics have influenced the Chinese approach to the UN human rights' framework.

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[73] Second and third paragraphs of resolution 2758 (XXVI) adopted by the General Assembly on 25th October 1971, in *Y. U. N. 1971*, p. 136:
"Recognising that the representative of the Government of the People's Republic of China are the only lawful representative of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council,
Decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representative of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organisations related to it."
[74] Samuel S. Kim, op. cit., pp. 104-105.
[75] *Ibidem*, pp. 106-107.
[76] *Ibidem*, pp. 110-115.
[77] *Ibidem*, pp. 178-241.

2. Human Rights and Sovereignty: a Chinese Perspective

"The question of human rights was an important issue for the Economic and Social Council. China was ready to work together with all the countries and peoples who loved peace and upheld justice in supporting the struggles of the peoples of the world against imperialism, colonialism and racism and for the attainment and defence of national independence, national sovereignty and fundamental human rights in accordance with the spirit of the Charter."[78]

This declaration of the Chinese representative, Mr. Wang Jun Sheng, was made at the Social Committee, where China was for the first time taking part in the discussions on human rights. In our view, it sums up the Chinese approach to human rights at the time: focus on the violation of collective fundamental human rights such as imperialism, colonialism and racism; therefore, emphasis on the rights of peoples and attainment of national independence as well as sovereignty; basis of such fundamental human rights is the Charter and not the International Bill of Human Rights. Human rights were understood as collective rights and they took priority over the first and second generation. In fact, in 1971 and 1972, human rights were not a major foreign policy concern for the PRC and, domestically, the Cultural Revolution was causing social turmoil and massive violation of those rights. The low profile and cautious attitude adopted by the Chinese representatives at the General Assembly and Security Council was also felt regarding human rights. In 1974, China announced that it had to examine and study both the UDHR and the Covenants, because the former had been adopted prior to 1949 and the latter adopted and signed by ROC.[79]

The position taken concerning the International Bill of Human Rights, namely one of caution and progressive steps, was also present in the Chinese participation at the Commission on Human Rights. Furthermore, not only were

[78] At the Social Committee, Mr. Wang stressed the issue of *apartheid*, racial discrimination in Southern Rhodesia, the situation in the Portuguese colonies, violation of human rights of the Palestinian people, and its support for the release and repatriation of the Pakistani prisoners of war held by India; see summary record of the six hundred and ninety-ninth meeting held on 30th May 1972 and chaired by Miss Lim from Malaysia, UN document E/AC.7/SR. 699.

[79] Samuel S. Kim, op. cit., pp. 485-486.

human rights not part of its foreign policy but they were not a concern to other countries and to the UN. This state of affairs lasted until mid-80s regarding China, and has been very aptly described as "the human rights' exception"; a state of grace mainly due to the information gap, sheer numbers, prejudices in China's favour, absence of lobby, self-exclusion from human rights' debates, and the focus on normalisation of its relations with the outside world.[80] The main concern of the UN was to bring China in and engage it within the framework of international society. Likewise, there was a kind of guilt at having denied China its rightful place at the UN, as well as the tragic history of foreign exploitation. There was also, however, a perception that with its time-honoured civilisation, China was different. Furthermore, there was no information regarding the situation of human rights in China, a gap that was compounded by the language problem. To get a clear picture of what was going on in China, one had to know Chinese. In addition, the sheer numbers were overwhelming and made the ability to deal with the scale of violations, a very difficult task.

Nevertheless, step by step, things began to change as information arrived at an increasing pace. This was due to the 'open-door' policy of Deng Xiaoping which did slightly open China to the outside, along with the increasing commitment of the Chinese government to international human rights. In 1978, the US State Department made its first report on China, a mild and cautious document contrasting with Amnesty International's first report (first ever by an NGO). The latter focused on the violation of human rights due to political imprisonments which after the suppression of the Democracy movement and the arrest of the man who asked for a fifth modernisation, Wei Jingsheng, was given a 'face'. His sentence in 1979 to fifteen years of imprisonment gave greater visibility to lack of freedom of expression. Lobbies focusing on specific issues such as the situation in Tibet or Taiwan began to include these issues, as well as forced abortion and state-sponsored sterilisation, used as means to curb population growth. At the same time, China became more active in the workings of the Commission on Human Rights. It sent observers to the Commission during 1979-1981 and was elected a

[80] The authoritative account is by Roberta Cohen, "People's Republic of China: the human rights exception", in *The Human Rights Quarterly*, Vol. 9, 1987, pp. 447-549. This paragraph draws heavily from this ground-breaking article.

member in 1981. It participated in the workings of the Commission in 1982 and the Sub-Commission in 1984. In 1984, and for the first time ever, it supported the appointment of a Special Rapporteur, in this case to investigate human rights conditions in Afghanistan and, in 1985, supported a resolution of the Commission calling for an investigation into the massive violations of human rights in Chile.[81]

Internationally, the *rapprochement* with the US was a light at the end of the tunnel, although it didn't totally relieve the pressure felt by the PRC. The Soviet policy of "encirclement" continued with the conclusion of a Treaty with Vietnam in 1978, the establishment of two Soviet bases in this country, Danang and Cam Rahn Bay, the Vietnamese membership of the Council for Mutual Economic Assistance, and the invasion of Afghanistan. On the other side, the US continued to sell arms to Taiwan, and newly elected President Reagan was clearly pro-Taiwan. Responding to this international environment, the PRC began what is called a 'policy of equidistance' between the superpowers which were now both regarded as hegemonic. China formalized this policy at the 12th Party Congress in 1982, in a speech made by Hu Yaobang. The Chinese leadership tried to distance itself from the US and began conversations with the SU. At the same time, the economy was booming due to the pragmatic reforms led by Deng Xiaoping and its foreign policy was becoming more moderate, avoiding the ideological radicalisation of the Cultural Revolution.[82] In 1982, the US and China reached an agreement concerning the American arms sales to Taiwan and, in 1984, President Reagan visited Beijing, starting off an era of positive relationship with the PRC. Until 1988, with the exception of the invitation of the Dalai Lama by Congress in 1987, this relationship was the best so far at all levels. Regarding the SU, conversations restarted in 1982: polemics against the PRC in the Soviet press virtually ceased to exist and biannual talks continued. This normalization of the Sino-Soviet relationship was also possible due to the fact that both leaders in these countries were reformers. On the Chinese side, the ascendancy of Deng Xiaoping after the death of Mao Zedong and the arrest of the Gang of Four was important as was, on the Soviet side, the death of Brezhnev and Mikhail "Grand-

[81] *Idem, ibidem.*
[82] See David Shambaugh (ed.), *Deng Xiaoping, Portrait of a Chinese Statesman*, Clarendon Press, Oxford, 1995.

Inquisitor" Suslov, the most ferocious critics of the Chinese revisionism. The Chinese started to reform earlier than the SU, whose first signs were taken by Yuri Andropov, in 1982, and continued by Mikhail Gorbachev, in 1985. De-radicalization on both sides was very important to set the record straight between these two countries. According to the Chinese, there were three major obstacles in this bilateral relationship: the Soviet troops along the Sino-Soviet border and the Asian SS20s located in Siberia, the withdrawal from Afghanistan and the question of the Vietnamese invasion of Cambodia. Gorbachev made clear that it was his intention to fulfil these conditions, especially at Vladivostok and Krasnoyarsk, and in his interview with the Indonesian newspaper, *Merdeka*, in 1987. Parallel to this, in the same year Zhao Ziyang dropped the "anti-hegemony" reference as a major principle of China's policy towards the SU.

Gorbachev's fulfilment of the essential of Deng Xiaoping's three preconditions for normalizing relations paved the way to his visit to Beijing, in May of 1989. Gorbachev's concept of *perestroika*, *glasnost* and his new political thinking allowed for "diversification" in socialist countries, therefore admitting that there is not a unique model of socialism to follow, and enabling ideology to play a low profile in Soviet foreign policy. By doing so, he "(...) focused on reversing the single greatest setback to Soviet foreign policy in the post-War era- the rift between China and the Soviet Union."[83] Ironically, what should have been an enormous commemoration and a foreign policy success ended up in the repression of students who were protesting following the death of Hu Yaobang. Regarding 'internal dissent', both leaders reacted differently, and while Gorbachev went along the "Sinatra Doctrine" which permitted the liberation of Eastern Europe, Deng went the opposite way and adopted a hard-line approach. Thus, the role of the CCP and the Leninist logic of the political elite were reinforced, making the vanguard party the guardian of national leadership and legitimacy.[84]

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[83] Charles Ziegler, *Foreign Policy and East Asia, Learning and Adaptation in the Gorbachev Era,* Cambridge University Press, Cambridge, 1993, p. 82.

[84] See Gordon White, "The Decline of Ideocracy", in Robert Benewick and Paul Wingrove (eds.), *China in the 1990s*, MacMillan Press, London, 1995, pp. 21-33, at p. 21. There are other elements, namely Lenin's pragmatism regarding alliances and the idea of the 'people's war'. Regarding the former, Leninist pragmatism results in a much more flexible foreign policy, in which sometimes you have to make contemporary alliances with your enemies in order to buy time. In our view, the greatest example is the Treaty of Brest-Litovsk that established a separate Peace Treaty in 1918, because the priority was to

It is trite to mention that in 1989 everything changed and "if nothing more, Tiananmen has dispelled any lingering illusion that 'China is different."[85] The hard-line response to the demonstrations in Tiananmen Square damaged the way China was viewed outside. There had been many victims in earlier contestations and campaigns but they were not as visible to the international society as those in 1989.[86] It was a good example of the power of information and the role of the media, which did change the international perception of a country. The strongest response came from the US, then Western Europe, followed by Japan.[87] The impact on the American public opinion was enormous, and "if Vietnam was the first "living-room war" for the Americans, Tiananmen was the first living-room revolution and massacre for the Americans."[88] Not only for the brutality of the repression, especially when compared with the relatively bloodless revolutions in Eastern Europe, but also because it was perceived as a suppression of 'American' democratic values. To the Chinese, the demise of the SU and the end of the Cold War were a mixed blessing. The greatest advantage was the end of the Soviet military threat that had haunted China. Moreover, it reinforced the role of the CCP as an alternative to the Soviet chaos. In contrast, it had reversed effects on the Sino-American relationship. The PRC had lost its political value as a strategic counterweight to the SU and therefore it extended "(...) the possibilities for Western diplomatic and economic pressure without the fear that such pressure would push Beijing into Moscow's embrace."[89]And this was exactly what happened after Tiananmen. The US imposed a ban on military sales to Beijing and on high-level official exchanges. Furthermore, it urged Western Europe and Japan to do

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consolidate the Communist Revolution. One can relate this trend to the Sino-American *rapprochement* in the 70s. As to the latter, the emphasis that Lenin put in the role of the third world is a fertile ground for the classical application of the 'people's war' by offering continuity for China's role as the leader of these underdeveloped countries.

[85] David Gillies, *Between Principle and Practice, Human Rights in North-South Relations*, McGill-Queen's University Press, Montreal, 1996, p. 173.

[86] Martin King Whyte, "Prospects for democratization in China", in *Problems of Communism*, Vol. XLI, 1992, pp. 58-70, p. 68.

[87] For a general overview of the responses to Tiananmen see Jack Donnelly, *International Human Rights*, Westview Press, Boulder, Colorado, 1998,chapter VI entitled "Responding to Tiananmen", pp. 115-135. For the reaction of Canada, the Netherlands and Norway see David Gillies, op. cit., pp. 140-173.

[88] David Shambaugh, "Patterns of Interaction in Sino-American Relations", in Thomas Robinson and David Shambaugh (eds.), op. cit., pp. 197-223, at p. 210. Harry Harding showed that this event was followed by more than 75% of Americans, op. cit., p. 240.

[89] Rosemary Foot, "China's foreign policy in the post-1989 era", in Robert Benewick and Paul Wingrove (eds.), op. cit., pp. 324-244, at p. 238.

the same, which was formalized in the Group of Seven reunion in 1989. The Asian Development Bank and the World Bank, from which the PRC was the largest borrower, suspended their lending and the International Monetary Fund suspended its technical assistance projects. Western Europe adopted the Madrid Declaration of 27th June 1989 criticising the events. Japan's reactions were less harsh due to several elements present in its relationship with China. First of all, geographical proximity and security concerns make Japan, which is 'just around the corner', more cautious regarding China. There is also the perception that China is not susceptible to outside pressures. Thus a 'negative human rights' diplomacy' including punitive tools such as sanctions is counter-productive. In the case of China breaking down, refugees will be a problem as is the North Korean nuclear concern. In addition, the historical sensitivities as to discussing human rights with any Asian country and especially with China, due to the 'Rape of Nanjing factor', make things even more problematic. Japan has focused its foreign policy as well as its domestic priority on economics and has clearly avoided the issue of confronting human rights in a concerted and official policy. All these ingredients led to the restoration of 'normalcy' in 1990.

At the Commission on Human Rights, China reacted to international criticism by clearly stating that it considered such manifestations as interference in its domestic affairs. They were incompatible with the purposes of the Charter and contravened the rules that regulated international relations. China's response was very hard in defending the principle of sovereignty and emphasising the double standards by which it was being measured. It did so by comparing 1989 to the effort of the Chinese government in improving the standard of living and, additionally, by reminding international society that the massive violations of the Cultural Revolution did not raise an eyebrow from them.[90] But despite this strong tone, the PRC realised that some concessions had to be made and it was very important to regain international credibility and respect. This flexibility is shown in the fact that just before the visit of the Japanese Prime-Minister Hashimoto, in 1990, martial law was lifted in Beijing. The PRC also played a very important role

[90] See Harry Harding, "Breaking the impasse over human rights", in Ezra F. Vogel (ed.), *Living with China, United States-China Relations in the Twenty First Century*, W. W. Norton & Co, New York and London, 1997, pp. 165-184.

in the Cambodian peace process, in restricting some arm sales and in expressing the desire to sign the non-proliferation treaty regarding nuclear weapons which it did in 1992. The great step was taken during the Gulf War, when Beijing's adherence to UN positions evidenced a very pragmatic foreign policy and how useful a cooperative China could be. The political price of China's decision not to block the UN resolutions and the decision to send a military multinational force was the lifting of some of the sanctions and the beginning of China's rehabilitation in the eyes of the world. China managed to gain the lifting of some of the sanctions imposed after 1989 by playing along with the UN. Chinese abstention also helped to preserve its third world identity by not bluntly going beyond the 'sacred sphere' of sovereignty and non-intervention. China established diplomatic relations with Saudi Arabia and Singapore, restored relations with Indonesia, reduced the tensions with Vietnam and cultivated expanding commercial ties with Japan and South Korea. Furthermore, the Chinese government played the "China economy card" and it was very successful in exploiting the differences within the Western bloc. The EU and Japan were keener in welcoming China again in the international system, a position not shared by the US. This is evident in the period between 1989 and 1994, when the renewal of the Most Favoured Nation clause was linked to the improvement of China's human rights record. In China, this was perceived as an American strategy to undermine its role in the world, especially the success of its economic reform, a perception that was enhanced by the politicisation of the entry of the PRC to the World Trade Organisation.[91]

The events that followed 1989 showed that China considers its relationship with the US as its top foreign relationship. It also highlighted the hindrances of the Sino-American relationship, where we can find that a repetitive "love/hate cycle" has been observed. This is mainly due to the perceptions on each side, which often do not match reality.[92] *Rapprochement* between the US and China was based not on common ground and values but rather on a 'marriage of convenience' due to a common threat, and 1989 made it clear that fundamental

[91] See Stuart Harris, "China's Role in the WTO and APEC", in David S. G. Goodman and Gerald Segal (eds.), *China Rising, Nationalism and Interdependence*, Routledge, London and New York, 1997, pp. 134-155.
[92] David Shambaugh, op. cit., p. 212.

problems remained unresolved.[93] If in 1971 and 1972, there was a 'normalisation' of this bilateral relationship, it was followed by a 'normal' state of affairs. China is still a fertile ground for democracy and "for the Chinese, the US remains a Beautiful Imperialist."[94] It has been very aptly described as a relationship between American exceptionalism (Manifest Destiny) and Chinese rooted exemptionalism (Middle Kingdom Complex).[95] In our view, there are many issues in this bilateral relationship and human rights is one of them. Perhaps the greatest (or, at least, the most volatile) is the unresolved situation of Taiwan.[96] The primacy of the American-Sino relationship over others can be seen as well in the subject of international relations which is an example of the maintenance of "American intellectual hegemony." [97]

To the initial emphasis put on the self-determination of the peoples, the collective right to development and economic, social and cultural human rights, the PRC now explicitly added that all rights were subordinated to state sovereignty and security.[98] In terms of the UN human rights structure, 1989 had an impact on the Commission and Sub-Commission, which paradoxically happened at a time when China was becoming more engaged in the work of both bodies. In fact, China had just been elected as a Vice-Chairman of the Commission. This election broke a tacit understanding, whereby permanent members of the Security Council

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[93] For a general overview of this theme see Harry Harding, *A Fragile Relationship, the United States and China since 1972*, The Brookings Institution, Washington, D. C., 1992.

[94] David Shambaugh, *Beautiful Imperialist, China Perceives America, 1972-1990*, Princeton University Press, Princeton, 1991, p. 303.

[95] Samuel S. Kim, "Chinese foreign policy in theory and practice", in Samuel S. Kim (ed.), *China and the World: Chinese Foreign Policy faces the New Millennium*, Westview Press, Boulder, Colorado, 1998, pp. 3-33, at p. 3.

[96] Lowell Dittmer, op. cit., p. 267. On the general issue of US-China relationship see also Andrew Nathan and Robert S. Ross, *The Great Wall and the Empty Fortress, China's Search for Security*, W. W. Norton & Co, New York and London, 1997, Michel Oksenberg , "The China problem", in *Foreign Affairs*, Vol. 70, nº 3, summer 1991, pp. 1-16 and Nicholas D. Kristof, "The rise of China", in *Foreign Affairs*, Vol. 72, nº 5, November/December 1993, pp. 59-73.

[97] From the very beginning of its normalisation of scholarly relations with China, programmes such as the Fulbright or several foundations (*e. g.* Ford and Rockefeller) have enhanced the dominance of the US. This is also felt in the predominance of Realism and of international relations as an American social science, although the English School (which also arrived *via* the US) has a very limited presence. The English School is appealing to the Chinese due to its focus on culture, civilisation and societal elements in international politics, as well as an alternative ontology and different image of world politics beyond the narrow confines of power politics and national interest; see Zhang Yongjin, "The 'English School' in China: a travelogue of ideas and their diffusion", in *European Journal of International Relations*, Vol. 9, nº 1, March/2003, pp. 87-114.

[98] See Ann Kent, *Human Rights in the People's Republic of China: National and International Dimensions*, Peace Research Centre, Research School of Pacific Studies, Australian National University, 1990.

would not sit on the Bureau of the Commission or other functional commissions of the ECOSOC. It also showed the importance attached to engaging China within the human rights' framework.[99] China had also signed or ratified several UN human rights' conventions, namely regarding discrimination against women, racial discrimination, genocide, suppression of *apartheid* and *apartheid* in sports, torture and refugees. The first body to be gathered after June 1989 was the Sub-Commission which, under the item 'other alleged human rights' violations' adopted resolution 1989/5 by secret ballot on 31st August 1989 by 15 votes to 9. The wording of the resolution was a mild one and stated that the Sub-Commission was concerned about events in China. It requested that the Secretary-General transmit information provided by the Chinese government and other reliable sources to the Commission. It also made an appeal for clemency, in particular in favour of persons deprived of their liberty as a result of those events.[100] Nevertheless, it was the first time that a permanent member had been 'named' in a resolution regarding violations of human rights in *its own country*. The reaction of the Chinese government was to characterise the events in Beijing as a rebellion and, therefore, as an internal affair and not a human rights' question.[101] The human rights' spotlight allowed the Tibetan issue to resurface. Previously at the General Assembly in 1959, a proposal by Ireland and the Federation of Malaya to include violations of human rights in Tibet succeeded in being adopted as resolution 1353 (XIV).[102] In 1960, the Federation of Malaya and Thailand proposed that the question of Tibet be placed on the agenda of the General Assembly but, due to work pressure, it was postponed to the next session.[103] In 1961, they were joined by El Salvador and Ireland and succeeded in adopting their draft resolution calling attention to the situation of Tibet, especially the suppression of the distinctive cultural and religious life, as well as the large-scale exodus of Tibetan refugees to

[99] *Idem*, *China, the United Nations, and Human Rights, the Limits of Compliance*, University of Pennsylvania Press, Philadelphia, 1999, p. 45.
[100] See resolution 1989/5 adopted on 31st August 1989 reproduced in *idem*, *Human Rights in the People's Republic of China: National and International Dimensions*, Peace Research Centre, Research School of Pacific Studies, Australian National University, 1990, p. 62.
[101] See *Y. U. N. 1989*, p. 556 and *Y. U. N. 1990*, p. 658.
[102] The resolution was adopted by a roll-call vote of 45-9-26, in *Y. U. N. 1959*, p. 69.
[103] See *Y. U. N. 1960*, pp. 173-174.

neighbouring countries.[104] In 1964, El Salvador, Nicaragua and the Philippines requested that the Tibet question be included in the discussions of the General Assembly including the Tibetans' right to self-determination, but it ended up not being discussed.[105] In 1965, another attempt to discuss this issue was made by the Philippines and a draft resolution together with six other countries, namely El Salvador, Ireland, Malaysia, Malta, Nicaragua and Thailand, was adopted.[106] The Tibetan question was given a new life in 1990, despite the fact that no draft resolution was presented due to the need to obtain China's approval or abstention regarding the intervention in Kuwait. In 1991, the Sub-Commission decided by secret ballot to adopt a resolution calling on China to respect fully the fundamental rights and freedoms of the Tibetan people, and asked the Secretary-General to transmit to the Commission information on the situation in Tibet provided by China and other reliable sources.[107] The main difference between the previous resolutions and this one was that the latter made the explicit linkage between China and the violation of human rights in Tibet. In our view, this resolution is of greater importance than the 1989 resolution at the Sub-Commission because it deals with a recurring violation of human rights rather than a 'special crisis' when it is easier to obtain a consensual condemnation. Nevertheless, success was short-lived and China managed to put the Tibetan question back onto the shelf.[108]

Unlike the Sub-Commission, the Commission did not pass any resolution condemning either the 1989 repression or any situation involving violations of human rights in China. This is not to say that this is a quiet and settled issue, and on the contrary, it has been a highly debated one. In 1990, the Commission decided to take no action (a motion presented by Pakistan) on a draft text which would have had the Commission endorse the Sub-Commission's 1989 appeal for clemency to all persons imprisoned as a result of the 1989 events. It also welcomed the decisions of the government of China in January 1990 to lift martial

[104] Resolution 1723 (XVI) was adopted by roll-call vote of 56-11-29, in *Y. U. N. 1961*, pp. 139-140.
[105] See *Y. U. N. 1964*, pp. 149-150.
[106] Resolution 2079 (XX) was adopted by roll-call vote of 43-26-22; see *Y. U. N. 1965*, pp. 193-194.
[107] Resolution 1991/10 was adopted by a secret ballot of 9-7-4. See *Y. U. N. 1991*, p. 606.
[108] For instance, on 20th August 1993, by secret ballot of 17-6-2 the Sub-Commission decided to take no action (decision 1993/107) on a draft resolution urging China to facilitate access to the Special Rapporteur of the Commission to all areas of Tibet; see *Y. U. N. 1993*, p. 941.

law in Beijing and to release 573 persons who had been detained.[109] In 1991, due to the Kuwait-Iraq conflict no draft resolution was presented. Following the 1991 Sub-Commission resolution on Tibet, the Secretary-General submitted in January 1992 a report on the situation in Tibet to the Commission, but the latter decided to take no action.[110]

On the general issue of Chinese violations of human rights discussed at the Commission, we can observe a pattern: firstly, a draft resolution is proposed regarding the situation of human rights in China; secondly, it is followed by a Chinese proposal for a no-action motion; lastly, after a protracted debate the no-action motion is adopted.[111] This is a successful manoeuvrable procedure under rule 65, paragraph 2 of the Rules of Procedure, meant for situations when the consideration of a draft resolution would be contrary to the purposes of the Charter.[112] Nevertheless, we find exceptions to this pattern: in 1991, when no draft was presented due to Gulf War; in 1995, when China was unable to secure a no-action motion which resulted in a tie (22-22-9); in 1998 and 2003, when the US decided not to present a draft resolution due to the improvements shown by China; and lastly in 2002, when the US was absent from the Commission and, despite consultations with other countries regarding the introduction of a China resolution, no member agreed to table a text.[113]

We can draw two conclusions from this. The first is that the leadership on this issue is clearly American and perceived as such by China, as can be seen

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[109] See decision 1990/106 of 6th March adopted by a roll-call vote of 17-15-11 and see as well *Y. U. N. 1990*, p. 658.

[110] Decision 1992/116 of 4th March 1992 was adopted by a roll-call vote of 27-15-10 and see as well *Y. U. N. 1992*, p. 794.

[111] In 1993, on 11th March the Commission on a roll-call vote of 22-17-12 decided to take no action on a draft resolution concerning the situation in China (decision 1993/110); in 1994, on 9th March through decision 1994/108 taken by roll-call vote of 20-16-17 decided to taken no action; in 1996 by a roll-call vote of 27-20-6 the Commission accepted China's motion that no action be taken on the draft; in 1997 on 15 April the Commission by a roll-call vote of 27-17-9, accepted a no-action motion; in 1999, on 23rd April, a no-action motion was adopted by a roll-call vote of 22-17-14; see *Y. U. N. 1993*, p. 933, *Y. U. N. 1994*, p. 1086, *Y. U. N. 1996*, p. 697, *Y. U. N. 1997*, p. 723 and *Y. U. N. 1999*, p. 707. In 2000, the no-action motion was adopted by roll-call of 22-28-12 in UN document E/CN.4/2000/SR. 55, pp. 12-17; in 2001, the no-action motion was adopted by roll-call of 23-17-12 in UN document E/CN.4/2001/SR. 62, pp. 10-15, and in 2004 it was adopted by a recorded vote of 28-16-9 in UN document E/CN.4/2004/L.10/Add.9, pp. 15-17.

[112] Rule 65, paragraph 2 of the Rules of Procedure of the Functional Commissions of the Economic and Social Council states that "A motion requiring that no decision be taken on a proposal shall have priority over that proposal" Rules of Procedure of the Functional Commissions of the Economic and Social Council adopted 1947 (last amendment 1982) at http://www.unhchr.ch/html/menu2/2/rules.htm (28th February 2005).

[113] See Bureau of Democracy, Human Rights and Labor, *Fact Sheet*, Washington D. C., 16th May 2002 at http://www.state.gov/g/drl/rls/10171.htm (last access on 20th October 2004).

from the debates prior to the voting. The only time that China did not manage to successfully pass the no-action motion was precisely when the US ended the linkage between human rights and renewal of the most-favoured nation clause in 1994. It transferred all its 'weight' to the Commission and, of course, with fewer economic and commercial costs to its companies.[114] The defeat of the US draft resolution was the closest ever, in that twenty one countries voted against the resolution, twenty in favour and twelve abstained.[115] The US leadership was even more obvious after 1997, when the state members of the EU were split over the need to present a resolution on China. Denmark and the Netherlands were in favour of supporting the US whilst Germany, Greece, France, Italy and Spain were against. In the end, Denmark plus nine other European countries decided to go along with the resolution and China interrupted the human rights' dialogue with the EU. It was resumed in 1998 and, in view of the encouraging results of the human rights dialogue, the EU or its members decided from then onwards not to sponsor or co-sponsor a resolution on China at the UN. It also decided to vote against the no-action motion on the part of China, and in favour of the resolution if it goes through.[116] In other words, it does not take the initiative but rather goes along with it. The last draft resolution introduced by the US, despite praising the successful economic reform policies and the reduction of persons living in extreme poverty, expressed concern amongst other issues at the severe restrictions on freedom of assembly, association, expression, conscience and religion, and legal processes that continue to fall short of international norms of due process and transparency, including those in Tibet and Xinjiang.[117] Additionally, we find that the Commission,

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[114] Ann Kent, *China, the United Nations, and Human Rights, the Limits of Compliance*, University of Pennsylvania Press, Philadelphia, 1999, p. 73 and Ming Wan, *Human Rights in Chinese Foreign Relations, Defining and Defending National Interests*, University of Pennsylvania Press, Philadelphia, 2001, p. 48.

[115] See *Y. U. N. 1995*, pp. 797-798.

[116] See Committee on Foreign Affairs, Human Rights, Common Security and Defence, *Explanatory Statement of the Human Rights Report of 2002*, EU document A5-0274/2003), report by Special Rapporteur Bob Van den Boos including motion for resolution and explanatory statement, p. 41 and Annex 15 of the *EU Human Rights Report 2000*, pp. 102-103, *EU Human Rights Report 2001*, p. 27, and *EU Human Rights Report 2002*, p. 47. See as well UN documents E/CN.4/2000/SR. 55, E/CN.4/2001/SR. 62 and E/CN.4/2004/L.10/Add.9. Japan adopts a similar cautious attitude and, for instance, in 1997 it did not co-sponsor the draft resolution regarding China even though it voted against the no-action motion presented by China; See Yozo Yokota and Chiyuki Aoi, "Japan's foreign policy towards human rights: uncertain changes", in David P. Forsythe (ed.), *Human Rights and Comparative Foreign Policy*, United Nations University Press, Tokyo, New York and Paris, 2000, pp. 115-145.

[117] UN document E/CN.4/2004/L.37 that can also be found at the Report of the Commission on Human

hardly surprisingly, is not immune either to great power efforts or to strategic and power politics' considerations. The decision not to pursue a resolution condemning Chinese violations of human rights in 1991, due to the need to secure Chinese abstention at the Security Council, is the best example.

The second conclusion is the success of China in achieving a consensus that enables the defeat of American sponsored resolutions and which reveals not only political proficiency, but also technical skills regarding the functioning of the Commission. Its search for consensus and support mainly from developing countries (although not all of them) is also part of the Chinese response to human rights after 1989, where three strategies reign: hard-line founded on the concept of sovereignty, some concessions agreeing to international standards of human rights, and an offensive stance emphasising Chinese discourse of human rights where priority is given to economic, social and cultural rights as the collective right to development.[118] All these consolidate the place in Chinese foreign policy of 'the human rights factor.'

Rights presented to the ECOSOC (deals with question of violation of human rights and fundamental freedoms in any part of the world), UN document E/CN.4/2004/L.10/Add.9, pp. 15-16.

[118] John F. Copper, op. cit., pp. 49-73.

3 China, Human Rights' Norms and Procedures, and the International Bill

"Within these bodies [Commission and Sub-Commission on Human Rights], China has thus been taker, shaper, and breaker of norms."[119]

It is indubitable that China attaches great importance to the UN and its role within it. Even if taking into consideration that the process of learning in an authoritarian state tends to be more difficult than in a democracy, due to control of information and constraints in the intellectual debate, China has become increasingly enmeshed in its framework and has adopted a more active position towards many issues. [120] This is especially accurate after the 1982 search for a more active and 'equidistant' role. The PRC participates in areas so diverse as international standards in crime prevention and criminal justice or peace-keeping.[121] As for the latter, it is interesting to note that China went from condemnation (1950-1971) to non-disruption (1971-1981), co-operation (1981-1988) and finally participation from 1988 onwards.[122] The hallmarks were the application for membership in the Special Committee on Peacekeeping Operations in 1988, and the dispatch of its first contingent in 1989. At the same time, problems that affect international society as whole cannot be handled without the participation of China, even if only for its sheer size in terms of population.[123] There are many areas, and the first that springs to mind is global management of the environment.[124]

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[119] Ann Kent, op. cit., p. 244.
[120] Charles Ziegler, op. cit., pp. 166-169.
[121] See Ye Feng, "The measures of enactment and implementation of United Nations standards and norms in crime prevention and criminal justice", in United Nations Office on Drugs and Crime, *United Nations Standards and Norms in Crime Prevention and Criminal Justice*, Vienna International Centre, 2003, pp. 85-89 at http://www.unodc.org/pdf/crime/publications/standards%20&%20norms.pdf (last access 20 October 2004).
[122] Yongjin Zhang, "China and UN peacekeeping: from condemnation to participation", in *International Peacekeeping*, Vol. 3, nº 3, autumn 1996, pp. 1-15.
[123] Lucian W. Pye makes this argument regarding US-China relations but we think that it is also valid for the relation of the world with China, "China: erratic state, frustrated society", in *Foreign Affairs*, Vol. 69, nº 4, fall 1990, pp. 56-74, at pp. 57-58.
[124] See Shaun Breslin, "China's environmental crisis in a global context", in *Global Society*, Vol. 10, nº 2, 1996, pp. 125-144.

As for international human rights it is noteworthy that in China, during the Maoist era, not a single article devoted entirely to human rights was published.[125] Nevertheless, respect for fundamental human rights and for the purposes and principles of the Charter of the United Nations was the first of the ten principles affirmed by the Non-Aligned Movement through the Joint Communiqué in 1955.[126] As to the "so-called "humanitarian intervention", it was perceived as a pretext for foreign imperialist intervention in domestic affairs and individuals were not subject to international law.[127] This situation began to change after the 1978 'open-door' policy pursued by Deng Xiaoping and the shift towards economic modernisation and reform, as well as participation at the UN. As we have seen, the emergence of a discourse on human rights was focused on collective rights and massive human rights' violations such as colonialism, genocide, slavery, and *apartheid* and where humanitarian intervention was no longer equated with intervention in domestic affairs. For the remaining human rights, China understood that their international protection was the result of the undertaking by sovereign states of the obligations assumed in international treaties or the expression of consent regarding a particular right. Then, it was up to each state to fulfil these obligations and implementation was a domestic matter. Nevertheless, and especially since 1989, domestic politics of human rights have influenced Chinese foreign policy and in a example of a second image reversed, international affairs have rebounded to reshape domestic affairs.[128]

The initial cautious attitude towards the International Bill of Human Rights was gradually relinquished and China came to accept it, as Foreign Minister Qian Qichen made clear in 1994.[129] As to the UDHR, China adopted the position of praising it as "the first international instrument which systematically sets forth the

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[125] Hungdah Chiu, "Chinese attitudes toward international law of human rights in the post-Mao era", in Victor C. Falkenheim (ed.), *Chinese Politics from Mao to Deng, Paragon House*, New York, 1989, pp. 237-270, at p. 239.

[126] "Joint Communiqué of Bandung Conference", 24th April 1955, reproduced in Jerome Alan Cohen and Hungdah Chiu, op. cit., pp. 123-124, at p. 124.

[127] I Hsin, "What does the Bourgeois international law explain about the question of intervention" of 1960, in *ibidem*, pp. 161-172, at p. 166.

[128] Andrew Nathan, "Human rights in Chinese foreign policy", in *The China Quarterly*, Vol. 139, September 1994, pp. 622-643, at p. 622.

[129] *Cit in* Zhu Feng, "Human Rights and the political development of contemporary China, 1979-1994", in Michael C. Davis (ed.), *Human Rights and Chinese Values, Legal, Philosophical and Political Perspectives*, Oxford University Press, Hong Kong, Oxford and London, 1995, pp. 116-141, at p. 138.

specific contents regarding respect for and protection of fundamental human rights. Despite its historical limitations, the Declaration has exerted a far-reaching influence on the development of the post-war international human rights' activities and played a positive role in this regard."[130] The Chinese participation in the making of the Universal Declaration, which was signed before the proclamation of Communist China is very interesting. China made important contributions, and they relied heavily on its constitutional experience and the adoption of its Constitution promulgated on 1st January 1947.[131] This Constitution had the goal of trying to synthesise Chinese traditional norms and modern Western liberal values but, in practice, the balance between the individual and the collective was tipped almost exclusively in favour of the state.[132] Despite the fact that it contemplated rights and freedoms such as the right to petition, freedom of assembly and speech and religious belief, through article 23 it allowed, in practice, for constitutional rights to be abrogated or limited by ordinary legislation, lowering it to the level of ordinary laws.[133] Equality was emphasised both domestically (even if only in theory) and internationally, as can be seen from the debates regarding the UDHR. In 1947, the Chinese representative at the Commission on Human Rights, Dr. Chang, was concerned that "the principle of equality should be examined, bearing in mind the concept of human dignity," as well as the need to emphasise "the idea of solidarity or unity of the human race" and the very background of the UDHR "on the morrow of a war waged by the enemy in the name of racial inequality."[134] Also noteworthy was the Chinese suggestion to the Commission, in 1947, to include in the Bill of Human Rights a right concerning the system of public examination for

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[130] Speech made at the 43rd Session of the UN General Assembly in September 1988, in Information Office of the State Council of the People's Republic of China, *Human Rights in China*, Beijing, 1991, chapter 10 entitled "Active participation in international human rights activities", paragraph 3 at http://www.china.org.cn/e-white/index.htm (last access on 15th October 2004).

[131] For the relevant articles of the Constitution regarding the drafting of the UDHR see United Nations, "Constitution of the Republic of China", in *United Nations Yearbook on Human Rights 1947*, Lake Success, New York, 1949, pp. 79-82.

[132] Thomas E. Greiff, "The principle of human rights in nationalist China: John C. H. Wu and the ideological origins of the 1946 Constitution", in *The China Quarterly*, Vol. 103, September/1985, pp. 441-461.

[133] *Idem*, *ibidem*. Article 23 stated "The freedoms and rights enumerated in the preceding articles shall not be restricted by law, except in cases where such a restriction is necessary for preventing an obstruction of the exercise of the freedoms of other persons, averting an imminent crisis, maintaining social order or advancing the public interest." See United Nations, "Constitution of the Republic of China", in *United Nations Yearbook on Human Rights 1947*, Lake Success, New York, 1949, pp. 79-82, at p. 80.

[134] See UN documents E/CN.4/SR.13, pp. 3-5 and E/CN.4/AC.1/3/Add.1, pp. 359 and 362.

the admission to public office, like the one prescribed in article 18 of the Chinese Constitution.[135]

The Chinese were active in the drafting of the UDHR and gave pride of place to the principles of its foreign policy, namely equality and reciprocity. It worked to "(...) respect treaties and the United Nations' Charter in order to protect the rights and interests of overseas' Chinese nationals, promote international co-operation, advance international justice and ensure world peace."[136] In 1947, along with the comments that China made to the secretariat draft covenant,[137] we find a Chinese reference to the article concerned with the right to life, which consisted of article 15 of the Constitution of China.[138] This article puts together the right to existence, to work and to property.[139] The exact wording is not agreed upon since we find 'right to existence' in the previous document and the 'right to life' in the 1949 UN Yearbook on Human Rights. Nevertheless, the translation suggested by Dr. Chang called for 'right to subsistence' rather than the 'right to life.'[140] We can also notice the adoption of a conciliatory approach, especially after

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[135] UN document E/CN.4/SR.13, p. 7.

[136] Article 141 of the Chinese Constitution mentioned by the Chinese delegation at the discussion of article 47 of the draft covenant regarding the duty of each member state to respect and protect the rights enunciated in the Bill of Rights; see UN document E/CN.4/AC.1/3/Add.1, pp. 387 and 388.

[137] UN document E/CN.4/AC.1/3.

[138] UN document E/CN.4/AC.1/3/Add. 1. In pages 15 and 172, reference to article 15 of the Constitution: "The right of existence, the right to work and the right of property shall be guaranteed to the people."

[139] *Ibidem*, the remaining comments were concerned with the corresponding relation between human rights and duties and the necessary obligations such as paying taxes and performing military services (pp. 5, 7, 61, and 202); the limits imposed upon human rights required by the rights of others and the just requirements of the state in relation to article 2 of the draft covenant (pp. 12-13); the right to liberty and the need for due process of law in the case of deprivation of that liberty and procedural safeguards In relation to articles 5, 6 and 7 and article 27 (pp. 25, 29, 51 and 236); freedom of movement within the country (article 10) and freedom of secrecy of correspondence in relation to articles 9 and 11 (pp. 68 and 81); Freedom of religious belief and freedom of speech, academic instruction, writing and publication regarding articles 14 and 17 (pp. 103 and 125); freedom of assembly and freedom of association concerning articles 19 and 20 (pp. 139 and 149); The right to property and to work in relation to articles 22 and 37 (pp. 172-173 and 310); right to good working conditions concerning article 38 (p. 316); right to equal opportunity of employment and right to a social insurance system regarding article 41 (pp. 341-342); The right to present petition, file complaints or institute legal proceedings in relation to article 28 (p. 248); right to claim an indemnity from the state for damage sustained in the case of a public functionary infringing upon the liberties and rights of any person (p. 403); the right of election, recall, initiative and referendum , to take public examinations and to hold public offices and to be elected regarding articles 30, 31, 32 (pp. 258, 262, 267, and 274); The state had the obligation in order to improve national health to extensively establish sanitation and infant health protection enterprises and a system of socialised medical service in relation to article 35 (p. 286); Right and duty of receiving citizen's education, equal opportunity to receive education, primary school from six to twelve years is free concerning article 36 (pp. 293-294); The need to protect the family especially mothers and children in relation to article 40 (p. 334); and the right to non-discrimination because of sex, race, class, religion or party affiliation regarding article 46 (p. 381).

[140] United Nations, "Constitution of the Republic of China", in *United Nations Yearbook on Human Rights*

the Soviet amendment proposing the abolition of the death penalty in peacetime.[141] The controversy that followed prompted China to propose that the Committee should not lose sight of the goal of the declaration. In the opinion of the Chinese representative, Mr. Chang, articles 1, 2 and 3 expressed "the three main ideas of eighteenth century philosophy; article 1 expressed the idea of fraternity, article 2 that of equality, and article 3 that of liberty." In addition, article 3 set forth a basic principle which was then defined and clarified in the nine following articles concerning slavery, equality before the law and so forth. The draft declaration should be left as it was since it possessed the qualities of logic, clarity and brevity.[142] China stated that it would abstain from discussing the substance of the SU amendment but would vote against because it dealt with a question of implementation. [143] Therefore, it considered that such a question was out of the scope of the Declaration and voted accordingly.[144] China also objected to the joint-amendment of Uruguay, Cuba and Lebanon which sought to replace the existing wording with "everyone has the right to life, honour, liberty, physical integrity, to the security of his person and to the economic, social and other conditions necessary to the full development of the human personality."[145] The Chinese representative considered that the content of "honour" was not sufficiently matured. It expressed the intention to vote against such a proposal, an intention that was fulfilled.[146] As to the final version of article 3, China voted in favour in 1948 at the Third Committee of the General Assembly.[147]

As to the international covenants, we can observe a 'wait and see' approach since China only signed the ICESCR in 1997 (ratified in 2001) and the ICCPR in 1998. It issued a statement concerning the signature of Taiwan, which usurped the name China, on 5th October 1967 stating that it is illegal, null and void.[148] It is neither a party nor a signatory to both protocols of the ICCPR. The

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1947, Lake Success, New York, 1949, pp. 79-82.
[141] UN document A/C.3/265.
[142] UN document A/C.3/SR.103.
[143] UN document A/C.3/SR.105.
[144] UN document A/C.3/SR.107.
[145] UN document A/C.3/274/Rev. 1.
[146] See UN documents A/C.3/SR.105 and A/C.3/SR.107.
[147] UN document A/C.3/SR.107, pp. 16-17.
[148] Reservations and declarations to the ICCPR are at http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (last access 15th February 2005).

Chinese participation at the drafting of the Covenants was made by ROC and we find that at the debate concerning the right to life in 1950, and regarding the British draft article, ROC considered that "it was not advisable at that time to include in article 5 [later article 6] too many detailed provisions, such as those which appeared in the third paragraph of the United Kingdom proposal, however important they might be. Any provisions of that sort would certainly create confusion and the Commission must at all costs avoid doing that when it was drafting the first covenant on human rights."[149] It asserted that the death penalty was a reality[150] and expressed some doubts as to the interpretation of the application of the death penalty to pregnant women.[151] The voting on the final version of the article concerning the right to life and that on the Covenant as a whole was the same: at the Third Committee, China abstained along with 16 other countries[152] and in the General Assembly, it voted in favour of the ICCPR. The PRC had no bearing on all the documents of the International Bill of Human Rights, with the exception of the Second Optional Protocol to the ICCPR. In 1987, in the discussion (after the report by Bossuyt had been presented) at the General Assembly, and in which it was decided to continue considering the matter of elaborating a second optional protocol to the ICCPR aiming at the abolition of the death penalty, "China believed that individual governments and peoples should decide the issue of abolishing the death penalty in ways appropriate to their national conditions."[153] In 1989, China voted against the adoption of the Second Optional Protocol.[154]

Moreover, at the time of the signature of the ICCPR, China indicated its intention to enter reservations with respect to freedom of association and movement and the death penalty, in that the latter touched upon article 7.[155] If on the one hand, signature of this covenant implied that the Chinese government recognised it as a general framework of references for purposes of domestic action, on the other, indication of reservations and understandings clearly showed

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[149] Comments by Mr. Chang in UN document E/CN.4/SR.139, paragraph 45.
[150] *Ibidem*, paragraph 44.
[151] UN document A/C.3/SR.809, paragraph 27.
[152] UN document A/C.3/SR.820, paragraph 27.
[153] In *Y. U. N. 1987*, p. 760.
[154] See *Y. U. N. 1989*, p. 485.
[155] Ann Kent, op. cit., p. 197.

that it was not in position to accept all the obligations enshrined in the Covenant.[156] Thus, reservations fulfil the goal of making the implementation of the Covenant more than "just empty words" enabling the Covenant to be truly implemented.[157] For the PRC, 'in the current stage of social and economic development the death penalty cannot be abolished and that the restrictions mentioned in article 7 of the International Covenant regarding the use of cruel, unusual and degrading punishment cannot be understood as prohibiting imposition and enforcement of the death penalty."[158] This resonates well with the general perception that, although abolition is a highly desirable goal, it is not possible for China to do it. China considers that it should not be rushed into either ratifying the ICCPR or abolishing the death penalty. As to the latter, the policy of the Chinese government was asserted to the Special Rapporteur on extrajudicial, summary and arbitrary executions in 2002: "furthermore, the Special Rapporteur was informed that the Chinese government believed that the death sentence as a most ancient form of legal penalty would eventually be abolished throughout the world, but that states should decide on the matter of abolition according to their specific conditions and by respecting the will of the people."[159] In addition, there are references to other countries and their historic processes either regarding the ratification of the Covenant or abolition of capital punishment. Firstly, China was not present at the drafting of the Covenant, and even other countries which were have opted for prolonged periods from the moment of signature to ratification. For instance, the US took fifteen years from 1977 to 1992 to ratify the ICCPR, and

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[156] Fausto Pocar, "Ratification and implementation of the International Covenants on Human Rights", in Faculdade de Direito da Universidade Nova de Lisboa, *EU-China Human Rights Dialogue, Third Seminar: Death Penalty; Ratification and Implementation of UN Covenants, Lisbon 8th - 9th May 2000*, FDUNL, Nº 1-2002, Lisboa, pp. 69-74, at p. 70, available at http://www.fd.unl.pt/web/investigacao/wpapers/pdf/2002/wp001-02.pdf (last access 5th December 2004).

[157] Wang Shangxin (Deputy Director-General, Legislative Affairs Office of the Standing Committee of the Chinese National People's Congress), "Procedural and substantive aspects of the ratification of International Covenants", in Faculdade de Direito da Universidade Nova de Lisboa, op. cit., pp. 82-85, at p. 83.

[158] Hans-Jörg Albrecht, "The death penalty in China from a European perspective", in Max Planck Institute for Foreign and International Criminal Law, Freiburg, Vol. 8, 1998, pp. 1-19 at pp. 4-5 in http://www.iuscrim.mpg.de/info/aktuell/projekte/deathprc.pdf (last access 5th December 2004), "The death penalty in China- placing the Chinese death penalty policies in international perspectives", in Faculdade de Direito da Universidade Nova de Lisboa, op. cit., pp. 11-34, at pp. 16-17, and Roger Hood, *The Death Penalty, A Worldwide Perspective*, Oxford University Press, Oxford, 2002, p. 53.

[159] In "Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary, or arbitrary executions- summaries of cases transmitted to governments and replies received", UN document E/CN.4/2002/74/Add.2, paragraph 45.

then with reservations which touched upon the death penalty.[160] Secondly, Europeans in general took around a hundred years to complete the process of restricting and ultimately abolishing the death penalty.[161] Thirdly, two of the world's most developed countries, the US and Japan, have the death penalty and are not inclined to abolish it, therefore hampering international consensus over this issue.[162] All these arguments culminate in the policy that, although abolition will ultimately take place worldwide, in China it is premature to make such a move, due to current economic and social conditions. Hence, we find a twofold discourse regarding the question of the death penalty within the International Bill framework. On the one hand, it focuses on the desirability of abolition of the death penalty and, therefore, falls under the aspirational standard espoused by article 3 of the UDHR; and on the other, it emphasises that the choice of the best path to follow is a *sovereign* matter. It thus seems that, in this matter the Chinese government prefers an interpretation of ICCPR provisions that calls for the reinforcement of the legitimacy of capital punishment rather than a progressive reading.

As for the remaining conventions with articles that touch upon the death penalty, China has ratified the Convention on the Rights of the Child with reservations concerning article 6[163] and article 37, paragraph (c) in connection with the Hong Kong Special Administrative Region.[164] None of these reservations focus on the non-application of the death penalty to persons less than 18 years of age. Moreover, the same can be said regarding the international humanitarian Geneva Conventions. The PRC not only recognised the signature of the ROC on 12th

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[160] Wang Shangxin, op. cit., p. 82.

[161] Hu Yunteng (Researcher at the Institute of Law of the Chinese Academy of Social Sciences), "The historical process of abolishing the death penalty in the EU countries", in Faculdade de Direito da Universidade Nova de Lisboa, op. cit., pp. 134-137.

[162] Du Weifu (Judge of the People's Supreme Court of the People's Republic of China), "Social functions of the death penalty", in Faculdade de Direito da Universidade Nova de Lisboa, op. cit., pp. 61-63.

[163] "The People's Republic of China shall fulfil its obligations provided by article 6 of the Convention under the prerequisite that the Convention accords with the provisions of article 25 concerning family planning of the Constitution of the People's Republic of China and in conformity with the provisions of article 2 of the Law of Minor Children of the People's Republic of China."; in http://www.unhchr.ch/html/menu2/6/crc/treaties/declare-crc.htm (last access 15th February 2004).

[164] "Where at any time there is a lack of suitable detention facilities, or where the mixing of adults and children id deemed to be mutually beneficial, the Government of the People's Republic of China reserves, for the Hong Kong Special Administrative Region, the right not to apply article 37 (c) of the Convention in so far as those provisions require children who are detained to be accommodated separately from adults;" Regarding Hong Kong, China also issued reservations concerning articles 22 and 32 (2) (b); see *idem, ibidem*.

August 1956 but, indeed, went further by ratifying the Conventions. The ratification was carried out with reservations, in that none were made regarding articles such as 68 (4) that provide for the application of the death penalty.[165]

As to human rights' international law, the PRC may be characterised as a taker, a breaker and a shaper. The UN human rights' framework is very important to China, as can be seen from the huge lobbying in order to avoid the adoption of a resolution condemning its human rights' practices, even if it is true that no country likes to be criticised even at the most unimportant forum or organisation. This has even led some to argue that "the value of the UN Commission on Human Rights seems to be substantially diminished by the extent of politicization. Resolutions do not reflect the human rights situation but the mobilisation of support for countries which have a record in human rights violations."[166] We also find the attempt to express its own perspective on human rights, a policy which is best exemplified by the promotion of the Bangkok Declaration. Tibet continues to be an issue, especially under the umbrella of the Special Rapporteur on freedom of religion or belief, but no resolutions have been adopted since that by the Sub-Commission in 1991. In our view, the debate at the UN has moved on from the question of sovereignty, *i. e.,* Tibet being an international issue or a domestic Chinese problem, to the question of the suppression of cultural and religious rights by Beijing.[167] Another 'hot issue' regarding intolerance of religion or belief is the case of the Falun Gong, which has also been reiterated in the reports of the Special Rapporteur.[168]

We consider that China has a dualistic position in international relations. This derives from its international status of being a great power and, at the same time, a developing country. In terms of international law, if the former leads to emphasis on sovereignty and state consent, the latter focuses on progressive issues such as international economic justice. In fact, China is a staunch supporter

[165] Status of Reservations and Declarations either by Treaty or State at International Committee Red Cross at http://www.icrc.org/ihl (28th February 2005).
[166] See Bob Van Den Bos, op. cit., p. 42.
[167] See Thomas Heberer, "The Tibet question as a problem of international politics", in *Aussen Politik*, Vol. 46, nº 3, 1995, English Edition, pp. 299-309.
[168] See the notes verbales dated 10th March 2003, 5th September 2003 and 14th October 2003 from the Permanent Mission of China to the Office of the UN High Commissioner for Human Rights regarding the letters from Special Rapporteur on freedom of religion or belief, Mr. Abdelfattah Amor in UN document E/CN.4/2004/G/18.

of the new international economic order and the right to development whereby developing economies should have preferential treatment and benefit from concessions on the part of the developed economies. This Chinese image is also present in the theory of the three worlds: first world comprising the superpowers, second world consisting of developed countries such as Canada, Japan and Western Europe and the third world encompassing the remaining countries. At the same time, sovereignty is given pride of place and has prevailed, for instance, regarding Macau and Hong Kong. It was understood to be a sovereign issue, and one to be dealt with through bilateral actions rather than within the Committee of the 24 framework. These territories were not colonies or non-autonomous territories but rather an integral part of China, and the problem was not one of sovereignty but rather the exercise of it.[169] The fierce defence of such a policy is linked to the Greater China strategy; a concept that can be traced back to the Qing Dynasty, but has been more recently debated due to Hong Kong and Macau.[170] The concept of Greater China has been a complex concept with various actors, dimensions and mainly an informal process.[171] In our view, it is a concept best understood as having three dimensions: cultural interaction, economic integration and political reunification. These dimensions have different boundaries and capitals or centres of activity.[172] With the return of Hong Kong and Macau, the concept of Greater China has now been more associated with the political reunification regarding Taiwan as a province of the PRC.[173] The PRC upholds a Chinese version of the 'Hallstein Doctrine' regarding Taiwan, and invests heavily in its diplomacy to prevent the recognition of Taiwan as a sovereign state, either bilaterally or by international organisations. At the UN, Taiwan has attempted to

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[169] See António Vasconcelos de Saldanha, *Some Aspects of the "Macau Question" and its Reflex in Sino-Portuguese Relations within the United Nations*, Instituto Superior de Ciências Sociais e Políticas/Centro de Estudos de Instituições Internacionais, Lisboa, 1996.

[170] Harry Harding, "The concept of Greater China: themes, variations and reservations", in David Shambaugh (ed.), *Greater China, The Next Superpower?,* Oxford University Press, Oxford, 1995, pp. 8-34, at pp. 9-11.

[171] Michael Yahuda, "The foreign relations of Greater China", in *ibidem*, pp. 35-58, at pp. 37-38.

[172] Harry Harding, op. cit., pp. 8-9.

[173] See *The China Quarterly Special Issue: Contemporary Taiwan*, Vol. 148, December 1996, and especially Ramon H. Myers, "A new Chinese civilization: the evolution of the Republic of China on Taiwan", pp. 1072-1090, Thomas W. Robinson, "America in Taiwan's post-Cold War foreign relations", pp. 1340-1361, Michael Yahuda, "The international standing of the Republic of China on Taiwan", pp. 1319-1339, and David Shambaugh, "Exploring the complexities of contemporary Taiwan", pp. 1045-1053. On the issue of nationalism see Jonathan Unger (ed.), *Chinese Nationalism*, M. E. Sharpe, Armonk and London, 1996.

surpass its exclusion from UN membership. In the last effort, a request that the representation of Taiwan be addressed only found support from 15 states.[174] Taiwan presents in its favour the fact that its 23 million population is not represented at the UN, since the PRC does not govern Taiwanese territory. It is a democracy, a free and peace-loving country able to uphold its international responsibilities (therefore fulfilling the UN criteria for membership). It has a thriving economy and, finally, it is a huge contributor to international aid. In addition, it is claimed that the 1971 resolution addressed only the issue of representation of the PRC at the UN and all related organisations, but it did not determine that Taiwan is a part of China nor did it confer on the PRC the right to represent Taiwan at the UN. These efforts have not born fruit, unlike those made at the World Trade Organisation. In this organisation Taiwan is a member under the name of Chinese Taipei (Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu).

Until the 70s, and despite the fact that no state is either strictly monist or wholly dualist, we consider that the PRC leaned towards the dualist spectrum of international law. It also lacked the knowledge of international law, as well as the preparation and legal expertise of legal scholars and lawyers.[175] This was also applicable to the discipline of international relations, in which communication between international relations' scholars in China and the West only began in the late 1970s. In fact, international relations as an academic discipline in China emerged only when China was trying to come to terms with the Cultural Revolution after the mid-1970s. Only then did the search for theoretical frameworks to better express its beliefs and to be engaged with the outside world make its way.

Nevertheless, the PRC's identification with other developing countries and its claim of possessing similarities, namely a distinct cultural tradition from the West; a past of foreign control and oppression followed by a long struggle for sovereignty and independence; and a low economic development,[176] is not without

[174] Letter sponsored by Belize, Burkina Faso, Chad, the Gambia, Grenada, Malawi, the Marshall Islands, Nicaragua, Palau, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Senegal, Solomon Islands, Swaziland and Tuvalu, under the title "Request for the inclusion of a supplementary item in the agenda of the fifty-ninth session, question of the representation of the twenty-three million people of Taiwan in the United Nations", UN document A/59/194.

[175] See Victor H. Li, "The role of law in Communist China", in *The China Quarterly*, Vol. 44, October/December 1970, pp. 66-111.

[176] Wang Tieya, "International law in China: historical and contemporary perspectives", in *Collected*

problems. This is mainly due to its emphasis on the uniqueness of China, which raises some doubts as to its being a true self-identification or rhetoric.[177] The emphasis on its uniqueness and the pride in its cultural heritage has led some to conclude that China is not just another nation-state but rather a civilisation pretending to be a nation-state.[178] The restoration of the glory of China associated with its great power status may render the identification of China with the downtrodden of international society not an easy path.

This Janus-faced standing of the PRC can be observed in what are considered the main aspects of the contemporary Chinese perspective of international law: five principles of peaceful co-existence, concept of sovereignty and the rule *pacta sunt servanda*.[179] Sovereignty is the central element due to the fact that it was a hard-worn prize, and it is underpinned not by its absolute version but rather equal sovereignty. Sovereignty is restricted by non-interference, non-aggression, mutual respect and *pacta sunt servanda*. Additionally, equality means mutual benefit, a concept that includes not only political but also *economic equality*. In addition, we should point out that the Chinese conception of sovereignty cannot be properly understood without taking into account its national desire for independence, as well as a revolutionary optimism in which man should participate actively in the making of history.[180]

Treaties become Chinese domestic law through a three-layered process. The first layer is carried out by the State Council which, according to article 89 (9) of the Constitution, has the task of concluding treaties and agreements with foreign states.[181] Then, the second step is made by the Standing Committee of the National People's Congress that decides on the ratification or abrogation of

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Courses/The Hague Academy of International Law, Vol. 221, 1990/I, pp. 195-370, at p. 355.

[177] See Peter Van Ness, "China as a third world state: foreign policy and official national identity", in Lowell Dittmer and Samuel S. Kim (eds.), *China's Quest for National Identity*, Cornell University Press, Ithaca and London, 1993, pp. 194-214.

[178] Lucien W. Pye, op. cit., p. 58.

[179] Wang Tieya, op. cit., pp. 195-370.

[180] See John Cranmer-Byng, "The Chinese view of their place in the world: an historical perspective", in *The China Quarterly*, Vol. 53, March/1973, pp. 67-79 and Donald J. Munro, "The malleability of man in Chinese Marxism", in *The China Quarterly*, Vol. 48, October/December 1971, pp. 609-640.

[181] See article 89 of the Constitution of the People's Republic of China adopted in 1982 at the China Court site sponsored by the Supreme People's Court of the People's Republic of China at http://en.chinacourt.org/public/detail.php?id=2697 (last access 20th October 2004). Hereafter simply cited as the Constitution of the PRC.

treaties and important agreements concluded with foreign states.[182] After the decisions are made, treaties are ratified or abrogated by the President of the PRC.[183] In the PRC, as a general rule, there is no need of legislative enactment for the implementation of treaties. The internal effect of treaties comes immediately upon promulgation of the President of the PRC. Sometimes, however the Standing Committee of the National People's Congress may enact special laws for implementation of treaties. The Constitution of the PRC has no express provision regarding the relative position of treaties and laws.[184] The problem of the conflict of treaties and laws in the municipal sphere has been divided into four categories: superiority of municipal law over a treaty, equality of municipal law with a treaty, superiority of a treaty over municipal law and superiority of a treaty over constitutional law. The PRC has been classified in the third category and, indeed, a tendency has been found in recent years in which treaties will be given superiority over laws, and the provisions of treaties will be applied internally, whether they are concluded before or after the enactment of laws.[185] This is very much linked to the principle that *equal* treaties must be respected. The Chinese Government's delegate to the Committee against Torture and the Committee for the Elimination of Discrimination against Women further explained that "according to China's legal system, once an international treaty has taken effect in China upon ratification or accession, the Chinese government will undertake the corresponding obligations and will not create any domestic law separately to make alterations (...). In case of divergence between the international conventions and domestic law, the former prevails over the latter, except for reservations that China

[182] *Ibidem*, articles 67 (14).
[183] *Ibidem*, article 81.
[184] The supremacy of the Constitution over treaties can also be seen by the fact that to amend the Constitution a majority of more than two thirds of the votes of the National People's Congress is required whilst international treaties are approved by the Standing Committee. The latter is the permanent body of the National People's Congress but in terms of hierarchy, the Constitution stipulates that the National People's Congress is the highest organ of state power and this includes the power to elect and recall all members of the Standing Committee. See articles 57, 62 (1), 64, and 65 of the Constitution of the PRC.
[185] Wang Tieya, op. cit., pp. 330-333.

has made."[186] The same approach is taken in the General Principles of the Civil Law of the People's Republic of China that was adopted on 12th April 1986.[187]

As to human rights' treaties and more specifically the ICCPR, a debate has been going on as to the best way to incorporate it. At this point, it seems that instead of being given direct application in the form of domestic law (monistic approach), it is preferred that they go through a transformation before it is applied in the form of domestic law (dualistic approach).[188] This is so because human rights' treaties have been regarded, in essence, as part of the domestic affairs of the state and therefore only applicable through a system of transformation.[189] There are several hindrances in the application of the Covenant in Chinese domestic law, such as conceptual obstacles (ignorance and judges' avoidance of using international sources of law), lack of dissemination and awareness of the rights that are set forth in the Covenant not only to the population in general but also to judges and lawyers. There is also legislative delay, since the political and civil rights defined in the Covenant exceed the ones that are set down in the Constitution.[190] One way of circumventing these obstacles is to make reservations at the time of ratification, although China has stated that according to article 19, paragraph 23 of the Vienna Convention, it will not state any reservation that goes against the objectives and principles of the Covenants and will also reduce the number of reservations to the minimum.[191] This cautious attitude was followed in the ratification of the ICESCR, whereby China declared that the application of

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[186] Huang Lie (Professor at the Department of Law of the Chinese Academy of Social Sciences), "The relation between international human rights treaties and China's domestic law", in Faculdade de Direito da Universidade Nova de Lisboa, op. cit., pp. 151-156, at p. 153.

[187] See Article 142: "the application of law in civil relations with foreigners shall be determined by the provisions in this chapter. If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations. International practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions." See General Principles of the Civil Law of the People's Republic of China that was adopted on 12th April 1986 at http://en.chinacourt.org/public/detail.php?id=2696 (last access 5th December 2004). See as well Li Lin (Professor at the Institute of Law Research of the Chinese Academy of Social Sciences), "International and domestic mechanisms for guaranteeing the implementation of the International Human Rights Covenants", in Faculdade de Direito da Universidade Nova de Lisboa, op. cit., pp. 177-182.

[188] Huang Lie, op. cit., p. 154.

[189] *Ibidem*, p. 153 and Paula Escarameia, "Conclusion", in Faculdade de Direito da Universidade Nova de Lisboa, op. cit., pp. 197-199, at p. 197.

[190] *Idem, ibidem.*

[191] Huang Lie, op. cit., p. 156.

Article 8.1 (a) of the Covenant that focuses on the right of everyone to form trade unions and join the trade union of his choice shall be consistent with its relevant domestic provisions.[192]

The preference for transformation of the Covenant's provisions rather than direct application resonates well with the resilience to new subjects of international law whether from 'above', as in the case of the UN, or from 'below', as in the case of individuals. As to the former, there is resistance to going beyond an inter-state into a world organisation closer to a world society conception. China understands the UN as being established on the basis of the sovereignty equality of all members and not a super-State sacrificing the sovereignty of states.[193] As to the latter, it follows the more classical approach of Western international law in which individuals only have rights *via* the state, since only national law can undertake the obligations of ensuring rights of its individual members.[194] This can also be seen in its traditional and conservative approach taken regarding the ability of treaty monitoring bodies to consider reservations made by states.[195] As to foreign policy, we believe that the dominant theory is realism due to its emphasis on the state as a unitary actor, power politics, and the predominance of military security or economic independence.[196] It has a pragmatic foreign policy and its history has gone from the 'two camps' and 'lean to one side', to the opposition to imperialism and revisionism and the three worlds, the *rapprochement* with the US and now the emphasis on development.[197]

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[192] Article 8 of the ICESCR states that: "1. The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others." China also issued another statement in which the Covenant continued to be implemented through the respective laws of the two special administrative regions of Macau and Hong Kong; for the statements made by the Chinese government upon ratification at http://www.unhchr.ch/html/menu3/b/treaty4_asp.htm (last access 5th December 2004).

[193] Wang Tieya, op. cit., p. 296.

[194] Suzanne Ogden, op. cit., pp. 323-327.

[195] See comments made by Chinese representative Mr. Guanjian during the discussion of the report of the ILC in 2002 at the Sixth Committee, UN document A/C.6/57/SR.24, paragraphs 32-35.

[196] See Wang Jisi, "International relations theory and the study of Chinese foreign policy: a Chinese perspective, in Thomas Robinson and David Shambaugh (eds.), op. cit., pp. 481-505, at p. 498.

[197] It has been argued that China's *realpolitik* behaviour is ideationally rooted in an imperial tradition that was continued by modern Chinese nationalist and Maoist strategic preferences. It is from Chinese strategic culture that China derives its *realpolitik* in which it views the world as a zero-sum game: us against them; Chinese national security policy in the Maoist period resulted from a 'hard' strategic culture of *parabellum*, a

The realist tradition is also evident in the field of human rights, and Beijing still plays human rights' diplomacy as traditional power politics. Its contacts with the outside have led mainly to adaptive rather than cognitive learning. In this line of thinking, China respects power and therefore is more accommodating to the US, then Western Europe and finally Japan.[198] A good example of how international human rights are perceived in China is 'prisoner diplomacy', such as the release of Wei Jingsheng on the eve of the International Olympic Committee deliberations about the 2000 Olympic Games.[199] The Chinese perception that human rights are an element of power politics was enhanced by the fact that it was only at a time when China had lost its strategic importance that human rights became an 'issue of foreign policy'.[200] We agree that "while the idea of human rights explains why Beijing has to engage in human rights diplomacy with the West, power and bargaining, explain the process and outcome of human rights exchanges between China and the West."[201] We find a human rights' factor in Chinese foreign policy and indeed China has come a long way fro the 'big lie' in 1989, when it asserted that not a single person had been killed.[202] It began to present a Chinese human rights' discourse arguing for its practices as culturally appropriate implementation of international human rights' standards in documents such as Human Rights' White Papers.[203] The arguments of cultural relativism were complemented by the establishment of official research centres, such as the China Society for Human Rights Studies.[204] In addition, it recognised international human

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quintessentially constructed worldview rather than the condition of international anarchy. See Alastair Ian Johnson, "Cultural realism and strategy in Maoist China", in Peter J. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics*, Columbia University Press, New York, 1996, pp. 216-268. Here *parabellum* derives from the realpolitician's axiom "*si pacem, parabellum*" meaning "if you want peace, prepare for war."

[198] This is the conclusion of Ming Wan, op. cit.

[199] James D. Seymour, "Human rights in Chinese foreign relations", in Samuel S. Kim (ed.), *China and the World: Chinese Foreign Policy faces the New Millennium*, Westview Press, Boulder, Colorado, 1998, pp. 217-238, at pp. 222-223.

[200] Zhu Feng, "Human rights and the political development of contemporary China, 1979-1994", in Michael C. Davis (ed.), op. cit., pp. 116-141, at p. 118.

[201] Ming Wan, op. cit., p. 146.

[202] Ann Kent, op. cit., p. 57.

[203] See Jack Donnelly, "The social construction of international human rights", in Tim Dunne and Nicholas J. Wheeler (eds.), *Human Rights in Global Politics*, Cambridge University Press, Cambridge, 2000, pp. 71-102, at p. 93.

[204] For a summary of the initiatives and network of human rights centres established by the Chinese government see Wang Jiaqin, "Human rights education at schools in China", pp. 164-169 and Meng Xianjun, "Human rights education in China", pp. 188-191, both in Faculdade de Direito da Universidade Nova de

rights *per se* and engaged in human rights' discussions with EU, US and other countries, mainly due to the perception that it is best to avoid Western monopoly over the process of defining human rights.[205] Moreover, it adopted an aggressive posture criticising western countries, most notably the US, for either double-standards in foreign policy (*e. g.* the non-condemnation of Israeli violations of human rights) or domestically for failure to provide for human rights at home, most notably through the publication of white papers on US human rights' practices. These will be explored in the next chapter.

Regarding the UN human rights' framework, China has accepted its existence and importance, and recognised its essence. It has learned that human rights are part of international relations and cannot be disregarded, at least up to a point where we can even argue that "(...) close to a dialogue of the deaf, we might reply that the sensitivities that states shown to the criticism of each other indicate that they listen."[206] The sensitivity shown to condemnation by UN Human Rights' Commission is, of course, measured by the extensive lobbying that in 1989 even prompted the Sub-Commission to decide to vote its draft resolution by secret ballot. This was adopted as a means to be able to circumvent the enormous Chinese diplomatic pressure.[207] At the same time, China has also rejected some of its contents and tried to change them. After the narrowness of the 1995 victory at the Commission, China went on the offensive and made a concerted move with other developing states. At the Sub-Commission, this resulted in the 1997 decision to exclude from the Sub-Commission's agenda item 6 ("Human rights' violations") country situations already being dealt with by the Commission.[208] This curtailed the scope of more objective resolutions or findings by the Sub-Commission and transferred it to the Commission. It changed the spotlight to the Commission, where China has been able to include its human rights' practices within the North-South debate. This is very obvious in the debates that preceded the voting on the resolutions at the Commission. In addition, by stressing sovereignty and non-

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Lisboa, op. cit.
[205] James D. Seymour, op. cit., pp. 219-220.
[206] R. J. Vincent, "Modernity and universal human rights" in Anthony McGrew, Paul G. Lewis *et al*, *Global Politics, Globalization and the Nation-State*, Polity Press, Oxford, 1995, pp. 269-292, at p. 290.
[207] Ann Kent, op. cit., pp. 58-59.
[208] *Ibidem*, p. 74.

interference, China has gained the support of Asian states and developing countries and some of these "(...) supported China out of fear that they might be the next targets for criticism from the West."[209] It also shows that the Chinese learning process appears to be more instrumental than normative, and it simply highlights the difficulties of UN monitoring of a great power and even more so in a non-crisis situation. In this process, we find that the US occupies a special place in Chinese foreign policy and most notably, regarding human rights. This is also present in the question of the death penalty where, as we have seen. the US is used as an example of the lack of consensus concerning the abolition of such punishment, manifest as well amongst developed countries.

As to the International Bill of Human Rights, China has come to accept it gradually. It recognised the importance of the UDHR, has ratified the ICESCR and signed the ICCPR. As to the right to life, it is worth noting that regarding article 3 of the UDHR, the Chinese perspective and its emphasis on the right to subsistence, resonate well, as we shall see in the next chapter, with the touchstone of Chinese human rights' policy, namely that of privileging development, economic and social rights. In addition, we believe that it is possible to establish a bridge between Communist (and revolutionist) China and Taipei revealing that, despite all its revolutionary zeal, the Chinese approach to the right to life did not start anew. As to the question of the death penalty and the two-track policy of the UN, it is clear that China has the guideline of emphasising the desirability of abolition *per se*, whilst affirming its sovereign right to establish the best way to achieve such a goal. Thus China, because it considers that the current domestic conditions render such initiative premature, has rejected abolition in peacetime of the Second Optional Protocol and has signalled the intention of ratifying the ICCPR with reservations on this issue. These indicate the strengthening of the legitimate use of the death penalty and a rejection, at least for now, of a more progressive interpretation whereby it may be considered a cruel, unusual and degrading punishment. Additionally, it seems that the Chinese approach to the death penalty is immersed in the wider policy towards human rights and the three concepts that characterise it, namely sovereignty, cultural relativism and focus on collective rights. Therefore,

[209] Ming Wan, "Human Rights and Sino-US relations: policies and changing realities", in *The Pacific Review*, Vol. 10, nº 2, 1997, pp. 237-255, at p. 245.

in order for us to be able to have a complete picture of the use of the death penalty, we firstly have to analyse its domestic practice and Chinese compliance with the second track UN policy, namely the ECOSOC safeguards and guarantees of 1984, 1989 and 1996 for capital offenders and, secondly, its role and function within China's human rights' foreign policy. These are the goals of our last chapter.

CHAPTER X

THE CHINESE STANDPOINT ON CAPITAL PUNISHMENT AND CIVILISATION: THEORY AND PRAXIS

"One must not think that abolishing the death penalty is the only means of achieving civilization, for civilization is not measured by the presence or absence of the death penalty."[1]

The recognition of an eventual abolition of the death penalty worldwide is understood as a distant historical inevitability that allows for each country to establish its own path. The path that the Chinese have set out for themselves can be ascertained by looking into their Chinese practice of the safeguards and guarantees provided by the ECOSOC to capital offenders. These standards were made in 1984, 1989 and 1996 with China's agreement, unlike the ICCPR, and therefore provide us with a yardstick by which to measure Chinese compliance. Likewise, we will explore the evolution of capital offences in both Criminal and Criminal Procedure Law Codes which were enacted for the first time in 1979 and revised in 1997. Additionally, we will analyse to what extent capital punishment plays a part in China's tri-dimensional human rights' policy: presentation of white papers, 'Asian values' and criticism of other countries' human rights' double-standards. Within the UN death penalty framework, we will consider the reaction of China and other retentionist countries to resolutions and drafts on this question both at the Commission on Human Rights and General Assembly, as well the Chinese policy regarding the UN two-track approach that we have already identified. We will explore the cultural relativist and civilisational claims made by the Asian countries, and try to understand the place that 'civilisation' occupies in the Chinese approach to the question of the death penalty.

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[1] Song Hansong (Deputy Director-General of the Supreme People's Procuratorate), "The death penalty as a form of social control", in Faculdade de Direito da Universidade Nova de Lisboa, *EU-China Human Rights Dialogue, Third Seminar: Death Penalty; Ratification and Implementation of UN Covenants, Lisbon 8th – 9th May 2000*, FDUNL, Nº 1-2002, Lisboa, pp. 122-126, p. 126 available at http://www.fd.unl.pt/web/investigacao/wpapers/pdf/2002/wp001-02.pdf (last access 5th December 2004).

1 Chinese Criminal Law, Evolution of Capital Offences, and ECOSOC Standards

"In China, the view is that penalties are instrumental to deterrence and the control of crime, which can be eliminated only through a lengthy process, under a just and rational social system, and on the basis of a highly developed and prosperous society in all its economic, cultural, moral and educational aspects. It is therefore premature to abolish capital punishment for all crimes in China."[2]

Throughout the history of China, we find traits that reveal a language of human rights as well as an approach to the question of the death penalty. It is trite to mention that the Chinese language did not have a word for rights, and when such a word appeared in the 19th century, it was used in the context of national rights and sovereignty.[3] In classical texts, there was certainly no word equivalent to rights, at least in the meaning of natural human rights as absolute and universal, but this is not to say that there was no conception of rights and duties. Historically, we find two different approaches regarding rights: Confucianism and Legalism which, in fact, ended up amalgamated.[4] These two schools of thought have left indelible marks on Chinese society, namely the concepts of *li* and *fa*, and they are relevant for us to understand Chinese law in general, and criminal law and capital punishment in particular. Confucianism emphasises *li*, understood as rules of propriety, and Legalism focuses on *fa*, the rule by law. The starting point of Confucianism is its emphasis on the educational function of *li* in the government of a state, and belief that all persons were educable. Good government could be

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[2] Wu Han (Head of the Criminology and Crime Detection Department, East China School of Law and Politics and member of the Committee on Crime Prevention and Control), "China's experience with the death penalty: no abolition now, only minimization", in *Crime Prevention and Criminal Justice Newsletter*, Vols. 12 and 13/Special Combined Issue on Capital Punishment, November/1986, pp. 25-26.

[3] See Wang Gungwu's essay "Power, rights, and duties in Chinese history" which was originally published in 1979 and is reproduced in his book *The Chineseness of China, Selected Essays*, Oxford University Press, Hong Kong, Oxford, New York, 1991, pp. 165-186, at p. 167, Julia Ching, "Human Rights: a valid Chinese concept?", in Wm. Theodore de Bary and Tu Weiming (eds.), *Confucianism and Human Rights*, Columbia University Press, New York, 1997, pp. 67-82, at pp. 70-71, and Jack Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca and London, 1996 (1st Ed. 1989), p. 54.

[4] For a thorough introduction to this theme see the first chapter of Jianfu Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development*, Kluwer Law International, The Hague, 1999, pp. 3-30.

exercised through virtue and example. *Li* is "a set of general rules governing proper conduct and behaviour by which rulers can maintain an ideal social order (....) a general instrument for training character and nourishing moral force."[5] Nonetheless, these rules varied according to status in society and family and were therefore hierarchical. The five cardinal relations of men that we enunciated in chapter two were the basis of this well-ordered society. Only one relation, namely between friends, was conceived of having reciprocal rights and duties. In a nutshell, there were duties and implicit rights between unequals and, despite this hierarchical vision of society, Confucianists attached pivotal importance to education and all persons, whether with a good or bad nature, were educable. It was crucial for people to be educated before they could be punished by law.

On the other side of the fence, Legalists called for severe punishment in order to maintain social stability. For them, man was intrinsically bad and, therefore, the primary task of law was not to encourage virtuous behaviour but rather to prevent evil. In order for this to be possible and, in fact, the only way to govern a state was to make a uniform law applicable to all (exception made to the ruler who was above the law), and include severe punishment for those who did not conform. Legalists, due to their suspicion of man's nature and motives, also advocated strict regulation and control over government officials and thus encouraged the creation of a complex system of administrative law. Here we find two different conceptions of authority: one Confucian, and clearly based on virtue and respect; and the other Legalist, emphasising fear and force. When looking at the history of the Chinese empire, we can observe that Legalism predominated in the first dynasty, the Qin, which began to reign in 221 BC. It was short-lived since the dynasty that followed in 206 BC, the Han, replaced it with Confucian teachings. Nevertheless, what really took place was the confucianisation of law, a harmonisation process that was made easier by the Chinese attitude of treating law as a secondary tool for governing a state. This process was completed with the enactment of the Tang Code in 653 AD. If, on the one hand, the Legalists' concept of equality before the law was replaced by the Confucian differentiation of social status; on the other, law became an increasingly

[5] *Ibidem*, p. 8.

administrative tool for determining and maintaining social order with the state at the centre. The concept of law remained attached to punishment, and turned into a harsh and detailed system of penal law. We find that state practice was guided by Legalist principles, and that Confucianism was upheld as a desired and ideal order for society. The approach that law is a supplementary tool for political, administrative and social stability purposes remained valid even after the fall of the Chinese empire. Law operated in a vertical direction having the ruler/state at the apex, and not on a horizontal level between individuals.

In imperial China, the protection of the individual was seen as coterminous with the protection of society, and the concept of the individual, although not absent, was of less importance than societal harmony. The criminal paid not only for the crime committed but also for the disruption of family order, which had forced the government to intervene.[6] In fact, we find family-based penalties in the form of clan punishment, which entailed the concept that the family itself had failed to prevent disruption and such an error was the root cause of crime.[7] In this sense, to punish the guilty was not only to do justice but also to restore social harmony and avoid the deep-rooted fear of chaos and lawlessness. Bearing this in mind, it is not surprising that in the Qing Code there was a great deal of importance attached to obtaining confessions, by torture if need be. Nevertheless, there were exceptions to the use of torture regarding certain categories of persons such as the elderly, the young, the disabled and the privileged classes.[8] In theory, the use of torture was highly organised and restrictions were clearly spelled-out. Limits were established according to the seriousness of the offence, and only specified instruments of torture were legally permitted, *i. e.*, they had to conform to the dimensions prescribed in the Qing Code, and to bear the seal of the magistrate's superior officials. The administration of judicial torture implied a detailed register explaining the reasons and the means of torture that were used. In practice, although corruption and the inability of the central government to control the local

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[6] See Ann Kent, *Between Freedom and Subsistence, China and Human Rights*, Oxford University Press, Hong Kong, Oxford and New York, 1995 (1st Ed. 1993), pp. 30-46.
[7] Michael R. Dutton, *Policing and Punishment in China, From Patriarchy to 'the People'*, Cambridge University Press, Cambridge, 1992, pp. 155 and 163.
[8] Alison W. Conner, "Confucianism and due process", in Wm. Theodore de Bary and Tu Weiming (eds.), op. cit., pp. 179-192.

administration of justice was a fact of Chinese society, confessions also had to be right. The Chinese, unlike the medieval and Inquisition practices, did not maintain that an innocent person would not confess falsely even under torture. If on the one hand, confession was crucial to redress a wrong committed to the victim and to society; on the other, it had to be a *true* confession. Here we find a concern not only for procedural but also substantial justice, in which only a true confession could allow for the re-establishment of social order and harmony.[9] Also interesting was the possibility of a crime by analogy, in which an unforeseen offence in the Law Code could be punished by using similar situations and punishments that were deemed to be a criminal practice.[10]

There were five basic forms of punishment: beating with the light bamboo, beating with the heavy bamboo, penal servitude, exile and death.[11] In the most serious cases, revision was provided for by the Board of Punishments in Beijing. These, of course, included capital cases and, in which not only was review compulsory but, in fact, only the Emperor could grant final approval of the sentence and its execution. All these procedures had the aim of limiting arbitrary and corrupt actions by the judicial agents. The methods of execution were proportional to the seriousness of the offence, and the use of the death penalty reflects the idea of relying heavily on criminal punishment to maintain social order and stability. The worst method of execution and the most dishonourable was death by slicing, followed by decapitation and then hanging. The dishonour of a punishment was proportional to the disfiguration of the body, and aimed at rendering the criminal's body useless for any future life. At the apex stood death by slicing (or lingering death), whereby the offender was tied to a cross and, by a serious of cuts, the head was sliced beyond recognition, followed by its public exposure in a cage for a period.[12] This kind of punishment also entailed its immediate execution while decapitation and hanging were divided into 'immediate' or 'after the assizes.' While the former allowed for no review and execution was

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[9] *Idem, ibidem.*

[10] Donald C. Clarke, "Justice and the legal system in China", in Robert Benewick and Paul Wingrove (eds.), *China in the 1990s*, MacMillan Press, London, 1995, pp. 83-93, at p. 88.

[11] Michael Palmer, "The People's Republic of China", in Peter Hodgkinson and Andrew Rutherford (eds.), *Capital Punishment: Global Issues and Punishments*, Waterside Press, Winchester, 1996, pp. 105-141, at pp. 108-109.

[12] *Ibidem*, pp. 109-110.

carried out after the emperor had upheld the death sentence, the latter entailed a review by senior officials at a special meeting (held in the autumn, which is the season of death) with the possibility of a reprieve or commutation.[13] For persons of higher rank, there was also the possibility of *cisi* that is the right to suicide, and to have a hidden burial site known only to the family.[14] Despite the impressiveness of the number of capital offences, it appears that the use of the death penalty was less frequent than might be assumed and there were categories of persons to whom, as in the case of use of torture, it was not applied such as the elderly, infirm or minors.[15]

In the late Qing, a two-stage legal reform was initiated by the established Law Codification Commission. The first stage had the aim of revising old law. On the one hand, to pave the way for the transition from traditional to modern western law and on the other, to deflect western criticisms regarding the cruelty of certain punishments, reform of the police and prison systems. This was carried out between 1902 and 1907. The Qing reform reduced the number of capital offences from more than 800 in total to about 20, a number that was retained by Nationalist China.[16] The second stage had the goal of enacting new legal codes along Western lines. It is noteworthy that the model chosen was indirectly western, since the Japanese legal system was mainly structured on the German example. Japan was chosen because it had successfully overturned extraterritoriality and had become a great power, thereby showing that being Asian was not an impediment to modernisation and development. It influenced not only the drafting of legal codes but even the prison system.[17]

The reform initiated by the Qing was continued by Republican China. The search for a new legal system meant that until the achievement of such a reform, Qing laws remained in force. The Guomindang laws were made in accordance with its guiding principles namely the 'Three Principles of the People- Nationalism, Democracy and People's Livelihood.' The main concern for the Chinese

[13] *Ibidem*, p. 110.
[14] Michael R. Dutton, op. cit., p. 157.
[15] Andrew Scobell, "The death penalty in post-Mao China", in *The China Quarterly*, Vol. 123, September 1990, pp. 503-520, at p. 515 and Michael Palmer, op. cit., p. 110.
[16] Jianfu Chen, op. cit., pp. 193-194.
[17] Michael R. Dutton, op. cit., pp. 159-171.

government was, as we have seen, the achievement of equal footing with other nations internationally. As to the other two principles, they were not adopted in an absolute way but rather adapted to Chinese reality. Sun Yat-sen's stress on rights is to be understood as people's rights rather than personal or civil liberties, and additionally, the rights of the individual were never autonomous but always subordinated to the rights of the group he belonged to. In this sense, the individual had the right to exercise the rights of his group.[18]

In practice, China became a Party-State. The state was governed in an authoritarian way and political tutelage was exercised by the Guomindang, since the masses had neither the vision nor the ability to carry on with such a task. The instrumentalist and utilitarian approach to law remained despite the enactment of several codes regarding civil, criminal, administrative, civil procedure and criminal procedure laws. A permanent Constitution was only established in 1946, and was, as we have seen, under the umbrella of the Guomindang rather than the other way around. In spite of the general overview that the rights propounded were clearly based on a notion of the supremacy of the collective and the group, two events stand out: firstly, the equality of rights between sexes, including the right of women to be on equal terms regarding inheritance and to have common property during marriage and secondly, the 'individualisation' of crime, *i. e.*, the shifting of the root causes of crime from the family to the individual.

Communist China continued the supremacy of the collective over the individual but this time directing it to the CCP which was, in fact, equated with the state. Unlike the Guomindang, which had overthrown Imperial China but retained its legal system, the CCP not only dismantled the power of the Guomindang but also its laws and codes. The Marxist understanding that law is a part of the superstructure based on and determined by the economic base of a particular society prevailed. The major influence in terms of a legal system came from the SU and the approach that "law was a tool to remould society and to suppress class enemies, to enforce party policy rather than to protect individual rights, was taking root."[19] The abolishment of the Law Codes that were enacted by the Guomindang was followed by the drafting and study of new law codes.

[18] Wang Gungwu, op. cit., p. 180.
[19] Jianfu Chen, op. cit., p. 34.

Nevertheless, and despite the enactment of a Constitution in 1954, the work on a legal system was set aside in 1957 with the Anti-Rightist Movement and the Great Leap Forward of 1958. It was only resumed in 1961 but did not last long. The 1963-1965 Four Clean-ups Movement with its focus on the clean-up of politics, economy, organisation and ideology swept away any attempt to reform the legal system. In fact, the legal system was destroyed by the following event, the Cultural Revolution that lasted from 1966 to 1976. The establishment of a criminal and a criminal procedure law codes suffered from this general approach to law, and the legal system and all attempts were continually postponed.

Deng Xiaoping reversed this tendency and linked legal reform to its pragmatic economic and open-door policy. This was reflected in a thorough Constitutional revision in 1982, making it a *de facto* new Constitution, and for the first time ever, there were Communist Criminal and Criminal Procedure Law Codes in 1979. They both came into force in 1980. The main characteristic of the Chinese legal system reflects the commitment of the CCP to continue ruling and to use law in the service of economic growth and social stability. In order for China to apply its opening-door policy, it began to develop its own laws and to borrow from foreign sources selectively. The salient feature in the process of legal reform in China is the imperative of maintaining supremacy of the CCP, whilst enabling economic reform.[20] This is easily traced in constitutional law, since the amendments to the 1982 constitutional text were mainly, although not totally, made to accommodate the pace and the demands of economic reform and modernisation. [21] In a nutshell, we find not a rule *of* law but rather rule *by* law.[22] The main purpose of the law is not to be an impartial arbiter between the state and

[20] See Pitman B. Potter, *The Chinese Legal System, Globalization and Local Legal Culture*, Routledge, London and New York, 2002.

[21] China enacted its Constitution in 1954 and subsequently made three major amendments in 1975, 1978 and 1982. The amended Constitution of 1982 suffered four minor amendments that had the goal of removing or adding specific clauses namely in 1988, 1993, 1999, and 2004. On general terms, the first one dealt primarily with the recognition of the private sector and the right to the use of the land. The 1993 amendment focused mainly on the assertion of 'building socialism with Chinese characteristics' and measures regarding the economic structure. The third amendment explicitly acknowledged the crucial importance of Deng Xiaoping Theory along with Marxism-Leninism and Mao Zedong Thought to the leadership of the Chinese Communist Party. The last amendment also continued the economic reform by adding for instance the possibility for the state to pay compensation in accordance with the law when it expropriates or takes land for public use.

[22] Pitman B. Potter, "The Chinese legal system: continuing commitment to the primacy of state power", in Richard Louis Edmonds (ed.), *The People's Republic of China after 50 Years*, Oxford University Press, Oxford, 2000, pp. 111-121 and Jianfu Chen, op. cit., p. 361.

citizens or between citizens and to limit state power, but rather a mechanism by which state power is exercised. It is an effective tool of promoting party dominance and "thus, the law is still what it has been in China; an instrument of control, not a vehicle for codifying rights."[23]

We agree with the general overview that Chinese Constitutional law is more focused on state organisational structure than establishing effective checks and balances, with the future direction of society rather than the protection of fundamental rights of citizens, and general principles instead of detailed rules of implementation.[24] As to the specific issue of human rights, we can note an increasing, albeit very limited, recognition of their importance within constitutional law. In the 1982 constitutional text, provisions on citizen's rights moved one step further up the hierarchical ladder by being placed as chapter two (and not chapter three) immediately after the general principles; in addition, the number of articles included was greater than in the previous texts.[25] The last amendment, which took place in 2004, encompassed among other things the inclusion of a new paragraph to article 33 stating that "the state respects and protects human rights."[26] Even if it is couched in general terms, it is the first time that respect and protection of *human* rights are explicitly recognised as a duty of the state. Also worthy of note is the use of *human* rather than *citizen*, in that the former presupposes that rights are inherent (we enjoy them by virtue of being human), whilst the latter is underpinned by the idea that rights are granted by the state. Nevertheless, this new constitutional paragraph is still included in chapter two which is precisely entitled "the fundamental rights and duties of citizens." Article 33 also declares that all citizens are equal before the law. The Chinese Constitution proclaims as well, among other rights and freedoms, the right to vote and to stand for election, freedom of speech, press, assembly, association, procession, demonstration, religious belief, inviolability of personal dignity, freedom of person, privacy of correspondence, right and duty to work, right to education, and equal rights for

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[23] James D. Seymour, "Human rights and the law in the People's Republic of China", in Victor C. Falkenheim (ed.), *Chinese Politics from Mao to Deng, Paragon House*, New York, 1989, pp. 271-297, at p. 289.
[24] See Jianfu Chen, op. cit., chapter 3 entitled "Constitutional law", pp. 57-96 being that these general appreciations are made in p. 58.
[25] *Ibidem*, p. 91.
[26] See article 33 of the Constitution of the PRC.

men and women.[27] Nonetheless, some of these constitutionally guaranteed rights do not benefit from an absolute safeguard. For instance, the article that deals with freedom of correspondence explicitly foresees exceptions. In cases of meeting the needs of state security or of investigation into criminal offences, public security or prosecutorial organs are permitted to censor correspondence with procedures prescribed by law.[28] Likewise, all fundamental rights and freedoms have to be viewed against article 51, which asserts that "the exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens."[29] What matters here is the fact that the interests of the state, society and collective are never given any explicit definition.

We find limits to the paramount place that constitutional norms usually occupy, despite the assertion that no law or administrative or local regulation can contravene the Constitution, which is in fact the fundamental law of the state and has supreme legal authority.[30] Some have considered that China has a Constitution but not constitutionalism.[31] First of all, there is no judicial review of constitution and secondly, there is no mention of the right of citizens or organisations to challenge the constitutionality of government actions, nor any mechanism established for the enforcement of constitutional rights.[32] The power to supervise the enforcement (and amendment) of the Constitution is carried out by the legislature, namely the National People's Congress and its Standing Committee.[33] In addition, the latter is also entrusted with the power to interpret the Constitution.[34] Citizens cannot seek legal redress for any unconstitutional acts that the state apparatus and political leaders commit.[35] It is the Chinese version of the

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[27] *Ibidem*, chapter II "The fundamental rights and duties of citizens" that begins with article 33 and ends with article 56.
[28] *Ibidem*, article 40.
[29] *Ibidem*, article 51.
[30] *Ibidem*, last paragraph of Preamble and article 5.
[31] Zhu Feng, "Human Rights and the political development of contemporary China, 1979-1994", in Michael C. Davis (ed.), *Human Rights and Chinese Values, Legal, Philosophical and Political Perspectives*, Oxford University Press, Hong Kong, Oxford and London, 1995, pp. 116-141, at p. 137.
[32] Michael C. Davis, "Chinese perspectives on human rights", in Michael C. Davis (ed.), op. cit., pp. 3-24, at pp. 7-11.
[33] Articles 62 (1) and (2) and 64 of the Constitution of the PRC.
[34] *Ibidem*, article 67.
[35] Yu Haocheng, "On human rights and their guarantee by law", in Michael C. Davis (ed.), op. cit., pp. 93-115, at pp. 113-115.

classic dilemma of 'who guards the guardians', when there is not an effective mechanism of checks and balances.

Returning to the question of the death penalty, we find continuity between traditional China and the Guomindang, which considered the death penalty as an important criminal punishment. At the UN, the ROC considered such a matter as belonging to the sovereign sphere of each state. In addition, it emphasised the need to not apply such a punishment unjustly and established a co-operative attitude regarding UN initiatives. This can be seen from the response given by Mr. Li, the ROC's representative at the ECOSOC regarding the 1968 resolution, who stated that capital punishment was a very complex situation "which related not only to the judicial systems and criminal laws of each country, but also to the social traditions and political situations in different parts of the world. For that reason, his delegation was glad to see that the draft resolution was couched only in general terms and dealt purely with the humanitarian aspects of the question, and it whole-heartedly supported it."[36] Its co-operation can be seen in the responses given to the first report made by Marc Ancel, in which it was included on the retentionist side.[37] It recognised the concept of diminished responsibility to the deaf-mute and the feeble-minded, and both pregnant women and the insane were usually exempted from execution. Death sentences could be passed by ordinary criminal courts and carried out by electrocution but a provision was made for hanging if the necessary equipment for electrocution was not available. Executions were not public but a special authorisation could be granted to journalists. In addition, death sentences were associated with some form of deprivation of public rights and honours.[38] Capital offences included crimes against the person, crimes against property, economic crimes, crimes against the state and political offences.[39] It was the only country to have reported an equal

[36] UN document A/C.3/SR.1557, paragraph 17.
[37] Ancel Report (UN document ST/SOA/SD/9), paragraph 8.
[38] *Ibidem*, paragraphs 22, 39, 46, 61, 66, 69 and 71.
[39] Capital offences against the person were murder, parricide and infanticide, homicide accompanied or followed by another crime (robbery, highway robbery and piracy), arson or destruction of various kinds causing death, rape, traffic in narcotics in certain particularly serious cases, arbitrary detention with torture, recidivism after sentence to the longest term of deprivation of liberty; commission of more than one offence punishable with such a penalty; capital offences against property and economic crimes included aggravated hoarding or unlawful and serious raising of prices and misappropriation of public funds; and capital offences against the state and political offences were treason, spying and disclosure of national secrets, assistance to,

number of death sentences and executions, namely 15 in the five-year period under survey. In addition, 60% of capital charges resulted in convictions and they were all for murder. The interval between sentence and execution was of 14 to 18 days and when judicial error had been proved the family had a right to claim an indemnity by an express provision.[40]

In the second capital punishment report made by Professor Morris, the veil was further uncovered and included information regarding military justice.[41] In general terms, the interval between sentence and execution was maintained and the death penalty was newly prescribed for the commission by public officials of certain offences, such as taking bribes or using false pretences to extort.[42] The system for considering extenuating circumstances in China was judicial rather than statutory. This meant that the jury or judge had absolute discretion in considering or refusing to consider extenuating circumstances. In capital cases, whenever these circumstances were considered, it avoided an otherwise mandatory death sentence.[43] Once again, we find death sentences matching executions, namely 25 from 1961 to 1965. The same goes for the military, in which 219 death sentences and executions were carried out, in this case by shooting.[44] In cases where extenuating circumstances were considered there was the possibility of an alternative penalty that ranged from imprisonment for life to imprisonment for a specified term of years usually 12 to 15 years. This situation also applied to the military realm.[45] Capital military offences were numerous.[46] A general court martial

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or collaboration with the enemy, crimes against the integrity and independence of the country, armed rebellion, insurrection, conspiracy against the state, looting, massacre, devastation and diversionism. *Ibidem*, paragraphs 102-143.

[40] *Ibidem*, paragraphs 145, 149, 155, 169, and 189.

[41] Morris Report (UN document ST/SOA/SD/10).

[42] *Ibidem*, paragraph 21 b and 77. Death penalty was applied to any of the following offences: selling, converting or stealing government food-stuffs; using authority or false pretences to extort; taking bribes or gifts or engaging in other corrupt acts while involved in construction, purchasing or supply; using government transport to smuggle or carry contraband; taking or soliciting a bribe for a breach of duty.

[43] *Ibidem*, paragraphs 41 and 100.

[44] *Ibidem*, paragraphs 63, 70, and 86.

[45] *Ibidem*, paragraphs 102, 105, and 114.

[46] Capital Military offences: espionage and delivery of military secrets to the enemy, assisting the enemy, revolt, insurrection, incitement to revolt or insurrection, use of violence against a superior, refusal to obey orders (in face of the enemy), desertion, desertion to the enemy, abandonment, failure to hold assigned post or position, capitulation, casting arms aside or ammunition, negligent failure to execute orders or mission, falsification or distortion of a message or signal, misuse of a flag of truce, rape, rape leading to death, theft or destruction of military equipment, property or supplies and pillage. For all these offences the death penalty is mandatory with the exception of two namely, assisting the enemy and use of violence against a superior, in

was composed of a maximum of nine members, in which at least one member of the court was required to have legal competence. The decision of a court martial was subject to review by a higher military tribunal and the reviewing officer could only order a re-examination by the trial court.[47]

The co-operative relationship between Chinese representatives and reports on capital punishment came to a halt in 1971. Unlike the ROC's attitude regarding the first two reports, the PRC did not reply to the third study on capital punishment. This approach was maintained regarding the Secretary-General's quinquennial reports (total of six) that we have already analysed. The PRC's approach to the death penalty is a mixture of traditional and Communist features. While Marx and Engels shared the view that it was a means of feudal and capitalist oppression, Lenin considered it a crucial tool of revolutionary government directed at the bourgeoisie. Mao Zedong viewed capital punishment, at first, as a short-term necessity and advocated that it should be used against counter-revolutionaries, but with caution and in a limited number of cases.[48] Crime was understood as a product of class society and alien to socialism, and therefore crime and criminal law were associated with the antagonistic contradictions between people and the enemy. The latter had different interests and should be dealt with harshly and through dictatorial means. Non-antagonistic contradictions were the ones between parties of the people which, nevertheless, shared the same interests and should be resolved through persuasion and education.[49] Deng Xiaoping argued for a harder approach to the use of the death penalty as a means of education of the masses, deterrence and belief in the rightness of retribution.[50]

The PRC is a retentionist country where we find two exceptions, namely concerning the special administrative regions of Macau and Hong Kong. These exceptions stem not from 'within' but from 'without', namely Portuguese and British administration. Macau was the first territory to abolish the death penalty in Asia, following the 1867 abolition for all civil crimes in Portugal. In 1870, a Decree was

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ibidem, Annex I, p. 126 and Annex II listed forty-nine additional categories of capital military offences, pp. 127-129.

[47] *Ibidem*, Annex III, paragraphs 3, 7, 8 and 9.

[48] Andrew Scobell, op. cit., p. 505.

[49] See Donald C. Clarke and James V. Feinerman, "Antagonistic contradictions: criminal law and human rights in China", in *The China Quarterly*, Vol. 140, 1995, pp. 135-154.

[50] Andrew Scobell, op. cit., p. 506.

published and, through its article 1, declared that "the death penalty is hereby abolished for all civil crimes in all overseas provinces."[51] As to the death penalty for military crimes, Macau once again followed Portugal, which abolished it in 1911. Nevertheless, this was short-lived due to the Portuguese participation in the First World War, which restored the death penalty for military crimes, on an extraordinary basis and only for crimes committed in the field of operations, but it was never applied to Macau. In 1976, article 24 of the new Portuguese Constitution categorically prohibited the application of the death penalty for any crime, whatever its nature. In addition, article 33, paragraph (3), prohibits the extradition for crimes which carry the death penalty under the law of the requesting state. The main concern of the Portuguese administration was to make sure that the application in Macau of the ICCPR did not in any way affect the status of Macau as defined by the Portuguese Constitution and the Organic Statute of Macau. This is to say that while the Covenant places emphasis on the limiting and conditioning of the use of the death penalty, the constitutional norms and laws in force in Macau safeguard the absolute right to life. For the Portuguese standard on the question of the death penalty, the ICCPR provisions on this matter were not enough. The resumption of sovereignty by the PRC over Macau after 20th December 1999 has entailed the agreement that the Covenant provisions remain in force, as well as the Chinese assurance that the death penalty shall not be introduced.[52] The Hong Kong Bill of Rights' Ordinance was enacted on 8th June 1991, and article 2 gives domestic effect to article 6 of the ICCPR. The death penalty was abolished in April 1993 with the enactment of the Crimes (Amendment) Ordinance of 1993. The death sentence for murder was replaced by mandatory life imprisonment and, in the cases of treason and of piracy with

[51] "Portugal, report on the application of the Covenant in Macau", 1st March 1996, UN document CCPR/C/70/Add.9, paragraphs 44 -51 (article 6).

[52] See Article 40 of the Basic Law: The provisions of International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Macao shall remain in force and shall be implemented through the laws of the Macao Special Administrative Region. The rights and freedoms enjoyed by Macao residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the first paragraph of this Article. The Basic Law of the Macau Special Administrative Region of the PRC is available at the official site http://www.macau.gov.mo/constitution/basiclaw_en.phtml (last access 20th October 2004).
The situation in 1999 had not changed and the fourth periodic report does not even mention the question of the death penalty or its reintroduction after the handing over to the PRC, see "Fourth periodic report of state parties due in 1996, Portugal (Macau)", 1st March 1999, UN document CCPR/C/POR/99/4.

violence, it was replaced with discretionary life imprisonment to be decided by the court.[53] The Joint Declaration and article 39 of the Basic Law constituted an express undertaking by the government of the PRC to ensure that the provisions of both Covenants as applied to Hong Kong, would remain in force after 1st July 1997, including the obligation to submit to the respective treaty monitoring bodies, the reports required by article 40 of the ICCPR and article 16 of the ICESCR.[54] This was acknowledged by the PRC by a letter to the Secretary-General dated 4th December 1997, and the initial report was made in 1999 covering the period from 1st July 1997 to 30th June 1998.[55] As to the application of the death penalty, its rejection could not be clearer through the assertion that "the Government has no intention of reinstating the death penalty."[56]

As to the overall situation of the death penalty in the PRC, the enormous difficulties in ascertaining the reality of the death penalty have often been mentioned.[57] It is consensual that numbers are underestimated but even so, China is still the leading executioner worldwide and the seventh country regarding the rate of executions per million of population with 1.65 during the period of 1996-2000.[58] Our main concern is to try to find out, in general terms, the level of Chinese compliance with the ECOSOC safeguards and guarantees of 1984, 1989, and 1996.[59] The fact that China has given its consent to these documents does not make the task easier, and the difficulty of piercing through the 'official' picture given by the Chinese government remains. As we will see later on, this is one of the main reasons why China has been the focus of the Special Rapporteur on

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[53] Fourth periodic report of states parties due in 1994 (Hong Kong): United Kingdom of Great Britain and Northern Ireland, 7th August 1995, UN document CCPR/C/95/Add.5, paragraph 53 pertaining to article 6.
[54] Special report (Hong Kong): United Kingdom of Great Britain and Northern Ireland, 13th August 1996, UN document CCPR/C/117, paragraph 4.
[55] Initial Report (Hong Kong): China, 16th June 1999, UN document CCPR/C/HKSAR/99/1, paragraph 2.
[56] *Ibidem*, paragraph 102. See as well the supplementary report in which the death penalty is not even considered under article 6, Addendum, People's Republic of China Hong Kong Special Administrative Region, 1st November 1999, UN document CCPR/C/HKSAR/99/1/Add.1, paragraphs 45-50.
[57] Xiao Yang, president of China's Supreme People's Court, said on March 2003 that in the past five years 819,000 persons had been sentenced to death (including suspended death sentences), to life imprisonment or to prison terms of over five years showing a 25 % increase over official figures for the past five years, *cit in* Foreign and Commonwealth Office, *Human Rights Annual Report 2003*, London, 2004, p. 174.
[58] See table made by Roger Hood in op. cit., p. 92.
[59] These three ECOSOC resolutions were adopted without vote; see *Y. U. N. 1984*, pp. 709-710, *Y. U. N. 1989*, p. 625, and *Y. U. N. 1996*, p. 1042. China was a member of the ECOSOC in the years in question and did not issue any statement indicating its dissociation from the voting; see *Y. U. N. 1983*, p. 1356 (Three-year term beginning in 1st January 1984), *Y. U. N. 1989*, p. 1002, *Y. U. N. 1996*, p. 1469.

extrajudicial, summary and arbitrary executions and the Working Group on Arbitrary Detentions.[60]

We have divided the main ECOSOC guarantees and safeguards regarding capital offenders into four categories. The first one deals with categories of persons who are exempted from the death penalty, namely juvenile offenders (below 18 years of age), pregnant women, mothers with dependant infants, the insane, persons suffering from mental retardation or extremely limited mental competence (whether at the time of sentence or execution) and the aged.[61] The second deals with the nature of capital offences which should not go beyond intentional crimes with lethal or other extremely serious consequences.[62] Thirdly, the procedural guarantees of due process of law and of a fair trial as are stated in article 14 of the ICCPR.[63] These include the allowance of time and facilities for an adequate defence and legal assistance at all stages of the proceedings and, in fact, going beyond the protection offered in non-capital cases.[64] For an adequate defence, it is also important to benefit from translation or interpretation in cases where the defendant does not understand the language in court.[65] A person can only be sentenced to death if there is clear and convincing evidence leaving no room for an alternative explanation of the facts.[66] Moreover, we also find the safeguard that a person can only be sentenced to death for a crime for which such punishment was prescribed at the time of the commission of the offence. In addition, if a subsequent law that provides for a lighter penalty is enacted, it should

[60] In general terms, the existence of guarantees and strict procedural safeguards regarding those who are accused of capital crimes has long been a concern of the Commission on Human Rights and resulted in 1983 in the establishment of a Special Rapporteur regarding summary and arbitrary executions. In 1992, the Commission widened the scope of the mandate by adding extrajudicial to the summary and arbitrary executions. The first Special Rapporteur was Mr. S. Amos Wako until 1992, followed by Mr. Bacre Waly Ndiaye who was replaced by Ms. Asma Jahangir in 1999. In the last report, the application of the death penalty is included as one of the situations involving violations of the right to life along with genocide and crimes against humanity, violations of the right to life during armed conflict, deaths in custody, deaths due to the use of force, death threats and violations of the right to life of persons carrying out peaceful activities in defence of human rights, expulsion, refoulement, and violations of the right to life concerning refugees and internally displaced persons, violations of the right of women (including crimes of honour), violations of the right of children (including killings by vigilantes and death squadrons) , violations of the right of persons belonging to national, ethnic, religious or linguistic minorities, and immunity, compensation and the rights of victims (UN document E/CN.4/2004/7).

[61] See Annex E, paragraph 3 and Annex F, paragraphs 1c) and d).

[62] See Annex E, paragraph 1.

[63] *Ibidem*, paragraph 5.

[64] See Annex F, paragraph 1 a).

[65] See Annex G, paragraph 4.

[66] See Annex E, paragraph 4.

benefit the offender.[67] Furthermore, capital offenders have the right to appeal to a court of higher jurisdiction, in that such an appeal has a mandatory nature.[68] They should have the right to seek pardon or commutation of sentence in all capital cases.[69] While any appeal or recourse, or proceedings relating to pardon or commutation is pending, the death penalty cannot be carried out.[70] The last category deals with the execution of a capital sentence, in that it is to be carried out with the infliction of minimum possible suffering.[71] Additionally, in 1989, the ECOSOC asked for transparency and release of information regarding numbers of sentences and executions by retentionist countries.[72]

From a general perspective, the Constitution proclaims that all citizens are equal before the law and that no citizen may be arrested except with the approval or by decision of a people's protectorate or by decision of a people's court, and arrests must be made by a public security organ. Likewise, unlawful deprivation or restriction of citizens' freedom of person by detention or other means is prohibited, as is the unlawful search of the body of a citizen.[73] The 1999 amendment had already stated that "the People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law."[74] Furthermore, the Constitution enshrined that "all cases handled by the people's courts, except for those involving special circumstances specified by law, shall be heard in public. The accused has the right of defence" and these courts exercise their judicial power independently.[75] The main characteristic that we have identified in the Chinese approach to law in general, namely the conception of law as a tool rather than something with value *per se*, is extendable to both criminal and criminal procedure laws. In fact, both codes highlight very well the tension between the need to adhere to generally accepted international standards and the protection of the CCP. The Criminal Procedure Law and Criminal Law Codes were formulated by the National People's Congress- the supreme organ of power in China- in

[67] *Ibidem*, paragraph 2.
[68] Annex E, paragraph 6 and Annex F, paragraph 1 b).
[69] Annex E, paragraph 7 and Annex F, paragraph 1 b).
[70] Annex E, paragraph 8.
[71] *Ibidem*, paragraph 9.
[72] Annex F, paragraph 5.
[73] See articles 33 and 37 the Constitution of the PRC.
[74] *Ibidem*, article 5.
[75] *Ibidem*, articles 125 and 126.

exercise of the rights endowed by the Chinese Constitution. In 1979, the PRC enacted its first Criminal and Criminal Procedure Law Codes. The former had 192 articles, whilst the latter had 164. These Codes were more concerned with the re-establishment of the state's monopoly on the *legitimate* use of coercive force than the rights and safeguards of criminal defendants.[76] The basis for the enactment of these codes was the study and research that had begun in the 50s which, together with the non-existence of a legal system after the Cultural Revolution, produced texts that were very general, vague and ambiguous and still attached to the Soviet legal experience.[77] All these deficiencies soon became noticeable and, as early as 1981, major supplementation laws began to emerge under the umbrella of the Standing Committee. In addition, in 1982 the Standing Committee also initiated the research on the reform of criminal law.[78]

In a nutshell, the flaws that became more obvious concerned the rule of analogy, equality before the law, political crimes under the guise of counter-revolutionary offences, proportionality, shelter and investigation, presumption of innocence, right to counsel, judicial independence, and the right to a fair trial. Ideology was very present, as can be seen from the fact that equality before the law was not considered and 'people' and 'enemies of the people' were given different treatment. Criminal Law was an important weapon for class struggle and the guiding lines were drawn from Marxism-Leninism-Mao Zedong Thought.[79] In addition, the crime of counter-revolution stood at the apex of the criminal system, whilst not being given a clear definition. There were no specific aggravating and mitigating circumstances to guide the court and, instead, the policy of combining punishment with leniency was followed. This resulted in the application of leniency to those who confessed and severity to those who resisted. The aim of social control was also important, and this was made *via* administrative punishment. The

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[76] Pitman B. Potter, op. cit., p. 105.

[77] See Xiong Qiuhong, "The reform of the Chinese Criminal Procedure Law in a human rights perspective", in *Human Rights Report*, Norwegian Centre of Human Rights, University of Oslo, 01/2003, at http://www.humanrights.uio.no/forskning/publ/hrr/2003/01/hrr.html (last access 25th October 2004) and Júlio A. C. Pereira, *Comentário à Lei Penal Chinesa*, Livros do Oriente, Macau, 1996.

[78] Cai Dingjian, "China's major reform in criminal law", in *Columbia Journal of Asian Law*, Vol. 11, nº 1, Spring 1997, pp. 213-218, at p. 213.

[79] The Criminal Code of 1979 is reproduced in Júlio A. C. Pereira, op. cit., pp. 319-350. The guiding principles and the aim of the criminal code as a weapon for class struggle and the suppression of counter-revolutionaries are in the first two articles that can be found in pp. 319-320.

most notorious measure was the process of 'shelter and investigation' (it dates back to 1961 with the original intention of preventive detention and not punishment) that enabled the discretionary arrest and detention of suspicious individuals without almost any legal restrictions. The Criminal Code, through its article 79, enabled a person to be convicted for acts not expressly identified as criminal by reference to the most closely analogous provision of law.[80] This rule of analogy, as we have seen, does not derive from the Communist system but belongs to Chinese history. Lastly, there was no presumption of innocence.

The revisions made to the criminal and criminal procedure law codes in 1997 are understood as part of a wider effort to reform the criminal justice system, and touched upon the four stages of the criminal process: pre-trial, trial, appeal and execution of sentence. This was a consequence of the need to meet the challenges posed by socio-economic change and to deflect international human rights' criticism.[81] The 1997 revision was considered a move from an inquisitorial system of criminal justice towards a more adversarial system. It complemented the Criminal Law resulting in a total of 452 articles (adding 260) and also incorporated greater procedural safeguards, as we will see. The amended Criminal Procedure Law Code has 225 articles, dropping the provisions that established Marxism-Leninism-Mao Zedong Thought as the guiding principle and the view of the criminal as a class enemy, and replacing them with the Constitution and the goal of ensuring correct enforcement of Chinese criminal law.[82] The 1997 amended Criminal Code, through article 3, abolished the rule of analogy and instead expressly provided for the principle *nullum crimen, nulla poena sine lege*.[83] In article 4, equality before the law was included.[84] The policy of combining

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[80] *Ibidem*, article 79 in p. 332.

[81] Pitman B. Potter, op. cit., p. 106.

[82] See articles 1 and 2 of the Criminal Procedure Law of the People's Republic of China adopted on 1st January 1997 at the China Court site sponsored by the Supreme People's Court of the People's Republic of China at http://en.chinacourt.org/public/detail.php?id=2693 (last access 20th October 2004). Hereafter simply cited as Criminal Procedure Law.

[83] Article 3 of the Criminal Law of the People's Republic of China adopted on 14th March 1997, states that "for acts that are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with law; otherwise, they shall not be convicted or punished", at the China Court site sponsored by the Supreme People's Court of the People's Republic of China at http://en.chinacourt.org/public/detail.php?id=5 (last access 5 December 2004). Hereafter simply cited as Criminal Law.

[84] Article 4 of the Criminal Law: "the law shall be equally applied to anyone who commits a crime. No one shall have the privilege of transcending the law." See as well article 6 of the Criminal Procedure Code which

punishment with leniency was abandoned in favour of proportionality, which we can find in article 5 of the Criminal Code, but elaborate and detailed provisions on aggravating and mitigating circumstances are still missing.[85] Criminal punishment is divided into five types of principal punishment and three of supplementary punishment. The former are control and supervision, criminal detention (from one to six months), fixed term imprisonment (from six months to fifteen or twenty years), life imprisonment and the death penalty, and the latter are fines, deprivation of political rights and confiscation of property.[86] There are ten types of crimes, in that counter-revolutionary offences are abolished.[87] The principle of presumption of innocence was adopted somewhat, since it is affirmed that only a people's court has the power to deem someone guilty.[88] Likewise, the burden of proof is mainly placed on the defence.[89] It is not a total endorsement of the principle but a significant step nonetheless. The procedure of 'shelter and investigation' was curtailed, since the public security organ when detaining or arresting a person must produce a warrant.[90] After the detention or arrest, the police or prosecution is under the duty to notify the family or unit within twenty-hours and giving the reasons for it and the place of custody.[91] These procedures apply except when notification would hinder investigation or when there is no way to notify the family. From the moment of the first interrogation or from the date a coercive mechanism is used, the accused or the detained can retain a lawyer. Therefore, right to counsel is now extended to pre-trial proceedings, with the exception of cases involving state secrets where the appointment of a lawyer has

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states that "the law applies equally to all citizens and no privilege whatsoever is permissible before law."

[85] Article 5 of the Criminal Law: "the degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender."

[86] Criminal Law, articles 32, 33 and 34.

[87] These are crime endangering state security, crime endangering public security, crime undermining the socialist market economic order, crime infringing the personal rights or democratic rights of the citizens, crime encroaching upon property, crime disrupting social order and its administration, crime endangering the interests of national defence, crime of bribery and embezzlement, crime of malfeasance, and crime in violation of military duties.

[88] Article 12 of the Criminal Procedure Law states that "no person shall be found guilty without being judged as such by a People's Court according to law."

[89] *Ibidem*, article 35: "The responsibility of a defender shall be to present, according to the facts and law, materials and opinions proving the innocence of the criminal suspect or defendant, the pettiness of his crime and the need for a mitigated punishment or exemption from criminal responsibility, thus safeguarding the lawful rights and interests of the criminal suspect or the defendant."

[90] *Ibidem*, articles 64 and 71.

[91] *Ibidem*, articles 64-65 and 71-72.

to be approved by the investigatory organs.[92] If the defendant has not appointed anyone due to financial difficulties or other reasons, the court may appoint a lawyer.[93] Additionally, when the lawyer meets with the criminal suspect in custody, the investigation organ may, in light of the seriousness of the offence and where it deems necessary, be present at the meeting. In cases involving state secrets, there is a need for the previous approval of the investigation organ.[94] Torture is forbidden in order to obtain a confession as is to collect evidence by threat, enticement, deceit or other unlawful means.[95] The right to remain silent is partially granted, since a person has the right to refuse to answer any questions irrelevant to the case. The problem lies in who decides what is relevant or not to the case.[96] The right to counsel has increased but problems remain since, in some cases, immediate access to a lawyer is not possible and much needs to be done in promoting the awareness of such a right. For those that cannot afford a lawyer and therefore have one that is assigned by the court, we find the same problems that affect all judicial systems, namely that court-appointed lawyers usually have lack of experience and are underpaid. In addition, they are usually assigned to a case after missing the crucial investigatory part of the criminal process, where lawyers are most needed. Here, of course, socio-economic conditions of the defendant make all the difference, but this is hardly unique to the Chinese criminal system and rather 'universal'. Trials are public except cases involving state secrets, private affairs of individuals, and minors, nonetheless verdicts are always public.[97]

Unlike the practice of 'verdict first, adjudicate second' of the 1979 Code, a court shall open its session and adjudicate the case if the bill of prosecution contains alleged crime facts, a list of evidence, names of witnesses, and copies or photos of principal evidence.[98] This is a change from a substantive into a procedural review. Furthermore, instead of the trial judge presenting evidence to the court and questioning the witnesses, the revised Criminal Procedure Law Code now requires that prosecutors and defenders present evidence to the court.

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[92] *Ibidem*, articles 33-36 and 96.
[93] *Ibidem*, article 34, first paragraph.
[94] *Ibidem*, article 96, second paragraph.
[95] *Ibidem*, article 43 and Criminal Law, article 247.
[96] Criminal Procedure Law, article 93.
[97] *Ibidem*, articles 11, 152, 163.
[98] *Ibidem*, article 150.

In addition, questioning and debating the evidence and the alleged crime facts will be mainly left to the prosecutors and the defenders, although at the discretion of the Chief Judge.[99] Moreover, a person cannot be convicted solely on oral statement and there is the need for evidence.[100] Nevertheless, evidence involving state secrets shall remain confidential.[101] The maximum period allowed for supplementary investigation is limited to one month, unlike the previous situation where prosecutors and courts were allowed to return cases to the police on many occasions.[102] Additionally, prosecutors can only send a case back to the police for supplementary investigation twice, and the judge cannot use the measure at all. There are other novelties that are worthy of note, such as the fact that victims have become parties in the criminal process the same way as defendants, and the possibility of the defendants awaiting trail away from prison, either through guaranty money or a guarantor.[103]

Courts in China are organised in a four-layered structure: basic (or primary), intermediate, higher and the Supreme Court. They are divided into criminal, civil, economic and administrative and, apart from the basic level, they all have both original and appellate jurisdiction. In basic and intermediate courts as first instance, trials are led by three judges or a judge with lay assessors. Nevertheless, summary procedure cases in the Primary People's Courts may be tried by a single judge. In High courts and the Supreme, in first instance, the collegial panel is composed of three to seven judges or judges with lay assessors. In appeal cases, there are no lay assessors in the panel, which is composed of three to five judges.[104] Verdicts are made by majority.[105] The Chinese government has been concerned with raising the quality and expertise of its judges but their independence is still questioned. What is guaranteed is rather the independence of people's courts rather than judges since "the People's Courts shall exercise

[99] *Ibidem*, articles 155-161.
[100] *Ibidem*, article 46: "In the decision of all cases, stress shall be laid on evidence, investigation and study; credence shall not be readily given to oral statements. A defendant cannot be found guilty and sentenced to a criminal punishment if there is only his statement but no evidence; the defendant may be found guilty and sentenced to a criminal punishment if evidence is sufficient and reliable, even without his statement."
[101] *Ibidem*, article 45.
[102] *Ibidem*, articles 165-166.
[103] *Ibidem*, articles 52-56, 82 (2), 96 and 134.
[104] *Ibidem*, article 147.
[105] *Ibidem*, article 148.

judicial power independently in accordance with the law (...)".[106] Furthermore, this perception is enhanced by the existence of Judicial Committees which are formed for each court and are composed by CCP's officials. They decide difficult, major and complex cases including ones where death penalties may be imposed.[107]

The application of the death penalty before the 1997 revision can be understood through the comments on the draft optional protocol in 1989, and the 'official' approach given in 1986.[108] The basic argument that runs through the whole account is that the existence of the death penalty in China is linked to three aspects: it depends entirely on current political, economic, social and cultural developments, on the state of social order and the need for combating crime, and the will of the population to retain such punishment.[109] To these arguments for retaining the death penalty, Professor Gao has added that such punishment in China has the aim of incapacitating those that are not reformable; death penalty is a deterrent; is a punishment deserved for certain crimes; is a means of preventing private retaliation; and reaffirms society of the importance of values represented in capital offences.[110] The defence of the death penalty as an indispensable tool of guaranteeing social stability is accompanied by the governmental reassurance that it restricts and limits its application. It was asserted that only one in one million of the population had been sentenced to death, and few of those so sentenced had actually been executed.[111] The conclusion was that "in short, the basic principle concerning the death penalty is not to abolish the death penalty, but apply strict control in an effort to minimise the number of executions."[112] In order to exemplify the effort of restriction and cautious application, the Chinese government stresses two situations, namely the categories of persons who are exempt from the death

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[106] *Ibidem*, article 5.
[107] *Ibidem*, article 149: "After the hearings and deliberations, the collegial panel shall render a judgment. With respect to a difficult, complex or major case, on which the collegial panel considers it difficult to make a decision, the collegial panel shall refer the case to the president of the court for him to decide whether to submit the case to the judicial committee for discussion and decision. The collegial panel shall execute the decision of the judicial committee."
[108] UN document A/44/592 (9th October 1989), pp. 7-8 and Wu Han, op. cit.
[109] See also An Zhiguo (political editor), "Notes from the editors, on capital punishment", in *Beijing Review*, nº 45, 7th November 1983, p. 4.
[110] Gao Ming Xuan, "A brief dissertation on the death penalty in the criminal law of the People's Republic of China", in *Revue Internationale de Droit Pénal*, Vol. 58, 1987, pp. 399-405.
[111] Wu Han, op. cit, pp. 25-26.
[112] UN document A/44/592 (9th October 1989), pp. 7-8.

penalty and the existence of reinforced procedural guarantees that capital offences benefit from, *e. g.* mandatory review, at least when compared with the remaining ones.[113] The Chinese government has also repeatedly asserted that within the reprieve system, 99% of criminals condemned to death had their sentences reduced to life or fixed-term imprisonment between 15 to 20 years.[114]

The 1979 Criminal Code contained 28 capital offences. Notwithstanding, in practice and due to the Decisions and Supplementary Provisions of the Standing Committee associated with the strike-hard campaigns against crime and the pace of economic modernisation, the number of capital offences had risen to a higher number. According to experts, the precise number of capital offences varied from 65 to 80.[115] Bearing this in mind, the revised Code merely transposed the reality of such punishment and the extension of the number of capital offences through supplementary legislation of the Standing Committee. There is also some uncertainty as to the actual number of capital offences in China but the more consensual number is placed at 68.[116] Nevertheless, after the revision of the criminal code, supplementary legislation such as that aiming at counter-balancing terrorism and the break of quarantine measures (in the case of SARS) have expanded the number of capital offences.[117]

Let us begin with juvenile offenders aged 16 or 17 who, under article 44 of the Criminal Law Code of 1979, were sentenced to death with a two year

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[113] Du Weifu (Judge of the People's Supreme Court of the People's Republic of China), "Social functions of the death penalty", in Faculdade de Direito da Universidade Nova de Lisboa, op. cit., pp. 61-63, at p. 61.
[114] See "Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary, or arbitrary executions and summaries of cases transmitted to governments and replies received", UN document E/CN.4/2002/74/Add.2, paragraph 45 and E/CN.4/2004/7/Add.1, paragraph. 69.
[115] See Jianfu Chen, op. cit., p. 194 which identified 80, Xiong Qiuhong, op. cit., who has considered 74, in the Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary, or Arbitrary Executions, UN document E/CN.4/1994/7, paragraph 209 we find a total of 65 capital offences and Cai Dingjian has considered 66 in op. cit., 217.
[116] Xiong Qiuhong, op. cit., Hans-Jörg Albrecht, "The death penalty in China from a European perspective", in *Max Planck Institute for Foreign and International Criminal Law*, Freiburg, Vol. 8, 1998, pp. 1-19, at p. 2 at http://www.iuscrim.mpg.de/info/aktuell/projekte/deathprc.pdf (last access 5th December 2004), Marina Svensson, "State coercion, deterrence, and the death penalty in the PRC", Paper presented to the Annual Meeting of the Association for Asian Studies, Chicago, Illinois, 22nd - 25th March, 2001, pp. 1-35, at p. 1, available at http://www.chinesehumanrightsreader.org/academic/ms_dp.pdf (last access 5th December 2004) and Roger Hood, *The Death Penalty, A Worldwide Perspective*, Oxford University Press, Oxford, 2002, p. 53.
[117] See Amnesty International, *People's Republic of China Executed "according to the Law"? - the Death Penalty in China*, AI Index ASA 17/003/2004, 22nd March 2004 at http://web.amnesty.org/library/index/ENGASA170032004 (last access 5th December 2004).

suspension of execution if the crime committed was particularly grave.[118] The Chinese government asserted that in judicial practice not only were these sentences meted out with great caution but also that the overwhelming majority of juvenile offenders sentenced to death with a two-year suspension had their sentences reduced at the end of two years.[119] The first report to the Committee on the Rights of the Child clarified the situation of juvenile offenders and capital punishment as well as to life imprisonment, which are both prohibited under article 37 (a).[120] Under the Criminal Code, a juvenile offender between 14 and 18 may legally be sentenced to life imprisonment for a particularly serious crime, in that the age of criminal responsibility is set at 14. Nevertheless, the Supreme People's Court ruled that after two years, and if they show repentance or merit, the sentences could be reduced.[121] The Committee, in its concluding observations, noted with concern that national legislation appeared to allow children between the ages of 16 and 18 to be sentenced to death with a two-year suspension of execution. It considered this situation as cruel, inhuman or degrading treatment or punishment and likewise expressed concern for the sentencing of juveniles between 14 and 18 to life imprisonment, although the sentence may be reduced on grounds of repentance and merit. In the Committee's view, these provisions of Chinese Criminal Law are incompatible with the principles and provisions of the Convention, most notably those of its article 37 (a).[122]

In 1997, the revision of this article incorporated these concerns and stated that the death penalty shall not be imposed on persons who had not reached the age of 18 at the time the crime was committed, in that the age for criminal responsibility was maintained.[123] This change was recognised in the 2000 five

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[118] For article 44 see Júlio A. C. Pereira, op. cit., p. 326.
[119] See Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary, or Arbitrary Executions, UN document E/CN.4/1995/61, paragraph 97.
[120] Report of the PRC to the Committee on the Rights of the Child, UN document CRC/C/11/Add.7, paragraphs 226-227.
[121] Supreme People's Court ruling of 8th October 1991 entitled "Some questions concerning the specific application of the law in the mitigation of sentences and release on parole", *cit in* Report of the PRC to the Committee on the Rights of the Child, UN document CRC/C/11/Add.7, paragraphs 226-227. See as well "Written replies by the government of China concerning the list of issues received from the Committee on the Rights of the Child in connection with the initial report of China", UN document CRC/C.12/WP.5, paragraph 28.
[122] See "Concluding observations of the Committee on the Rights of the Child: China, 7th June 1996", UN document CRC/C/15/Add.56, paragraph 21.
[123] Criminal Law, article 49: "the death penalty shall not be imposed on persons who have not reached the

year report on the question of the death penalty.[124] Nonetheless, reports since 1997 suggest that persons under 18 at the time of the offence continue to be executed, because the courts do not take sufficient care to determine their age. In 2003, a juvenile named Zhao Lin who was 16 at the time of the offence was executed.[125] Nevertheless, the official policy of the PRC is not to execute juvenile offenders, and compliance with international law in this respect is relatively unproblematic, unlike the possibility of applying life imprisonment to juvenile offenders.

As to exclusion of the death penalty for pregnant women, it was already foreseen in article 44 of the 1979 Criminal law Code and reiterated in the same article that deals with juvenile capital punishment of the revised Code. The exemption of pregnant women from capital punishment is applicable at any stage of the process, and even in the case of an abortion of forced or natural nature. This extensive interpretation was made by the Supreme People's Court in two decisions of 1983, and has the goal of trying to prevent fraudulent situations of forced abortion or postponement of the trial until the child was born that would, in the opinion of the Court, go against the spirit of the article.[126] Chinese Criminal law does not make any explicit exemption for the elderly or mothers with dependant infants.

Article 18 of the Criminal Law deals with the mentally ill and equates levels of illness with different punishments in a proportionate way. Firstly, the mentally ill are not to be held criminally responsible if, at the time they committed the crime, they were unable to recognise right from wrong or unable to control their condition.[127] The law establishes that a mental illness is to be determined upon verification and confirmation through legal procedure.[128] Secondly, if the mental illness is of an intermittent nature, the offender bears criminal responsibility if the crime has been committed in a normal mental state.[129] Thirdly, "if a mental patient

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age of 18 at the time the crime is committed or on women who are pregnant at the time of trial."

[124] See UN document E/2000/3, paragraph 90.

[125] In Amnesty International, "Executions of child offenders since 1990" at http://web.amnesty.org/pages/deathpenalty-children-stats-eng (last access 2nd September 2004).

[126] See Michael Palmer, op. cit., p. 122 and Júlio A. C. Pereira, op. cit., pp. 125-126.

[127] Criminal Law, article 18, paragraph 1.

[128] *Idem, ibidem.*

[129] Criminal Law, article 18, paragraph 2.

who has not completely lost the ability of recognising or controlling his own conduct commits a crime, he shall bear criminal responsibility; however, he may be given a lighter or mitigated punishment."[130] Lastly, any intoxicated person who commits a crime shall bear criminal responsibility.[131]

We find that there are no guiding principles to differentiate mental incapacity or insanity, and mental abnormality or diminished responsibility and, presumably, a mental patient refers to both diminished responsibility as a result of mental illness and mental retardation. Nonetheless, it does not absolutely bar their execution, since the possibility of a lighter or mitigated punishment *may* be given.[132] The same is true of the blind and the deaf-mute who *may* benefit from mitigating circumstances and, additionally, *may* be exempt from punishment, but these considerations are left to the discretion of the court.[133] We find that there are no guiding principles as to drawing the line regarding the level of mental retardation. Here, Chinese criminal law is no exception to the international lack of consensus concerning the identification of an IQ threshold, even in countries that exempt the mentally retarded from capital punishment such as the US. In addition, it is very difficult to assess how the insane and the mentally handicapped are treated in practice, due to the secrecy that surrounds the application of the death penalty.

The remaining categories are the ones that have been most criticised and in which a gap between theory and practice is more evident. In the second category regarding the nature of capital offences, we find that they go beyond intentional crimes with lethal or other serious consequences. If, on the one hand, counterrevolutionary offences were taken out of the Chinese Criminal Law, on the other, it was a cosmetic move, since they were replaced by state security offences. This replacement that was followed by the 1999 Constitutional amendment[134] was not, in our view, a step towards mitigating the ambiguity that characterised counterrevolutionary offences. Moreover, capital offences include financial crimes such as counterfeiting currency, embezzlement, corruption and property crimes, as well as excavating and robbing a site of ancient culture or an

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[130] *Ibidem*, article 18, paragraph 3.
[131] *Ibidem*, article 18, paragraph 4.
[132] Roger Hood, op. cit., p. 127.
[133] Criminal Law, article 19.
[134] See article 28 of the Constitution of the PRC.

ancient tomb (which is designated as a major site to be protected at the national or provincial level for their historical and cultural value), or of persons involved in organized international drug trafficking.[135] What we find is that capital punishment can be applied "if the circumstances are serious"[136] or "if the circumstances are especially serious"[137] in many offences. However, capital punishment is not mandatory and remains at the discretion of the court.[138] Such discretion is not restricted or guided through general sentencing provisions.[139] The revised Criminal Law Code reaffirms the principle of non-retroactivity in its article 12, *i. e.*, offences committed before the revision shall be pursued by the previous law apart from the exception whereby a defendant can benefit from a subsequent law that prescribes a lighter punishment.[140]

The third category, namely of procedural guarantees, has also raised some issues. In cases involving a capital offence, the jurisdiction belongs to the intermediate courts.[141] In capital cases, if the defendant does not have a lawyer or cannot afford one, the court is under the obligation to appoint one as it does for the blind, deaf, mute, and minors.[142] Nevertheless, free legal representation is only offered no later than 10 days before trial which, in capital cases, makes all the difference because it misses the pre-trial phase where evidence is gathered.[143] It

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[135] *E. g.*, articles 170, 263, 328, 347, 383 and 386 of the Criminal Law.
[136] *E. g.*, articles 125 and 127 of the Criminal Law.
[137] *E. g.*, articles 113, 151, 170, 205, 206, 240, 264, 295, 317, 358, 369, 370, 383, 426, 430, 433, 438, 439 and 446 of the Criminal Law.
[138] Hans-Jörg Albrecht, "The death penalty in China- placing the Chinese death penalty policies in international perspectives", in Faculdade de Direito da Universidade Nova de Lisboa, op. cit., pp. 11-34, at p. 14.
[139] Criminal Law, article 61: "When sentencing a criminal, a punishment shall be meted out on the basis of the facts, nature and circumstances of the crime, the degree of harm done to society and the relevant provisions of this Law."
[140] *Ibidem,* article 12: "if an act committed after the founding of the People's Republic of China and before the entry into force of this Law was not deemed a crime under the laws at the time, those laws shall apply. If the act was deemed a crime under the laws in force at the time and is subject to prosecution under the provisions of Section 8, Chapter IV of the General Provisions of this Law, criminal responsibility shall be investigated in accordance with those laws. However, if according to this Law the act is not deemed a crime or is subject to a lighter punishment, this Law shall apply. Before the entry into force of this Law, any judgment that has been made and has become effective according to the laws at the time shall remain valid."
[141] Criminal Procedure Law, article 20. Intermediate courts also have jurisdiction as courts of first instance over the cases that involve offences that endanger state security and counterrevolutionary offences, ordinary criminal cases punishable by life imprisonment, and criminal cases in which the offenders are foreigners.
[142] *Ibidem*, article 34.
[143] *Ibidem*, article 151 (2): "to deliver to the defendant a copy of the bill of prosecution of the People's Procuratorate no later than ten days before the opening of the court session. If the defendant has not appointed a defender, he shall be informed that he may appoint a defender or, when necessary, designate a

is applied only to those who have committed extremely serious crimes and, like the imperial system, it can be of immediate execution or benefit from a two-year suspension "if immediate execution is not essential."[144] The offender is given a death sentence with a two-year-reprieve and, subject to rehabilitative labour announced at the same time, the death sentence is imposed. It is not an independent form of sentence but rather a supplementary penalty, and it provides for the criminal to render meritorious service in order to atone for his crimes through labour. If he truly repents and does not commit any intentional crimes during the reprieve period, he may be given a reduction of sentence to life imprisonment. If he also shows a meritorious service, it could be reduced to a fixed-term imprisonment of 15 to 20 years. This is a manifestation of the policy of combining severe punishment with leniency but if he does not repent and 'resists reform in an odious manner' the Supreme Court approves the execution of the death sentence.[145] Moreover, all persons sentenced to death or to life imprisonment are deprived of political rights for life, which include the right to freedom of speech, press, assembly, association, procession and demonstration.[146]

A death sentence, like all others, can be appealed by the defendant or private prosecutor, and protested by the procuratorate.[147] As in any other case, the defendant has 10 days after receiving the written notification of the judgment that pronounces the sentence to decide whether he wants to appeal. If the defendant decides to carry on with the appeal, he can do so in writing or orally. The appeal

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lawyer that is obligated to provide legal aid to serve as a defender for him;"

[144] Criminal Law, article 48: "The death penalty shall only be applied to criminals who have committed extremely serious crimes. If the immediate execution of a criminal punishable by death is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence. All death sentences, except for those that according to law should be decided by the Supreme People's Court, shall be submitted to the Supreme People's Court for verification and approval. Death sentences with a suspension of execution may be decided or verified and approved by a Higher People's Court."

[145] See Gao Ming Xuan, op, cit., p. 404, and Criminal Law, article 50: "anyone who is sentenced to death with a suspension of execution commits no intentional crime during the period of suspension, his punishment shall be commuted to life imprisonment upon the expiration of the two-year period; if he has truly performed major meritorious service, his punishment shall be commuted to fixed-term imprisonment of not less than 15 years but not more than 20 years upon the expiration of the two-year period; if it is verified that he has committed an intentional crime, the death penalty shall be executed upon verification and approval of the Supreme People's Court."

[146] Criminal Law, articles 54 and 57.

[147] Criminal Procedure Law, articles 180 and 190.

cannot increase the sentence (for instance, in the case of a suspended death sentence).[148] The procuratorate can protest by writing but in this case, as in the private prosecutor's, the sentence can be increased.[149] The second instance court, after hearing appeal or protest, can affirm the original judgment, revise the judgment or order a retrial (the facts were clear but the application of the law or punishment was inadequate or the facts were unclear or evidence insufficient).[150] All judgments and orders of second instance and orders of the Supreme People's Court are final.[151] Unlike the appeal procedure, the review process and approval are mandatory, and examine the factual and legal aspects of the case and not limited to the scope of the appeal or protest. In first instance cases where an Intermediate People's Court has imposed a death sentence and the defendant has not appealed, the review is made by the Higher People's Court and then submitted to the Supreme People's Court for approval. First instance cases where a Higher People's Court has imposed a death sentence and the defendant does not appeal, and cases of second instance where a death sentence has been imposed, are submitted to the Supreme People's Court for approval.[152] The death sentence has to be submitted to the Supreme People's Court for approval[153] with the exception of cases where an Intermediate People's Court has imposed a death sentence with a two-year suspension of execution that are approved by a Higher People's Court.[154] Even then, if there is verified evidence that during the period of suspension the criminal has committed intentional offence and there is the need for the execution of his death sentence, the Higher Court submits the matter to the Supreme for examination and approval.[155] The reviews by the Supreme involving death sentences and reviews by a Higher People's Court of cases involving death sentences with a suspension of execution are conducted by collegial panels, each composed of three judges.[156]

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[148] *Ibidem*, article 183.
[149] *Ibidem,* articles 185 and 190.
[150] *Ibidem*, article 189.
[151] *Ibidem*, article 197.
[152] *Ibidem*, article 200.
[153] *Ibidem*, article 199.
[154] *Ibidem,* article 201 and Criminal Law, article 48.
[155] Criminal Procedure Law, article 210.
[156] *Ibidem*, article 202.

Nevertheless, in the early 80s, the Standing Committee enacted a decision that enabled the Supreme People's Court approval of death sentences to be made by the Higher Court in certain cases, such as homicide, rape, theft, bombing actions, and other offences that seriously put public security at risk.[157] Despite the fact that the revised Criminal Procedure Law Code places this task in the hands of the Supreme People's Court, in practice these provisions are still applicable as was recognised by the Chinese government in 2004.[158] In practical terms, convicted capital offenders are deprived of an extra objective level of review, since High Courts are usually the courts of appeal. If the Supreme or Higher Court upholds the death sentence and issues the corresponding order, the People's Courts at a lower level shall cause the sentence to be executed within 7 days.[159] There is no automatic clemency procedure, although there is the possibility of filing a petition regarding a legally effective judgment or order.[160] However, such a petition is successful only to the extent that new evidence is found that the facts were wrong, evidence that was the basis of the conviction is contradictory or unreliable, the application of the law or punishment was inadequate, there is proof that judges committed acts of embezzlement, bribery or malpractices for personal gain. Likewise, within the 7 days period for the execution of the death sentence, there is the possibility of suspension (awaiting an order from the Supreme People's Court) if it is discovered that the judgment contains an error, if the criminal is pregnant or if the criminal exposes major criminal facts or renders other significantly meritorious service.[161] As for cases were there is the need of interpreters or translators in case the defendant does not understand the language used in court, information is scarce and unavailable.

Regarding Chinese compliance with the third category of ECOSOC safeguards, we find that there are many questions left unanswered. In our view, despite the compulsory nature of the review and approval procedure, and the

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[157] Hans-Jörg Albrecht, "The death penalty in China from a European perspective", in Max Planck Institute for Foreign and International Criminal Law, Freiburg, Vol. 8, 1998, p. 18, Júlio A. C. Pereira, op. cit., p. 126, and Roger Hood, op. cit., pp. 157-158.
[158] See UN document E/CN.4/2004/G/18, pp. 9-11, Du Weifu, op. cit., p. 61 and Song Hansong, op. cit., pp. 122-123.
[159] Criminal Procedure Law, article 211.
[160] *Ibidem*, article 203.
[161] *Ibidem*, article 211, paragraphs 1, 2 and 3.

possibility of suspension of a death sentence, the frailties that still exist in the revised criminal and criminal procedure law codes are made more evident in capital cases. This is especially true of cases which involve state secrets where trials are not public, evidence remains confidential and where right to counsel has to be approved by the investigative organ. In addition, the access to an adequate defence in a capital case is less safeguarded if the defendant cannot afford a lawyer, whereby free legal representation is only offered no later than 10 days before trial. Likewise, lack of definition as to the criteria to be used when deciding if the crime committed is extremely grave or when an immediate execution is not deemed to be essential imperils the assurance of safeguards to those facing capital offences and promotes arbitrariness. There is the need for the establishment of unambiguous sentencing guidelines and the listing of circumstances leading to the mitigation of sentences.

Regarding the last category of ECOSOC safeguards, death sentences are executed by means of shooting or lethal injection.[162] According to law, the announcement of the execution is public but its actual carrying out is not and after execution, the People's Court notifies the family according to the law.[163] The practice of notifying the family after the execution has taken place is also part of other criminal systems such as Taiwan or Kazakhstan.[164] Contrasting with its international policy of not providing accurate information to the outside, domestically every execution leads to a report being made and submitted to the Supreme People's Court.[165] In practice, occasionally public executions have been

[162] Criminal Procedure Law, article 212, second paragraph.
[163] *Ibidem*, article 212, fifth and seventh paragraphs.
[164] Roger Hood, op. cit., p. 111. Some countries such as Byelorussia, Tajikistan, Kazakhstan, and Uzbekistan, go further and not only do they not inform relatives in advance of the date of execution, but they also do not return the body and do not disclose the place of burial. Kazakhstan is the exception and the place of burial is available for relatives two years after the execution. The Special Rapporteur on Torture after a mission to Uzbekistan believes that all these actions in general have the intentional goal of punishing the family (UN document E/CN.4/2003/68/Add. 2 and 3, paragraph 65). These features of the application of capital punishment are also present in the legislative framework of abolitionist de facto countries such as the Russian Federation and Kyrgyzstan. Office for Democratic Institutions and Human Rights of the OSCE, Background Paper 2003/1 for the Human Dimension Implementation Meeting (October 2003), *The Death Penalty in the OSCE Area*, Warsaw, 2003. Information regarding Byelorussia is in pp. 23-26, Kazakhstan in pp. 31-34, Kyrgyzstan in pp. 35-37, Russian Federation in pp. 41-44, Tajikistan in pp. 47-49, and Uzbekistan in pp. 61-64.
[165] Criminal Procedure Law, article 212, sixth paragraph.

reported as well as public display (including televised sentencing) and humiliation of persons who have been sentenced to death.[166]

The overall conclusion that we have reached so far is that although some movements have been made in order to comply with international standards regarding criminal justice, especially those set out in article 14 of the ICCPR, much needs to be done. The areas that are still the least protected of all the ECOSOC safeguards are surely those pertaining to the nature of capital offences and the right to a fair trial. [167] We find a positive evolution in criminal and criminal procedure law, as well as the increase of expertise in legal matters by lawyers and judges. In addition, China's body of laws has been expanding to many new areas, and these changes are partly active and reactive as they result not only from the opening of its economy to foreign investment and membership of the World Trade Organisation (in this case the adoption of a Labour Law is emblematic) but also from Chinese engagement with international society and the need (and will) to comply with international standards.[168]

In our view, capital offences highlight better than any other the shortcomings of the criminal system in China and especially the conception of law as a means to further the dominance and control of the party over the course of the economic modernisation, which is now its *leitmotiv* to be in power. The concern with crimes of an economic nature can also be seen in the 1999 Amendment to the Criminal Law that focused solely on punishing "crimes

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[166] See Marina Svensson, op. cit., p. 16 and Roger Hood, op. cit., p. 104.

[167] The Working group on Arbitrary Detention visited China on invitation of the government from the 6th to 16th October 1998 and following a preparatory mission conducted in 1996. It visited Beijing, Chengdu, Shanghai and Lhasa in Tibet. The group concluded that despite the revisions of its criminal and criminal procedure laws, much still needed to be done. For instance, to incorporate a provision stating that a person was presumed innocent until proved guilty by a court or tribunal at the end of a trial, and define the crime of endangering national security in precise terms. It noted with concern that many of the offences were vague and jeopardised the fundamental rights of those wishing to exercise their right to hold an opinion or exercise their freedoms of expression, the press, assembly and religion. The group believed that the absence of an independent tribunal or a judge at the time of committing a person to re-education through labour might fall short of accepted international standards. It also proposed incorporating in the criminal law an exception to the effect that the law would not regard as criminal any peaceful activity in the exercise of the fundamental rights guaranteed by the 1948 UDHR and establishing a permanent independent tribunal for, or associating a judge with, all proceedings under which authorities might commit a person to re-education through labour; see report made by the Working Group on Arbitrary Detention in UN document E/CN.4/1998/44/Add. 2. See as well Amnesty International's report *People's Republic of China Executed "according to the law"?- the death penalty in China,* AI Index ASA 17/003/2004 22nd March 2004 at http://web.amnesty.org/library/index/ENGASA170032004 (last access 5th December 2004).

[168] *E. g.*, Labour Law adopted in 1994, Police Law, Public Procurators law, and the Judges Law in 1995, and the Regulations on Providing Judiciary Assistance for litigants Actually in Financial Difficulty in July 2000.

disrupting the order of the socialist market economy and to ensure the smooth building of socialist modernisation."[169] The death penalty as a state coercion tool is observed, firstly, in the strike-hard campaigns and type of crimes that are targeted such as traffic of women and children,[170] white-collar crimes such as embezzlement, bribery or corruption, criminal gangs, drug-related offences and separatism. This is also evident from the periods of the year where most executions take place and which coincide with international anti-drugs day on 26th June, Chinese New Year, and China's national day on 1st October. And finally, in the way the media reports selected death penalty cases, where we find a different discourse depending on whether it is for domestic or foreign consumption; and how the state organises public mass rallies at which people sentenced to death are paraded and have the explicit goal of 'education', 'deterrence' and to display state power. The link between party legitimacy, rule by law and economic success is also observed in what the party considers its struggle for life and death, namely corruption: "if it loses the struggle against corruption it might lose both the people and the land, in this respect there are some hard lessons to be learned from Chinese history."[171] This is behind the recent execution of high-ranking party officials convicted of serious economic crimes. Capital punishment is used as a tool to suppress any contestation of the CCP or its ruling of China and, in this regard, not only is it linked with the repression of pro-democracy activists, but also of persons belonging to national, ethnic, religious,[172] or linguistic minorities (in particular the Uighur community, Muslim leaders and Tibetans[173]) and violations of

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[169] It amended or supplemented articles 162, 168, 174, 180, 181, 182, 185, 225 of the Criminal Law; see Amendment to the Criminal Law of the People's Republic of China, 25th December 1999 at the China Court site sponsored by the Supreme People's Court of the People's Republic of China at http://en.chinacourt.org/public/detail.php?id=6 (last access 5th December 2004).

[170] This crime has taken great proportions in China due to the effects of the one-child policy. This policy and due to the traditional preference for boys has made childless couples so desperate for having a baby boy that it has promoted criminal gangs specialised in abductions. Likewise, preference for boys has also decreased the number of marriageable women and many men also use these criminal networks in order to get a bride. Lastly, many of these women as well as children are sold into prostitution; see Marina Svensson, op. cit., pp. 21-27.

[171] *Ibidem*, p. 27.

[172] In the case of religious freedom the nuances expressed in the Constitution regarding this right are telling: "the state protects *normal* religious activities" and "religious bodies and religious affairs are not subject to *any foreign domination*." See article 36 of the Constitution of the PRC (italics are ours).

[173] *E. g.*, see the high profile case of the Tibetans Ngawang Tashi and Lobsang Dhondup. Ngawang was accused of incitement to separatism and causing explosions and Lobsang was accused of the same crimes plus unlawful possession of firearms and ammunition. These cases were brought to the attention of the

freedom of opinion, religion, association or belief, such as the case of the Falun Gong or Catholics, or the formation of independent trade unions, such as the Beijing Autonomous Workers.[174] Moreover, these concerns were also echoed by the Special Rapporteur on extrajudicial, summary, or arbitrary executions.[175] Lastly, Chinese leadership has stressed the 'will of the people' as one of the

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Special Rapporteur on extrajudicial, summary or arbitrary executions who sent a communication. The response given by the Chinese government was similar to the one given to the Special Rapporteur on freedom of religion and belief, namely that the judgment made by the Kardze Intermediate People's Court had been correct and according to the law. They were accused by the People's Procuratorate on 20 August 2002 and in 2 December 2002 they were found guilty in first instance. Ngawang was sentenced to death with a two year suspension and Lobsang was sentenced to death. According to the Chinese government only Ngawang appealed to the Sichuan Province Higher People's Court. The court upheld the sentence and considered that the judgement on first instance had been based on clear facts and ample evidence and took place according to the law. Furthermore, it was clarified that the judgment was not public due to the severity of the offences that 'touched upon state secrets' and therefore falling under one of the exceptions in article 125 of the Criminal Procedure Law. The Court announced the judgment publicly upon conclusion of its proceedings. Moreover, because under Chinese law the Supreme People's Court has conferred upon the higher people's courts the authority to ratify death sentences handed down in cases involving the causing of explosions, the Sichuan Province Higher People's Court ratified the death sentence passed on Lobsang Dhundup. See the "Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary, or arbitrary executions and summaries of cases transmitted to governments and replies received", UN document E/CN.4/2004/7/Add.1, paragraphs 43 and 68, and UN document E/CN.4/2004/G/18, pp. 9-11.

[174] The Working Group on Arbitrary Detentions has also expressed concern over the detainment of persons in psychiatric hospitals such as the *Ankang* in Beijing determined by the Public Security Bureau without trial or an independent medical examination. For a general overview of all these issues that are a concern of the Working Group see *e. g.* Opinion nº 30/1998 (UN document E/CN.4/2000/4/Add.1, pp. 21-23), Opinion nº 1/1999 (UN document E/CN.4/2000/4/Add.1, pp. 26-28), Opinion nº 2/1999 (UN document E/CN.4/2000/4/Add.1, pp. 29-31), Opinion nº 30/2000 (UN document E/CN.4/2002/77/Add.1, pp. 5-7), Opinion nº 35/2000 (UN document E/CN.4/2002/77/Add.1, pp. 22-24), Opinion nº 36/2000 (UN document E/CN.4/2002/77/Add.1, pp. 25-27), Opinion nº 7/2001 (UN document E/CN.4/2002/77/Add.1, pp. 50-54), Opinion nº 8/2001 (UN document E/CN.4/2002/77/Add.1, pp. 55-56), Opinion nº 20/2001, (UN document E/CN.4/2003/8/Add.1 pp. 4-7), Opinion nº 1/2002, (UN document E/CN.4/2003/8/Add.1 pp. 47-49), Opinion nº 5/2002, (UN document E/CN.4/2003/8/Add.1 pp. 61-65), Opinion nº 15/2002, (UN document E/CN.4/2004/3/Add.1 pp. 3-6), Opinion nº 2/2003, (UN document E/CN.4/2004/3/Add.1 pp. 24-26), Opinion nº 7/2003, (UN document E/CN.4/2004/3/Add.1 pp. 35-40), Opinion nº 10/2003, (UN document E/CN.4/2004/3/Add.1 pp. 54-58), Opinion nº 12/2003, (UN document E/CN.4/2004/3/Add.1 pp. 62-65) and Opinion nº 13/2003, (UN document E/CN.4/2004/3/Add.1 pp. 65-69). See as well the reaction of the Government of China to Opinion nº 19/2000 and 28/2000 in UN document E/CN.4/2001/14.

[175] The Special Rapporteur in addition to the numerous communications, urgent appeals and follow-ups sent to the Chinese government expressed concern over the scope of capital offences which includes crimes of economic nature and drug-related crimes; the extensive use of the death penalty; number of persons who died while in custody, and many of whom were followers of the Falun Gong movement; the lack of official statistics and secrecy surrounding the detention, sentencing and execution affecting the families of the detainees; and lastly, the reports received from credible sources concerning organs of executed persons used for transplant and which were sometimes removed before the execution. See the Reports of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary, or arbitrary executions and summaries of cases transmitted to governments and replies received, *e. g.* UN documents E/CN.4/1993/46, paragraphs 172-184, E/CN.4/1994/7, paragraphs 209-219, E/CN.4/1995/61, paragraphs 94-99, A/51/457, paragraphs 107, 114, 115, and 117, E/CN.4/1997/60, paragraphs 83, 86, 89, and 91, E/CN.4/1998/68, Chapter 5.A.3, paragraph 4, E/CN.4/1999/39, paragraph 57, E/CN.4/1999/39/Add.1, paragraphs 53-57, E/CN.4/2000/3, paragraphs 12, 22, 47, and 49, E/CN.4/2001/9, paragraphs 13 and 45, E/CN.4/2002/74, paragraphs 34, 101, E/CN.4/2002/74/Add.2, paragraphs 33-45, E/CN.4/2003/3/Add.1, paragraphs 54-69, E/CN.4/2004/7, paragraphs 48 and 76, and E/CN.4/2004/7/Add.1, paragraphs 43-76.

factors that leads to the maintenance of capital punishment. This may indeed be the case, but it is an area that has been neglected and we were not able to find any credible statistics or a way of confirming this assumption.

In all its interaction with the UN and its death penalty framework, we consider that China has not been immune to the establishment of international standards and takes great pain in demonstrating that it complies with the ECOSOC guarantees. In our view, the most successful measure has been the elimination of the possibility of imposing a death sentence on capital offenders who were below 18 at the time of the commission of the crime. This is the outcome of a mix of national policy and international consensus. It is true that, in practice, juveniles were given a special treatment within criminal justice, in the sense that they could be sentenced to the death penalty but not executed. It is also true that there has been an international convergence in this area and in this regard, the Convention on the Rights of the Child stands out. China ratified it in 1991, as well as having signed the 'Beijing Rules' even in the face of a problem with juvenile delinquency and increasing juvenile crime.[176] In fact, the majority of those that are executed are quite young.[177] On balance, the introduction of a constitutional clause stating that the state respects and protects human rights may be understood as paving the way for the ratification of the ICCPR and, in a way, comes closer to the 'inherent' nature of the right to life espoused by the first paragraph of its article 6. Likewise, it is noteworthy that China has responded to the Working Group on Arbitrary Detention, using the Covenant as *the* reference and stating that its national laws are in accordance with it.[178] However, cases that fall under the umbrella of state secrets leave the defendant almost helpless, and capital cases continue to suffer from the fact that they are frequently linked to situations where the CCP perceives its authority and legitimacy to be at stake. Moreover, the death penalty is considered an important tool to combat crime and to maintain social and economic stability. It is interesting to observe that the

[176] See Nicola Macbean, "Young offenders and juvenile justice", in Robert Benewick and Paul Wingrove (eds.), *China in the 1990s*, MacMillan Press, London, 1995, pp. 94-104.
[177] Andrew Scobell, op. cit., p. 518, Michael Palmer, op. cit., p. 126 and Marina Svensson, op. cit., p. 17.
[178] *E. g.*, the Chinese government has stated that its national laws enable full freedom of expression, opinion and association and are in accordance with articles 18 and 22 of the ICCPR. See Opinion nº 7/2001, paragraph 12 (UN document E/CN.4/2002/77/Add.1, pp. 50-54).

application of the death penalty has inherited some of the tenets of Imperial times: the rule of analogy (until 1997), the possibility of a suspended death sentence and the system of review and approval of death sentences. Regarding the latter, the Supreme People's Court has assumed the role of the Emperor. We consider that the greatest gap between theory and praxis in China regarding capital punishment is found in the procedural safeguards conducive to a fair trial, even with the revision of the criminal and criminal procedure law codes. Thus, we are now in a better position to frame the approach that "according to the [Chinese] Government, death sentences serve as a form of punishment but its ultimate worldwide abolition will be the inevitable consequence of historical development."[179] We consider that the current Chinese practice of capital punishment renders the achievement of such a finishing line a distant prospect.

[179] In "Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary, or arbitrary executions- summaries of cases transmitted to governments and replies received", UN document E/CN.4/2004/7/Add.1, paragraph 69.

2 China and the Death Penalty: a Hobbesian Floor rather than a Kantian Ceiling

"To abolish the death penalty when all the conditions have been met in a community is no doubt a sign and a step towards progress and civilisation. However, before the proper time comes, maintaining the death penalty is no less a necessity in order to ensure that society heads towards civilisation and progress."[180]

The end of the state of grace of the 'human rights' exception' was marked by a combination of both defensive and aggressive approaches. China felt the need to introduce and explain human rights both in terms of theory and practice and, instead of rejecting international human rights, it has opted for a selective enthronement of some rights revealing a preference for a minimal Hobbesian floor rather than the lofty standard of a Kantian ceiling.[181] The main result of this approach was the presentation of white papers on human rights commencing in 1991. Besides issuing white papers on specific human rights' questions, another five general white papers on human rights were produced in 1995, 1997, 2000, 2001 and 2004. The presentation of an international discourse on human rights did not limit itself to the statement of general human rights but also addressed specific issues, such as the Tibet question, Taiwan, Xinjiang and national minorities' policy. Tibet was the object of six white papers and the others one each. In addition, such diverse areas as defence, non-proliferation, narcotics control or mineral resources' policy or family planning have been the object of white papers.[182]

From the start, it is worthy of note that the Chinese have chosen to present white papers on *human* rather than *citizen* rights and, in fact, it was the first time that this terminology was used in official documents. In the first paper, we find four

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[180] Song Hansong, op. cit., p. 126.

[181] The title derives from Stanley Hoffmann's brilliant observation that "when we are in an economic depression or in a civil war, we are indeed much closer to the Hobbesian floor than to the Kantian ceiling, and we behave accordingly", in *Duties beyond Borders, On the Limits and Possibilities of Ethical International Politics*, Syracuse University Press, New York, 1981, p. 17.

[182] All these White Papers are retrievable from the Official Information Internet Site of the PRC at http://www.china.org.cn and the direct link to the White Papers is http://www.china.org.cn/e-white/index.htm (both last access on 15th October 2004).

main characteristics that define the evolution of the Chinese approach regarding human rights: the comparison between old and new China, emphasis on sovereignty, cultural relativism, and the paramount effort of improving subsistence rights.[183] It stressed the foreign humiliations suffered until 1949, as well as the imperial oppression that resulted in the "three big mountains", namely imperialism, feudalism and bureaucrat-capitalism, under which there were no human rights to speak of. In addition, although praising international human rights in general, and most notably the UDHR, it stressed that due to differences in historical background, social systems, cultural traditions and economic development, countries differed in their understanding of the praxis of human rights. Therefore, despite its international aspect, the issue of human rights falls by and large within the sovereignty of each country. It is not an absolute approach since in cases where gross violations of human rights endanger international security, international society should intervene. These encompass colonialism, racism, foreign aggression and occupation, genocide, slave trade and international terrorism. Moreover, the right to subsistence is paramount, without which all the others are meaningless. It showed that China's priority regarding human rights was food, clothes and shelter and that in order for these to be possible, stability (understood as party leadership) was essential. The first paper also gave an introductory overview of the legislative and executive systems. It stressed the need to increase material infrastructures available to all citizens, the right to work, education, equality between men and women, and the rights of the disabled. Moreover, it justified its family planning policy as the only means to promote economic and social development, and emphasised the voluntary and consensual adherence of its citizens. It also blamed the infanticide of female and disabled babies as a feudal practice alien to Communism and stressed the government's policy of prohibition. Even if we disregard its shortcomings, such as the claim that there were no political prisoners or news censorship in China, this first white paper is worthy of note since it articulated a stance on a *new* matter of foreign policy.

In 1995, the emphasis on the right to development and subsistence, *i. e.*, improvement of material conditions and infrastructures for the general population,

[183] See Information Office of the State Council of the People's Republic of China, *Human Rights in China*, Beijing, 1991 at http://www.china.org.cn/e-white/index.htm (last access on 15th October 2004).

was strengthened along with its association with CCP leadership.[184] This was also the case of the third report which in addition focused on social security, safety at work and workers' rights.[185] The fourth report, which had the aim of praising the fifty years of the PRC as a time of human rights' progress, spelled out more clearly the link between the three-phase economic development strategy (building socialism with Chinese characteristics), and the improvement of such rights.[186] It considered that the goal of the first and second phases had already been basically achieved: the problems of food and clothing of the entire Chinese people were solved and enabled them to live a relatively comfortable life. It also claimed that the third phase, namely of realising common prosperity for all Chinese by reaching the level of medium-developed countries in the mid-21st century, already had a good foundation.[187] Additionally, it stressed that in order for this to come about: "stability is the prerequisite, development is the key, reform is the motive power, and government according to law is the guarantee."[188] The last two white papers on human rights brought no surprises and reiterated the same reasons for making the right of the entire Chinese people to development paramount, and only accomplishable through CCP leadership.[189]

As to the death penalty, only the first report of 1991 touched upon this matter and, even so, in general terms. It focused on its thorough application and respect for international standards: "China, like most countries in the world, maintains capital punishment, but imposes very stringent restrictive regulations on the use of this extreme measure."[190] Besides a very general description of how the death penalty works in the Chinese criminal system, we find that this question is

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[184] *Idem*, *The Progress of Human Rights in China*, Beijing, 1995 at http://www.china.org.cn/e-white/index.htm (last access on 15th October 2004).
[185] *Idem*, *Progress in China's Human Rights Cause in 1996*, Beijing, 1997, at http://www.china.org.cn/e-white/index.htm (last access on 15th October 2004).
[186] *Idem*, *50 Years of Progress in China's Human Rights*, Beijing, 2000 at http://www.china.org.cn/e-white/index.htm (last access on 15th October 2004).
[187] *Ibidem*, chapter 6 entitled "The cross-century development prospects for human rights in China", paragraph 9.
[188] *Ibidem*, paragraph 19.
[189] *Idem*, *Progress in China's Human Rights Cause in 2000*, Beijing, 2001 and Information Office of the State Council of the People's Republic of China, *Progress in China's Human Rights Cause in 2003*, Beijing, 2004, both at http://www.china.org.cn/e-white/index.htm (last access on 15th October 2004).
[190] *Idem*, *Human Rights in China*, op. cit., chapter 4 entitled "Guarantee of human rights in China's judicial work", paragraph 16.

also dealt with in the white paper concerning criminal justice reform.[191] The Chinese government considered that the restriction of the application of capital punishment underpinned the criminal system and was one of the basic principles of its reform. It also argued that this was such a strong guideline of Communist China that it had not even been used against Japanese war criminals, Guomindang members, Manchukuo's war criminals and the last emperor.[192] The Chinese government corroborated the assertion made to the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary, or arbitrary executions that, in actual judicial practice, about 99% of persons sentenced to death with a two-year reprieve had their sentences commuted to life imprisonment or a set-term of between fifteen to twenty years.[193]

Capital punishment is also a question that is raised in bilateral foreign policy with the EU, and especially in specific human rights' dialogues.[194] In the case of Great Britain, amongst other human rights' issues, concern was expressed regarding the extensive use of the death penalty. This led the British government to call for, on the one hand, the reduction and ultimate abolition of the death penalty and, on the other, the publication of official statistics.[195] As for the EU, there is also a specific human rights' dialogue with China, where two meetings take place per year: one in Europe and the other in China. At the UN, as we have seen, the EU does not sponsor the tabling of a resolution on the violation of human rights in China at the Commission on Human Rights. This is so despite the fact that the EU communication on China (prior to the beginning of the session of the Commission on Human Rights) in 2000 stated that much needed to be done concerning human rights in general and the death penalty in particular. In addition,

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[191] *Idem*, *Criminal Reform in China*, Beijing, 1992 at http://www.china.org.cn/e-white/criminal/index.htm (last access on 15th October 2004).
[192] *Ibidem*, chapter 1 entitled "Basic principles of criminal reform."
[193] *Ibidem*, chapter 7 entitled "Carrying out the punishment of criminals."
[194] In 2003, human rights dialogues were carried out with Australia, Canada, Great Britain, Holland, Norway, Switzerland, Austria, and Belgium. See *Idem*, *Progress in China's Human Rights Cause in 2003*, op. cit., last chapter entitled "International exchanges and cooperation in human rights", paragraph 13.
[195] Great Britain expressed concerns about a wide range of human rights issues in China regarding 2003: no freedom of religion or belief, use of torture, arbitrary detention, practice of re-education through labour, no freedom of expression and association, deprivation of religious and cultural rights in Tibet and Xinjiang, prison conditions and the treatment of prisoners, psychiatric abuse, treatment of the Falun Gong supporters and aspects of the implementation of the one child policy. See Foreign and Commonwealth Office, *Human Rights Annual Report 2003*, London, 2004, pp. 33-40 and p. 174.

China was, in fact, mentioned at the Commission's country statement made by the EU under the agenda item of the "question of the violation of human rights and fundamental freedoms in any part of the world."[196] In 2000 and 2001, dismay was expressed at the continued frequent imposition of death sentences.[197] This rather mild approach of the EU Commission contrasts with the more critical stance that is espoused by the European Parliament. In 2002, the European Parliament's report regretted that the EU-China Summit of September 2002 did not take up any of the European concerns on the violation of human rights in China,[198] and that the EU did not sponsor any resolution on China at the UN Commission on Human Rights.[199] For the European Parliament, the situation of the death penalty in China is of particular concern, especially due to the increasing number of death sentences associated with the lack of religion freedom.[200] Notwithstanding, and despite the démarches and commitment to addressing the question of the death penalty, the EU recognises that little progress has been achieved in practice.[201]

The less confrontational stance of 'European foreign policy' contrasts largely with what is by far the most acrimonious Chinese relationship regarding human rights, namely with the US. In our opinion, this is due to three main reasons: the strong and condemnatory American reaction to the 1989 events; the American sponsorship of a resolution concerning Chinese violations of human rights (even more so since the 1994 dissociation of the renewal of Most Favoured Nation Clause from respect of human rights) and the yearly Country Reports on Human Rights Practices. These reports, which began in 1977, are made by the Bureau of Democracy, Human Rights and Labor of the US Department of State. Their goal is to assess the state of democracy and human rights and, if need be, to correct American foreign policy. In the last report concerning 2003, a plethora of violations of human rights were found and these included the use of capital punishment. It remarked that the Chinese government considers the number of

[196] See *EU Human Rights Report* of 2000, paragraph 19, *EU Human Rights Report 2001*, paragraph 37, *EU Human Rights Report 2002*, p. 127 and *EU Human Rights Report 2003*, point 4.4.2 under the title of "Situation of Human Rights in Asia".
[197] See *e. g.* UN document E/CN.4/2000/SR.55, paragraph 97 and UN document E/CN.4/2001/SR.62.
[198] See paragraph 28 of the European Parliament "resolution on human rights in the world in 2002 and European Union's human rights policy"(EU document P5_TA(2003)0375).
[199] *Ibidem*, paragraph 52.
[200] *Ibidem*, paragraph 172.
[201] See *EU Human Rights Report 2003* under point 4.1.3 entitled "Human Rights Dialogues."

executions as a state secret, so information is scarce. There is lack of safeguards involving capital cases including summary trials, no adequate legal counselling for the accused, and public executions.[202]

These factors, but especially the yearly country report, have led the PRC to issue white papers condemning the US' own record on human rights. In our view, this approach is both active and re-active since, although the PRC is 'on the offensive' and criticising the American practice of human rights, it seems to us that the Chinese reports are a counter-measure rather than an initiative *per se*.[203] They result directly from the issuance of the country reports. We find common threads throughout the Chinese reports on American human rights' records: American society is very violent (including a high rate of violent crimes, gun ownership, drug-related crimes, the highest prison population and police brutality), They also argued that American democracy is a myth (high abstention rate, intense lobbying and money donations in the presidential election), there are problems of gender and racial discrimination, no safeguards of workers' rights (refusal to ratify the ICESCR), an increasing gap between the rich and the poor, and war crimes and violations of human rights abroad (ranging from the bombings of Vietnam to the NATO bombing in Former Yugoslavia). All the reports end with the rebuke that although the US regards itself as the 'world human rights' judge', it falls short of

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[202] In addition, the Country Report stated that the violations of human rights in China encompassed censorship, lack of religious freedom and persecution of minorities such as the Uighurs and Tibetans, lack of freedom of assembly and association such as the case of the Falun Gong practitioners, no freedom of speech and existence of political prisoners some of them detained in *ankang* institutions, forced disappearances, arbitrary arrest and detention, torture and forced confessions, commerce of organs of executed prisoners, forced abortion and sterilisation, corruption, lack of workers' rights including freedom of forming trade unions, discrimination against women and the disabled, and the vagueness concerning the education-through-labour system which is an administrative rather than a criminal punishment that ranges from one to three years. See US Department of State, *Country Report on Human Rights Practices-2003, People's Republic of China, including Tibet, Hong Kong and Macau*, 25th February 2004 at http://www.state.gov/g/drl/rls/hrrpt/2003/27768.htm (last access 30th September 2004).

[203] See the reports made by the Information Office of the State Council of the People's Republic of China, *United States Human Rights Record in 1999*, Beijing, 2000 and *United States Human Rights Record in 2000*, Beijing, 2001, available at the China Society for Human Rights Studies internet site at http://www.humanrights-china.org being that the direct link to the reports are respectively http://www.humanrights-china.org/whitepapers/white_u03.htm and http://www.humanrights-china.org/whitepapers/white_u04.htm (last access 15th October 2004). Two subsequent reports were issued by the Information Office of the State Council of the People's Republic of China, *The Human Rights Record of the United States in 2001,* Beijing, 2002 at http://www.china.org.cn/e-white/index.htm (last access on 15th October 2004) and *The Human Rights Record of the United States in 2003,* Beijing, 2004, available at Chinese News Agency site http://news.xinhua.net.com/english/2004-03/01/content_1338758.htm (last access 15th October 2004).

respecting and promoting those rights at home. We consider that, murky rhetoric aside, this is an unprecedented move by the Chinese government, since it departs from its traditional view of the role of human rights in international relations.

Within these human rights' reports, we find several references to the use of the death penalty in the US. The Chinese government stresses that despite international condemnation, the US continues to execute juvenile offenders (pointed out in all reports); there is an increase in the number of capital offences and executions in the US since the 1990s; the large amount of re-sentencing due to misjudgements as well as innocents on death row which reveals that the system is not working. It is worth mentioning that the death penalty is considered in these counter-reports solely from a human rights' point of view, and does not fall under the umbrella of domestic criminal jurisdiction. It is also interesting that, for instance, the increase in capital offences (e. g. drug-related crimes) is very much applicable to both American and Chinese criminal practices.

Along with the Chinese policy of telling 'its human rights story' by focusing on its 'Chineseness' (unique conditions and solutions), and actively criticising American double standards, we have observed an attempt to internationalise its human rights' policy (and the critiques made of it) within a developing countries' strategy and an 'Asian values' claim. China calls upon other developing countries and tries to frame the draft resolutions regarding violations of human rights within the North-South debate. The Chinese government considers that the defeat of draft resolutions at the Commission on Human Rights "is a victory not only for China, but also for the vast number of developing countries and international justice forces in defending the purposes and principles of the Charter of the United Nations."[204] In addition, developing countries have also expressed common recommendations and concerns as to the functioning of the Commission and its effectiveness.[205] The regional discourse centred on 'Asian values' represents not only a challenge to the unitary conception by playing down the first generation

[204] *Idem*, *The Progress of Human Rights in China*, op. cit., last chapter entitled "Working hard to promote the healthy development of international human rights activities", paragraph 11.

[205] *E. g.*, see the joint-statement of Algeria, Bhutan, China, Cuba, Egypt, India, Iran, Malaysia, Myanmar, Nepal, Pakistan, Sri Lanka, Sudan and Viet Nam which transmitted their comments, observations and alternate recommendations on the report of the Bureau aiming at the review of the Commission's mechanisms in order to enhance their effectiveness. (UN document E/CN.4/1999/120).

rights, but also a challenge to the universal conception by focusing on its Western origins. It upholds that international human rights' law cannot be extended beyond cultural boundaries whether Western or not.[206]

Culture has been brought back into international relations, thereby renewing the debate between cosmopolitans and communitarians with cultural relativism claims such as the 'Asian values', There is also the idea that, in the post-Cold War world, conflict will occur along civilisational lines. The main argument behind the idea of a civilisational clash is that the increasing interactions intensify not only civilisational awareness but also the differences among civilisations. Modernisation and economic development neither require nor produce cultural Westernisation. The overriding alignment will be between the West and the rest, stressing that the West is unique rather than universal. This uniqueness is the result of the combination of several factors such as classical legacy, Western Christianity, European languages, separation of spiritual and temporal authority, rule of law, social pluralism and civil society, representative bodies and individualism.[207] The idea of a clash of civilisations has sparked a great deal of controversy and been a major dynamo in the re-discovery of culture and civilisation in international relations. At the same time, it has been counter-argued that such an idea aims at providing conceptual ammunition to fill the American threat vacuum left by the demise of Communism, therefore becoming a self-fulfilling prophecy. To argue that the inter-civilisational relations are dominated by conflict could not only be misleading but narrow, by ignoring the richness of cultural borrowing between civilisations that has been a constant throughout history; the positive impact that western civilisation has had in other cultures; and the heterogeneity within each culture.[208]

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[206] For the opposite view regarding international law see Alfred P. Rubin, "International law as a cultural excrescence", in *American Journal of International Law*, Vol. 67, 1973, pp. 319-324.

[207] Samuel P. Huntington, "The clash of civilisations?" and "Response: If not civilizations, what? Paradigms of the post-Cold War world", in Council on Foreign Relations, *Samuel P. Huntington's The Clash of Civilizations? The Debate in Foreign Affairs*, W. W. Norton, New York and London, 1996, pp. 1-25 and pp. 56-67, and "The West, unique, not universal", in *Foreign Affairs*, Vol. 75, nº 6, November/December 1996, pp. 28-46.

[208] See Donald J. Puchala, "International encounters of another kind", in *Global Society*, Vol. 11, nº 1, 1997, pp. 5-29, Jacinta O'Hagan, "Civilisational conflict? Looking for cultural enemies", in *Third World Quarterly*, Vol. 16, nº 1, 1995, pp. 19-38, Adam Tarock, "Civilisational conflict? Fighting the enemy under a new banner", in *Third World Quarterly*, Vol. 16, nº 1, 1995, pp. 5-18, and Fouad Ajami, "The summoning, but they said, we will not hearken", in Council on Foreign Relations, *Samuel P. Huntington's The Clash of*

The debate regarding uniqueness and universalism was revived with the resurfacing by non-western countries, and in particular the 'Asian values' approach, of the defence of community prevalence over the individual. To the communitarians, the community represents the beliefs of each member and political institutions are legitimate when they serve to express the will of the community.[209] The individual is not pristine and separate but exists in the context of the family and society. Freedom of the individual is replaced by freedom of the community, family is the foundation of society, resolution of important questions is made by consensus rather than competition, and governance is exercised by honourable men. In addition, there is the emphasis on the perceived decadence of western societies present in the disintegration of the family, lack of caring and respect for the elders, as well as rampant crime rates and especially drug use.[210] In contrast, cosmopolitans place a high value on individual autonomy, and social and political institutions are legitimate only to the extent that individuals have given their consent. The state plays a minimal role in public life, being characterised as a bearer of rights and an observer of rules, intervening only to protect these rules. The cosmopolitans argue that the individual is an end in its own terms, and not a means through which the community is safeguarded. They believe that rights are inherent in the human person and not contingent upon the performance of any given prescribed role.

The revival of culture and civilisation or rather 'cultures and civilisations' in the post-Cold War world brought us, once again, the question of the perception of the *other*. This is linked to the relationship between identity and equality, and how the other is perceived: as equal, different (but inferior) or equally different.[211] The perception of the other as equal was present in the Christian assumption of a community of mankind. Nevertheless, equality was made in the name of a specific religion, Christianity, and therefore the postulate of equality involved the assertion

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Civilizations? The Debate in Foreign Affairs, W. W. Norton, New York and London, 1996, pp. 26-35.

[209] David Miller, *On Nationality*, Clarendon Press, Oxford, 1995, pp. 193-195.

[210] Kishore Mahbubani, "The dangers of decadence, what the rest can teach the West", in Council on Foreign Relations, op. cit., pp. 36-40.

[211] This is the common thread that runs through the whole fascinating account by Tzvetan Todorov regarding the role of semiotics in the Western conquest of America and how the Native Americans and Westerners viewed each other, in *The Conquest of America, The Question of the Other*, University of Oklahoma Press, Norman, 1999.

of identity. This is to say that being equal was linked with being Christian, and thus "what is denied is the existence of a human substance truly other, something capable of being not merely an imperfect state of oneself."[212] As we have seen, the standard of civilisation institutionalised differences and saw the other as different and in most cases as inferior, leaving the other to be genuinely discovered.[213] The rejection of the contents of the standard of civilisation was followed by a search whereby equality would no longer imply the loss of identity and values would be proposed and not imposed.

In our view, the post-Cold War debate presents a contemporary version of this relationship between equality and identity and where we find two dominating themes: international human rights and democracy, whether they are western but accepted as universal, whether they are common to all cultures, or rather culturally specific (western) and not exportable. In a nutshell, regarding international human rights, the debate between communitarians and cosmopolitans can be reduced to one main question, namely whether tolerance of cultural diversity entails the tolerance of violations of basic human rights.[214] The relationship between cultural diversity and human rights can be categorised into four levels. In the first one, strong relativism holds that human rights are principally, but not entirely, determined by culture or other circumstances. In the second, weak relativism asserts that human rights are held to be subject only to secondary cultural modifications but universality is presumed. With the third, radical relativism considers that culture is the sole source of all values and universal human rights represent the imposition of a particular culture on all the others: "there are no universal values. This, to the cultural relativist, is not a problem. It is a solution."[215] Lastly, radical universalism regards all values, including human rights, as universal and in no way subject to modification in the light of cultural or historical differences.[216]

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[212] *Ibidem*, p. 42.
[213] *Ibidem*, p, 247.
[214] Stanley Hoffmann, "The problem of intervention", in Hedley Bull (ed.), *Intervention in World Politics*, Clarendon Press, Oxford, 1994 , pp. 7-28, at p. 27.
[215] R. J. Vincent, *Human Rights and International Relations*, Cambridge University Press in association with RIIA, Cambridge, 2001 (1st Ed. 1986), p. 38.
[216] Jack Donnelly, *International Human Rights*, Westview Press, Boulder, Colorado, 1998, p. 33, *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca and London, 1996 (1st Ed. 1989), pp.

The other main theme that has dominated this debate is that democracy is defended by the cosmopolitans, while communitarians focus on tolerance. The communitarian defence of tolerance entails the existence of illiberal political regimes and the refusal to accept the universalising tendency of liberal democracy and is, in fact, presented in terms of an international society of *free* states.[217] This defence was enhanced by the increasing resistance to the post-Cold War democratic euphoria from countries like North Korea, Vietnam and especially China, which having survived the Cold War, regarded the "(...) American rhetoric about the New World Order and the enlargement of the scope of democracy as aimed at undermining their political systems.[218] Additionally, Lee Kuan Yew from Singapore and Mahathir Mohammad from Malaysia, the most outspoken leaders of the 'Asian Values' claim, also shared the perception of Americans as missionaries of democracy.[219] For them, not only was culture equated with destiny but it was also possible to modernise without Westernising and, therefore, to have an alternative framework to the perception of imposed standards of international human rights and democratic institutions.[220] The dissatisfaction regarding an aggressive western promotion of human rights after the end of the Cold War made its way with the Bangkok Declaration of 1993 that preceded the Vienna World Conference.

The challenge to the universality of human rights is not something new, and can be observed in the International Bill of Human Rights. The first instance was Saudi Arabia's abstention from the voting of the UDHR. This abstention was due to article 18, which established the right to change and to choose one's religion.

109-110 and "Cultural relativism and universal human rights", in *The Human Rights Quarterly*, Vol. 6, nº 4, 1984, pp. 400-419.

[217] See Christopher Hughes, "China and Liberalism globalised", in *Millennium: a Journal of International Studies*, Vol. 24, nº 3, 1995, pp. 425-445. For the specific African situation see Tom Young, "A Project to be realised: Global liberalism and contemporary Africa", in *Millennium: Journal of International Studies*, Vol. 24, nº 3, 1995, pp. 527-546.

[218] Michael Yahuda, *The International Politics of the Asia-Pacific, 1945-1995*, Routledge, London and New York, 1996, p. 143.

[219] See Michael R. J. Vatikiotis, *Political Change in Southeast Asia, Trimming the Banyan Tree*, Routledge, London and New York, 1996, p. 96. It is also interesting to see the parallel that Lee Kuan Yew drew between Russia and Asia. He considered that Russia's lack of a liberal civic society was due to the fact that it had missed the Renaissance and the Enlightenment. Therefore if democracy had not worked for the Russians which are a white Christian people it was not reasonable to assume that it would work for Asians, in *ibidem*, p. 104.

[220] Fareed Zakaria, "Culture is destiny, a conversation with Lee Kuan Yew", in *Foreign Affairs*, Vol. 73, nº 2, 1994, pp. 109-126.

The fundamental premises of article 18 did not conform to the Saudi Islamic approach prohibiting apostasy and promotion of other religions. Here, the rejection of the universal contents regarding right to religion is based on the fact that they are not applicable, because they do not conform to Islamic law.[221] Egypt restated the earlier comments made by Saudi Arabia and considered that the article concerning the freedom to marry without any restrictions as to race, nationality or religion would meet in reality with limitations and restrictions in Moslem countries. This was especially the case regarding the marriage of women with persons belonging to another faith.[222] The same line of reasoning was adopted by Egypt regarding article 18 and the right to religion of the ICCPR.[223] In both Saudi and Egyptian rejections of universal human rights, we find them confined to religion and the idiosyncratic Islamic non-recognition of the right to apostasy. From then onwards, the disputation of the universality of human rights grew both in numbers of supporters and in the reasons of the challengers. This evolution has not been directed at a specific right but rather at the whole edifice which is considered Western. The membership of the challengers is very heterogeneous and focuses on second and third generation rights.

The 'Asian values' claim fits well into this movement of contestation of human rights as Western rights, and entails the idea that Asia has a different standard.[224] Therefore, it is important to analyse the Bangkok Declaration to understand the level of cultural relativism that Asian countries advocate and, if possible, to categorise it. [225] We find that emphasis is placed on the diversity and richness of cultures and traditions and that international human rights should be promoted within the context of co-operation.[226] Thus, co-operation and consensus were stressed and, in contrast, we find a clear double rejection of the application

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[221] See *Y. U. N. 1948-1949*, pp. 528-529.
[222] *Ibidem*, p. 532.
[223] In 1950, the Egyptian draft proposed "to delete from article 13, paragraph 1, of the Draft International Covenant on Human Rights the implication concerning freedom to change one's religion or belief", see UN document A/C.3/L.75/Rev.1.
[224] Bilahari Kausikan, "Asia's different standard", in *Foreign Policy*, Vol. 92, fall/1993, pp. 24-41.
[225] The Bangkok Declaration resulted from the meeting of the Economic and Social Commission for Asia and the Pacific at Bangkok from 29th March to 2nd April 1993 and is reproduced in Michael C. Davis (ed.), op. cit., pp. 205-209. There were two other regional meetings, namely of Africa (held at Tunis from 2nd to 6th November 1992) and Latin America and the Caribbean (held at San José from 18th to 22nd January 1993) which also adopted declarations on human rights. Hereafter simply cited as Bangkok Declaration.
[226] *Ibidem*, paragraphs 2 and 5 of the Preamble.

of double-standards as to human rights' practices and of the linkage of development assistance with human rights' compliance.[227] Furthermore, Asian countries reiterated the central role of the state as having the primary responsibility for protecting human rights and sovereignty, and these should not be used as an instrument of political pressure.[228] Concern was expressed regarding the fact that international mechanisms relate mainly to one category of human rights, namely civil and political rights.[229] There were also calls for the establishment of a just and fair world economic order, and reduction of the widening gap between the Northern and Southern countries, as well as legitimacy of the struggle of the Palestinian people.[230]

It seems to us that criticisms were more directed at the use of human rights than international human rights *per* se, whose universality was recognised albeit with a need for contextualisation within "a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."[231] We did not find the presentation of a *new* international standard of human rights but rather an attempt to reform the present one. This is very clear in the strong dissent towards democracy rather than the whole edifice of political and civil rights. In our view, what is here at stake is more the perception of western double-standards regarding human rights, and its use as a political tool. This can be seen in the co-ordination of efforts, most notably between Singapore and Malaysia, prior to the Vienna Conference.[232] Furthermore, we find a more aggressive critique of 'western human rights' foreign policy' which works with genocidal rulers when it serves their interests.[233] There are also other aspects of the 'Asian values' claim that place

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[227] *Ibidem*, paragraphs 9 and 10 of the Preamble and paragraph 4 of the text of the Declaration.
[228] *Ibidem*, paragraphs 5 and 9 of the text of the Declaration.
[229] *Ibidem*, paragraph 6 of the Preamble.
[230] *Ibidem*, paragraphs 17, 18 and 26 of the text of the Declaration.
[231] *Ibidem*, paragraphs 8 of the text of the Declaration.
[232] *E. g.* letter dated 29th April 1993 from Singapore to the co-ordinator of the World Conference on Human Rights containing the speech delivered by Kishore Mahbubani at a Conference regarding Asian and American perspectives on capitalism and democracy held in Singapore from 28th – 30th January 1993, entitled "An Asian perspective on human rights and freedom of the press". Singapore requested that the speech be issued as a document at the fourth session of the preparatory Committee of the World Conference on Human Rights (UN document A/CONF.157/PC/63/Add.28).
[233] *Ibidem*, paragraphs 2, 3 and 15-21. The examples given were the double-standards of western foreign policy regarding Myanmar's violations of human rights and the violent overturn of the result of democratic elections in Algeria.

such an alternative on less solid ground. The first thing that springs to mind is the very definition of what is meant by Asian, since Asia is the most heterogeneous continent in the world, leading some to argue that it has not been much more than a geographical concept.[234] From a human rights' perspective, it is the only region without a regional convention and the diversity of political and economic systems, religions and cultures render a coherent Asian approach problematic.[235] At Bangkok even the possibility of establishing a regional human rights' arrangement was couched in very vague and uncompromising terms, and such a project is still in the realm of good intentions.[236] The argument for the rejection of a democratic blueprint is linked to the goal of economic modernisation and the improvement of the standard of living of its populations. It is argued that both these goals are best pursued by a strong political centre.[237] This idea was objectively challenged after the 1998 Asian financial crisis. The lack of transparency and public participation in the review of financial arrangements of some authoritarian countries was considered to be one of the reasons for the dimension that the crisis took on.[238] Moreover, some of the values that are propounded as Asian can, in fact, be considered as conservative in western societies, where criticism of the excesses of individualism also takes place. There is a strong communitarian tradition in western countries too, and the association of good government with superior virtue and wisdom of the elite can be traced to Plato and his conception of the role of the guardian-philosophers. Likewise, we find 'Western' ideas in Asia. South Korea and Taiwan have proven wrong the suggestion that Confucian heritage is incompatible with democracy and universal human rights.[239] Furthermore, some traits of

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[234] See Yoichi Funabashi, "The Asianization of Asia", in *Foreign Affairs*, Vol. 72, nº 5, November/December 1993, pp. 75-85 and for the specific case of Southeast Asia see Donald G. McCloud, *Southeast Asia, Tradition and Modernity in the Contemporary World*, Westview Press, Boulder, San Francisco and Oxford, 1995.

[235] See Cristina Gomes da Silva, "Perspectivas Asiáticas dos direitos humanos", in *Perspectivas do Direito*, nº 8, Vol. V, 2000-1º, Direcção dos Serviços de Asseuntos de Justiça, Macau, pp. 109-134.

[236] Bangkok Declaration, op. cit., paragraph 26: "reiterate further the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia."

[237] For a general overview of democracy in South East Asia, see Michael R. J. Vatikiotis, op. cit., chapter 3 entitled "Differing on democracy", pp. 82-108 and Clark D. Neher and Ross Marlay, *Democracy and Development in Southeast Asia, the Winds of Change*, Westview Press, Boulder, 1995.

[238] See Amartya Sen, "Democracy as a universal value", in *Journal of Democracy*, Vol. 10, nº 3, 1999, pp. 3-17.

[239] See Maynard Parker (leading editor), "Interview with Lee Teng-hui, building a new culture", in *Newsweek*, May 20, 1996, pp. 18-19. See as well Wm. Theodore de Bary, "Introduction" and Sumner B.

Confucian thought, such as tolerance and resistance to unjust authority have a place in modern (and Western) human rights' discourse.[240] On the one hand, we have the Confucian reverence for the ruler and, on the other, the need for the ruler to be virtuous, otherwise he may lose the mandate of heaven.

As to the 'Asian values' claim, and if we dig deeper than the inflammatory speeches of its most strident spokesmen, we find that there is not a rejection of human rights *per se* and, in fact, their international character is recognised. The arguments that are used call for a re-interpretation rather than rejection of international standards. In our view, the 'Asian values' claim to having a different standard of human rights does not hold water, and instead is focused on what it considers the predominance of first generation rights and democracy.[241] It should perhaps be seen as a political rather than cultural or civilisational challenge aiming at countering Western leadership of international affairs.[242] In this respect, it is legitimate to wonder whether the proposed alternative is really genuine or rather a mask to perpetuate some political elites in power, since it is assumed that Asian governments are wise and benign.[243] Hence, we consider that in the 'Asian values' approach, culture does not determine the whole edifice of human rights but is important in its implementation. Therefore, the alternative propounded by Asian countries is based more on a weak cultural relativism than a strong or radical one. This was also the path followed by the Vienna Declaration, where the final document of the Conference reaffirmed that the universality and the indivisibility of human rights is beyond question and, at the same time, pointed out that we should bear in mind the national and regional idiosyncrasies and the various historical, cultural and religious backgrounds.[244]

Twiss, "A constructive framework for discussing Confucianism and human rights", in W. Theodore de Bary and Tu Weiming (eds.), op. cit., pp. 1-26 and pp. 27-53.

[240] See Du Gangjian and Song Gang, "Relating human rights to Chinese culture: the four paths of the Confucian Analects and four principles of a new theory of benevolence", in Michael C. Davis (ed.), op. cit., pp. 35-56.

[241] On the broader issue of establishing a common floor regarding universal values arising from cross-cultural dialogue see Bhikhu Parekh, "Non-ethnocentric universalism", in Tim Dunne and Nicholas J. Wheeler (eds.), *Human Rights in Global Politics*, Cambridge University Press, Cambridge, 2000, pp. 128-159.

[242] Andrew Hurrell, "Power, principles and prudence: protecting human rights in a deeply divided world", in Tim Dunne and Nicholas J. Wheeler (eds.), op. cit., pp. 277-302, at pp. 295-297.

[243] Margaret Ng, "Are rights culture-bound?", in Michael C. Davis (ed.), op. cit., pp. 59-71, Aryeh Neier, "Asia's unacceptable standard", in *Foreign Policy*, Vol. 92, fall/1993, pp. 42-51 and Michael Freeman, "Human rights, democracy and 'Asian values', in *The Pacific Review*, Vol. 9, nº 3, 1996, pp. 352-366.

[244] UN document A/CONF.157/23, paragraphs 1 and 5.

In spite of being refuted as an alternative human rights' project, the building-blocks propounded by the 'Asian values' framework, *i. e.*, democratic rights of individuals cannot be achieved at the expense of the stability of society as a whole, and the need for a strong political centre in order to achieve economic success and increase the standard of living, fitted China's human rights' strategy like a glove. China searched for the members of the Association of South East Asian Nations (ASEAN) after the 1989 setback as a way of escaping the pressure exerted by Western countries. The ASEAN leaders did not condemn the suppression of the demonstrations in 1989, and adopted a pragmatic policy. The new direction of Chinese foreign policy is exemplified by the resumption of diplomatic relations with Indonesia and the establishment of diplomatic relations with Singapore. The latter even became the focus of a 'Singaporean model' that showed that economic modernisation was only possible with a strong political leadership.[245] China played a high-profile at the Vienna Conference, where it held one of the posts as Vice-Chairperson and tried to push the 'Asian values' proposal from the onset.[246] It was one of the strongest sponsors contrasting with the Japanese stance that, in spite of having signed the Declaration of Bangkok (although reluctantly), clearly supported the universality and indivisibility of human rights. In fact, Japan has been a party to both Covenants since 1979. Nevertheless, Chinese commitment to the Bangkok Declaration did not bear fruit and its participation in Vienna ended up being dominated by two main themes, namely Austria inviting the Dalai Lama to attend the Conference and the role of NGOs.[247]

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[245] Chen Jie, "Human rights: ASEAN's new importance to China", in *The Pacific Review*, Vol. 6, nº 3, 1993, pp. 227-237.

[246] Christine Loh, "The Vienna process and the importance of universal standards in Asia", in Michael C. Davis (ed.), op. cit., pp. 145-167, at p. 157.

[247] See Ann Kent, *China, the United Nations, and Human Rights, the Limits of Compliance*, University of Pennsylvania Press, Philadelphia, 1999, pp. 173-193. The NGOS' issue presented two questions. The first one had to do with the Chinese proposal that NGOs should be excluded from the discussions. The second one was the request that Chinese organisations such as the Chinese Society for Human Rights be included as NGOs. The NGOS clearly resisted since Chinese 'private organisations' are in fact supported by the government and a pivotal player in China's human rights strategy, and this situation led to their ironic naming as GANGO (Government Appointed NGO). The invitation made to the Dalai Lama originated all sorts of pressure and even an official stance where Beijing expressed its 'strong discontent.' See UN document A/CONF.157/20 which contains the letter dated 24th June 1993 from the Deputy Chairman of the Delegation of China addressed to the President of the World Conference on Human Rights.

The question of the death penalty is not present in the Bangkok Declaration, but we find that it is a quite consensual matter, where Asian countries have explicitly articulated their individual positions along with other retentionists at the UN. In fact, leadership has mostly been provided by Asian countries. At the General Assembly, Singapore and Egypt (the only non-Asian) led the retentionist strategy and at the Commission on Human Rights, the mantle was taken up again by Singapore (1998 and 1999), followed by Indonesia (2000), and Saudi Arabia (2001, 2002, 2003, and 2004). In fact, Singapore and Saudi Arabia are the countries worldwide with the highest rate of executions per million of population.[248] From the sixty-four co-signatories of the dissociation statement concerning the last Commission's resolution on the question of the death penalty, almost half are Asian and Japan is amongst them.

At the General Assembly in 1994, and referring to the first European attempt to adopt a resolution on the death penalty, Singapore enunciated the reasons behind its refusal to accept such a draft.[249] Firstly, there was the need to take into account the rights of the victims and of the community to live in peace and security; secondly, capital punishment was not contrary to international law; thirdly, abolitionist countries did not have the right to impose their values on others and the abolition of the death penalty did not necessarily contribute to the advancement of human dignity. On the contrary, it was such a penalty that had helped to preserve maintenance of law and order and safeguard Singaporean society. One of the examples given by Singapore were crimes regarding drug trafficking, where the death penalty is part of a wider strategy to fight this type of crime, an issue that has been under the attention of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions.[250] It is a matter that falls under the umbrella of sovereignty and should be understood as a part of criminal policy

[248] The first is Singapore with a rate of 6.40, followed by Saudi Arabia with 4.46, Belarus with 2.48, Sierra Leone with 2.36, Jordan with 1.96, and Iran with 1.76; see table prepared by Roger Hood, op. cit., p. 92.

[249] See UN document A/C.3/49/SR.33, paragraphs 23-27.

[250] See D. C. Jayasuriya, "Penal measures for drug offences: perspectives from some Asian countries", in *Bulletin on Narcotics*, United Nations Office on Drugs and Crime, 1984, issue nº 3, pp. 9-13 and J. L. O'Hara and M. Zawawi Salleh, "Recent developments in legislative and administrative measures in countries of the Association of South-East Asian Nations to counter the illicit traffic in drugs", in *Bulletin on Narcotics*, United Nations Office on Drugs and Crime 1987, issue nº 1, pp. 51-56. The issue of the Singaporean combat on drugs as well as the safeguards of capital offenders have been under the attention of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions and have originated acrimonious responses from Singapore, *e. g.*, see UN documents E/CN.4/1998/113, E/CN.4/2002/170 and E/CN.4/2003/G/57.

linked to its deterrent power and not an international human right. The emphasis is placed not on the abolition of capital punishment but rather the improvement of conditions that guarantee that it is applied justly and less prone to error. Furthermore, Singapore called upon all retentionist states to join in their dissent and to vote against the resolution. The resolution in question included, amongst other elements, an appeal for a moratorium on pending executions and affirmed the conviction that abolition of the death penalty contributed to the enhancement of human dignity and the progressive development of human rights.[251] Singapore and Egypt proposed amendments aimed at changing the content of the resolution in such a way as to make it meaningless. Both amendments were, in some respect, successful and a new paragraph was included that took account of the sovereign right of states to determine their criminal systems, although not going as far as the Singaporean amendment proposed.[252] The revised draft included the sovereign right of states but reaffirmed that this right had to be exercised in accordance with international law, including the Charter of the UN.[253] At this point, the draft resolution began to lose some of its sponsors that considered the changes unacceptable. The situation worsened when both Singapore and Egypt proposed additional amendments. The most incisive was the Singaporean, which aimed at withdrawing the reference to limits established by international law on the matter of capital punishment.[254] The attempt to reach a compromise was seen in the inclusion of a new paragraph, but this new amendment made such conciliation impossible and, after its adoption, all fifty sponsors withdrew.[255] The revised draft, as amended by the Singaporean proposal, was rejected at the end by 44 votes to

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[251] See last preambular paragraph and last operative paragraph of draft resolution UN document A/C.3/49/L.32.

[252] The Singaporean amendment (UN document A/C.3/49/L.73) asked for the inclusion of the following paragraph: "Affirming the sovereign right of States to determine the legal measures and penalties which are appropriate in their societies to combat serious crimes effectively" and Egypt (UN document A/C.3/49/L.74) called for the replacement of the opening words in three paragraphs making them less bold and was successful in two of these.

[253] UN document A/C.3/49/L.32/Rev.1, last preambular paragraph: "Reaffirming the sovereign right of States to determine, in accordance with international law, including the Charter of the United Nations, the legal measures and penalties which are appropriate to deal with the most serious crimes".

[254] See UN document A/C.3/49/L.73/Rev. 1 for the Singaporean amendment that aimed at the replacement of the last preambular paragraph with the following wording: "Affirming the sovereign right of States to determine the legal measures and penalties which are appropriate in their societies to combat serious crimes effectively." The Egyptian amendment is in UN document A/C.3/49/L.74/Rev.1.

[255] The Singaporean amendment was adopted by a recorded vote of 71-65-21. See the summary records of the 61st session of the Third Committee, UN document A/C.3/49/SR.61, paragraphs 9-10.

36 and 74 abstentions.[256] The disagreement regarding the discussion of this issue at the General Assembly was once again shown in 1999 but this time, as we have already mentioned, in a collective strategy encompassing over seventy countries. These countries called for the insertion of two new paragraphs, one couched in the same terms as the 1994 amendment, and another reaffirming the non-intervention principle regarding domestic affairs as stipulated in the UN Charter.[257] The revised draft took into account some of the proposed amendments but not all and it ended in a very similar way as its predecessor.[258]

At the Commission, the reasons presented for dissociation from the resolutions adopted on the question of the death penalty are structured upon those made at the Third Committee. In order to strengthen the lack of international consensus, attention was drawn not only to the failure of the European sponsored resolutions at the General Assembly and the dissociation statements from resolutions adopted by the Commission, but also to article 6 of the ICCPR and the declarations of the president of the Rome Diplomatic Conference regarding the ICC. These countries state that article 6 enables death sentences to be imposed only for the most serious crimes and, in addition, the President of the Rome Statute conference acknowledged that "not including the death penalty in the Rome Statute would not in any way have a legal bearing on national legislations and practices with regard to the death penalty, nor should it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes."[259] Reference was also made to the 7th paragraph of article 2 regarding domestic jurisdiction, because the death penalty is a criminal law issue linked to the inalienable right of each country to chose its political, economic, social, cultural

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[256] *Ibidem*, paragraphs 55-56.

[257] The two amendments to the EU draft (UN document A/C.3/54/L.8) called for the inclusion of a new preambular paragraph which read "*Recalling* the purposes and principles of the Charter of the United Nations, in particular, Article 2, paragraph 7, which clearly stipulates that nothing in the Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state" (UN document A/C.3/54/L.31) and a new operative paragraph that read "*Reaffirms* that every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state" (UN document A/C.3/54/L.32).

[258] See UN document A/C.3/54/L.8/Rev.1.

[259] The structure (five operative paragraphs) of the declaration is the same in all documents since 2000 and only updated with the previous year dissociation statement and number of co-signatories. See, for instance, paragraphs a), b) and c) of the last dissociation statement, UN document E/CN.4/2004/G/54.

and legal systems without interference. Likewise, the question of whether to retain or abolish the death penalty should be carefully studied by each state, taking fully into account the sentiments of the people and the state of crime and criminal policy. [260] Moreover, the characterisation of capital punishment as a human rights' issue in the context of the right of the convicted prisoner had to be weighed against the rights of the victims and of the community to live in peace and security.[261]

In sum, we find a rejection of its abolition and the focus is shifted to the compliance of safeguards and guarantees to the accused. Regarding the use of the death penalty, we find different levels of response going from the hard-line propounded by Singapore and Malaysia to the softer approach of Brunei, which is considered to be an abolitionist de facto since it hasn't carried out any executions for the last ten years. There are also other retentionist Asian countries which have not signed the statements of dissociation from the Commission's resolutions such as India or South Korea. There are also others which have become abolitionists such as Nepal (last execution in 1979 and totally abolitionist since 1997), and Bhutan (last execution in 1964 and completely abolitionist since 2004), and voted in favour of the Commission's 2004 resolution on the question of the death penalty.[262] We should also add the case of Taiwan where some abolitionist winds seem to be blowing, as can be seen by the desire expressed by the Minister of Justice in 2001 to abolish the death penalty.[263]

China has been present in this concerted strategy although with a lower profile than its active stance in the 'Asian values' claim. At the Third Committee, China voted against the inclusion of the issue of capital punishment and always along with the Singaporean and retentionist initiatives.[264] China has consistently voted against the resolutions of the Commission and Sub-Commission on the death penalty.[265] It has also been a co-signatory of the joint-statements and

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[260] *Ibidem*, paragraph e).
[261] *Ibidem*, paragraph d).
[262] UN document E/CN.4/2004/SR.57, paragraph 90.
[263] Roger Hood, op. cit., pp. 46-47.
[264] See *e. g.* UN documents A/C.3/49/SR.61, paragraphs 9-10 and 55-56.
[265] UN document E/CN.4/1999/SR. 58, paragraphs 60-62; in 2000, see UN document E/CN.4/2000/SR.66, paragraphs 29-31; in 2001, see UN document E/CN.4/2001/SR.78, paragraphs 16-18; in 2002, see UN document E/CN.4/2002/SR.56, paragraphs 104-105; in 2003, see UN document E/CN.4/ 2003/SR.61,

dissociations from the resolutions adopted within the wider group of retentionist countries.[266] The Chinese position of dissociation from the Commission's resolutions is not surprising, when we consider its two-fold approach regarding capital punishment within the International Bill and the progressive contents of the resolutions themselves. The last resolution expressed the "conviction that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights" and after the study of the yearly supplement presented by the Secretary-General "concludes that the trend towards abolition of the death penalty continues."[267] Moreover, it asked states party to the ICCPR to consider acceding to or ratifying the Second Optional Protocol and not to enter any new reservation under article 6 that might be contrary to the object and purpose of the Covenant, and withdraw existing ones.[268] Furthermore, it called on retentionist countries to abolish the death penalty completely and, in the meantime, establish a moratorium on executions, and progressively restrict the number of capital offences, or at least not increase them.[269] These progressive contents are contentious but, in our view, it is this last appeal regarding the complete abolition of capital punishment and moratorium on executions that clearly goes against the Chinese policy of deciding when and how it is best to abolish such punishment.

We find two different ways of looking at the relationship between abolition of the death penalty and civilisation. For abolitionists, the abolition of the death penalty is one of the elements of a new standard of civilisation, and it is an *end* in itself, and not something that is contingent upon any other factor, such as criminal policy, deterrence or economic and social stability. In Chinese theory and praxis regarding capital punishment, we find the setting aside of this idea: the death penalty is one of the *means* to achieve ends such as civilisation and development.

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paragraphs 92-93; and in 2004, see UN document E/CN.4/2004/SR.57, paragraphs 90-91.

[266] In 1997, China was the 6th signatory (UN document E/1997/106), 8th (Commission) and 11th (ECOSOC) in 1998, (UN documents E/CN.4/1998/156 and E/1998/95), 9th (ECOSOC) and 5th (Sub-Commission) in 1999, (UN documents E/1999/113 and E/CN.4/Sub.2/1999/52), 7th in 2000, (UN document E/CN.4/2000/162), 9th in 2001, (UN document E/CN.4/2001/161), 11th in 2002, (UN document E/CN.4/2002/198), 8th in 2003, (UN document E/CN.4/2003/G/84), and 8th in 2004 (UN document E/CN.4/2004/G/54).

[267] See fourth preambular paragraph and the first operative paragraph of resolution 2004/67.

[268] *Ibidem*, paragraphs 3 and 4 g).

[269] *Ibidem*, paragraphs 5 a) and b).

It is dependent upon the achievement of a certain level of civilisation and development that enables you to be able to abolish capital punishment. Until that stage is achieved, the death penalty is, in fact, one of the tools that renders possible the achievement of a highly developed and prosperous society in all its economic, cultural, moral and educational aspects. The death penalty is a device of state coercion, has a criminal deterrent effect and helps to fight crime. It is one of the means of keeping economic reform and modernisation under control as well as territorial integrity, and helps to maintain the legitimacy of CCP as the sole party in China. We can also note a conception of different developmental stages, and the positioning of China at a stage where it cannot afford to abolish capital punishment because the conditions are not yet ripe.

We consider that China is not immune to the UN two-track policy regarding capital punishment, but it clearly prefers the second track to guide its practice. Thus, focus should be maintained in complying with international safeguards for those that face capital punishment and, in that respect, the Chinese government takes great pain in demonstrating that it does comply with the international safeguards established by the ECOSOC. The recent revision of its criminal law and criminal procedure law codes is a step worthy of note, and entails the will to conform to international standards. Nevertheless, the movement from *citizen* to *human* rights and from the rule *by* law to rule *of* law has not yet been completed. There are still many gaps to fill, and capital cases show us markedly the deficiencies and limitations of the criminal system. Therefore, Chinese compliance with ECOSOC safeguards is still mostly in the realm of theory, and this is especially true of procedural safeguards that guarantee a fair trial. Additionally, capital punishment plays a part in China's human rights' foreign policy whether in the presentation of white papers, or in the criticism of other countries' human rights' double-standards. There is also the setting aside of UN initiatives regarding progressive abolition which move beyond the compliance with ECOSOC safeguards as is obvious in the dissociation from the Commission's resolutions and the blocking of the adoption of similar resolutions at the General Assembly. The faster pace of abolitionist countries that sponsor such resolutions is clearly rejected and sovereignty is asserted. On balance, we find that in the Chinese

praxis of capital punishment, there is a preference for a Hobbesian floor, even if a lofty Kantian standard is recognised as desirable.

CONCLUSION

We live in a unique international society in which, for the first time in history, almost all political entities are part of an international organisation, namely the UN. At the same time, this international society is still in an embryonic stage and at a crossroads between a thinner or thicker conception of its functions. This is linked to the fact that although some of the tenets of its predecessor, the European society of states, were accepted (*e. g.*, state sovereignty) others, such as the standard of civilisation, were clearly rejected. Nonetheless, in spite of this rejection, we believe that the idea of *a standard* has remained and, at the heart of its re-definition, we find international human rights. The quest to find a *new* standard of civilisation, by which to appraise how states conduct their foreign relations and how they govern themselves, has not been a straightforward process. It is enmeshed in the wider search for the role of international society and how states, international organisations, and the individual relate to it. The inclusion of human rights in the domestic dimension of a new standard of civilisation is also connected to a thicker and more solidarist society of states, which has normative concerns as to state accountability and how states treat their own citizens. Thus, it pursues a greater level of homogeneity and convergence between international standards and domestic guidelines as to the protection and promotion of human rights.

Unlike this concept where we find an explicit link between one way of looking at both the international and domestic societies, a thinner international society entails a more functional and instrumental approach to how a society of states should work. It focuses on the existence of minimal shared concerns about exchanges under anarchy, and society is primarily a functional counterweight to excesses of disorder of international anarchy. The discussion between a thicker or thinner conception of international society is reflected in international law. For instance, although the existence of peremptory norms is agreed upon, the actual definition of which norms have achieved the status of expressing a community interest remains a bone of contention. Moreover, the two souls of international law also reflect the lack of clarity that surrounds the role and functions of international

society. The 'old'/Westphalian soul generates greater consensus than the 'new'/UN Charter model principles and of all the 'new' principles, human rights is the most challenging of all. This 'new' principle is, in fact, a much more pristine concept than the Westphalian system, and represents a return to the perception of humanity as a community that was subdued by the secularisation of the European international society. In spite of the fact that the standard of civilisation entailed not only economic and power interests but also a civilisational mission, it ended up institutionalising rather than overcoming differences. Unlike the pristine notion of the community, (whether divine or rational), which remained theoretical and potential, the search for a new standard of civilisation entails the coming full circle between the *jus inter gentes* (interstate relations) and the *jus gentium*, common to all human beings (whether Christian or not).

In our view, the debate around the question of whether this new standard is really being proposed rather than imposed is best captured by international human rights. The contention around the weight that should be given to human rights in international society is also present in international relations' theory. For some, sovereignty is strengthened by the respect of human rights whilst for others, human rights' claims are not always coterminous with order and stability and therefore should be avoided in international society. The attempt to find a universal common floor and to fulfil the 'human ends of power' has been carried out at the UN. The UN has been pivotal in establishing not only standards, such as the International Bill of Human Rights, but also by actively pursuing promotion and protection, as well as punishing human rights' violations either through *ad hoc* or permanent criminal courts. Nowadays, most states have accepted the International Bill of Human Rights, and there is agreement that international concern with human rights is legitimate, as well as minimal consensus as to gross violations of human rights that are unacceptable. We are not at the point of claiming the 'sovereignty of the individual' but at the same time, 'absolute sovereignty' is no longer descriptive of reality.

Within the debate regarding state accountability and the establishment of a new standard of civilisation, we find the question of the death penalty. From a historical perspective, we can characterise the evolution of capital punishment as

being towards greater restriction. Additionally, if in the 19th century few countries questioned and even took the step of abolishing the death penalty, nowadays the number of states and territories that have become abolitionist is greater than retentionists. In our view, the UN has been decisive in establishing an 'abolitionist window of opportunity.' It has benefited immensely from the commitment by abolitionist countries, as well as from the work done by the CE and the EU. It has developed a two-track policy complemented by setting capital punishment apart from the range of penalties available to the *ad hoc* and permanent criminal courts.

The first-track entails the shift from understanding capital punishment as a matter of domestic criminal policy towards the promotion of its progressive abolition. This change of heart draws its strength mainly from the aspirational standard set out in article 3, the final outlook of article 6 of the ICCPR, and from the questioning of the deterrent value of the death penalty. The second-track focuses on the compliance of safeguards and guarantees regarding those who have been accused of a capital offence. While the first-track centres its strategy on state consent, as can be seen by the optional nature of the protocol that deals with the abolition of the death penalty, the second-track is much more active and critical of those countries that do not comply with the ECOSOC standards. The second-track has been somewhat successful in the sense that there is now an almost universal consensus around the issue of not executing juveniles. Nonetheless, this is a consensus that has not spilled-over to the abolition of the death penalty *per se*. In fact, the debate between abolitionists and retentionists has become entrenched. In the world today, there are less retentionist countries than some decades ago (although they represent the majority of the world population), but their contestation and articulation of efforts at the UN has developed into a concerted approach parallel to the expansion of the abolitionist strategy.

China, the leading country worldwide regarding death sentences and executions, has asserted that abolition of capital punishment will ultimately become a reality in international society. This is complemented by the conception that such a process is contingent upon the historic, economic, social and political conditions of each country and, therefore, falls under the scope of sovereignty. It

considers that it is premature to abolish the death penalty in China, and the real issue is to ensure that it is applied justly. Capital punishment is a *means* to achieve civilisation and not an end in its own terms and, therefore, has no place in a new standard of civilisation. Hence, and taking into account the UN's first-track policy, we consider the Chinese approach to be two-fold. On the one hand, it falls under the umbrella established by the aspirational standard of article 3 of the UDHR and, on the other, it asserts its sovereign right of setting the time and path towards such purpose. The Chinese government has signalled the intention of entering reservations to the ICCPR regarding the death penalty, and these indicate an option for a minimal interpretation of the progressive contents of article 6. China rejects the pace of abolitionist countries at the Commission on Human Rights and General Assembly, as well as the goal of abolition in peacetime that is present in the Second Optional Protocol. As for the second-track, China painstakingly shows that it meets the standards set out by the ECOSOC. Nevertheless, and despite revisions made to its criminal and criminal procedure law codes, theory is not matched by practice and we find some concepts - state secrets, for instance - being very loosely interpreted.

The eclectic approach of the English School enables us to understand the different components of the debate that surrounds the question of capital punishment. The UN's goals on capital punishment (and human rights) have clearly community aspirational standards, but they work within a societal framework. In our view, the successful inclusion of the abolition of the death penalty into a new standard of civilisation is linked to its norm institutionalisation. This process is not yet achieved and, in fact, is just taking its first steps. The window of opportunity in the matter of abolition that the UN has been able to construct is less communitarian or solidarist than abolitionist countries would like but more than retentionists desire. Moreover, it shows that ideas, as well as interests, matter in international society. Abolitionist countries believe that to abolish the death penalty is to take one step further in the moral progress of mankind. The normative power espoused by abolitionists, most notably Europeans, rests upon the assumption that it is the *right* thing to do, and that power is not just dominance but also legitimacy and authority. At the same time,

abolitionist ideas rest on the *ability* and *power* of their proponents in order to achieve institutionalisation within the UN framework. This can be seen in the success of the European civilisational mission regarding other countries that want to join the EU (*e. g.,* Turkey) or have joined the CE (*e. g.,* Russia) and, at the same time, in the failure to do so regarding great powers such as US, Japan or China. Unlike the previous standard, which was also European in origin, we do not find consensus among the great powers. In addition, the US, which is *the* great power, is retentionist and thus, there is not even consensus amongst western powers. Nonetheless, the lack of accord and opposition of countries such as the US and China, two retentionists with a permanent seat, has not prevented abolitionist countries from keeping the issue alive and on the UN agenda. Some initiatives have not born fruit, *e. g.*, at the Third Committee of the General Assembly, but others have been successful since 1997, *e. g.*, the adoption of resolutions on the question of the death penalty at the Commission on Human Rights.

Furthermore, internal conditions are important to understand the different problems that are posed by the issue of the death penalty. This is the case of China, where domestic conditions have great bearing on the practice of capital punishment. It is impossible to understand its policy on this issue without taking into account the endogenous factors of party leadership and legitimacy, economic reform, the fight against crime and territorial integrity and stability. These factors are not easily cast aside and point to the complexity of all the elements that influence the Chinese practice of capital punishment. At the same time, we can observe that China has not stayed aloof from international standards regarding criminal justice, and that these are immersed in the wider process of engagement that have been taking place since the open-door policy days. In this sense, the existence of an international standard has a bearing on domestic arrangements, even if the gap between the international and domestic practices is still wide.

We believe that to look at the question of the death penalty as merely a Trojan horse for power politics or as a utopian ideal, where conviction precedes evidence, does not enable us to grasp what is taking place in this debate. The current discussion regarding capital punishment is associated with the attempt to

establish what is 'normal' and 'acceptable' regarding the conduct of states in international society. Whether or not the inclusion of the abolitionist norm into the new standard of civilisation is a successful move remains to be seen and rests on endogenous and exogenous factors, as well as power and normative concerns. These reveal the embryonic stage of a global international society which is trying to find a consensual definition of its role and functions. The construction of the abolitionist building is in dispute, but the very window of opportunity is undoubtedly an acknowledgment of our *Zeitgeist*.

ANNEXES

ANNEX A

Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty

The States Parties to the present Protocol,

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966,

Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty,

Have agreed as follows:

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.
3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.

Article 3

The States Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol.

Article 4

With respect to the States Parties to the Covenant that have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider communications when a State Party claims that another State Party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 5

With respect to the States Parties to the first Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 6

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.

2. Without prejudice to the possibility of a reservation under article 2 of the present Protocol, the right guaranteed in article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant.

Article 7

1. The present Protocol is open for signature by any State that has signed the Covenant. 2. The present Protocol is subject to ratification by any State that has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified the Covenant or acceded to it.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 8

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 9

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 10

The Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

(a) Reservations, communications and notifications under article 2 of the present Protocol;

(b) Statements made under articles 4 or 5 of the present Protocol;

(c) Signatures, ratifications and accessions under article 7 of the present Protocol:

(d) The date of the entry into force of the present Protocol under article 8 thereof.

Article 11

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989.

ANNEX B

Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty

Council of Europe Treaty Series No.: 114

The member States of the Council of Europe, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty;

Have agreed as follows:

Article 1 – Abolition of the death penalty

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

Article 2 – Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Article 3 – Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 4 – Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 5 – Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

Article 6 – Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 7 – Signature and ratification

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 8 – Entry into force

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

Article 9 – Depositary functions

The Secretary General of the Council of Europe shall notify the member States of the Council of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance or approval;

c. any date of entry into force of this Protocol in accordance with Articles 5 and 8;

d. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 28th day of April 1983, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

ANNEX C

Protocol to the American Convention on Human Rights to Abolish the Death Penalty

PREAMBLE

THE STATES PARTIES TO THIS PROTOCOL,

CONSIDERING:

That Article 4 of the American Convention on Human Rights recognizes the right to life and restricts the application of the death penalty;

That everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason;

That the tendency among the American States is to be in favor of abolition of the death penalty;

That application of the death penalty has irrevocable consequences, forecloses the correction of judicial error, and precludes any possibility of changing or rehabilitating those convicted;

That the abolition of the death penalty helps to ensure more effective protection of the right to life;

That an international agreement must be arrived at that will entail a progressive development of the American Convention on Human Rights, and

That States Parties to the American Convention on Human Rights have expressed their intention to adopt an international agreement with a view to consolidating the practice of not applying the death penalty in the Americas,

HAVE AGREED TO SIGN THE FOLLOWING PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS TO ABOLISH THE DEATH PENALTY

Article 1

The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.

Article 2

1. No reservations may be made to this Protocol. However, at the time of ratification or accession, the States Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.
2. The State Party making this reservation shall, upon ratification or accession, inform the Secretary General of the Organization of American States of the pertinent provisions of its national legislation applicable in wartime, as referred to in the preceding paragraph.
3. Said State Party shall notify the Secretary General of the Organization of American States of the beginning or end of any state of war in effect in its territory.

Article 3

1. This Protocol shall be open for signature and ratification or accession by any State Party to the American Convention on Human Rights.
2. Ratification of this Protocol or accession thereto shall be made through the deposit of an instrument of ratification or accession with the General Secretariat of the Organization of American States.

Article 4

This Protocol shall enter into force among the States that ratify or accede to it when they deposit their respective instruments of ratification or accession with the General Secretariat of the Organization of American States.
Adopted at Asunción, Paraguay, on June 8, 1990, at the twentieth regular session of the General Assembly.

ANNEX D

Protocol nº 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances

Council of Europe Treaty Series nº 187

The member States of the Council of Europe signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

Article 1 – Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2 – Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 3 – Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 4 – Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 5 – Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 6 – Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 7 – Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 8 – Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

a. any signature;
b. the deposit of any instrument of ratification, acceptance or approval;
c. any date of entry into force of this Protocol in accordance with Articles 4 and 7;
d. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Vilnius, this 3 May 2002, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

ANNEX E

Safeguards guaranteeing protection of the rights of those facing the death penalty

The Economic and Social Council,

Having regard to the provisions bearing on capital punishment in the International Covenant on Civil and Political Rights, in particular article 2, paragraph 1, and articles 6, 14 and 15 thereof,

Recalling General Assembly resolution 38/96 of 16 December 1983, in which, inter alia, the Assembly expressed its deep alarm at the occurrence on a large scale of summary or arbitrary executions,

Recalling also General Assembly resolution 36/22 of 9 November 1981, in which the Committee on Crime Prevention and Control was requested to examine the problem with a view to making recommendations,

Recalling further Council resolution 1983/24 of 26 May 1983, in which it decided that the Committee on Crime Prevention and Control should further study the question of death penalties that did not meet the acknowledged minimum legal guarantees and safeguards, as contained in the International Covenant on Civil and Political Rights and other international instruments, and welcomed the intention of the Committee that the issue should be discussed at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Acknowledging the work done by the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities in the areas of summary or arbitrary executions, including the reports of the Special Rapporteur,

Considering the relevant views and comments of the Human Rights Committee established under the International Covenant on Civil and Political Rights,

Expressing its concern at the tragic incidence of arbitrary or summary executions in the world,

Having considered the note by the Secretary-General on arbitrary and summary executions,

Guided by the desire to continue to contribute to the strengthening of the international instruments relating to the prevention of arbitrary or summary executions,

1. Takes note of the note by the Secretary-General on arbitrary and summary executions;

2. Again strongly condemns and deplores the brutal practice of arbitrary or summary executions in various parts of the world;

3. Approves the safeguards guaranteeing protection of the rights of those facing the death penalty, recommended by the Committee on Crime Prevention and Control and annexed to the present resolution, on the understanding that they shall not be invoked to delay or to prevent the abolition of capital punishment;

4. Invites the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders to consider the safeguards with a view to establishing an implementation mechanism, within the framework of the item of its provisional agenda entitled "Formulation and application of United Nations standards and norms in criminal justice".

Safeguards guaranteeing protection of the rights of those facing the death penalty - ANNEX

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.

2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

Economic and Social Council resolution 1984/50
25 May 1984 Meeting 21 Adopted without vote

ANNEX F

Implementation of the Safeguards guaranteeing Protection of the Rights of those facing the Death Penalty

The Economic and Social Council,

Recalling its resolution 1984/50 of 25 May 1984 in which it approved the safeguards guaranteeing protection of the rights of those facing the death penalty,

Recalling also resolution 15 of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Recalling further section X of its resolution 1986/10 of 21 May 1986, in which it requested a study on the question of the death penalty and new contributions of the criminal sciences to the matter,

Taking note of the report of the Secretary-General on the implementation of the United Nations safeguards guaranteeing protection of the rights of those facing the death penalty,

Noting with satisfaction that a large number of Member States have provided the Secretary-General with information on the implementation of the safeguards and have made contributions,

Noting with appreciation the study on the question of the death penalty and the new contributions of the criminal sciences to the matter,

Alarmed at the continued occurrence of practices incompatible with the safeguards guaranteeing protection of the rights of those facing the death penalty,

Aware that effective implementation of those safeguards requires a review of relevant national legislation and the improved dissemination of the text to all

persons and entities concerned with them, as specified in resolution 15 of the Seventh Congress,

Convinced that further progress should be achieved towards more effective implementation of the safeguards at the national level on the understanding that they shall not be invoked to delay or to prevent the abolition of capital punishment,

Acknowledging the need for comprehensive and accurate information and additional research about the implementation of the safeguards and the death penalty in general in every region of the world,

1. Recommends that Member States take steps to implement the safeguards and strengthen further the protection of the rights of those facing the death penalty, where applicable, by:
(a) Affording special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases;
(b) Providing for mandatory appeals or review with provisions for clemency or pardon in all cases of capital offence;
(c) Establishing a maximum age beyond which a person may not be sentenced to death or executed;
(d) Eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution;

2. Invites Member States to co-operate with specialised bodies, non-governmental organizations, academic institutions and specialists in the field in efforts to conduct research on the use of the death penalty in every region of the world;

3. Also invites Member States to facilitate the efforts of the Secretary-General to gather comprehensive, timely and accurate information about the implementation of the safeguards and the death penalty in general;

4. Further invites Member States that have not yet done so to review the extent to which their legislation provides for the safeguards guaranteeing protection of the rights of those facing the death penalty as set out in the annex to Council resolution 1984/50;

5. Urges Member States to publish, for each category of offence for which the death penalty is authorized, and if possible on an annual basis, information on the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted, and to include information on the extent to which the safeguards referred to above are incorporated in national law;

6. Recommends that the report of the Secretary-General on the question of capital punishment, to be submitted to the council in1990, in pursuance of its resolution 1745(LIV) of 16 May 973, should henceforth cover the implementation of the safeguards as well as the use of capital punishment;

7. Requests the Secretary-General to publish the study on the question of the death penalty and the new contributions of the criminal sciences to the matter, prepared pursuant to Council resolution 1986/10, section X, and to make it available, with other relevant documentation, to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.
Economic and Social Council resolution 1989/64 adopted without vote

ANNEX G

Safeguards guaranteeing protection of the rights of those facing the death penalty

The Economic and Social Council,

Recalling General Assembly resolutions 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977 and Economic and Social Council resolutions 1745 (LIV) of 16 May 1973, 1930 (LVIII) of 6 May 1975, 1990/51 of 24 July 1990 and 1995/57 of 28 July 1995,

Recalling also article 6 of the International Covenant on Civil and Political Rights,

Recalling further the safeguards guaranteeing protection of the rights of those facing the death penalty, annexed to its resolution 1984/50 of 25 May 1984, and its resolution 1989/64 of 24 May 1989 on the implementation of the safeguards,

Taking note of the report of the Secretary-General on capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty,

Recalling the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, set forth in the annex to its resolution 1989/65 of 24 May 1989 and endorsed by the General Assembly in its resolution 44/162 of 15 December 1989, and taking note of the recommendations of the Special Rapporteur on extrajudicial, summary or arbitrary executions concerning the death penalty contained in his report to the Commission on Human Rights at its fifty-second session,

Taking note of Security Council resolution 827 (1993) of 25 May 1993, in which the Security Council decided to establish the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 and to adopt the Statute of the International Tribunal annexed to the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), and taking note also of Security Council resolution 955 (1994) of 8 November 1994, in which the Security Council decided to establish the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda

and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 and to adopt the Statute of the International Tribunal for Rwanda annexed to that resolution,

1. Notes that, during the period covered by the report of the Secretary-General on capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, an increasing number of countries abolished the death penalty and others followed a policy reducing the number of capital offences, and declared that they had not sentenced any offender to that penalty, while still others retained it and a few reintroduced it;

2. Calls upon Member States in which the death penalty has not been abolished to effectively apply the safeguards guaranteeing protection of the rights of those facing the death penalty, in which it is stated that capital punishment may be imposed for only the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences;

3. Encourages Member States in which the death penalty has not been abolished to ensure that each defendant facing a possible death sentence is given all guarantees to ensure a fair trial, as contained in article 14 of the International Covenant on Civil and Political Rights, and bearing in mind the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers, the Guidelines on the Role of Prosecutors, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the Standard Minimum Rules for the Treatment of Prisoners;

4. Also encourages Member States in which the death penalty has not been abolished to ensure that defendants who do not sufficiently understand the language used in court are fully informed, by way of interpretation or translation, of all the charges against them and the content of the relevant evidence deliberated in court;

5. Calls upon Member States in which the death penalty may be carried out to allow adequate time for the preparation of appeals to a court of higher jurisdiction and for the completion of appeal proceedings, as well as petitions for clemency, in

order to effectively apply rules 5 and 8 of the safeguards guaranteeing protection of the rights of those facing the death penalty;

6. Also calls upon Member States in which the death penalty may be carried out to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency of the prisoner in question;

7. Urges Member States in which the death penalty may be carried out to effectively apply the Standard Minimum Rules for the Treatment of Prisoners, in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering.

ANNEX H

List of Abolitionist, Abolitionist for Ordinary Crimes and Abolitionist de facto Countries and Territories

According to UN document E/CN.4/2004/86

Abolitionist	Abolitionist for Ordinary Crimes	Abolitionist de facto
Germany	Albania	Algeria
Andorra	Argentina	Antigua and Barbuda
Angola	Bosnia-Herzegovina	Barbados
Australia	Brazil	Belize
Austria	Chile	Benin
Azerbaijan	Cyprus	Bhutan
Belgium	El Salvador	Brunei Darussalam
Bolivia	Fiji	Burkina Faso
Bulgaria	Greece	Congo
Cape Verde	Cook Islands	Dominica
Cambodia	Israel	Eritrea
Canada	Latvia	Gabon
Colombia	México	Gambia
Costa Rica	Peru	Ghana
Côte d'Ivoire	Turkey	Grenada
Croatia		Jamaica
Denmark		Kenya
Djibouti		Madagascar
Ecuador		Malawi
Slovakia		Maldives
Slovenia		Mali
Spain		Morocco
Estonia		Mauritania
Finland		Myanmar
France		Nauru
Georgia		Niger
Cyprus		Papua New Guinea
Guinea-Bissau		Central African Republic
Haiti		Laos
Honduras		Samoa
Hungary		Senegal
Ireland		Sri Lanka
Iceland		Suriname
Marshall Islands		Swaziland
Solomon Islands		Togo
Italy		Tonga
Kiribati		Tunisia
Macedonia		

Liechtenstein Lithuania Luxemburg Malta Mauritius Micronesia (Federate States) Monaco Mozambique Namibia Nepal Nicaragua Norway New Zealand Netherlands Palau Panama Paraguay Poland Portugal United Kingdom Czech Republic Moldova Dominican Republic Romania San Marino Holy See Sao Tome and Principe Serbia and Montenegro Seychelles South Africa Sweden Switzerland Timor-Lorosae Turkmenistan Tuvalu Ukraine Uruguay Vanuatu Venezuela		

According to Amnesty International (until 1st December 2004)

Abolitionist	Abolitionist for Ordinary Crimes	Abolitionist de facto
Andorra	Albania	Algeria
Angola	Argentina	Benin
Australia	Armenia	Brunei Darussalam
Austria	Bolivia	Burkina Faso
Azerbaijan	Brazil	Central African
Belgium	Chile	Republic
Bhutan	Cook Islands	Congo
Bosnia-Herzegovina	El Salvador	Gambia
Bulgaria	Fiji	Grenada
Cambodia	Greece	Kenya
Canada	Israel	Madagascar
Cape Verde	Latvia	Maldives
Colombia	Mexico	Mali
Costa Rica	Peru	Mauritania
Cote D'Ivoire		Nauru
Croatia		Niger
Cyprus		Papua New Guinea
Czech Republic		Russian Federation
Denmark		Senegal
Djibouti		Sri Lanka
Dominican Republic		Suriname
Timor Lorosae		Togo
Ecuador		Tonga
Estonia		Tunisia
Finland		
France		
Georgia		
Germany		
Guinea-Bissau		
Haiti		
Honduras		
Hungary		
Iceland		
Ireland		
Italy		
Kiribati		
Liechtenstein		
Lithuania		
Luxembourg		
Macedonia		
Malta		
Marshall Islands		
Mauritius		

Micronesia (Federated States) Moldova Monaco Mozambique Namibia Nepal Netherlands New Zealand Nicaragua Niue Norway Palau Panama Paraguay Poland Portugal Romania Samoa San Marino Sao Tome and Principe Serbia and Montenegro Seychelles Slovak Republic Slovenia Solomon Islands South Africa Spain Sweden Switzerland Turkey Turkmenistan Tuvalu Ukraine United Kingdom Uruguay Vanuatu Vatican Venezuela		

ANNEX I

List of Retentionist Countries and Territories

According to UN document E/CN.4/2004/86	According to Amnesty International (until 1st December 2004)
Afghanistan	Afghanistan
Saudi Arabia	Antigua and Barbuda
Bahamas	Bahamas
Bahrain	Bahrain
Bangladesh	Bangladesh
Belarus	Barbados
Botswana	Belarus
Burundi	Belize
Cameroon	Botswana
Chad	Burundi
China	Cameroon
Comoros	Chad
Cuba	China
Egypt	Comoros
United Arab Emirates	Democratic Republic of Congo
United States of America	Cuba
Ethiopia	Dominica
Russian Federation	Egypt
Philippines	Equatorial Guinea
Guatemala	Eritrea
Guinea	Ethiopia
Equatorial Guinea	Gabon
Guyana	Ghana
India	Guatemala
Indonesia	Guinea
Iran	Guyana
Iraq	India
Libya	Indonesia
Japan	Iran
Jordan	Iraq
Kazakhstan	Jamaica
Kyrgyzstan	Japan
Kuwait	Jordan
Lesotho	Kazakhstan
Lebanon	North Korea
Liberia	South Korea
Malaysia	Kuwait
Mongolia	Kyrgyzstan
Nigeria	Laos
Oman	Lebanon
Pakistan	Lesotho
Palestine	Liberia

Qatar	Libya
Syria	Malawi
South Korea	Malaysia
Democratic Republic of Congo	Mongolia
North Korea	Morocco
Tanzania	Myanmar
Rwanda	Nigeria
Saint Kitts and Nevis	Oman
Saint Vicente and Grenadines	Pakistan
Saint Lucia	Palestine
Sierra Leon	Philippines
Singapore	Qatar
Somalia	Rwanda
Sudan	Saint Kitts and Nevis
Thailand	Saint Lucia
Taiwan	Saint Vincent and Grenadines
Tajikistan	Saudi Arabia
Trinidad and Tobago	Sierra Leone
Uganda	Singapore
Uzbekistan	Somalia
Viet Nam	Sudan
Yemen	Swaziland
Zambia	Syria
Zimbabwe	Taiwan
	Tajikistan
	Tanzania
	Thailand
	Trinidad and Tobago
	Uganda
	United Arab Emirates
	United States of America
	Uzbekistan
	Viet Nam
	Yemen
	Zambia
	Zimbabwe

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1 EXPLICATORY NOTE

The bibliography is divided in two parts: primary and secondary sources. The latter consists of general reference, articles (from books and periodicals) and books. They are organised in alphabetical order. The former is subdivided in six parts: international law, international law of human rights (promotion, protection and punishment), United Nations, other international organisations, states and non-governmental organisations and associations, and they are all listed chronologically. This criterion was complemented in two specific cases. In the first one, United Nations' decisions and resolutions, documents are firstly organised by year and then alphabetically: Commission on Human Rights, ECOSOC, General Assembly, Security Council and Sub-Commission on Human Rights. In the second case, namely that of United Nations' documents, drafts and reports, we have opted for the United Nations documentation criterion and, therefore, they are listed according to the following order: A/ (General Assembly); A/C.3/ (Third Committee of the General Assembly); A/C.6/ (Sixth Committee of the General Assembly); A/CN.4/ (working documents of the International Law Commission); CCPR/C/ (Human Rights Committee); CRC/C/ (Committee on the Rights of the Child); E/ (ECOSOC); E/AC.7/ (Social Committee of ECOSOC); E/CN.4/ (Commission on Human Rights); E/CN.4/Sub.2/ (Sub-Commission on Human Rights); E/CN.15/ (Commission on Crime Prevention and Criminal Justice); S/ (Security Council); and ST/ (Secretariat).

2 OUTLINE

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- A 1 Advisory Opinions and Judgments of the Permanent International Court of Justice and International Court of Justice
- A 2 International Covenants and Treaties
- A 3 International Humanitarian Law and Documents (International Committee of the Red Cross)
  - A 3 i Conventions and Protocols
  - A 3 ii Documents

B. INTERNATIONAL LAW OF HUMAN RIGHTS (PROMOTION, PROTECTION AND PUNISHMENT)

- B 1. International Bill of Human Rights
- B 2. Other Conventions and Treaties on International Human Rights
- B 3. International Criminal Law (including statements and declarations regarding the Nuremberg and Tokyo War Trials)

C. UNITED NATIONS

- C 1. Decisions and Resolutions
- C 2. Documents, Drafts and Reports
- C 3. Yearbooks (including Yearbooks on Human Rights and International Law Commission)

D. OTHER INTERNATIONAL ORGANISATIONS

D 1. Council of Europe

D 2. European Union

D 3. Organisation of American States

D 4. OSCE - Organisation for Security and Co-operation in Europe (previously Conference for Security and Co-operation in Europe)

E. STATES (official documents, reports and judgments)

E 1. Canada

E 2. People's Republic of China

E 3. United Kingdom

E 4. United States of America

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F 2. Amnesty International

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