

THE ROYAL COMMISSION OF INQUIRY:

Investigating War Crimes *and* Human Rights Violations Committed *in the* Hawaiian Kingdom



Edited by *Dr. David Keanu Sai*
HEAD, ROYAL COMMISSION OF INQUIRY

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Hawaiian Kingdom

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HEAD, ROYAL COMMISSION OF INQUIRY

JANUARY 2020

HAWAIIAN KINGDOM

MINISTRY OF THE INTERIOR

Hawaiian Kingdom

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Dedicated to Her late Majesty
Queen Lili‘uokalani
(1838-1917)



“Oh, honest Americans, as Christians, hear me for my down-trodden people! Their form of government is as dear to them as yours is precious to you. Quite as warmly as you love your country, so they love theirs. With all your goodly possessions, covering a territory so immense that there yet remain parts unexplored, possessing islands that, although near at hand, had to be neutral ground in time of war, do not covet the vineyard of Naboth’s so far from your shores, lest the punishment of Ahab fall upon you, if not in your day in that of your children, for ‘be not deceived, God is not mocked.’”

—Lili‘uokalani, *Hawai‘i’s Story by Hawai‘i’s Queen* 373 (1898).

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INTERNATIONAL HUMAN RIGHTS LAW AND SELF-DETERMINATION OF PEOPLES RELATED TO THE UNITED STATES OCCUPATION OF THE HAWAIIAN KINGDOM

Professor Federico Lenzerini

Introduction

As emphasized in the Preamble of the 1993 *Vienna Declaration and Programme of Action*, “all human rights derive from the dignity and worth inherent in the human person, and [...] the human person is the central subject of human rights and fundamental freedoms”.¹ Human rights are therefore inherent in all human beings—for the sole reason of them being *human*—and their effective achievement is essential to allow that the level of wellbeing of persons is consistent with the minimum conditions for human dignity to be realized. In other words, human rights constitute an essential prerequisite for allowing human beings to give realization to their basic aspirations and wishes, which are at the basis of a good and enjoyable life. In synthesis, human rights may be considered the basic rights and freedoms belonging to every person living in the world, from the initial to the final instant of her existence. In principle, human rights never abandon the person, although the actual enjoyment of most of them may be subject to certain conditions and may be restricted when some circumstances come to existence. As will be better illustrated later in this chapter, a very limited core of human rights are however non-derogable, and, therefore, no restriction, derogation or suspension of their enjoyment is allowed. Non-derogable human rights include the right to life, the prohibition of torture and inhuman and degrading treatment or punishment, the prohibition of slavery and servitude, the prohibition of retroactive application of criminal law, as well as the judicial guarantees attached to the said human rights standards.

International Development of Human Rights Standards

While a few international treaties concerning specific violations of human rights were adopted before the 1940s,² the development of modern international law on human rights basically constituted a reaction to the absolute lack of consideration for the value of human dignity, and the ensuing horrifying abuses of the human person suffered by millions of individuals during World War II. Protection of human rights was included among the purposes of the United Nations, established in San Francisco. Article 1 para. 3 of the U.N. Charter affirms that one of the main purposes of the United Nations is “[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”, while Article 55 specifies that the Organization shall promote “universal respect for, and observance of, human rights

1 See *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, available at <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>> (accessed on 2 August 2019), second recital of the preamble; see also *International Covenant on Civil and Political Rights* (ICCPR), 1966, 999 UNTS 171, second recital of the preamble.

2 See, for instance, the *Slavery Convention*, adopted in 1926, 60 LNTS 254.

3. 78 UNTS 277.

and fundamental freedoms for all without distinction as to race, sex, language, or religion”. In 1948—when the wounds determined by the conflict were still wide and deep—the U.N. General Assembly adopted the *Convention on the Prevention and Punishment of the Crime of Genocide*³ and, on 10 December, the *Universal Declaration on Human Rights* (UDHR).⁴ The latter emphasizes in its preamble how “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind”,⁵ while “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.⁶ It therefore notes that “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people”.⁷

The UDHR includes 30 articles, which start from the assumption that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.⁸ The UDHR recognizes a wide list of human rights ranging from civil and political rights to economic, social and cultural rights. While, as a *declaration*, the UDHR was not binding for States at the time of its adoption, it undoubtedly represented the basis of the subsequent developments of international human rights law, and all the human rights standards enshrined by the Declaration have successively evolved into rules of customary international law, hence binding for all States in the world irrespective of the pertinent international treaties they have ratified.

The development of human rights protection at the U.N. level continued with the adoption, in 1966, of the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),⁹ which at the moment of this writing count, respectively, 173¹⁰ and 170¹¹ States parties. The two UN Covenants represent the main parameters of reference of contemporary international human rights law, although the development of human rights standards at the regional level, as will be specified *infra* in this paragraph, started well before their adoption. In consideration of the different nature of the rights enshrined in the two Covenants, they adopt a different approach in establishing the level of effectiveness of their protection that should be guaranteed by States parties. In fact, while Article 2 ICCPR establishes that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”, as well as “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”, Article 2 ICESCR provides for the duty of States parties to undertake “to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”. However, the Committee on Economic, Social and Cultural Rights has clarified that, “while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized

3 78 *UNTS* 277.

4 General Assembly Resolution 217 A (III) (10 Dec. 1948).

5 See second recital.

6 See first recital.

7 See second recital.

8 See Article 1.

9 993 *UNTS* 3.

10 See <<http://indicators.ohchr.org/>> (accessed on 12 September 2019).

11 Ibid.

in the [ICESCR]”.¹²

The two Covenants also established two monitoring bodies—respectively the Human Rights Committee (HRC) and the just mentioned Committee on Economic, Social and Cultural Rights—having similar competences. In particular, both Covenants request States parties to regularly submit reports concerning how they implement the obligations established by them; the two committees receive such reports, examine them and address their concerns and recommendations to the State party concerned in the form of “concluding observations”. Also, the two committees periodically elaborate documents concerning the interpretation of the provisions of the Covenant of their competence, defined as “general comments”. Last but not least, it is notable that the HRC may receive, consider and examine both inter-State complaints and, in particular, individual complaints concerning alleged violations of the ICCPR by one or more States parties; the latter competence, however, may only be exercised with regard to the States parties to the *Optional Protocol to the International Covenant on Civil and Political Rights*, also adopted in 1966,¹³ which at the moment of this writing are 116 (not including the United States of America)¹⁴.

Similarly, the Committee on Economic, Social and Cultural Rights, in addition to considering inter-State complaints, has the competence to receive communications from individuals claiming violations of their rights as established by the ICESCR, but only with respect to the States which are parties to the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* of 2008,¹⁵ entered into force in 2013, which at present counts only 24 States parties (not including the United States of America).¹⁶ In any event, even in the context of individual communications the two Committee do *not* possess the competence of enacting any measure of binding character for the State(s) part(ies) concerned.

The U.N. action in the field of human rights protection is also characterized by the existence of a number of important sectorial conventions, which include the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) of 1965,¹⁷ the *Convention on the Elimination of All Forms of Discrimination against Women* of 1979,¹⁸ the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 1984,¹⁹ the *Convention on the Rights of the Child* (CRC) of 1989,²⁰ the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* of 1990,²¹ the *International Convention for the Protection of all Persons from Enforced Disappearance* of 2006,²² as well as the *Convention on the Rights of Persons with Disabilities*, also adopted in 2006.²³ Most of these conventions are also complemented by optional protocols aimed at improving the level

12 See General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant), 1990, available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11> (accessed on 12 Sep. 2019), para. 2.aspx?Lang=en&TreatyID=9&DocTypeID=11> (accessed on 12 September 2019), para. 2.

13 999 UNTS 171.

14 See <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=en> (accessed on 12 September 2019).

15 Available at <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>> (accessed on 12 Sep. 2019).

16 See <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&clang=en> (accessed on 12 Sep. 2019).

17 660 UNTS 195.

18 1249 UNTS 13.

19 1465 UNTS 85.

20 1577 UNTS 3.

21 2220 UNTS 3.

22 2716 UNTS 3.

23 2515 UNTS 3.

and effectiveness of protection granted by the instruments concerned.²⁴ All the conventions just mentioned establish monitoring bodies with competences similar to those of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. Most of them are entitled to receive and consider individual complaints presented against those States parties which have explicitly accepted this competence through making an ad-hoc declaration or ratifying an optional protocol to the convention concerned.²⁵

Human rights standards have also notably evolved—in a parallel way with the development within the UN—at the regional level. In this respect, the first treaty of general character was adopted already in 1950, which is the *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights—ECHR),²⁶ concluded within the framework of the Council of Europe. Since the time of the adoption of the ECHR, the system of protection established by such a treaty has notably evolved, today being characterized by the presence of 16 protocols. More in general, the Council of Europe has so far adopted 225 treaties, most of which concern topics related to human rights protection.²⁷ Still with regard to the European continent, human rights—as defined by the *Charter of Fundamental Rights of the European Union*²⁸—represent a priority of the European Union. According to Article 6 of the *EU Treaty*²⁹, “[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the [EU] Treaties”,³⁰ while “[f]undamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.³¹

As far as the American continent is concerned, the main regional system of human rights protection is the one which has developed in the context of the Organization of American States, and its structure is characterized by the *American Declaration of the Rights and Duties of Man*, adopted in 1948,³² plus 12 treaties,³³ the most important of which is undoubtedly the *American Convention on Human Rights* (ACHR), concluded in 1969.³⁴ The ACHR, however, has not been ratified by Canada and the United States.³⁵

In Africa 12 treaties on human rights exist at present,³⁶ adopted in the framework of the African Union (previously Organization of African Unity). The main treaty is the *African Charter on Human and Peoples’ Rights*, adopted in 1981,³⁷ which is characterized by the fact of including in the list of protected rights not only rights of individual nature—consistent with the approach prevailing in the U.N. and within the other regional treaties—but also of *collective*

24 For the full list of such protocols and the status of ratification of all relevant treaties see <<http://indicators.ohchr.org/>> (accessed on 12 Sep. 2019).

25 For the list and explanation of the competences of such monitoring bodies see <<https://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx>> (accessed on 12 Sep. 2019).

26 CETS No. 005.

27 See <<https://www.coe.int/en/web/conventions/full-list>> (last visited on 12 September 2019).

28 *Official Journal of the European Union* C 326 of 26 October 2012, p. 391.

29 *Id.*, 13.

30 See para. 1.

31 See para. 3.

32 Available at <<http://www.oas.org/en/iachr/mandate/Basics/declaration.asp>> (accessed on 12 Sep. 2019).

33 For the full list and links to all such treaties see <http://www.oas.org/dil/treaties_subject.htm>

34 *OAS Treaty Series* No. 36.

35 See <https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm> (accessed on 12 Sep. 2019).

36 See <<https://au.int/treaties>> (accessed on 12 Sep. 2019).

37 1 21 ILM 58 (1982).

character,³⁸ as well as a list of duties,³⁹ consistent with the African tradition and understanding of rights and social relations, based on the value of solidarity.

The regional systems of human rights protection established by the treaties just listed present at least two clear advantages in comparison with the conventions adopted at the U.N. level. The first is represented by the fact that, to a certain extent, they include specific provisions aimed at addressing the specific characters and needs of the regional realities in which they are incorporated, therefore being more responsive to the concrete necessities of the people to whom they apply. Secondly—and particularly important—they are much more effective in allowing the actual enjoyment of protected rights by human beings, thanks to the presence of regional courts with the competence (according to relatively different conditions and procedures established by the relevant treaties) of receiving individual claims against States and of deciding on such claims through releasing *proper* judgments of binding character, which the States concerned have an international obligation to comply with. These courts are the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), and the African Court on Human and Peoples' Rights (ACtHPR). An important role is also played by the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights, which in their respective areas of competence may adopt decisions concerning the violation of protected rights by the States which are not subjected to the jurisdiction of the corresponding courts; these decisions, however, are not binding for the States concerned, although they undoubtedly have a strong moral force and legal significance. For a number of reasons, in present times the regional human rights system characterized by the highest level of effectiveness is the European one, in light of the higher rate of compliance by States with the judgments of the ECtHR in comparison with the other two regional systems; however, prolonged non-implementation of the said judgments continues to be a concern in a number of European countries.⁴⁰

Treaty Law and Customary International Law

Those indicated in the previous paragraph only represent the most significant examples of the many international treaties which compose the very sophisticated and advanced network of human rights protection at the international level. Virtually all countries in the world are subject to treaty obligations in the human rights field, although the number of treaties concluded and/or ratified by each of them, and, particularly, the effective degree of compliance with them, is very heterogeneous. However, ratification of relevant treaties does *not* constitute an indispensable condition for States to be subjected to international legal obligations in the human rights field. In fact, it is universally recognized that all main human rights standards are today enshrined and protected by rules of customary international law, which are in themselves binding for all States in the world, irrespective of whether or not they have ratified any international treaties relating to the same subject. Of course, ratifying the relevant treaties remains important for a number of reasons, including the fact that written rules provide more certainty about the contents and scope of the relevant obligations than provisions of customary international law, which are by their own nature of oral character. More significantly, the circumstance of being part to a human rights treaty exposes the State to the jurisdiction of the monitoring bodies established by the convention, which—as seen in the previous paragraph—in some cases translates into the competence of enacting decisions concerning individual claims of human rights violations, including (at the regional level) proper judgments of binding character for the State

38 See Articles 19-24.

39 See Articles 27-29.

40 See Council of Europe, “Non-implementation of the Court’s judgments: our shared responsibility” (23 Aug. 2016), available at <<https://www.coe.int/it/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility>> (accessed on 12 Sep. 2019).

concerned. Therefore, in general treaty provisions guarantee more effectiveness of protection than rules of customary international law. Nevertheless, this does not preclude the latter from establishing real international obligations that States are bound to fully comply with them and internationally responsible for their violations.

Main Human Rights Standards

The most important human rights standards, as recognized by the UDHR and the relevant treaties at the U.N. and regional levels, are the following: right to life, liberty and security of the person; freedom from slavery, servitude and forced labour; freedom from torture or cruel, inhuman or degrading treatment or punishment; right to recognition as a person before the law; freedom from discrimination based on any ground; right to a fair trial, to an effective remedy for human rights violations and, more generally, to judicial protection; right not to be punished without law (i.e., prohibition of retroactive application of criminal law); right to liberty and freedom from arbitrary arrest or detention; right to private and family life, including the right to the integrity of home, correspondence, personal honour and reputation; right to freedom of movement; right not to be deported to countries where the fundamental rights of the person would be endangered (*non-refoulement*); right to nationality; right to establishment and protection of the family; right to property; right to education, consistent with one's (or, for children, parents') own convictions; right to freedom of thought, conscience and religion; right to freedom of opinion and expression; right to freedom of peaceful assembly and association; right to participation in the national government; right to social security; right to enjoy one's own culture and to participation in cultural life; right to the highest attainable standards of health; right to protection of fundamental rights at work, which include the rights to just and favourable conditions of work, to protection against discrimination in respect of employment and occupation, to protection against unemployment, to just and favourable remuneration, to equal pay for equal work, to form and to join trade unions, freedom of association to collective bargaining, as well as freedom from forced or compulsory labour and from child labour. As may be easily noted, all the rights just listed are of individual character. As far as collective rights are concerned, the only one which is traditionally recognized as a fundamental human right is the right of peoples to self-determination,⁴¹ although in recent times the international community has agreed on the existence of a number of collective rights in favour of indigenous peoples, enshrined by the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), adopted in 2007.⁴²

The list just provided includes rights characterized by a heterogeneous degree of "cogency". While some of them are considered absolutely non-derogable in whatever circumstances—particularly right to life, freedom from slavery and servitude, freedom from torture or similar treatment or punishment, right to recognition as a person before the law, freedom from discrimination, right not to be punished without law, and the judicial guarantees attached to such rights—others may be legitimately suspended in time of public emergency.

A third "category" of rights (e.g. right to private and family life, right to freedom of thought, conscience and religion, right to freedom of opinion and expression, and right to freedom of peaceful assembly and association) may be the object of limitations, derogations or restrictions when certain conditions are met, usually consisting in the requirements that the restrictive or derogatory measure is prescribed by (non-discriminatory) law and that it is necessary for the

41 See below in this chapter.

42 General Assembly Res. 61/295 (13 Sep. 2007). For an explanation of the most important rights recognized in favour of indigenous peoples see International Law Association's Resolution No. 5/2012, available at <<http://www.ila-hq.org/index.php/committees>> (accessed on 12 Sep. 2019).

realization of certain values pursued in the interest of the national society, e.g. national security, public safety, prevention of disorder or crime, protection of health or morals, and protection of the rights of others. The rights which cannot be the object of derogation in any circumstances may be defined as *fundamental* (or “basic”) human rights,⁴³ which, in addition of being non-derogable, cannot be disposed by their holders. The latter aspect implies that the consent possibly given by the victim of a violation of one of the rights in point is not capable of removing the illicit character of the breach, since it is considered as an offence to human dignity which is intolerable for humanity as a whole.

Fundamental Human Rights as Rules of Jus Cogens

Consistently with the remarks developed at the end of the previous paragraph, it is worth noting that the provisions of customary international law protecting the most fundamental human rights are today uniformly considered as rules of *jus cogens*, i.e. peremptory norms of general international law. According to Article 53 of the 1969 *Vienna Convention on the Law of Treaties* (VCLT)⁴⁴, “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. The peremptory nature of fundamental human rights is indirectly confirmed by Article 4, para. 2, ICCPR, Article 15, para. 2, ECHR, and Article 27, para. 2, ACHR, which, as will be better explained below, establish that the most fundamental human rights provided for by the relevant treaties cannot be the object of any suspension even in time of war or other public emergency which threatens the integrity or security of the State concerned. It is however to be specified that the exact list of human rights which may be considered of peremptory character remains controversial, as demonstrated by the fact that the number of rights considered as absolutely non-derogable by the above treaty provisions does not exactly correspond.

Human Rights Obligations as Obligations Erga Omnes and Erga Omnes Partes

In its famous 1970 judgment concerning the *Barcelona Traction* case, the ICJ clarified 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*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law”.⁴⁵

As defined by the Institut de Droit International, an obligation *erga omnes* is “an obligation

⁴³ It is to be clarified that, in the context of relevant international practice, different meanings may be attributed to the expression “fundamental rights”. While the most common tendency reflects the approach described in this chapter, others are also followed; for instance, in the context of the European Union, as shown above in this chapter, the expression in point refers to all human rights standards.

⁴⁴ 1155 UNTS 331.

⁴⁵ See *Barcelona Traction, Light and Power Company, Limited*, judgment of 5 February 1970, *I.C.J. Reports*, paras. 33-34 (5 Feb. 1970).

under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action”.⁴⁶ In this respect, the International Law Commission (ILC) has clarified that “in certain situations, all States may have [...] an interest [in invoking responsibility and ensuring compliance with obligations *erga omnes*], even though none of them is individually or specially affected by the breach”.⁴⁷

Consistently, Article 48 of the ILC’s *Articles on State Responsibility* provides for the possibility that State responsibility is invoked by a State other than an injured State when “the obligation breached is owed to the international community as a whole”.⁴⁸ This provision clearly refers to the obligations *erga omnes*, although, as explained by the ILC itself, the use of this expression is avoided because it would convey “less information than the [...] reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty”.⁴⁹ In fact “obligations protecting a collective interest [...] may derive from multilateral treaties [...] Such obligations have sometimes been referred to as ‘obligations *erga omnes partes*’”,⁵⁰ which may be defined as obligations “under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action”.⁵¹ The latter are also particularly relevant to the purposes of this chapter, because the obligations arising from multilateral human rights treaties are exactly to be considered as obligations *erga omnes partes*. Irrespective of whether human rights obligations derive from customary international law (obligations *erga omnes* in the proper sense of the term) or from a multilateral treaty (obligations *erga omnes partes*), in case of their breach the responsibility of the State concerned may be invoked by States other than the injured State. In the case of obligations *erga omnes partes* this prerogative is reserved to all other States which are parties to the treaty concerned, while, as regards obligations *erga omnes* arising from customary international law, all members of the international community may invoke such a responsibility. In the words of the ILC, “[e]ach State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations”.⁵²

In the human rights field this is particularly important, because in most cases of human rights violations there is *no* injured State, since breaches are often perpetrated by governments to the prejudice of their own citizens; in all these cases only States other than the injured one may invoke the responsibility of the State author of the violation. All States (or all States parties to a multilateral treaty) are consequently entitled to “claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition [...]; and (b) performance of the obligation of reparation”.⁵³ Furthermore, “[s]hould a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed: (a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations; (b) shall not recognize as lawful a situation created by the breach; [and] (c) are entitled to take non-forcible counter-measures under conditions anal-

46 See Resolution of 27 Aug. 2005, “Obligations *erga omnes* in international law”, available at <http://www.idi-il.org/app/uploads/2017/06/2005_kra_01_en.pdf> (accessed on 12 Sep. 2019), Article 1(a).

47 *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, adopted by the International Law Commission at its fifty-third session, 116 (2001), available at <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> (accessed on 23 Aug. 2019).

48 *Id.*, Article 48, para. 1(a).

49 *Id.*, p. 127.

50 *Id.*, p. 126.

51 See Institut de Droit International, Resolution, “Obligations *erga omnes* in international law”, Article 1(b) (27 Aug. 2005).

52 See *Draft articles on Responsibility of States*, 127.

53 *Id.*, Article 48, para. 2.

ogous to those applying to a State specially affected by the breach”.⁵⁴ As previously emphasized, these rules apply in particular to human rights violations; indeed, as noted by the HRC, “the ‘rules concerning the basic rights of the human person’ are *erga omnes* obligations [which], as indicated in the fourth preambular paragraph of the [ICCPR], [determine] a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms”.⁵⁵

State Responsibility in the Field of Human Rights Protection

Human rights obligations imply the existence of a multilayered responsibility for States. In particular, States are required “to respect and to ensure [human] rights to all persons who may be within their territory and to all persons subject to their jurisdiction”.⁵⁶ In addition, “States [must] take the necessary steps to give effect to [human] rights in the domestic order. It follows that, unless [human] rights are already protected by their domestic laws or practices, States [...] are required [...] to make such changes to domestic laws and practices as are necessary to ensure their conformity with the [the rights concerned]”.⁵⁷ Furthermore, “States [...] must ensure that individuals also have accessible and effective remedies to vindicate [human] rights”,⁵⁸ and are requested to “make reparation to individuals whose [human] rights have been violated”.⁵⁹

The various layers of State obligations in the human rights field have been egregiously categorized by the African Commission on Human and Peoples’ Rights, which has affirmed that “[i]nternationally accepted ideas of the various obligations engendered by human rights indicate that all rights—both civil and political rights and social and economic—generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties”.⁶⁰ The “obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action”.⁶¹ The obligation to protect “requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms”.⁶² As far as the obligation to promote is concerned, it presupposes a duty of the State to “make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures”.⁶³ Finally, the obligation to fulfil consists “more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights”.⁶⁴

⁵⁴ See Institut de Droit International, Article 5.

⁵⁵ See General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, para. 2 (26 May 2004).

⁵⁶ *Id.*, para. 10.

⁵⁷ *Id.*, para. 13.

⁵⁸ *Id.*, para. 15.

⁵⁹ *Id.*, para. 16.

⁶⁰ See Communication No. 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, para. 44 (13-27 Oct. 2001).

⁶¹ *Id.*, para. 45.

⁶² *Id.*, para. 46.

⁶³ *Id.*

⁶⁴ *Id.*, para. 47.

The multilayered characterization of State responsibility in the human rights field just described is generally accepted at the international level. While the existence of an obligation to promote the rights may sometimes not be mentioned in the practice of some human rights monitoring bodies, the existence of a tripartite responsibility by States to guarantee the effective realization of human rights—composed by the obligations to respect, protect and fulfil—is beyond question.

Finally, each time that a human rights violation is committed, the victim is entitled to receive *appropriate redress* for the wrongs suffered; consistently, an additional profile of State responsibility arises, materializing into an obligation to grant adequate and prompt reparation in favour of the victim(s) of human rights breaches. Depending on the circumstances of the case, such reparation may take different forms—particularly restitution, compensation, rehabilitation, satisfaction, other forms of non-monetary redress, or a combination of two or more of such means; what is important, is that the form(s) of reparation chosen is/are actually capable of making the victim(s) feel effectively redressed for the wrongs suffered.⁶⁵

Human Rights Violations and Domestic Remedies

Violations of human rights cannot be considered, under international law, to be definitively finalized when the State allegedly responsible of the violation provides the victim(s) with adequate domestic remedies, until such remedies have been exhausted. The rule of the *prior exhaustion of domestic remedies* applies to all existing international human rights monitoring bodies—either of judicial or non-judicial character—and even according to customary international law a State cannot be considered internationally responsible of a breach of human rights until the alleged victim has not unsuccessfully exhausted—or has done everything that was reasonably possible to exhaust—available domestic remedies, if any. The rationale of this rule is mainly grounded on two reasons. First, it appears fair—and practically advisable—to offer domestic courts the opportunity to decide on claims of human rights breaches before they are brought to an international forum. More generally, a State should be given the opportunity to remove an alleged violation before being considered responsible of an internationally wrongful act. Secondly, international instances of recourse for human rights violations cannot be treated as courts of first instance, for evident practical reasons of sustainability of their work.

However, it is uniformly recognized that, in order for the rule of the prior exhaustion of domestic remedies to be effectively applicable, the relevant remedies must be *available, effective and sufficient*. “A remedy is considered available if the petitioner can pursue it without [practical] impediment, it is deemed effective if it offers a [reasonable] prospect of success, and it is found sufficient if it is capable of redressing the complaint”.⁶⁶ A remedy must allow the competent domestic authority “to deal with the substance of an ‘arguable complaint’ [...] and to grant appropriate relief”,⁶⁷ and must be “available to the applicant in theory and in practice, that is to say, [...] accessible, [and] capable of providing redress and offered reasonable pros-

65 See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Res. 60/147 (16 Dec. 2005) (although this document formally refers to “gross violations” of human rights only, its basic principles may be considered as generally applicable to human rights violations). See also Dina Shelton, *Remedies in International Human Rights Law* (3rd ed., 2015). Finally, see Federico Lenzerini, “Reparations for Indigenous Peoples in International and Comparative Law: An Introduction”, in Federico Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives* 3 (2008).

66 See African Commission on Human and Peoples’ Rights, *Dawda Jawara v. Gambia*, Communications Nos. 147/95 and 149/96, para. 32 (11 May 2000).

67 See ECtHR, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, judgment, para. 288 (21 Jan. 2011).

pects of success”.⁶⁸ In the words of the HRC,

“domestic remedies must not only be available but also effective, and [...] the term ‘domestic remedies’ must be understood as referring primarily to judicial remedies. The Committee considers that the effectiveness of a remedy also depends to some extent on the nature of the alleged violation. In other words, if the alleged offence is particularly serious, such as in the case of violations of basic human rights, in particular the right to life, purely administrative and disciplinary remedies cannot be considered adequate and effective. This conclusion applies in particular in situations where [...] the victims or their families may not be party to and not even intervene in the proceedings before military jurisdictions, thereby precluding any possibility of obtaining redress before these jurisdictions in consideration of the specific circumstances of the case”.⁶⁹

An equivalent approach is followed by the Inter-American Commission and the IACtHR, according to which a remedy must be *adequate*, i.e. “suitable to address an infringement of a legal right”,⁷⁰ and *effective*, i.e. “capable of producing the result for which it was designed”.⁷¹

It follows that, in addition to the cases when they are completely non-existing, domestic remedies cannot be considered available, adequate or effective, for instance, when one of the following situations occurs: existing remedies have no reasonable concrete chances of success;⁷² existing remedies are merely formalistic; existing remedies are unduly prolonged;⁷³ existing remedies are not obligatory but have an extraordinary character; existing remedies are granted at the discretion of a State authority; existing remedies are hindered by financial impediments;⁷⁴ access to courts is unreasonably arduous; procedural rules bar the applicant from pursuing the remedy; the reparation granted by the existing remedies is inadequate; the case is settled through unreasonable, unbalanced settlements concluded in an unfavorable context;⁷⁵ there is lack of due process; the judicial body entrusted to take care of the existing remedies is not independent or impartial (this is presumed, for instance, where in the organization of the State there is no effective separation of powers); or when the activity of a court is hindered by legislative provisions or measures taken by the executive power. In all these and other equivalent cases, the alleged victim of a human rights breach, as a matter of exception, is no longer obliged to try to exhaust domestic remedies and may directly use the avenues available at the international level in order to obtain justice.

68 See ECtHR, *McFarlane v. Ireland*, Appl. No. 31333/06, judgment, para. 114 (10 Sep. 2010).

69 See *Jose Vicente and Amado Villafaña Chaparro, Dioselina Torres Crespo, Hermes Enrique Torres Solis and Vicencio Chaparro Izquierdo v. Colombia*, Communication No. 612/1995, para. 5.3 (14 Mar. 1996).

70 See *Velasquez Rodriguez v. Honduras*, Series C No. 4, judgment (Merits), para. 64 (29 July 1988).

71 *Id.*, para. 66.

72 See, e.g., HRC, *Earl Pratt and Ivan Morgan v. Jamaica*, Communications Nos. 210/1986 and 225/1987, Views, para. 12.3 (6 Apr. 1989); Committee on the Elimination of Racial Discrimination, *D.R. v. Australia*, Communication No. 42/2008, Views, para. 6.5 (15 Sep. 2009); Committee on the Rights of Persons with Disabilities, *Noble v. Australia*, Views, para. 7.7 (23 Aug. 2016); ECtHR, *Case of Al-Skeini and Others v. The United Kingdom*, Appl. No. 55721/07, judgment, para. 105 (7 July 2011); Inter-American Commission on Human Rights, Admissibility Report No. 43/10, Petition 242-05, *Mossville Environmental Action Now (United States)*, para. 32 (17 Mar. 2010).

73 See, e.g., HRC, *Rajapakse v. Sri Lanka*, Communication No. 1250/2004, Views, para. 6.1 (5 Sep. 2006); Committee on the Elimination of Racial Discrimination, *Durmic v. Serbia and Montenegro*, Communication No. 29/2003, Views, para. 6.5 (6 March 2006); Committee Against Torture, *Ali v. Tunisia*, Communication No. 291/2006, Views, para. 7.2 (26 Nov. 2008).

74 See, e.g., HRC, *Quelch v. Jamaica*, Communication No. 292/1988, Views of 23 October 1992, para. 8.2; ECtHR, *Case of Airey v. Ireland*, Appl. No. 6289/73, judgment, para. 24 (9 Oct. 1979).

75 See Inter-American Commission on Human Rights, Admissibility Report No. 134/11, Petition 1190-06, *Undocumented Workers (United States)*, para. 28 (20 Oct. 2011).

Also, in principle there is no requirement for a victim of a human rights violation to pursue multiple ways to seek a remedy,⁷⁶ unless, in the presence of multiple avenues to avail him/herself of a remedy, the applicant has unsuccessfully made recourse to a particular remedy while another exists which has a higher likelihood of success.⁷⁷

Finally, it is uniformly agreed by human rights monitoring bodies that, when doubts exist on whether or not domestic remedies have been effectively pursued, the burden of proof rests with the State, which must demonstrate that domestic remedies actually existed which were available, adequate and effective, and that the alleged victim of the violation did not make recourse—or made wrong recourse—to them.

Human Rights and Intertemporal Law

A well-established rule in international law, which also applies to human rights, is that of *intertemporal law*. This rule was famously expressed by Judge Max Huber in the well-known *Island of Palmas* arbitration, stating that “a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled”.⁷⁸ This rule has been subsequently generally accepted and applied in the context of international law. For instance, it was used by the International Court of Justice (ICJ) in the case of *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, when the Court had to establish the meaning and extent of the consular jurisdiction granted to the United States by two treaties concluded in 1787 and 1836; in that occasion the Court concluded that “[i]t is necessary to take into account the meaning of the word ‘dispute’ at the times when the two treaties were concluded”.⁷⁹

This rule is expressed for treaties in Article 28 VCLT—stating that, “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”. No doubt, however, that it is equally applicable to obligations existing under customary international law. In principle, therefore, a violation may be considered as having been produced only whether and to the extent that the act, fact or omission from which the supposed breach originated *was prohibited by the law in force at the time when it was held or took place*. It follows—again, in principle—that the application of the rule on *intertemporal law* to human rights implies that the human rights standards concerned cannot be applied *retroactively*; consequently, a State cannot be held responsible of a violation of human rights when the act, fact or omission committed by that State which would potentially give rise to the violation was done at a time when such State was not (yet) bound to respect the right concerned.

Concept of Continuing International Wrongful Acts

A very significant expression used by Article 28 VCLT is the one referring to the fact that—for the principle of *intertemporal law* to apply—it is necessary that the relevant situation “took

76 See, e.g., Committee Against Torture, *Osmani v. Serbia*, Communication No. 261/2005, Views, para. 5.2 (25 May 2009); Inter-American Commission on Human Rights, Admissibility Report No. 43/10, Petition 242-05, *Mossville Environmental Action Now (United States)*, para. 32.

77 See Committee on the Elimination of Racial Discrimination, *Sadic v. Denmark*, Communication No. 25/2002, Views, paras. 6.2–6.7 (19 Mar. 2003).

78 *Island of Palmas case (Netherlands, USA)*, *Reports of International Arbitral Awards*, Vol. II, 829, 845 (4 Apr. 1928).

79 Judgment, *I.C.J. Reports*, 176, 189 (27 Aug. 1952).

place or [...] *ceased to exist*” before the relevant international obligation came into existence. In this respect, the term *situation* is to be considered as comprising all different elements composing a juridical fact which may translate into a potential violation, from the material fact or act producing it to, particularly, its *legal effects*. A given situation cannot be considered as having *ceased to exist* when it *continues to produce wrongful effects*, irrespective of the time when the “primary” material fact, act or omission from which such effects started to be produced took place. The “precise meaning of [the] retroactivity principle is not as clear as it may seem. Facts or acts can occur once or repeatedly and situations can continue to exist. All of these may be relevant factors in ascertaining whether the retroactivity principle forms a bar against taking them into account”.⁸⁰ It is a general principle of international law on State responsibility the one according to which—as specified by Article 14(2) of the ILC’s Articles on State Responsibility—“[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation”. As clarified by the ILC Special Rapporteur Sir Humphrey Waldock, in cases of continuing violations, the relevant rule

“does not, strictly speaking, apply to a fact, act or situation falling partly within and partly outside the period during which it is in force; it applies only to the fact, act or situation which occurs or exists after [such a rule has entered] in[to] force. This may have the result that prior facts, acts or situations are brought under consideration for the purpose of the application of the [rule]; but it is only because of their causal connexion with the subsequent facts, acts or situations to which alone in law the [rule] applies”.⁸¹

As examples of “continuing wrongful acts” the ILC mentions

“the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent”.⁸²

It is important to correctly identify the constitutive element of a continuing violation. As noted, again, by the ILC, a violation cannot be considered of having a continuing character merely because its (material) consequences “extend in time [...] The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed”.⁸³ Therefore, “[i]t must be the wrongful act as such which continues”.⁸⁴ The reality of the contemporary world, however, is that “many [human rights] abuses continue today and violate existing human rights norms binding on all States”.⁸⁵ Needless to say that, of course,

“[a] continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example

80 See Antoine Buyse, “A Lifeline in Time – Non-retroactivity and Continuing Violations under the ECHR”, 75 *Nordic Journal of International Law*, 63, 65 (2006).

81 See Sir Humphrey Waldock, “Sixth Report on the Law of Treaties”, in *Yearbook of the International Law Commission*, vol. 2, 51, 63, para. 3 (1966).

82 See *Draft articles on Responsibility of States*, 60, para. 3.

83 *Id.*, para. 6.

84 *Id.*

85 Shelton, 48.

by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue”.⁸⁶

However, even when a wrongful act has ceased, its material “consequences are the subject of the secondary obligations of reparation, including restitution [...] The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable, [although] [t]hey do not [...] entail that the breach itself is a continuing one”.⁸⁷

Continuing Human Rights Violations

The concept of “continuing violation” is extensively applied in the human rights field. Many examples may be provided in this respect. The Human Rights Committee (HRC), established by Article 28 of the ICCPR, has clarified in many cases that it is not entitled to consider alleged violations of the Covenant which occurred before the Optional Protocol⁸⁸ through which a State party may accept its competence to receive individual communications has entered into force for the respondent State. This rule, however, is subject to exception in the cases with respect to which “the violations complained of continue after the entry into force of the Optional Protocol. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party”.⁸⁹ Hence, the HRC is allowed to consider a communication related to acts, facts or omissions occurred before the entry into force of the Optional Protocol for the State concerned which “continued to have effects which themselves constitute a violation of the Covenant *after* that date”.⁹⁰ For instance, in *Sandra Lovelace v. Canada*, the HRC considered the situation of a woman who had lost her status of being a member of an Indian tribe in 1970, after marrying a non-Indian, and complained that the Canadian Act which established such a rule was discriminatory on the ground of sex and violated several articles of the ICCPR. The Committee affirmed that it

“must also take into account that the Covenant has entered into force in respect of Canada on 19 August 1976, several years after the marriage of Mrs. Lovelace. She consequently lost her status as an Indian at a time when Canada was not bound by the Covenant. The Human Rights Committee has held that it is empowered to consider a communication when the measures complained of, although they occurred before the entry into force of the Covenant, continued to have effects which themselves constitute a violation of the Covenant after that date”.⁹¹

The HRC accordingly found that, “[s]ince the author of the communication is ethnically an Indian, some persisting effects of her loss of legal status as an Indian may, as from the entry into force of the Covenant for Canada, amount to a violation of rights protected by the Covenant”,⁹² concluding that “to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other

86 See *Draft articles on Responsibility of States*, 60, para. 5.

87 *Id.*, p. 60, para. 6.

88 See n. 13 above.

89 See Simunek, Hastings, *Tuzilova and Prochazka v. The Czech Republic*, Communication No. 516/1992, U.N. Doc. CCPR/C/54/D/516/1992, para. 4.5 (31 July 1995).

90 See James A. Sweeney, “The Elusive Right to Truth in Transitional Human Rights Jurisprudence”, 67 *International and Comparative Law Quarterly* 353, 363 (2018).

91 See *Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) 166 (1981), available at <<http://hrlibrary.umn.edu/undocs/session36/6-24.htm>> (accessed on 15 Aug. 2019), para. 7.3

92 *Id.*, para. 7.4.

provisions referred to”.⁹³

Subsequently, in *S.E. v. Argentina*, the HRC warned the respondent government that “it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies where applicable, for victims or their dependents”,⁹⁴ although the Committee eventually held that no substantive violations had been committed in the instant case. In *Sarma v. Sri Lanka* the HRC also held that enforced disappearance determined by illegal detention entailed a continuing violation of Article 9 (right to liberty and security of the person) and 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment) ICCPR, the latter with regard to the author’s son and the author’s family,⁹⁵ on account of “the anguish and stress caused to the author’s family by the disappearance of his son and by the continuing uncertainty concerning his fate and whereabouts”.⁹⁶ Last but not least, in *Mariam Sankara and others v. Burkina Faso*, the HRC found that the assassination in 1987 of Thomas Sankara, president of Burkina Faso, although perpetrated well before the entry into force of the Optional Protocol for the State concerned (1999), determined a violation of Article 7 ICCPR due to

“the anguish and psychological pressure which Ms. Sankara and her sons, the family of a man killed in disputed circumstances, have suffered and continue to suffer because they still do not know the circumstances surrounding the death of Thomas Sankara, or the precise location where his remains were officially buried. Thomas Sankara’s family have the right to know the circumstances of his death, and the Committee points out that any complaint relating to acts prohibited under article 7 of the Covenant must be investigated rapidly and impartially by the competent authorities. In addition, the Committee notes, as it did during its deliberations on admissibility, the failure to correct Thomas Sankara’s death certificate of 17 January 1988, which records a natural death contrary to the publicly known facts, which have been confirmed by the State party. The Committee considers that the refusal to conduct an investigation into the death of Thomas Sankara, the lack of official recognition of his place of burial and the failure to correct the death certificate constitute inhuman treatment of Ms. Sankara and her sons, in breach of article 7 of the Covenant”.⁹⁷

While the competence of the HRC to consider individual communications is limited to the States that have ratified the Optional Protocol, which do not include the United States,⁹⁸ all States parties to the ICCPR are obviously bound to respect the rights protected by the Covenant. On its part, the HRC is the body to which the ICCPR attributes the competence to interpret its articles and define the conditions according to which they should be implemented and, *a fortiori*, the situations when a State party is to be considered responsible of their breach. It follows that even the States parties which have not ratified the Optional Protocol—although they cannot be the object of scrutiny by the HRC in the context of individual communications—are anyway to be considered internationally responsible of continuing violations of the

93 *Id.*, para. 17. Article 27 ICCPR reads as follows: “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.

94 See *S.E. v. Argentina*, Communication No. 275/1988, decision, U.N. Doc. CCPR/C/38/D/275/1988, para. 5.4 (26 Mar. 1990).

95 See *Sarma v. Sri Lanka*, Communication No. 950/2000, Views, U.N. Doc. CCPR/C/78/D/950/2000, para. 9.5 (16 July 2003).

96 *Id.*

97 See *Mariam Sankara and others v. Burkina Faso*, Communication No. 1159/2003, Views, U.N. Doc. CCPR/C/86/D/1159/2003, para. 12.2 (28 Mar. 2006).

98 See <<http://indicators.ohchr.org/>> (accessed on 12 Sep. 2019).

ICCPR for situations originating before the date of the entry into force of the Covenant for them which continue to produce wrongful effects *after* such a date. The United States ratified the ICCPR on 8 June 1992.⁹⁹ Pursuant to Article 49, para. 2, ICCPR, the Covenant has entered into force for the US “three months after the date of the deposit of its own instrument of ratification or instrument of accession”.

The ECtHR has also widely recognized the existence of continuing violations of the rights protected by the ECHR and its protocols. While “[t]he Court’s jurisdiction *ratione temporis* covers only the period after the ratification of the Convention or its Protocols by the respondent State[,] [f]rom the ratification date onwards, all the State’s alleged acts and omissions must conform to the Convention or its Protocols and subsequent facts fall within the Court’s jurisdiction even where they are merely extensions of an already existing situation”.¹⁰⁰ For example, in the *Case of Papamichalopoulos and Others v. Greece*, the Court found Greece responsible of the violation of the right to property of the applicant—established by Article 1 of Protocol 1 to the ECHR—on account of seizure of property not resulting in formal expropriation; in fact, “the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants *de facto* to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions”.¹⁰¹ While the seizure of the property concerned had occurred about eight years before Greece recognized the competence of the Court to receive individual applications, the Court noted that “the applicants’ complaints relate to a continuing situation, which still obtains at the present time”.¹⁰²

Also, in the *Case of Loizidou v. Turkey*, taking place in the context of the occupation of the Northern part of Cyprus by Turkey (through the puppet government of the Turkish Republic of Northern Cyprus (TRNC)) since 1974, the ECtHR considered that “the Court’s jurisdiction extends only to the applicant’s allegations of a continuing violation of her property rights subsequent to 22 January 1990”, because Turkey had accepted the jurisdiction of the Court on that date.¹⁰³ In the examination of the merits, the Court concluded that Turkey had prevented the applicant from accessing her property for sixteen years, “gradually [...] affect[ing] the right of the applicant as a property owner and in particular her right to a peaceful enjoyment of her possessions, thus constituting a continuing violation of Article 1 [of Protocol 1]”.¹⁰⁴ In the interstate case ensuing from the same events, *Cyprus v. Turkey*, the ECtHR found Turkey responsible of *continuing* violations of the following provisions of the ECHR: a) Article 2 (right to life), “on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances”;¹⁰⁵ b) Article 5 (right to liberty and security), “by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons in respect of whom there is an arguable claim that they were in custody at the time they disappeared”;¹⁰⁶ c) Article 3 (prohibition of torture), since “the authorities of the respondent State have failed to undertake any investigation into the circumstances surrounding the disappearance of the missing persons [causing] the relatives of persons who went missing during the events of July

99 See <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> (accessed on 16 Aug. 2019).

100 See *Maria Hutten-Czapska v. Poland*, Appl. No. 35014/97, decision on admissibility (16 Sep. 2003).

101 See *Case of Papamichalopoulos and Others v. Greece*, Appl. No. 14556/89, judgment, para. 45 (24 June 1993).

102 *Id.*, para. 40.

103 See *Case of Loizidou v. Turkey (Preliminary Objections)*, Appl. 15318/89, judgment, para. 102 (23 Mar. 1995).

104 See *Case of Loizidou v. Turkey (Merits)*, judgment, para. 60 (18 Dec. 1996).

105 See *Case of Cyprus v. Turkey*, Appl. No. 25781/94, judgment, para. 136 (10 May 2001). For a more comprehensive assessment of the jurisprudence of the ECtHR on continuing violations see Loukis G. Loucaides, *The European Convention on Human Rights. Collected Essays*, 25 (2007); Buyse.

106 See *Case of Cyprus v. Turkey*, Appl. No. 25781/94, judgment, para. 150 (10 May 2001).

and August 1974 [to be] condemned to live in a prolonged state of acute anxiety which cannot be said to have been erased with the passage of time”;¹⁰⁷ d) Article 8 (right to private and family life), “by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus”;¹⁰⁸ e) Article 1 of Protocol 1 (protection of property), “by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights”.¹⁰⁹

An analogous approach is followed by the IACtHR. For instance, in the *Case of Blake v. Guatemala* the Court held that forced disappearance of a person is a crime characterized by the fact that its “effects could be deemed to be continuing until such time as the victims’ fate or whereabouts were determined”.¹¹⁰ As a consequence, the IACtHR considered “Mr. Nicholas Blake’s disappearance as marking the beginning of a continuing situation, and will decide about the actions and effects subsequent to the date on which Guatemala accepted the competence of the Court”,¹¹¹ finding Guatemala responsible of the violation of Articles 8(1) (right to a fair hearing) and 5 (right to humane treatment) ACHR, both to the detriment of the relatives of Mr. Nicholas Chapman Blake. Later, in the *Case of the Moiwana Community v. Suriname*, concerning a massacre perpetrated by members of the armed forces of Suriname against the N’djuka Maroon village of Moiwana on 29 November 1986, while the respondent State accepted the jurisdiction of the Court on 12 November 1987, the IACtHR confirmed that, “in the case of a continuing or permanent violation, which begins before the acceptance of the Court’s jurisdiction and persists even after that acceptance, the Tribunal is competent to examine the actions and omissions occurring subsequent to the recognition of jurisdiction, as well as their respective effects”.¹¹² Relying on this principle, the IACtHR found that Suriname violated Articles 5(1), 22 (right to freedom of movement and residence), 21 (right to property), as well as the rights to judicial guarantees and judicial protection enshrined in Articles 8(1) and 25 ACHR. The same principle was reiterated by the Court more recently, again with respect to forced disappearances.¹¹³

The Inter-American Commission on Human Rights stands along the same lines of the IACtHR. In all aforementioned and other cases, the Commission has constantly urged the Court to consider the alleged breaches of the ACHR as continuing violations. The position of the Inter-American Commission is relevant for the reason that it has jurisdiction over the violations committed by the United States under the *American Declaration of the Rights and Duties of Man* of 1948.¹¹⁴ While the provisions of this Declaration are not binding in themselves, and, consequently, the reports of the Commission do not entail any literal obligations for the States concerned to comply with them, this does not mean that the State is not subject to an international obligation to respect the relevant human rights and to guarantee their enjoyment to the persons subject to its jurisdiction. This holds true in light of the fact that today virtually all the provisions of the American Declaration (to a similar extent of the UDHR) correspond to obligations existing under customary international law. As a consequence, although the violations of the Declaration committed by a State cannot be sanctioned by a monitoring body, once the Commission, as the body competent of interpreting the provisions of the Declaration, has

107 *Id.*, para. 157.

108 *Id.*, para. 175.

109 *Id.*, para. 189.

110 See *Case of Blake v. Guatemala*, Series C No. 36, judgment, para. 54 (24 Jan. 1998).

111 *Id.*, para. 67.

112 See *Case of the Moiwana Community v. Suriname*, Series C No. 124, judgment, para. 39 (15 June 2005).

113 See *Case of Gomes Lund and Others (“Guerrilha do Araguaia”) v. Brazil*, Series C No. 219, judgment, paras. 17 and 110-111 (24 Nov. 2010)..

114 The text of the American Declaration is available at <https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf> (accessed on 16 Aug. 2019).

ascertained that the latter has been breached, in most cases the State concerned is responsible of a breach of the rules of customary international law corresponding to the relevant provisions of the Declaration.

The ACtHPR has equally affirmed, in several cases, its competence to deal with violations of the ACHPR arising from facts, acts or omissions occurred before the State concerned has accepted its jurisdiction, when such violations are continuing after the date of acceptance.¹¹⁵

A case of interest is also provided by the practice of the International Labour Organization (ILO). It is a case of a representation submitted in 2001 against Denmark by an indigenous community living in Greenland, under the the *Indigenous and Tribal Peoples Convention No. 169* of 1989,¹¹⁶ claiming that the relocation of the community concerned from its traditional lands in 1953, a long time before the Convention entered into force for Denmark (22 February 1997), gave rise to a violation of certain articles of the treaty concerned. Facing the argument of the respondent State, according to which the Convention could not be applied retroactively, the Committee observed that

“the relocation of the population of the Uummannaq settlement, which forms the basis of this representation, took place in 1953. [...] the Convention only came into force for Denmark on 22 February 1997. The Committee considers that the provisions of the Convention cannot be applied retroactively, particularly with regard to procedural matters, such as whether the appropriate consultations were held in 1953 with the peoples concerned. However, the Committee notes that the effects of the 1953 relocation continue today, in that the relocated persons cannot return to the Uummannaq settlement and that legal claims to those lands remain outstanding. Accordingly, the Committee considers that the consequences of the relocation that persist following the entry into force of Convention No. 169 still need to be considered with regard to [a number of] Articles [...] of the Convention [...], despite the fact that the relocation was carried out prior to the entry into force of the Convention. These provisions of the Convention are almost invariably invoked concerning displacements of indigenous and tribal peoples which predated the ratification of the Convention by a member State”.¹¹⁷

In sum, it is evident that the principle of State responsibility for human rights breaches of continuing character corresponds to a crystallized rule of general international law. In this respect, “‘the passage of time’ does not reduce, but adds to, the severity of continuing violations [...] continuing illegalities, such as continuing usurpation of properties [...] continuing illegal detention, etc., cannot be subject to prescription or exculpation through lapse of time, because they call for a remedy for as long as they last”.¹¹⁸ For a continuing violation of human rights

115 See *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe Human and Peoples' Rights Movement v. Burkina Faso*, Appl. No. 013/2011, order, paras. 76-77 (23 Aug. 2012); *Peter Joseph Chacha v. The United Republic of Tanzania*, Appl. No. 003/2012, judgment, para. 126 (28 Mar. 2014); *Wilfred Onyango Nganyo & 9 others v. The United Republic of Tanzania*, Appl. No. 006/2013, judgment, para. 66 (18 Mar. 2016).

116 Available at <https://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> (accessed on 14 Sep. 2019).

117 See *Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (Sulinerimik Inuussutissarsiuteqartut Kattuffiat-SIK) (SIK)*, Decision, 2001, available at <https://www.ilo.org/dyn/normlex/en/?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507219,en:NO> (accessed on 23 Aug. 2019), para. 29.

118 See Loukis G. Loucaides “Is the European Court of Human Rights Still a Principled Court of Human Rights After the Demopoulos Case?”, 24 *Leiden Journal of International Law* 435, 444 (2011).

to exist – as a matter of treaty law but also of customary international law – it is necessary and sufficient to ascertain that a *situation* determined by an act, fact, or, in some cases, omission (e.g. when a State fails to take the necessary measures to allow a person to effectively enjoy a property to which she is entitled) —i.e. its *legal effects*—was continuing to exist at the moment when the State concerned started to be bound by an international obligation not to produce the effects continuing to be determined by that act, fact or omission. The conduct of the said State began to be wrongful—and to generate its international responsibility—exactly from that precise moment.

State Jurisdiction and Extraterritorial Applicability of Human Rights

Most human rights treaties of general character establish that States parties are bound to guarantee the enjoyment of those rights to all human beings subject to, or within, their *jurisdiction*.¹¹⁹ According to traditional international law, the concept of jurisdiction is linked to the State territory; as noted by the Permanent Court of International Justice in the *Lotus* case,

“the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention [...] all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty”.¹²⁰

However, in more recent times the meaning of *State jurisdiction* has positively evolved, especially in the field of human rights protection, to include all situations with respect to which a State exercises its *effective control*, irrespective of the territory where such a control is exercised. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ observed that, “while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the [ICCPR], it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions”;¹²¹ hence, the Court concluded that “the [ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”.¹²²

Consistently, in its General Comment No. 31[80], the HRC emphasized that “States Parties are required by article 2, paragraph 1 [ICCPR], to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, *even if not situated within the territory of the State Party*”.¹²³ In a communication concerning Uruguay, the HRC had previously held that “Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights ‘to all individuals within its territory and subject to its jurisdiction’, but it does not imply that the State party concerned cannot be held accountable for violations of

119 See Article 2, para. 1, ICCPR; Article 1 ECHR; Article 1, para. 1, ACHR.

120 See *The Case of the S.S. “Lotus”*, judgment, *Publications of the Permanent Court of International Justice, Collection Of Judgments*, Series A, No. 70, 18 (7 Sep. 1927) Generally on this issue see Arthur Lenhoff, “International Law and Rules on International Jurisdiction”, 50 *Cornell Law Quarterly* 5 (1964).

121 *I. C. J. Reports*, 136, para. 109 (2004).

122 *Id.*, para. 111.

123 See General Comment No. 31 [80], para. 10 (emphasis added).

rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it”.¹²⁴ In similar terms, the Committee against Torture, in a communication concerning the United Kingdom, manifested its concern for

“the State party’s limited acceptance of the applicability of the [CAT] to the actions of its forces abroad, in particular its explanation that ‘those parts of the Convention which are applicable only in respect of territory under the jurisdiction of a State party cannot be applicable in relation to actions of the United Kingdom in Afghanistan and Iraq’; the Committee observes that the [CAT] protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the *de facto* effective control of the State party’s authorities”.¹²⁵

Furthermore, in its General Comment No. 4, concerning the principle of *non-refoulement* enshrined in Article 3 CAT, the Committee made it clear that

“[e]ach State party must apply the principle of non-refoulement in any territory under its jurisdiction or any area under its control or authority, or on board a ship or aircraft registered in the State party, to any person, including persons requesting or in need of international protection, without any form of discrimination and regardless of the nationality or statelessness or the legal, administrative or judicial status of the person concerned under ordinary or emergency law. As the Committee noted in its General Comment No. 2, ‘the concept of “any territory under its jurisdiction” ... includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the *de jure* or *de facto* control of the State party’”.¹²⁶

The approach just described is confirmed by the uniform practice of regional human rights monitoring bodies. The ECtHR, in particular, has developed a jurisprudence in the context of which the extraterritorial jurisdiction of ECHR’s States parties has been affirmed in a number of different circumstances of “acts of their authorities producing effects outside their own territory”.¹²⁷ These situations include the acts of diplomatic and consular agents “abroad and on board craft and vessels registered in, or flying the flag of, that State[, with respect to whom,] [...] customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State”;¹²⁸ the acts committed when a State, “through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Gov-

124 See *Lopez Burgos v. Uruguay, Delia Saldias de Lopez (on behalf of Lopez Burgos) v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1, para. 12.3 (1984). See also *Lilian Celiberti de Casariego v. Uruguay*, Communication No. 56/1979, U.N. Doc. CCPR/C/13/D/56/1979, para. 10.3 (1981).

125 See Conclusions and recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland – Dependent Territories. 10/12/2004, U.N. Doc. CAT/C/CR/33/3, para. 4(b) (10 Dec. 2004). See also Consideration of Reports Submitted by States Parties under Article 19 of the Convention. Conclusions and recommendations of the Committee against Torture. United States of America, U.N. Doc. CAT/C/USA/CO/2, para. 15 (25 July 2006).

126 See General Comment No. 4 on the implementation of article 3 of the Convention in the context of article 22 (2017), available at <<https://www.refworld.org/docid/5a903dc84.html>> (accessed on 23 Aug. 2019), para. 10.

127 See *Case of Drozd and Janousek v. France and Spain*, Appl. No. 12747/87, judgment, para. 91 (26 June 1992).

128 See *Banković and Others v. Belgium and Others*, Appl. No. 52207/99, Grand Chamber decision as to the admissibility, para. 73 (12 Dec. 2001).

ernment”;¹²⁹ the cases when the use of force by a State’s agent operating outside its territory brings an individual under his/her control, for instance where an individual is taken into the custody of State agents abroad;¹³⁰ the interception of a foreign boat by a vessel of the State navy, in international waters, and the forcible transfer of its passengers to a foreign country;¹³¹ as well as the situations occurring “when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory”.¹³² With respect to the latter case—which is particularly significant for the situations of military occupation—

“[a]ccording to the relevant principles of international law, a State’s responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – that State in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration [...] It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned”.¹³³

The practice of the Inter-American Commission on Human Rights is, finally, especially significant. In particular, in *Saldaño v. Argentina*, the Commission expressed its position on the meaning of the term “jurisdiction” under Article 1, para. 1, ACHR, holding as follows:

“[t]he Commission does not believe [...] that the term ‘jurisdiction’ in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state’s own territory. This position finds support in the decisions of European Court and Commission of Human Rights which have interpreted the scope and meaning of Article 1 of the [ECHR]”.¹³⁴

In *Coard et Al. v. United States* the Commission went even further, reiterating its position according to which “the American Declaration [of the Rights and Duties of the Man] is a source of international obligation for members states not party to the American Convention, and [...] its Statute authorizes [the Commission] to examine complaints under the Declaration and requires it to pay special attention to certain core rights”.¹³⁵ The Commission then concluded that,

“[w]hile the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extra-

129 *Id.*, para. 71.

130 See *Case of Öcalan v. Turkey*, Appl. No. 46221/99, judgment (Grand Chamber), para. 91 (12 May 2005).

131 See *Case of Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, judgment, para 81 (23 Feb. 2012).

132 See, among others, *Case of Chiragov and Others v. Armenia*, Appl. No. 13216/05, judgment (Merits), para. 106 (16 June 2015).

133 See *Issa and others v. Turkey*, Appl. No. 31821/96, judgment, paras. 69-70 (16 Nov. 2004).

134 See *Report No. 38/99, Petition, Victor Saldaño v. Argentina*, (11 March 1999), available at <<http://cidh.org/annualrep/98eng/Inadmissible/Argentina%20Salda%C3%B1o.htm>> (accessed on 12 September 2019), para. 17.

135 Report No. 109/99, Case 10.951, *Coard et al. v. United States* (29 Sep. 1999), available at <<https://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm>> (accessed on 12 Sep. 2019), para. 9.

territorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination—‘without distinction as to race, nationality, creed or sex.’ Given that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter’s agents abroad. In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control”.¹³⁶

Suspension (Derogation) of Human Rights Guarantees in Times of Public Emergency

Human rights treaties of general character—with the only exception of the ACHPR—include a derogation clause, applicable in times of public emergency. Article 4, para. 1, ICCPR, establishes that, “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

Similarly, Article 15, para. 1, ECHR, provides that, “[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”. To an equivalent extent, Article 27, para. 1, ACHR, states as follows: “[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin”. The three provisions are equivalent with each other in allowing States parties to the relevant treaties to suspend the human rights guarantees in times of public emergencies.

However, the application of the said clauses is not unconditioned. In particular, as emerges from their formulation, the public emergency must be “officially proclaimed”. In this respect, Article 4, para. 3, ICCPR, dictates that “[a]ny State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation”. A substantially identical provision is enshrined by Article 15, para. 3, ECHR (which obviously refers to the Secretary General of the Council of Europe, who must be kept “fully informed of the measures which [the State concerned] has taken and the reasons therefor”, and must be informed “when such measures have ceased to operate and the provisions of the Convention are again being fully executed”).

136 *Id.*, para. 37.

Finally, Article 27, para. 3, ACHR, establishes that “[a]ny State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension”. The provisions just reproduced make it clear that any measures of derogation of the rights established by the treaties in discussion, applied by a State without officially proclaiming a state of emergency or duly informing the other States parties, is to be considered unlawful (unless the derogation is otherwise justified by the specific provision contemplating the right which is the specific object of derogation).

As clarified by the HRC with specific respect to Article 4 ICCPR, “[b]efore a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed”.¹³⁷ Consistently, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ noted the following:

“Israel made use of its right of derogation under [Article 4 ICCPR] by addressing the following communication to the Secretary-General of the United Nations on 3 October 1991: ‘Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens. These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings. In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant. The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention. In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision’”.¹³⁸

As a consequence, according to the Court, since “the derogation so notified concerns only Article 9 [ICCPR], which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention”, “[t]he other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory”.¹³⁹

Furthermore, the faculty of States to suspend the human rights guarantees provided for by the relevant treaties, even in situations of public emergency, is not unlimited as regards the rights which may be the object of derogation. In fact, according to para. 2 of Article 4 IC-

137 See General Comment No. 29, State of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, para. 2 (31 Aug. 2002). The statement reproduced in the text seems to reverse a more flexible approach previously followed by the HRC; in particular, in *Jorge Landinelli Silva, Luis E. Echave Zas, Omar Patron Zeballos, Niurka Sala Fernandez and Rafael Guarga Ferro v. Uruguay*, Communication No. 34/1978, Views (8 April 1981), the Committee had declared that, “[a]lthough the substantive right to take derogatory measures *may not depend on a formal notification* being made pursuant to article 4 (3) of the Covenant, the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes article 4 (1) of the Covenant” (see para. 8.3, emphasis added).

138 See para. 127.

139 *Id.*

CPR, “[n]o derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision”. In the context of the ICCPR, the following rights are therefore considered non-derogable even in times of public emergency: right to life; protection against torture or cruel, inhuman or degrading treatment or punishment; protection against slavery and servitude; right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation; protection against retroactive application of criminal law; right to recognition everywhere as a person before the law; right to freedom of thought, conscience and religion.

Opting for a more restrictive approach, Article 15, para. 2, ECHR establishes that “[n]o derogation from Article 2 [right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [prohibition of torture and inhuman or degrading treatment or punishment], 4 (paragraph 1) [prohibition of slavery and servitude] and 7 [prohibition of retroactive application of criminal law] shall be made under this provision”. More in favour of human rights is instead Article 27, para. 2, ACHR, according to which “[t]he [...] provision [of paragraph 1] does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights”. As may be easily noted, only the latter provision makes explicit reference to the “judicial guarantees essential for the protection” of non-derogable rights as also being non-derogable.

However, the judicial guarantees indispensable for the protection of non-derogable rights are to be considered implicitly included among the latter also in the context of the other two treaties under consideration, particularly the ICCPR. According to the HRC, while the obligation for the States parties to the ICCPR to provide remedies for any violation of the provisions of the Covenant “is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, [...] it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation [...] to provide a remedy that is effective”.¹⁴⁰ Therefore, “[i]t is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights [...] the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency”.¹⁴¹

In addition, according to the HRC, other rights not explicitly mentioned in Article 4, para. 2, ICCPR, are to be added to the list of those considered non-derogable also in times of public emergency. Among such rights is first of all to be included the prohibition of death penalty for the States which have ratified the Second Optional Protocol to the ICCPR.^{142 143} Also absolutely non-derogable are the right of “[a]ll persons deprived of their liberty [to] be treated with humanity and with respect for the inherent dignity of the human person”,¹⁴⁴ the “prohibitions against taking of hostages, abductions or unacknowledged detention”,¹⁴⁵ the prohibition of

142 *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, 1989, 1642 UNTS 414.

143 See General Comment No. 29, para. 7.

144 *Id.*, para. 13(a).

145 *Id.*, para. 13(b).

genocide and other “elements” attached to “the rights of persons belonging to minorities”,¹⁴⁶ the prohibition of “deportation or forcible transfer of population without grounds permitted under international law”,¹⁴⁷ the prohibition of “propaganda for war, or [...] advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence”.¹⁴⁸

A situation of armed conflict or military occupation undoubtedly represents one of the most typical cases of national emergency. However, it is important to clarify that Article 4 ICCPR cannot be automatically invoked for the sole fact of the existence of a situation of armed conflict or military occupation. In fact, “even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation”;¹⁴⁹ and, in any event, “measures derogating from the Covenant, as set forth in article 4, paragraph 1, [...] [must be] limited to the extent strictly required by the exigencies of the situation”.¹⁵⁰

The treaty provisions described in this paragraph establish a sort of parallelism between treaty law and customary international law, in the sense that, *grossly speaking*, the rights considered absolutely non-derogable by the provisions in point may be considered as corresponding to rules of *jus cogens* under customary international law. This parallelism, however, must be considered with a due degree of flexibility. First, as previously noted, the lists of non-derogable rights provided by the norms under examination do not correspond with each other, and this raises the question of which of them may be considered as illustrating the actual core of human rights corresponding to rules of *jus cogens*. Secondly, it may well be possible that, while “[t]he proclamation of certain provisions of the [ICCPR] as being of a non-derogable nature, in article 4, paragraph 2, 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)”, “the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence”.¹⁵¹

Up to the moment of this writing, the United States of America has never used the opportunity offered by Article 4 ICCPR (the only one applicable to the American government among the provisions in discussion) to officially proclaim a state of emergency suspending the enjoyment of the rights established by the Covenant.¹⁵² It has been noted, however, that “the Military Order on Detention, Treatment, Trial of Certain Non-Citizens in the War Against Terrorism issued by President Bush on 13 November 2001 contains provisions which, as a matter of fact, do establish a derogation from Articles 9 [right to liberty and security of the person] and 14 [right of all persons to equality before courts and tribunals] ICCPR”.¹⁵³

146 *Id.*, para. 13(c).

147 *Id.*, para. 13(d).

148 *Id.*, para. 13(e).

149 *Id.*, para. 3.

150 *Id.*, para. 4.

151 *Id.*, para. 11.

152 See <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> (accessed on 14 Sep. 2019).

153 See Angelika Siehr, “Derogation Measures under Article 4 ICCPR, with Special Consideration of the ‘War Against International Terrorism’”, 47 *German Yearbook of International Law* 545, 571-572 (2004).

Applicability of Human Rights in the Event of Armed Conflict

According to the traditional understanding of international law, application of human rights would be in principle reserved to situations of peacetime, while the body of law applicable in the event of armed conflict would be international humanitarian law (hereinafter: IHL).¹⁵⁴ In its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,¹⁵⁵ the ICJ elaborated the theory of IHL as *lex specialis*, “namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities”.¹⁵⁶ However, the Court also stated that “the right not arbitrarily to be deprived of one’s life [provided for by Article 6 ICCPR] applies also in hostilities”,¹⁵⁷ while “whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life [...] can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself”.¹⁵⁸

The ICJ clarified its position—quite ambiguous indeed¹⁵⁹—in the subsequent advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, stating that “the protection offered by human rights conventions does not cease in case of armed conflict”, “[s]ave through the effect of provisions for derogation [in time of emergency] of the kind to be found in Article 4 [ICCPR]”.¹⁶⁰ Among the human rights instruments assumed to have been violated by Israel, after specifying that “the [ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”,¹⁶¹ the Court included the ICESCR and the CRC. With respect to the former, the ICJ affirmed that “the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the [ICESCR]”.¹⁶² As far as the CRC is concerned, the Court took note of its Article 2¹⁶³ and concluded that it is “applicable within the Occupied Palestinian Territory”.¹⁶⁴

Subsequently, in its judgment concerning the armed activities of Uganda in the territory of the Democratic Republic of Congo, the ICJ confirmed that international instruments on human rights are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”, particularly in occupied territories.¹⁶⁵ In the case at hand, the Court established that Ugandan military forces perpetrated “massive human rights violations” and grave breaches of international human rights law,¹⁶⁶ leading the government of Uganda to be in “clear violation” of, *inter alia*, Articles 6(1) and 7 ICCPR, Articles 4 and 5 ACHPR, Articles 38(2) and 38(3) CRC and Articles 1, 2, 3(3) and 3(6) of the *Optional Protocol to the Conven-*

154 See, among others, Jean Pictet, *Humanitarian Law and the Protection of War Victims* (1975).

155 Advisory Opinion, ICJ Reports, 226 (8 July 1996).

156 *Id.*, para. 25.

157 *Id.*

158 *Id.*

159 See Christian Tomuschat, “Human Rights and International Humanitarian Law”, 21 *European Journal of International Law* 15, 17-18 (2010).

160 See *Legal Consequences of the Construction of a Wall*, para. 106.

161 *Id.*, para. 111.

162 *Id.*, para. 112.

163 Article 2, para. 1, CRC states that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.

164 See *Legal Consequences of the Construction of a Wall*, para. 113.

165 See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment, I.C.J. Reports, 168, para. 216 (19 Dec. 2005).

166 *Id.*, para. 207.

tion on the Rights of the Child on the Involvement of Children in Armed Conflict.^{167 168} The same position was reiterated by the ICJ in its order on provisional measures released in the contest of the dispute between Georgia and the Russian Federation concerning the application of the CERD, when the Court affirmed that such a Convention always applies in the event of armed conflict, “even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law”.¹⁶⁹ Last but not least, in its judgment on admissibility concerning the case of *Congo v. Rwanda*, the judges emphasized that,

“[w]hile the Court has come to the conclusion that it cannot accept any of the grounds put forward by the DRC to establish its jurisdiction in the present case, and cannot therefore entertain the latter’s Application, it stresses that it has reached this conclusion solely in the context of the preliminary question of whether it has jurisdiction in this case [...] The Court is precluded by its Statute from taking any position on the merits of the claims made by the DRC. However, as the Court has stated on numerous previous occasions, there is a fundamental distinction between the question of the acceptance by States of the Court’s jurisdiction and the conformity of their acts with international law. Whether or not States have accepted the jurisdiction of the Court, they are required to fulfil their obligations under the United Nations Charter and the other rules of international law, including international humanitarian and human rights law, and they remain responsible for acts attributable to them which are contrary to international law”.¹⁷⁰

The position of the ICJ is confirmed by the practice of human rights monitoring bodies. The HRC has made it clear that “the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the [ICCPR] [...] Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, [ICCPR] for the actions of their authorities outside their own territories”.¹⁷¹ In other words, “the [ICCPR] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive”.¹⁷²

In its recent General Comment No. 36, concerning Article ICCPR, on the right to life, the HRC reiterated that, “[l]ike the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities”.¹⁷³ To a similar extent, the Committee against torture has made it clear that a “State party should recognize and ensure that the [CAT] applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction”,¹⁷⁴ the latter expression including “all areas under the de facto effective control of the State party, by

167 2173 UNTS 222.

168 See *Armed Activities on the Territory of the Congo*, para. 219.

169 See *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order, I.C.J. Reports, 353, para. 112 (15 Oct. 2008).

170 See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports, 6, para. 127 (2006).

171 See Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11. See also Concluding observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add.93, para. 4 (18 Aug. 1998).

172 See General Comment No. 31 [80], para. 11.

173 See General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc. CCPR/C/GC/36, para. 64 (30 Oct. 2018).

174 See Conclusions and Recommendations of the Committee against Torture, United States of America, U.N. Doc. CAT/C/USA/CO/2, para. 14 (25 July 2006).

whichever military or civil authorities such control is exercised”.¹⁷⁵ In an equivalent vein, the Committee on Economic, Social and Cultural Rights, in a report on the occupation of Palestinian territories by Israel, strongly rejected “the State party’s assertion regarding the distinction between human rights and humanitarian law under international law to support its argument that the Committee’s mandate ‘cannot relate to events in the Gaza Strip and West Bank’”. The Committee accordingly reminded Israel that “even during armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law and are also prescribed by international humanitarian law”.¹⁷⁶

Regional human rights courts stand along the same lines. The IACtHR, despite some initial hesitation, has constantly affirmed the applicability of the ACHR in the event of armed conflict, specifying that the scope of the provisions of the Convention—apart from the possibility of suspending part of them in time of public emergency, as examined in the previous paragraph—cannot be limited per effect of the inherent difficulties usually faced by States in ensuring their application in arduous situations like those usually characterizing armed conflicts.¹⁷⁷ The African Commission on Human and Peoples’ Rights has also taken the position that those human rights which are usually considered as non-derogable in time of emergency apply fully and unconditionally in the event of armed conflict, and States are bound to use at least the same level of diligence expected from them in peacetime, irrespective of the existence and possible applicability of IHL as *lex specialis*.¹⁷⁸

As far as the ECtHR is concerned, while it has developed a more abundant and laborious practice, its jurisprudence is clearly oriented towards recognizing the full applicability of the ECHR in the event of armed conflict and military occupation, provided that the existence of the jurisdiction of the State concerned has been established and that the specific rights at stake are not lawfully derogated from pursuant to the provisions of the Convention.¹⁷⁹ It is notable that, with specific respect to the right to life, the ECtHR has recognized that the test of *necessity* to be satisfied for deprivation of life to be considered justified pursuant to Article 2, para. 2, ECHR¹⁸⁰ is the same in time of war and in peacetime. In fact,

“Article 2 [ECHR] covers not only intentional killing but also the situations where it is permitted to ‘use force’ which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is, however, only one factor to be taken into account in assessing its necessity. Any use of force must be no more than ‘absolutely necessary’ for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates

175 *Id.*, para. 15.

176 See Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, U.N. Doc. E/C.12/1/Add.69, para. 12 (31 Aug. 2001). See also, consistently, Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, prepared by Mr. Walter Kälin, Special Rapporteur of the Commission on Human Rights, in Accordance with Commission Resolution 1991/67, U.N. Doc. E/CN.4/1992/26, paras. 55–59 (15 Jan. 1992).

177 For a more comprehensive assessment of the pertinent practice of the IACtHR see Federico Lenzerini, “From *Jus in Bello* to *Jus Commune Humanitatis*, The Interface of Human Rights Law and International Humanitarian Law in the Regulation of Armed Conflicts”, in Federico Lenzerini and Ana Filipa Vrdoljak (eds.), *International Law for Common Goods. Normative Perspectives on Human Rights, Culture and Nature* 69–77 (2014).

178 *Id.*, pp. 77–79.

179 *Id.*, pp. 79–87.

180 Article 2, para. 2, ECHR states that “[d]eprivation 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” (emphasis added).

that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is ‘necessary in a democratic society’ under [other provisions of the Convention]. Consequently, the force used must be *strictly proportionate* to the achievement of the permitted aims”.¹⁸¹

The long-lasting practice of U.N. bodies confirms the validity of the approach of human rights monitoring bodies. Already in 1967, in Resolution 237 of 14 June the Security Council affirmed that “essential and inalienable human rights should be respected even during the vicissitudes of war”.¹⁸² Three years later the General Assembly affirmed that “[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict”.¹⁸³ In more recent times, the Security Council has called upon States, in many occasions, to fully respect human rights in situations of armed conflicts.¹⁸⁴ An equivalent position has been followed by the Secretary-General, based on the assumption that “the human rights provisions of the [U.N.] Charter make no distinction in regard to their application as between times of peace on the one hand and times of war on the other”.¹⁸⁵

In a 1970 report, the Secretary-General even stressed that “[t]here are instances in which the autonomous protection ensured by the human rights instruments of the United Nations is more effective and far-reaching than that derived from the norms of the Geneva Conventions and other humanitarian instruments oriented towards armed conflicts”.¹⁸⁶ Also, in 1991 the Commission on Human Rights, taking position on the occupation of Kuwait by Iraq, strongly condemned “the Iraqi authorities and occupying forces for their grave violations of human rights against the Kuwaiti people and nationals of other States and in particular the acts of torture, arbitrary arrests, summary executions and disappearances in violation of the Charter of the United Nations, the International Covenants on Human Rights, and other relevant legal instruments”.¹⁸⁷ Finally, the Human Rights Council has emphasized that “effective measures to guarantee and monitor the implementation of human rights should be taken in respect of civilian populations in situations of armed conflict, including people under foreign occupation, and that effective protection against violations of their human rights should be provided, in accordance with international human rights law and applicable international humanitarian law”.¹⁸⁸

181 See *Case of Isayeva, Yusupova and Bazayeva v. Russia*, Applications nos. 57947/00, 57948/00 and 57949/00, judgment, para. 169 (24 Feb. 2005) (emphasis added). The Court has confirmed this position in many other cases. In particular, the ECtHR “has delivered more than 250 judgments finding violations of the Convention in connection with the armed conflict in the Chechen Republic of the Russian Federation. About 60% of the applications concern enforced disappearances; other issues include killing and injuries to civilians, destruction of homes and property, indiscriminate use of force, use of landmines, illegal detention, torture and inhuman conditions of detention. The applicants most commonly refer to Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), 5 (right to liberty and security), 8 (right to respect for private and family life), 13 (right to an effective remedy) and 14 (prohibition of discrimination) [ECHR] and to Article 1 (protection of property) of Protocol No. 1 to the Convention” (see European Court of Human Rights, *Factsheet – Armed conflicts*, September 2018, available at <https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf>, accessed on 22 Aug. 2019), p. 10.

182 See preamble, second recital.

183 See *Basic principles for the protection of civilian populations in armed conflicts*, 9 December 1970, A/RES/2675, available at <<https://www.refworld.org/docid/3b00f1c961.html>> (accessed on 22 Aug. 2019), para. 1.

184 For the relevant practice see Office of the UN High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, 96-100 (2011).

185 *Id.*, p. 100.

186 *Id.*, p. 101.

187 See Situation of human rights in Kuwait under Iraqi occupation, Res. 1991/67 (6 March 1991), available at <<https://www.refworld.org/docid/3b00f0bf50.html>> (accessed on 22 Aug. 2019).

188 See Resolution 9/9, Protection of the human rights of civilians in armed conflict, available at <https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_9.pdf> (accessed on 22 Aug. 2019), preamble,

In light of the practice just summarized, the full applicability of human rights in time of war is beyond question, with the exception of such rights which can be, *and are*, legitimately suspended in a time of public emergency, provided that the latter concept undoubtedly includes situations of armed conflict.¹⁸⁹ Accordingly, in light of the “relevant principles of international law, a State’s responsibility may be engaged where, *as a consequence of military action—whether lawful or unlawful*—that State in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, [human] rights and freedoms [...] derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration”.¹⁹⁰

Protection of Human Rights in Occupied Territory

The considerations just developed re the applicability of human rights in the event of armed conflict plainly extend to the situations of military occupation. It is evident that there is even a stronger reason for applying human rights standards in situations of military occupation than in armed conflict.¹⁹¹ In fact, “while it might be more difficult to assert extraterritorial application in other situations of armed conflict, the case for the extraterritorial application of human rights obligations in situations of occupation is more straightforward, because occupation actually entails the exercise of authority over foreign territory (or part thereof)”.¹⁹² In other words, “the situation of military occupation is different from the situation of armed conflict. The distinction is that the occupier controls the occupied territory, there are no major military operations in the occupied zone, a certain minimum extent of order and security is reconstituted, and civil life is also restored to some extent. Occupational law, by its very nature, ‘resembles’ the law of peace, even though it forms part of the law of armed conflicts”.¹⁹³ In addition,

“human rights are not conditional. They are given to every individual because they are human. The political, social and economic circumstances surrounding the individual do not affect an individual’s human rights; therefore, the rights and protections found in human rights documents cannot be withheld simply because the individual lives under a foreign military force. There is little doubt that the rights and protections found in human rights documents are applicable to populations living under occupation”.¹⁹⁴

There is therefore little or no doubt that “[a] state in belligerent occupation is obliged to adhere to the norms of human rights law”.¹⁹⁵

seventh recital.

- 189 See, consistently (among many others), Michelle A. Hansen, “Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict”, 194 *Military Law Review* 1, 7 (2007); Noam Lubell, “Human rights obligations in military occupation”, 94 (885) *International Review of the Red Cross* 317, 318 (Spring 2012) (“international human rights law applies at all times, regardless of peace or war”); Eyal Benvenisti, *The International Law of Occupation* 13 (2nd edition, 2012); Klaudia Hraníková Pytelová, “Military Occupation and Human Rights Protection”, 3 *ASEJ Scientific Journal of Bielsko-Biala School of Finance and Law* 27, 29 (2018).
- 190 See ECtHR, *Case of Issa and Others v. Turkey*, Appl. No. 31821/96, judgment, para. 69 (16 Nov. 2004). See also *Loizidou v. Turkey (preliminary objections)*, para. 62.
- 191 See Adam Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights”, 100 *American Journal of International Law* 580, 594 (2006).
- 192 See Hanne Cuyckens, “Review Essay - The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Occupation: A Review of the Relevant Parts of the Books on the Law of Occupation”, 10 *Human Rights and International Legal Discourse* 275, 288 (2016).
- 193 See Pytelová, 30.
- 194 See Brian Walsh & Ilan Peleg, “Human rights under military occupation: The need for expansion”, 2 *The International Journal of Human Rights* 62, 66 (1998).
- 195 See John Quigley, “The Relation Between Human Rights Law and the Law of Belligerent Occupation:

This conclusion is confirmed by the relevant international practice. In its 2005 judgment concerning the *Armed Activities on the Territory of the Congo*, the ICJ, after concluding that at the relevant time Uganda was “an occupying Power” of part of the territory of Congo, found that “Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account”.¹⁹⁶ The Court added that “Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation”.¹⁹⁷ It therefore concluded that “Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the [Uganda Peoples’ Defence Forces] and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power [...] in respect of violations of international human rights law and international humanitarian law in the occupied territory”.¹⁹⁸

The position of the ICJ is echoed by human rights monitoring bodies. Among them, the jurisprudence of the ECtHR emerges. The European Court has released many judgments concerning different situations of military occupation, in which it has recognized the violation by the occupying State of a number of rights protected by the ECHR—including, among others, Article 1 (obligation to respect human rights), Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment), Article 5 (right to liberty and security), and Article 13 (right to an effective remedy)¹⁹⁹—on the basis of the exercise by the State concerned of an *effective control* over the occupied territory. Furthermore, “[m]any states and international organisations evaluate occupants with reference to standards derived from both the law of occupation and human rights law. For example, the US State Department uses the law of occupation and human rights standards to evaluate Israeli behaviour in the Occupied Territories”.²⁰⁰

It is just the case to specify that the catalogue of human rights to be guaranteed by the occupying powers in the occupied territories is not limited to civil and political rights, but also extends to economic, social and cultural rights. As noted above, the applicability of the ICESCR in situations of military occupation has been affirmed by the ICJ in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.²⁰¹ Also, in its previously cited report of the occupation of Palestinian territories by Israel, the Committee on Economic, Social and Cultural Rights expressed

“its deep concern about the State party’s continuing gross violations of economic, social and cultural rights in the occupied territories, especially the severe measures adopted by the State party to restrict the movement of civilians between points within and outside the occupied territories, severing their access to food, water, health care, education and work. The Committee is particularly concerned that on frequent occasions, the State party’s closure policy has prevented civilians from reaching medical services and that emergency situations have ended at times in

Does an Occupied Population have a Right to Freedom of Assembly and Expression?”, 12 *Boston College International and Comparative Law Review* 1, 28 (1989).

196 See *Armed Activities on the Territory of the Congo*, para. 179.

197 *Id.*, para. 180.

198 *Id.*, para. 220.

199 See, among many others, *Case of Al-Saadoon and Mufdhi v. The United Kingdom*, Appl. No. 61498/08, judgment (2 Mar. 2010); *Case of Al-Skeini and Others v. The United Kingdom*; *Case of Al-Jedda v. The United Kingdom*, Appl. No. 27021/08, judgment (7 July 2011); *Case of Jaloud v. The Netherlands*, Appl. No. 47708/08, judgment (20 Nov. 2014).

200 See Walsh & Peleg, 66.

201 See above in this chapter.

death at checkpoints”.²⁰²

Guaranteeing economic, social and cultural rights may be of vital importance during military occupation, since “for the populations of an occupied territory, it is often precisely these rights that are of the greatest concern [...] the inhabitants of the territory require their health, education, and employment situation to continue in as uninterrupted a manner as possible”.²⁰³ In this respect, “the duties of the Occupying Power go beyond non-interference and negative/respect obligations to include positive obligations [...] In a prolonged occupation, it may be incumbent upon the Occupying Power not only to engage in the core minimum of obligations but also to ensure the long-term strategic aspects of fulfilling the population’s rights”.²⁰⁴

Continuing Violations of Human Rights in Situations of Military Occupation

Once established that human rights standards are fully applicable in situations of military occupation, there is not much to elaborate on the fact of whether or not continuing violations of human rights may also take place in the same situations. The solution of this issue is indisputably positive, as continuing violations are an integral part of the human rights discourse. In *Cyprus v. Turkey* the ECtHR accordingly found that the respondent State, which was exercising effective control determined by military occupation over the territory of the Northern part of Cyprus, committed “a continuing violation of Article 8 of the Convention [right to private and family life] by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus”,²⁰⁵ as well as of Article 1 of Protocol 1 (protection of property), “by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights”.²⁰⁶ With respect to the latter provision, the Court has specified that it “would eschew any notion that military occupation should be regarded as a form of adverse possession by which title can be legally transferred to the invading power”.²⁰⁷

Also, in *Varnava and Others v. Turkey*, in relation to the disappearance of nine Cypriot nationals who had been detained by the Turkish military forces, the Court, sitting as Grand Chamber, found that there was a “continuing violation of Article 2 [ECHR] on account of the failure of the respondent State to provide for an effective investigation aimed at clarifying the fate of the nine men who went missing in 1974”,²⁰⁸ as well as a continuing violation of Article 5 ECHR, by virtue of the fact that the Turkish authorities had failed to carry out “an effective investigation into the arguable claim that the two [of the] missing men had been taken into custody and not seen subsequently”.²⁰⁹ Similarly, in *Chiragov and Others v. Armenia*—a case concerning six Azerbaijani refugees who were unable to return to their homes and property in Azerbaijan, from where they had been forced to flee in 1992, during the conflict over Nagorno-Karabakh—the Grand Chamber held that the respondent State was responsible of continuing violations of Article 1 of Protocol 1 and Articles 8 and 13 ECHR.²¹⁰

202 See Concluding Observations of the Committee on Economic, Social and Cultural Rights, para. 13

203 See Noam Lubell, “Human rights obligations in military occupation”, 94 (885) *International Review of the Red Cross* 317, 329 (Spring 2012).

204 *Id.*, 332.

205 See *Case of Cyprus v. Turkey*, Appl. No. 25781/94, judgment, para. 175 (10 May 2001).

206 *Id.*, para. 189.

207 See Grand Chamber Decision as to the Admissibility of Application nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04 by *Takis Demopoulos and Others against Turkey*, para. 112 (1 Mar. 2010).

208 See *Case of Varnava and Others v. Turkey*, Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, judgment, para. 194 (18 Sep. 2009).

209 *Id.*, para. 208.

210 See *Case of Chiragov and Others v. Armenia*, cit. For an analogous case see *Case of Sargsyan v. Azerbaijan*, Appl.

The existence of a situation of military occupation does not produce particular implications as regards the rule of the prior exhaustion of domestic remedies.²¹¹ The main consideration to be taken into account in this respect is that, in a situation of military occupation, the expression “domestic remedies” usually refers to the remedies made available by the occupying power. In most cases such remedies are those ordinarily available in the territory of the occupying State. In other cases, however, ad hoc courts may be established by the occupying government, usually of military or special character. While the fact of whether or not a domestic remedy may be considered as available, effective and sufficient²¹² must be evaluated on a case-by-case basis, taking into account the specific characteristics of the instant case, generally “military or special courts [...] could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice [...] [and] do not afford the strict guarantees of the proper administration of justice [...] which are essential for the effective protection of human rights”.²¹³

According to Principle No. 9 of the *Draft Principles Governing the Administration of Justice through Military Tribunals*,²¹⁴ “[i]n all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes”. In general, the approach of human rights monitoring bodies is based on the consideration that “military courts [...] in most cases do not comply with the obligation of independence and impartiality”.²¹⁵ It follows that, when remedies against human rights violations occurring in situations of military occupation are only available before military courts, a strong presumption exists (which is up to the occupying government to rebut) that such remedies are not available, effective and sufficient.

Conditions for Establishing United States’ International Responsibility

International responsibility for human rights violations is an issue of States *vis-à-vis* individual (or groups of) victims. However, States other than the one responsible for the violation hold an indirect (although internationally relevant) interest that the violation is brought to an end, in light of the fact that protection of human rights corresponds to an interest of the international community as a whole. This implies that all States have a legal interest in it, irrespective of whether or not they have any “more qualified” connection with a violation (as happens, in particular, when the victim of a human rights breach is a citizen of the State concerned).

The present chapter is premised on the postulation that the Hawaiian Kingdom was occupied by the United States in 1893 and that it has remained in the same condition since that time.²¹⁶ Previous paragraphs have shown that, in situations of military occupation, internationally recognized human rights find full application consistently with the ordinary rules generally gov-

No. 40167/06, judgment (16 June 2015).

211 See above in this chapter.

212 *Id.*

213 See HRC, General comment No. 13: Article 14 (Administration of justice) (1984), available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f4721&Lang=en> (accessed on 14 Sep. 2019), para. 4. See also General Comment No. 32, para. 22.

214 U.N. Doc. E/CN.4/2006/58 (13 Jan. 2006).

215 See Sharon Weill, “The judicial arm of the occupation: the Israeli military courts in the occupied territories”, 89 (866) *International Review of the Red Cross* 395, 400 (June 2007).

216 This postulation is elaborated in Chapters 2 and 3 of Part II of this book.

erning human rights law. An occupied territory falls within the jurisdiction of the occupying Power, for the latter exercises *effective control* over such a territory. The only possible exception to the full applicability of human rights in situations of military occupation is represented by the case when it is established that the military occupation determines a situation of public emergency, which is officially declared by the occupying State, explaining which specific rights are suspended and the reasons of their suspension. Up to the moment of this writing, however, the United States of America has never used the opportunity offered by Article 4 ICCPR (the only one applicable to the American government among the international treaties including provisions allowing for suspension of human rights guarantees in times of public emergency) to officially proclaim a state of emergency suspending the enjoyment of the rights established by the Covenant.²¹⁷ Furthermore, most fundamental human rights remain non-derogable in whatever circumstances, including situations of public emergency, and demand to be fully and effectively applied in all cases of military occupation, depriving the occupying Power of the possibility to suspend, derogate or even limit their implementation.

International responsibility for human rights violations arises from both treaty law and customary international law. As a consequence, all States in the world are bound to respect and guarantee the effective enjoyment of human rights by all persons subject to their jurisdiction irrespective of whether or not they have ratified the relevant treaties. Even leaving aside any consideration concerning the political and legal status attributed to the Hawaiian Kingdom pending the occupation by the United States, the existence of the jurisdiction of the latter over the territory of Hawai'i is well established, as the American government retains a *de facto* and *de jure* control over such a territory.

The actual existence of human rights violations is based on the principle of *tempus regit actum*. Therefore, a violation of such rights may be considered as existing only whether and to the extent that the act, fact or omission from which the supposed breach originated was prohibited by the law in force at the time when it was held or took place. However, according to the principle of continuing violations, a human rights breach continues to exist for the entire time that the situation determined by the above act, fact or omission continues to produce wrongful effects. As a consequence, a State may be held responsible for a human rights violation even when the act, fact or omission from which it originally arose was committed a long time ago, on the condition that its wrongful effects continued to be produced after a rule entered into force for the above State qualifying the above act, fact or omission as a human rights breach. In other words, State responsibility for human rights violations extends over the entire period during which the act continues and remains not in conformity with its international obligations. Continuing violations of human rights frequently occur in the event of armed conflict and in time of military occupation. Based on the condition that sufficient evidence of the actual existence of breaches is collected, it may be maintained that certain supposed human rights violations committed by the United States in the territory of Hawai'i since 17 January 1893, before the time that human rights standards have crystallized as rules of international law, may assume the characterization of continuing violations, whether and to the extent that they have continued to produce illegal effects after that time.

Provided that sufficient evidence of their breach is collected, among the rights which may be supposed of having been violated by the United States as a result of the occupation of the territory of the Hawaiian Kingdom particular attention should be devoted to those inherently connected to the violations of international humanitarian law determined by the occupation. These violations, whether and to the extent they have actually taken place,²¹⁸ would first of all need to be treated as war crimes, which are primarily to be considered under the lens of

217 See above in this chapter.

218 See, Schabas, Chapter 4.

international criminal law. However, they would also produce notable implications in terms of human rights protection. It is the case, for instance, of the crime of *usurpation of sovereignty* consequent to the occupation.²¹⁹ The human rights implications arising from such a crime are determined by the fact that it usually hinders the effective exercise by the citizens of the occupied State of the right to participate in government, provided for by Article 25 ICCPR and Article 23 ACHR. Even supposing that the citizens of the country to which sovereignty has been usurped are given the formal opportunity to participate in the government installed on their territory by the occupied State, this would hardly comply with the requirement, inherent in the right in point, that all citizens shall enjoy the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives. In fact, it is reasonable to maintain that in most cases the representatives “freely chosen” by the citizens of the occupied State would be part of the political organization of the latter, and not of the government imposed by the occupying power.

Similar reflections may be developed with respect to the war crime of *denationalization*.²²⁰ Indeed, such a crime presupposes several implications in terms of human rights. As a matter of facts, denationalization impedes the enjoyment of the right of peoples to self-determination, of the right to nationality (since one is actually deprived of his/her own original nationality), of the right to freedom of thought and expression, and, in a particularly remarkable way, of right to education consistent with one’s (or, for children, parents’) own convictions and wishes.

Obvious human rights repercussions are also determined by the crimes of *pillage*²²¹ and of *confiscation and destruction of property*,²²² which normally translate into breaches of the right to property. Last but not least, a few specific considerations should be devoted to the crime of *unlawful transfer of populations to the occupied territory*.²²³ In this regard, the Hawaiian government census of 1889 revealed that at that time only 1,928 citizens of the United States lived in Hawai‘i, corresponding to less than 2% of the entire population; by 1950 this number had increased to 293,379.²²⁴ Irrespective of whether or not such a mass migration is to be considered as illegal, today the expulsion of those people from the Hawaiian territory would contravene international human rights law in many respects, even if expulsion would be grounded only on the basis of nationality and not on other grounds (such as race, religion, political opinion, etc.).²²⁵ At the same time, however, one may raise the issue of whether the allegedly unlawful transfer of Americans to the Hawaiian territory may have resulted into human rights breaches to the prejudice of Hawaiian citizens. This issue would be relevant, in particular, with respect to the right to participate in government, in a similar fashion to what has been noted above with respect to the crime of usurpation of sovereignty. Also, if adequate evidence would show that the transfer of the American population to Hawai‘i was promoted in view of consolidating the American occupation, the question might be raised of whether it has given rise to violations of the cultural rights of the Hawaiian people. In addition, it might be inferred that the unlawful transfer of American citizens to Hawai‘i facilitated the commission of the crime of denationalization, and would therefore be correlated with the human rights implications arising from it.

219 *Id.*, 155-157, 168.

220 *Id.*, 159-161, 168. On the process of denationalization of the Hawai‘i see David Keanu Sai, “The Impact of the U.S. Occupation on the Hawaiian People”, 13 October 2018, available at <<http://neatoday.org/2018/10/13/us-occupation-of-hawaii/>> (accessed on 14 Sep. 2019).

221 See Schabas, Chapter 4, 161-163, 170

222 *Id.*, 163-164, 168.

223 *Id.*, 166-167, 169.

224 See David Keanu Sai, “American Occupation of the Hawaiian State: A Century Unchecked”, 1 *Hawaiian Journal of Law and Policy* 46, 63-64 (2004).

225 See Yaël Ronen, “Status of Settlers Implanted by Illegal Territorial Regimes”, 79 *British Yearbook of International Law* 194, 236-259 (2008).

Whether and to the extent that the existence of human rights violations committed by the United States during the occupation of the Hawaiian Kingdom since 17 January 1893 would be actually established, victims would first of all need to rely on the domestic remedies afforded by the United States, provided that such remedies are available, effective and sufficient. Once such remedies have been unsuccessfully exhausted, or it is apparent that they are not available, effective or sufficient, victims might have recourse to the available international human rights monitoring bodies in order to obtain a decision recognizing the existence of the breach, requesting the responsible State to put it to an end, and asking it and to provide adequate redress. Considering the international human rights treaties ratified by the United States, the only international human rights body that would hold the competence to receive petitions claiming human rights violations committed by the American government is the Inter-American Commission on Human Rights, on the basis of the 1948 American Declaration of the Rights and Duties of Man. The Commission does not possess the competence to release any decision of binding character, but its findings have a strong moral force.

In consideration of the *erga omnes* character of State obligations in the human rights field, responsibility for their breach is owed to the international community as a whole—*rectius*: to all other States members of the international community—and, therefore, all States may invoke the responsibility of the government author of the violation, as well as claim its immediate cessation and the granting of appropriate reparation in favour of the victim(s) of the breach. It follows that any State in the world would be entitled—or would even have a moral duty—to appropriately react against possible human rights violations committed in the territory of Hawai‘i, once their actual commission has been verified.

Development and Contents of the Right of Peoples to Self-Determination

The right to self-determination attributes peoples a free choice to determine their own destiny,²²⁶ particularly in political terms. It originally emanated from the proclamation of enlightened ideas of popular sovereignty and representative government, affirmed in particular by Locke and Rousseau²²⁷ and subsequently incorporated in the American *Declaration of Independence* of 1776 and in the French *Declaration of the Rights of Man and of the Citizen* of 1789. Self-determination was afterwards used by Lenin as the foundation of the Bolshevik Revolution, while in 1918 US President Woodrow Wilson consecrated it “as a paramount principle of international legitimation”,²²⁸ through declaring that “[n]ational aspirations must be respected; peoples may now be dominated and governed by their own consent. Self-determination is not a mere phrase, it is an imperative principle of action which statesman will henceforth ignore at their peril”.²²⁹

Although the right to self-determination did not find its way in the *Covenant of the League of Nations*, it was implicitly part of the mandate of the League in the context of two of its areas of competence, i.e. the protection of minorities and the system of administration of mandated territories.²³⁰ However, in 1920 the International Committee of Jurists and the Commission of Rapporteurs appointed by the Council of the League of Nations to settle the *Åland Islands*

226 See Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcom N. Shaw and Christian Tomuschat, “The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty”, in Anne Bayefski (ed.), *Self-determination in International Law: Quebec and Lessons Learned*, 248, para. 1.17 (2000).

227 See Christine Griffioen, *Self-Determination as a Human Right. The Emergency Exit of Remedial Secession* 6 (2010).

228 See Uriel Abulof, “We the peoples? The strange demise of self-determination”, in 22 *European Journal of International Relations* 536 (2016).

229 See President’s address to Congress, *The Washington Post* (12 Feb. 1918).

230 See Griffioen, 7.

dispute between Sweden and Finland held that, “[a]lthough the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations”.²³¹

It was with the *Charter of the United Nations* that the right to self-determination was recognized as one of the fundamental rules of the international society. In particular, Article 1(2) includes among the purposes of the United Nations the commitment “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”. This principle is reiterated in Article 55, according to which respect for self-determination of peoples stands at the basis of the “creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations”. While scholars disagree on the contents of the right to self-determination at the time it was enunciated in the rules just described—particularly on the fact of whether or not it already presupposed a right to secession for people under colonization²³²—subsequent developments of international practice, especially within the United Nations, progressively led to its positive development as encompassing a right to independence for peoples subjected to foreign domination. Beginning in the 1950s, the UN General Assembly affirmed the right to self-determination in numerous resolutions.²³³ Res. 1514 (XV) of 14 December 1960, in particular, “represents a defining moment in the consolidation of State practice on decolonization”,²³⁴ because

“it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption. The resolution was adopted by 89 votes with 9 abstentions. None of the States participating in the vote contested the existence of the right of peoples to self-determination”.²³⁵

As stated by the ICJ, Res. 1514 (XV) uses a “normative” language,²³⁶ in so far as it declares that “[a]ll peoples have the right to self-determination”,²³⁷ affirms that “[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights [and] is contrary to the Charter of the United Nations”,²³⁸ and demands that “[i]mmediate steps shall be taken, in [...] all [...] territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire”.²³⁹

In 1966, Article 1 common to the ICCPR and the ICESCR proclaimed that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political

231 See Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question (October 1920), available at <<https://www.ilsa.org/Jessup/Jessup10/basicmats/aaland1.pdf>> (accessed on 23 Aug. 2019), p. 3.

232 For a negative opinion see Cassese, 41.

233 See, among others, Res. 637 (VII) (16 Dec. 1952), Res. 738 (VIII) (28 Nov. 1953) and Res. 1188 (XII) (11 Dec. 1957).

234 See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, para. 150 (25 February 2019), available at <<https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>> (accessed on 23 Aug. 2019).

235 *Id.*, para. 152.

236 *Id.*, para. 153.

237 See Resolution 1514(XV), *Declaration on the granting of independence to colonial countries and peoples*, para. 2 (14 December 1960).

238 *Id.*, para. 1.

239 *Id.*, para. 5.

status and freely pursue their economic, social and cultural development”. Subsequently, the U.N. General Assembly reaffirmed, in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, adopted on 24 October 1970, that the right to self-determination of peoples, which includes respect for “the national unity and territorial integrity of a State or country”,²⁴⁰ is one of the “basic principles of international law”,²⁴¹ to the point that today the fact that it has arose to the status of a principle of *jus cogens* cannot be reasonably disputed. This is confirmed by the circumstance that the principle in discussion is constantly reiterated in the context of State practice when violations occur.²⁴² In this respect—as a matter of example—one may refer to the position taken by the United States in 1979, in occasion of the invasion of Afghanistan by the USSR. In a memorandum dated 29 December 1979, the Legal Adviser of the US Department of State, Roberts B. Owen, declared that,

“[b]y the terms of Article 2, paragraph 4 of the UN Charter, the USSR is bound ‘to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.’ Among those Purposes are ‘respect for the principle of equal rights and self-determination of peoples’ (Article 1, paragraph 2). The use of Soviet troops forcibly to depose one ruler and substitute another clearly is a use of force against the political independence of Afghanistan; and it just as clearly contravenes the principle of Afghanistan’s equal international rights and the self-determination of the Afghan people”.²⁴³

Contents and Applicability of the Right to Self-Determination

In the well-known judgment *Reference: Secession of Quebec*, the Supreme Court of Canada noted that the

“right of colonial peoples to exercise their right to self-determination by breaking away from the ‘imperial’ power is now undisputed [...] The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context [...] A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession”.²⁴⁴

While the third situation described by the Canadian Supreme Court remains controversial, no reasonable doubts arise on the fact that a right to *external* self-determination—corresponding to a right to obtain political independence—exists in the first two cases illustrated by the Court. This right was consolidated as a principle of general international law already in the 1960s. It follows that, since then, in the two cases just described, a people is entitled to enjoy its right to self-determination—understood as independence and territorial integrity—and all

240 Available at <<https://www.un.org/ruleoflaw/files/3dda1f104.pdf>> (accessed on 23 Aug. 2019), preamble, fifteenth recital.

241 *Id.*, 3.

242 See, among others, Cassese, 66.

243 See Marian L. Nash, “Contemporary Practice of the United States Relating to International Law”, 74 *American Journal of International Law*, 1980, p. 418.

244 See *Reference re Secession of Quebec*, 20 August 1998, [1998] 2 S.C.R. 217, para. 134.

States have an obligation to respect it and to cooperate in order to make its enjoyment by the people concerned concretely possible.

In the recent Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice (ICJ) held that the right to self-determination of peoples, where it has not been properly exercised and the current political situation does not reflect “the free and genuine expression of the will of the people concerned”,²⁴⁵ cannot be considered as having been extinguished with the passing of time, as the fact of impeding a people to exercise its right to self-determination over time “is an unlawful act of a continuing character”²⁴⁶ resulting from the fact of maintaining the situation of alien domination. At the same time, “[s]ince respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right [...] [and] all [UN] Member States must co-operate”²⁴⁷ to make it possible that the right in point is properly exercised. The first of the conclusions reached by the ICJ is consistent with the long-established rules on *intertemporal law*.²⁴⁸ Indeed, “the right to self-determination [...] is a *continuing right*”.²⁴⁹ As a right of continuing character, the right to self-determination must be interpreted as implying that “a State’s domestic political institutions must be free from outside interference [...] [and prohibiting] States from invading and occupying the territory of other [...] States in such a manner as to deprive the people living there of their right of self-determination”.²⁵⁰ This is consistent with Judge Huber’s position expressed in the previously quoted *Island of Palmas* arbitration, making it clear that “[t]he same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law”.²⁵¹ It follows that, “even if the mere discovery of Palmas could be considered to have conferred on Spain a full and perfect title under the law of the seventeenth century, it would not constitute a good title today unless Spain’s sovereignty had been maintained in accordance with the requirements of the modern law of effective occupation”.²⁵² As a consequence, occupation of a territory by a foreign State cannot be considered lawful if it is not in line with the current rules of international law governing occupation itself, irrespective of whether or not it might be considered legitimate at the time when the territory concerned was occupied. Consistently, “belligerent occupation does not affect the continuity of the State. The governmental authorities may be driven into exile or silenced, and the exercise of the powers of the State thereby affected. But it is settled that the powers themselves continue to exist”.²⁵³

The “Kind” of Self-Determination Which Does Not Apply to Hawai‘i

In contemporary times a fervent debate is ongoing concerning the exact meaning and contents of the right to self-determination, the “peoples” that are entitled to it, as well as the concrete prerogatives arising from it. The main reason of such a debate is that the concept of self-determination of peoples, considered as a whole, has recently broadened to cover situations which

245 See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, cit., para. 172.

246 *Id.*, para. 177.

247 See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, cit., para. 180. See also *East Timor (Portugal v. Australia)*, judgment of 30 June 1995, *I.C.J. Reports*, 1995, p. 90, para. 29: “[i]n the Court’s view, 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”.

248 See above in this chapter.

249 See Cassese, *Self-determination of Peoples: A Legal Reappraisal*, cit., p. 54 (Italics in the original text).

250 *Id.*, p. 55.

251 See *Island of Palmas case*, 845.

252 See International Law Commission, “Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur Topic: Law of Treaties”, in *Yearbook of the International Law Commission*, Vol. II, 9 (1964).

253 See James Crawford, *The Creation of States in International Law*, 73 (2nd ed., 2007).

were not contemplated in its traditional characterization, to which we have referred so far in this chapter. The debate in point is developing not only among scholars and legal experts, but also among activists, NGOs and other actors, who, while driven by the most commendable intentions, do not always possess the necessary competences to manage the issue with sufficient clarity. This is the reason why confusion and misunderstandings are quite common with respect to the identification of the different peoples in the world that have a title to self-determination and, especially, of the concrete prerogatives to which they are entitled. In fact, while the contents of—and the implications arising from—the claims advanced by such peoples are often notably different, the real outcomes to which each claim of self-determination may lead are frequently misunderstood, to the point of attributing to a given people prerogatives that are totally different from those to which such a people is entitled.

In recent times, the Hawaiian people has been the object of this kind of misunderstanding, in the sense that its right to self-determination has been referred to as the specification of the right in point as recognized in favour of indigenous peoples. This has especially happened as regards the case of the planned construction of the thirty meter Telescope on Mauna Kea, with respect to which the need to “ensure [that] the human rights of Indigenous Peoples opposed to the telescope project are respected, protected and fulfilled” has been claimed, referring especially to the right of free, prior and informed consent.²⁵⁴ Among the human rights to which the sentence just reproduced refers, the right to self-determination is included, which, to some extent, may be considered the main foundation of the other collective human rights recognized in favour of indigenous peoples. In this respect, Article 3 UNDRIP states that “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. This provision is to be read in coordination with Article 46, para. 1, of the same Declaration, according to which “[n]othing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”. As explained by the Committee on the Rights of Indigenous Peoples of the International Law Association,

“scholars, governments and indigenous peoples assert that Articles 3 and 46 para. 1 UNDRIP, taken together, recognize a right of self-determination for indigenous peoples that differs from the right to self-determination held by non-self-governing peoples living under colonial domination [or foreign occupation]. According to this view, UNDRIP confirms that indigenous peoples have an international legal right to a unique ‘contemporary’ form of self-determination, giving them the right to engage in ‘belated nation-building’, to negotiate with the others within their State, to exercise control over their lands and resources, and to operate autonomously”.²⁵⁵

For the sake of simplicity—and going along with the approach followed by the majority of scholars and in the context of the pertinent international practice—we may refer to this kind of self-determination as *internal self-determination*. By the very fact of being *internal*, this characterization of self-determination *does in no way imply any form of right to independence or*

254 See “Amnesty International calls for a TMT moratorium”, *The Hawaii Independent* (27 July 2019), available at <<https://thehawaiiindependent.com/story/amnesty-international-calls-for-tmt-moratorium>> (accessed on 21 Sep. 2019); “United Nations Indigenous Issues Expert Pens Letter To Governor About Mauna Kea”, *Big Island Video News* (17 Sep. 2019), available at <<https://www.bigislandvideonews.com/2019/09/17/united-nations-indigenous-issues-expert-pens-public-letter-to-governor-about-mauna-kea/>> (id.).

255 See International Law Association, *The Hague Conference* (2010), *Rights of Indigenous Peoples*, Interim Report, available at <<http://www.ila-hq.org/index.php/committees>> (accessed on 21 September 2019), p. 11.

secession from the territorial State to which a given people *de facto* belongs. It follows that the fact of referring to the Hawaiian people as holder of *this kind* of the right to self-determination is simply *misleading and incorrect*. In other words, the kind of self-determination commonly referred to as *internal* self-determination—which is the one that is recognized in favour of indigenous peoples—is *not* the category of the right to self-determination which is claimed by the Hawaiian people, intended as the *national people of the Hawaiian Kingdom*. In fact, as stated by the Committee on the Rights of Indigenous Peoples, the latter peoples have an international legal right to negotiate “within their State”, implying that indigenous peoples are not States of their own, but reside and are entitled to exercise their rights within an existing State. This characterization does *not* apply to Native Hawaiians as citizens of the Hawaiian Kingdom, who rather claim to be a national people under foreign occupation.

The “Kind” of Self-Determination Which Is Actually Claimed by the Hawaiian People

As emphasized above quoting the Canadian Supreme Court’s judgment *Reference: Secession of Quebec*, a “clear case where a right to *external self-determination* accrues is where a people is subject to *alien subjugation, domination or exploitation* outside a colonial context”.²⁵⁶ The *Hawaiian people*—as allegedly entitled to self-determination—is to be intended as the complex of subjects of the Hawaiian Kingdom, including not only those Hawaiians of aboriginal blood, whether pure or part,²⁵⁷ but also non-aboriginal Hawaiian individuals. At the same time, the kind of self-determination to which the Canadian Supreme Court refers—defined *external self-determination*—is the one which *actually entitles a people to exercise a right to independence, or secession*, from the State by which it is *de facto* occupied or subjugated. In other words, we are referring to the kind of self-determination attributed to a people

“whose government represents the whole of the people of its territory without distinction of any kind, that is to say, on a basis of equality, and in particular without discrimination on grounds of race, creed or colour, [which] complies with the principle of self-determination in respect of all of its people [...] To put it another way, the people of such a State exercise the right of self-determination through their participation in the government of the State on a basis of equality”.²⁵⁸

A people of this kind is consequently “entitled to the protection of its territorial integrity”.²⁵⁹ Consistently, “the Hawaiian people retain[s] a right to self-determination in a manner prescribed by general international law. Such a right would entail, at the first instance, the removal of all attributes of foreign occupation, and a restoration of the sovereign rights of the dispossessed government”.²⁶⁰

Applicability of the Right to Self-Determination During the American Occupation

Before the American occupation of 1893, the Hawaiians were used to self-governing themselves “through [the] participation in the government of the State on a basis of equality”,²⁶¹

256 See text corresponding to n. 244 above (emphasis added).

257 Hawaiian Kingdom law refers to the natives that comprise part of the national population of Hawaiian subjects as aboriginal, both pure and part; see *Naone v. Thurston*, 1 Haw. 392 (1856), *Rex v. Booth*, 2 Haw. 616 (1863), *In re Estate of His Late Majesty Lunalilo*, 4 Haw. 162 (1879), *Makea v. Nalua*, 4 Haw. 221 (1879), and *Bishop v. Gulick*, 7 Haw. 627 (1889).

258 See Crawford, 118-19.

259 *Id.*, p. 119.

260 See Craven, Chapter 3, 126.

261 See text corresponding to n. 258 above.

according to the model which, some decades later, would have been accepted as a generally recognized rule of international law. In other words, the Hawaiian people was exercising its right to self-determination before this right was recognized in international law. This clearly emerges from the conduct of international relations by the Hawaiian Kingdom at the relevant time. For instance, between 1855 and 1857, the then Hawaiian Majesty's Commissioner, and Political and Commercial Agent, to the Independent States and Tribes of Polynesia planned to annex to Hawai'i, with the help of a British adventurer, the Polynesian atoll of Sikaiana, in order to extend the Hawaiian Kingdom's territory south of the equator. The planned annexation deal, which King Kamehamea IV eventually refused to ratify, "included a plebiscite of the islanders to obtain their approval, a progressive idea unheard of at the time".²⁶² Also, less than one year after the beginning of the American occupation, a petition by the Hawaiian Patriotic League was addressed to US President Cleveland,²⁶³ in which the fact was highlighted that, as a result of the US intervention, Hawaiians were actually deprived of all their political rights, especially the right of being governed by a government representative of them, giving rise to "a political crime [which] was committed, not only against the legitimate Sovereign of the Hawaiian Kingdom, but also against the whole Hawaiian nation, a nation who, for the past sixty years, had enjoyed free and happy constitutional self-government".²⁶⁴ These examples clearly show that the idea of self-determination was well-entrenched in the understanding of internal and international relations by the Hawaiian Kingdom well before it was accepted as a rule of international law. Therefore, in claiming its entitlement to exercise the right to self-determination, the Hawaiian people—intended, as specified in the previous paragraph, as the complex of subjects of the Hawaiian Kingdom—does not only demand to enjoy a right considered as being attributed to it by international law, but also to recover its capacity to manage the government of the Kingdom consistently with what was used to do at the time predating the American occupation.

As noted above, the right to self-determination is a right of continuing character implying that "a State's domestic political institutions must be free from outside interference [...] [and prohibiting] States from invading and occupying the territory of other [...] States in such a manner as to deprive the people living there of their right of self-determination".²⁶⁵ It follows that, to the extent that the Hawaiian Kingdom may be considered as being subjected to foreign occupation (a postulation on which – as noted above – the present chapter is premised), the Hawaiian people retains its rights to self-determination, as established by customary international law, according to the terms explained above in this chapter.

Conclusion

Based on the postulation on which this chapter is premised, that the Hawaiian Kingdom was occupied by the United States in 1893 and that it has remained in the same condition since that time, it may be concluded that the potential implications on such a situation arising from the applicable international legal rules on human rights and self-determination are remarkable. In fact, the previous paragraphs have established that an adequate legal basis would exist for claiming in principle the international responsibility of the United States of America—as occupying Power—for violations of both internationally recognized human rights to the prejudice of individuals and of the right of the Hawaiian people to freely exercise self-determination,

262 See Lorenz Gonschor, "*Ka Hoku o Osiania*: Promoting the Hawaiian Kingdom as a Model for Political Transformation in Nineteenth-Century Oceania", in Sebastian Jobs and Gesa Mackenthun (eds.), *Agents of Transculturation. Border-Crossers, Mediators, Go-Betweens* 166 (2013).

263 See US House of Representatives, 53d Congress, 3d Session, Appendix II, *Foreign Relations of the United States*, 1894, Affairs in Hawaii 1294 (1895) 1294.

264 *Id.*, p. 1295.

265 See text corresponding to n. 250 above.

according to the terms explained above. Furthermore, the existence of a likely possibility that breaches of international human rights (provided that certain conditions are met) have actually taken place, and/or that the right to self-determination has been denied as a result of the occupation is *prima facie* realistic. It follows that, should the existence of these violations be effectively confirmed by adequate factual evidence to be determined by the Royal Commission of Inquiry, the Hawaiian Kingdom—as well as the individuals affected by human rights breaches—would be entitled to claim that such violations would be brought to an end, as well as the right to receive appropriate redress for the wrongs suffered. Also, in consideration of the fact that both human rights in general, and the right of a national people to exercise its self-determination in particular, are the object of *erga omnes* obligations, all States in the world would be affected by their breach, and would therefore be entitled—or would even have a moral duty—to appropriately react against the above violations.