Christopher McCrudden, 'Judicial Comparativism and Human Rights', *Oxford Legal Studies Research Paper* No. 29/2007, also published as a chapter in E. Örücü and D. Nelken (eds.), *Comparative Law: a Handbook*, (Oxford: Hart Publishing, 2007), p. 371 at pp. 378–9:

There are four uses of this type that are frequently not sufficiently distinguished. The first is where a court in jurisdiction 'X' quotes from a court in jurisdiction 'Y' a particular phrase or way of describing an issue that appears to the judge particularly apposite or elegant. Some judges in some jurisdictions have had a way with words that is deemed by other judges to be particularly worth quoting. This can be termed the 'rhetorical' use of 'foreign' material and is akin to using quotations from Shakespeare or the Bible. The second is where a court in jurisdiction 'X' cites 'foreign' material such as a judicial decision in jurisdiction 'Y' as part of the evidence to support an empirical conclusion that a particular approach is or is not workable in practice, or has particular unintended effects. The fact that it is a judicial opinion that is part of the evidence is, essentially, neither here nor there; it is merely a convenient source of the empirical information ... [The] third and fourth uses are the most controversial [because they treat foreign judgments as having some persuasive authority]. Both involve the use of a judicial decision in jurisdiction 'Y', or some other legal norm, that is not legally binding in jurisdiction 'X' (such as an unratified human rights convention), as part of a judicial decision regarding what is the legal position in jurisdiction 'X'. In both, the 'foreign' material is part of a normative argument, in a judicial context that is, in any event, often controversial. But there are significant differences within that general category. One use (our third approach) involves the citation of a 'foreign' material as establishing a reason (however attenuated) why a human rights claim against a governmental entity should not succeed. Another (our fourth approach), and probably the most controversial, involves the use of 'foreign' material in a similar context where it establishes a reason (however attenuated) why a rights claim should succeed.

One underestimated aspect of the emergence of this *jus commune* is that human rights have been autonomized from international law. The conversation of which this *jus commune* is a product has increasingly involved national constitutional courts, established outside international law, and whose interpretation of the human rights norms they are to apply, in most cases, take no account of the broader principles of general international law, even where the human rights they apply originate in international law. As a result, human rights have established themselves as a separate regime of international law, but one which increasingly borrows its methodology, including its methods of interpretation, to domestic constitutional law. Both for this reason and because they have developed their own specialized institutions, human rights therefore provide a good illustration of the problem of fragmentation of international law into a number of self-contained regimes, each with their own norms and dispute-settlement mechanisms, and relatively autonomous both *vis-à-vis* each other and *vis-à-vis* general international law (on this debate, see in particular, B. Simma, 'Self-Contained Regimes', *Netherlands Yearbook of International Law*, 16 (1985), 111; and the Report of the Study Group of the International Law Commission (chaired by

Martti Koskenniemi), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. doc. A/CN.4/L.702, 18 July 2006 (also reproduced in the Report on the work of the fifty-eighth session (1 May–9 June and 3 July–11 August 2006) of the International Law Commission to the UN General Assembly, Official Records, sixty-first session, Supplement No. 10 (A/61/10), chapter 12)). In practice, this autonomization of international human rights law, accelerated by the formation of a *jus commune* as a result of the conversation between judicial and non-judicial bodies applying human rights law, has favoured a certain activism of the specialized courts of expert bodies concerned. The example of the binding nature of interim measures indicated by human rights bodies illustrates this (see box 1.3.).

Unavoidably, risks of instrumentalization are present in this development. For example, this aspect of the jurisprudence of the European Court of Human Rights has been described as follows:

James G. Merrill, *The Development of International Law by the European Court of Human Rights*, second edn (Manchester University Press, 1993), p. 218:

Although the task of the [European Court of Human Rights] is to interpret the Convention, light can often be shed on its meaning by comparing it with other treaties, and the Court has made extensive use of this assistance. The situations in which it has done so, and which provide further evidence of its resourcefulness in developing the law, fall into three types. [1] When a provision needing interpretation was inspired by an earlier instrument dealing with the subject, the Court has naturally turned to the other treaty for guidance. [2] When, on the other hand, the Convention omits certain rights guaranteed in another treaty, the Court may refer to the other treaty to justify an interpretation holding that a right is not protected. [3] Finally, in cases falling into neither of the preceding categories, the Court may refer to another treaty to show that a particular interpretation is in harmony with other obligations in the human rights field.

The second attitude ([2]) is illustrated in the case law of the European Court of Human Rights by cases such as *Kosiek* v. *Germany*, in which the Court concludes that the ECHR cannot be read as including a right of everyone to equal access to public service in his or her country since, in contrast to the Universal Declaration of Human Rights (Art. 21 para. 2) and the International Covenant on Civil and Political Rights (Art. 25), neither the European Convention nor any of its Protocols sets forth a right of everyone to equal access to public service in his country, and that the omission of such a right was deliberate when Protocol No. 7 was drafted (Eur. Ct. HR (plenary), *Kosiek* v. *Germany*, judgment of 28 August 1986, para. 34); or by the refusal of the Court in the 1986 case of *Johnston* v. *Ireland* to recognize a right to the dissolution of marriage in the ECHR, since, in contrast to Article 16 of the Universal Declaration on Human Rights, Article 12 ECHR does not refer to the dissolution of marriage, an omission which the Court considers to be deliberate (Eur. Ct. HR, *Johnston* v. *Ireland*, judgment of 18 December 1986, at paras. 52–3). But this method of interpretation is clearly not immune from a certain selectivity: in

Box 1.3.

The binding nature of interim measures indicated by human rights bodies

Should the provisional measures adopted by human rights bodies or courts be treated as obligatory for the parties to whom they are addressed? The controversy about this issue illustrates how the idea of a *jus commune* of human rights can encourage an activist attitude by human rights bodies. While they set up judicial or quasi-judicial bodies which may receive individual communications or applications from victims of human rights violations, the major international human rights treaties are silent about the possibility of these bodies granting provisional measures, protecting the alleged victims until a decision is made on the merits of their complaint. However, the idea has gradually emerged that this power of human rights bodies is inherent in their jurisdiction, and that it should be recognized in the name of an effective protection of human rights.

This development was inaugurated under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. When, acting in accordance with Article 18(2) of the Convention, the Committee against Torture adopted its Rules of Procedure, it included a Rule 108 §9 enabling it to adopt provisional measures in proceedings brought by individuals alleging a violation of the Convention against Torture. In the case of *Cecilia Rosana Núñez Chipana* v. *Venezuela*, it took the view that non-compliance with such provisional measures should be considered a violation of the Convention, as 'the State party, in ratifying the Convention and voluntarily accepting the Committee's competence [to examine individual communications] under article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee' (Committee against Torture, *Cecilia Rosana Núñez Chipana* v. *Venezuela*, final views of 10 November 1998 Communication No. 110/1998 (CAT/C/21/D/110/1998)). The Human Rights Committee followed this lead. Under Rule 86 of its rules of procedure, which the Human Rights Committee adopts in accordance with Article 39(2) of the ICCPR, the Human Rights Committee 'may, prior to forwarding its views on the communication to the State party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation'. The Human Rights Committee considered unanimously in its final views of 19 October 2000 adopted in the case of *Dante Piandiong, Jesus Morallos and Archie Bulan* v. *The Philippines*, that a refusal of a State to comply with such measures, 'especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol [providing for the possibility of individual complaints filed by alleged victims of violations of the ICCPR]' (Human Rights Committee, final views adopted on the Communication n°869/1999 (U.N. doc. CCPR/C/70/D/869/1999), *Annual Rep.* I, p. 181). It has repeated this statement since (see, e.g. Human Rights Committee, *Weiss* v. *Austria*, communication No. 1086/02, final views of 8 May 2003 (CCPR/C/77/D/1086/2002)), confirming its view that the States parties to the Covenant could be under an obligation to comply with the interim measures indicated by the Committee,

despite the fact that the power to adopt such interim measures was not attributed to the Committee under the text of the Covenant itself.

In a judgment of 4 February 2005, the European Court of Human Rights considered for the first time in a final judgment that a refusal by a State party to the European Convention on Human Rights to comply with an interim measure indicated by a Chamber of the Court or its President on the basis of Article 39 of the Rules of the Court constitutes a violation of Article 34 of the Convention, which imposes an obligation on the Contracting Parties 'not to hinder in any way the effective exercise' of the right to individual application (European Court of Human Rights (Grand Chamber), judgment of 5 February 2005 in the case of *Mamatkulov and Askarov* v. *Turkey*, Appl. Nos. 46827/99 and 46951/99). This represented a shift in attitude from the part of the Court. In its previous case law, while finding that there existed a general practice of States parties to the Convention to comply with such interim measures, the Court fell short from identifying the emergence of a rule of a customary nature in the application of the European Convention on Human Rights. Instead, it held: 'The practice of Contracting Parties in this area shows that there has been almost total compliance with Rule 36 indications [indications given by the European Commission of Human Rights or its President that, in the interest of the proceedings, the parties should refrain from adopting certain measures, based on Rule 36 of the Rules of Procedure of the European Commission of Human Rights]. Subsequent practice could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision (see, mutatis mutandis, [the *Soering* v. *United Kingdom*, judgment of 7 July 1989], Series A No. 161, 40–41, §103, and Article 31 §3 (b) of the Vienna Convention of 23 May 1969 on the Law of Treaties) but not to create new rights and obligations which were not included in the Convention at the outset ... In any event, as reflected in the various recommendations of the Council of Europe bodies [calling upon the States parties to the Convention to agree to recognizing the Court has a power to adopt provisional measures of a binding character], *the practice of complying with Rule 36 indications cannot have been based on a belief that these indications gave rise to a binding obligation* ... It was rather a matter of good faith co-operation with the Commission in cases where this was considered reasonable and practicable' (*Cruz Varas* v. *Sweden*, judgment of 20 March 1991, Series A No. 201, at para. 100 (emphasis added)) (for comments, see, e.g. R. Bernhardt, 'Interim Measures of Protection under the European Convention on Human Rights', in R. Bernhardt (ed.), *Interim Measures Indicated by International Courts* (Berlin: Springer Verlag, 1994), p. 102; R. St. J. Mcdonald, 'Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights', 52(3–4) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 703 (1992)).

There was good reason for the Court to be cautious. The Rules of the Court are adopted by the plenary Court under Article 26 of the European Convention on Human Rights. They are thus not agreed upon by the States parties to the Convention. Their status therefore differs markedly from that of Article 41 of the Statute of the International Court of Justice, which the International Court of Justice interpreted in the *LaGrand (Germany* v. *United States)*, judgment of 27 June 2001 as imposing on the States parties to a dispute before the Court an

obligation to comply with the provisional measures indicated under that provision, despite the vague character of the wording of that provision (Art. 41 of the Statute of the International Court of Justice provides: '1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council'). Nor may Article 39 of the Rules adopted by the European Court of Human Rights be considered equivalent to Article 63(2) of the American Convention on Human Rights, which provides explicitly for a power of the Inter-American Court of Human Rights to adopt provisional measures 'in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons'. Both the Statute of the International Court of Justice and the American Convention on Human Rights are international treaties to whose terms the States parties have agreed. No equivalent clause exists in the European Convention on Human Rights. However, in *Mamatkulov and Askarov* v. *Turkey*, the Court considered that the precedents set by the Committee against Torture and the Human Rights Committee authorized it to consider, like these expert bodies, that the obligatory character of interim measures should be considered as a condition of the effectiveness of the protection provided to the individual by a system of individual communications. The episode offers a clear example of human rights bodies developing a doctrine, motivated perhaps by the need to ensure an effective protection of human rights, but which is difficult to reconcile with an orthodox (some might say conservative) view of international law. That this development was made possible by a number of human rights bodies moving in the same direction and, in part, legitimizing their interpretative inventivity by referring to one another's case law, seems hardly contestable.

the case of *Burghartz* v. *Switerland*, the Court noted: 'Unlike some other international instruments, such as the International Covenant on Civil and Political Rights (Article 24 para. 2), the Convention on the Rights of the Child of 20 November 1989 (Articles 7 and 8) or the American Convention on Human Rights (Article 18), Article 8 of the Convention does not contain any explicit provisions on names. As a means of personal identification and of linking to a family, a person's name nonetheless concerns his or her private and family life [and thus deserves protection under Art. 8 ECHR]' (Eur. Ct. HR, *Burghartz* v. *Switzerland*, judgment of 22 February 1994, para. 24). We can safely assume that the European Court of Human Rights has agreed to include the protection of the name of the individual in Article 8 of the European Convention on Human Rights, despite the absence of an explicit reference to the name in that provision, because other international human rights instruments do contain such a reference and ensure such a protection: once the 'right to the name' (whatever its specific implications) is recognized under at least some human rights treaties, reading it into the Convention is easier to justify. This seems to illustrate rather the third of the three attitudes ([3]) distinguished by Merrill, in which the Court draws on the existing corpus of international human rights law to develop the interpretation of the ECHR in line with the content of other human

rights instruments, since all these instruments have their common source of inspiration in the Universal Declaration of Human Rights.

Or consider the reasoning followed by the European Committee of Social Rights, to justify setting aside the appendix to the European Social Charter which explicitly states that the Charter only benefits nationals of the Contracting parties:

European Committee on Social Rights, *International Federation for Human Rights (FIDH)* v. France, Collective Complaint No. 14/2003, decision on the merits of 8 September 2004:

[Paragraph 1 of the Appendix to the Revised European Social Charter provides that a wide range of social rights protected under the Charter, including the right to social and medical assistance (Art. 13 para. 1) and the right to the protection of the child (Art. 17), at stake in this case, cover foreigners 'only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned'. The complaining non-governmental organization nevertheless considered that the Revised European Social Charter had been violated by France, since French law excluded the provision of medical assistance to children of undocumented migrants on French territory, except as regards treatment for emergencies and life threatening conditions. The Committee set aside the limitation imposed on the scope of application *ratione personae* of the Charter:]

26. The present complaint raises issues of primary importance in the interpretation of the Charter. In this respect, the Committee makes it clear that, when it has to interpret the Charter, it does so on the basis of the 1969 Vienna Convention on the Law of Treaties. Article 31§1 of the said Convention states: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

27. The Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention of Human Rights.

28. Indeed, according to the Vienna Declaration of 1993, all human rights are 'universal, indivisible and interdependent and interrelated' (para. 5). The Committee is therefore mindful of the complex interaction between both sets of rights.

29. Thus, the Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter.

30. As concerns the present complaint, the Committee has to decide how the restriction in the Appendix ought to be read given the primary purpose of the Charter as defined above. The restriction attaches to a wide variety of social rights in Articles 1–17 and impacts on them differently. In the circumstances of this particular case, it treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment.

31. Human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights and health care is a prerequisite for the preservation of human dignity.

32. The Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.

This example and that of interim protection granted by human rights bodies (see box 1.3.) are both episodes in which the reference to case law from other courts or quasi-judicial bodies, or to the corpus of international human rights law, has served to expand the power of the courts or bodies tasked with the function of monitoring. In other cases, such references serve to economize judicial resources, by borrowing solutions from other jurisdictions which those jurisdictions are presumed to have carefully weighed, and which can be trusted in developing appropriate solutions. Or they may be a means to ensure that advanced democracies shall move together in the same direction, without excessive differences in approach to similar issues. Consider the following examples:

United States Supreme Court, *Lawrence et al.* v. *Texas*, 539 U.S. 558 (2003):

[The case has its source in the conviction for deviate sexual intercourse of Lawrence and Gardner, two adult men who were found engaging in a private, consensual sexual act, in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct. Although, in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), a similar statute had been considered not to be in violation of the Due Process Clause of the Fourteenth Amendment to the United States Federal Constitution, the Court here reconsiders this holding, which, it is now led to conclude, was wrongly decided. Instead, the Court now finds, the liberty protected by the United States Constitution allows homosexual persons the right to choose to enter into relationships in the confines of their homes and their own private lives and still retain their dignity as free persons. The excerpts below illustrate the role played by the reference to the jurisprudence of the European Court of Human Rights in the reasoning of the United States Supreme Court.]

Justice Kennedy delivered the opinion of the Court.

It must be acknowledged ... that the Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.' *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 850 (1992) ...

Chief Justice Burger joined the opinion for the Court in Bowers and further explained his views as follows: 'Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards.' 478 U.S., at 196 ...

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, §1.

Of even more importance, almost five years before Bowers was decided the European Court of Human Rights considered a case with parallels to Bowers and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon* v. *United Kingdom*, 45 Eur. Ct. H.R. (1981) §52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in Bowers became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the Bowers decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances ...

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* v. *Hardwick* should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.' Casey, *supra*, at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind

us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The following cases relate to assisted suicide and whether this constitutes an unreasonable restriction to the liberty of the individual. They too illustrate the reliance on comparative law in order to adjudicate human rights claims.

United States Supreme Court, *Washington* v. *Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258 (1997):

[At issue in this case was the criminalization of assisted suicide in the State of Washington. The State made '[p]romoting a suicide attempt' a felony, and provided: 'A person is guilty of [that crime] when he knowingly causes or aids another person to attempt suicide.' Petitioners before the Court sought a declaration that the ban on physician-assisted suicides is, on its face, unconstitutional. They argued that the Fourteenth Amendment's Due Process Clause protected a liberty interest extending to a personal choice by a mentally competent, terminally ill adult to commit physician assisted suicide. The Supreme Court disagreed. It found that the asserted right to commit suicide and to be assisted in doing so had no trace in the United States' traditions, given the country's consistent, almost universal, and continuing rejection of the right, even for terminally ill, mentally competent adults. Rehnquist, C.J. delivered the opinion for a unanimous Court. Referring to the concern of the State of Washington that 'permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia', the Court noted:]

This concern is further supported by evidence about the practice of euthanasia in the Netherlands. The Dutch government's own study revealed that in 1990, there were 2,300 cases of voluntary euthanasia (defined as 'the deliberate termination of another's life at his request'), 400 cases of assisted suicide, and more than 1,000 cases of euthanasia without an explicit request. In addition to these latter 1,000 cases, the study found an additional 4,941 cases where physicians administered lethal morphine overdoses without the patients' explicit consent. Physician Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady, at 12–13 (citing Dutch study). This study suggests that, despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia. Id., at 16–21; see generally C. Gomez, Regulating Death: Euthanasia and the Case of the Netherlands (1991); H. Hendin, Seduced By Death: Doctors, Patients, and the Dutch Cure (1997). The New York Task Force, citing the Dutch experience, observed that 'assisted suicide and euthanasia are closely linked', New York Task Force 145, and concluded that the 'risk of ... abuse is neither speculative nor distant,' id., at 134.

The issue of assisted suicide was presented before European courts in the case of Dianne Pretty. Ms Pretty was suffering from a progressive neuro-degenerative disease of motor cells within the central nervous system, for which there was no treatment available.

Because of the weakness affecting the voluntary muscles of the body, she was unable to commit suicide herself, although she considered that her situation was intolerable, as she was essentially paralysed from the neck downwards, was tube-fed, and would soon die in undignified conditions. However, in English law it was a crime to assist another to commit suicide (section 2(1) of the Suicide Act 1961), and Ms Pretty had failed to obtain from the Director of Public Prosecutions an undertaking not to prosecute her husband should he assist her to commit suicide in accordance with her wishes (for a fuller examination of this case, see chapter 4, section 2.4.). In their successive judgments on this case, both the House of Lords in the United Kingdom and the European Court of Human Rights rejected the claims of Ms Pretty based on the European Convention on Human Rights. Both also referred to the judgment of the Supreme Court of Canada in *Rodriguez* v. *Attorney General of Canada* [1993] 3 S.C.R. 519. The appellant in that case, Sue Rodriguez, suffered from a disease similar to that afflicting Ms Pretty. Invoking section 7 of the Canadian Charter of Rights and Freedoms (which states that 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'), she had sought an order which would have allowed a qualified medical practitioner to assist her to commit suicide at a time of her choosing. While suicide in Canada was not a crime, section 241(b) of the Criminal Code was effectively identical to section 2(1) of the English 1961 Act: it contained a blanket prohibition of assistance to suicide. Ms Rodriguez failed in her claim that such prohibition was unconstitutional. The majority of the Supreme Court took the view that the prohibition in section 241(b) fulfils the government's objective of protecting the vulnerable, and that it reflects the policy of the state that human life should not be depreciated by allowing life to be taken, which itself stems from the recognition of the sanctity of life – the fact that, in Dworkin's terms, human life is seen to have a deep intrinsic value of its own (R. Dworkin, *Life's Dominion: an Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Alfred Knopf, 1993)). The Supreme Court also noted that a blanket prohibition on assisted suicide similar to that in section 241(b) seemed to be the norm among Western democracies, and that such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights. The following excerpts illustrate the role of comparative jurisprudence in achieving a consensus on the issue of assisted suicide, and in maintaining the distinction between passive and active forms of intervention in the dying process:

Supreme Court of Canada, *Rodriguez* v. *British Columbia (Attorney General)* [1993] 3 S.C.R. 519 (opinion for a plurality of the Court by Sopinka J):

A brief review of the legislative situation in other Western democracies demonstrates that in general, the approach taken is very similar to that which currently exists in Canada. Nowhere is assisted suicide expressly permitted, and most countries have provisions expressly dealing with assisted suicide which are at least as restrictive as our s. 241 [citing provisions from criminal legislation in Austria, Italy, and Spain].

The relevant provision of the Suicide Act, 1961 of the United Kingdom punishes a 'person who aids, abets, counsels or procures the suicide of another or an attempt by another, to commit suicide', and this form of prohibition is echoed in the criminal statutes of all state and territorial jurisdictions in Australia (M. Otlowski, "Mercy Killing Cases in the Australian Criminal Justice System" (1993) 17 Crim. L.J. 10). The U.K. provision is apparently the only prohibition on assisted suicide which has been subjected to judicial scrutiny for its impact on human rights prior to the present case. In the Application No. 10083/82, *R.* v. *United Kingdom*, July 4, 1983, D.R. 33, p. 270, the European Commission of Human Rights considered whether s. 2 of the Suicide Act, 1961 violated either the right to privacy in Article 8 or freedom of expression in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The applicant, who was a member of a voluntary euthanasia association, had been convicted of several counts of conspiracy to aid and abet a suicide for his actions in placing persons with a desire to kill themselves in touch with his co-accused who then assisted them in committing suicide. The European Commission held (at pp. 271–72) that the acts of aiding, abetting, counselling or procuring suicide were 'excluded from the concept of privacy by virtue of their trespass on the public interest of protecting life, as reflected in the criminal provisions of the 1961 Act', and upheld the applicant's conviction for the offence. Further, the Commission upheld the restriction on the applicant's freedom of expression, recognizing (at p. 272): 'the State's legitimate interest in this area in taking measures to protect, against criminal behaviour, the life of its citizens particularly those who belong to especially vulnerable categories by reason of their age or infirmity. It recognises the right of the State under the Convention to guard against the inevitable criminal abuses that would occur, in the absence of legislation, against the aiding and abetting of suicide.'

Although the factual scenario in that decision was somewhat different from the one at bar, it is significant that neither the European Commission of Human Rights nor any other judicial tribunal has ever held that a state is prohibited on constitutional or human rights grounds from criminalizing assisted suicide.

Some European countries have mitigated prohibitions on assisted suicide which might render assistance in a case similar to that before us legal in those countries. In the Netherlands, although assisted suicide and voluntary active euthanasia are officially illegal, prosecutions will not be laid so long as there is compliance with medically established guidelines. Critics of the Dutch approach point to evidence suggesting that involuntary active euthanasia (which is not permitted by the guidelines) is being practised to an increasing degree. This worrisome trend supports the view that a relaxation of the absolute prohibition takes us down 'the slippery slope'. Certain other European countries, such as Switzerland and Denmark, emphasize the motive of the assistor in suicide, such that the Swiss Penal Code, art. 115, criminalizes only those who incite or assist a suicide for a selfish motive, and the Danish Penal Code, art. 240, while punishing all assistance, imposes a greater penalty upon those who act out of self-interest. In France, while no provision of the Penal Code addresses specifically the issue of assisted suicide, failure to seek to prevent someone from committing suicide may still lead to criminal sanctions under art. 63, para. 2 (omission to provide assistance to a person in danger) or art. 319 (involuntary homicide by negligence or carelessness) of that Code. Moreover, the Loi no 87–1133 du 31 décembre 1987 introduced two new articles to the Penal Code, arts. 318–1 and 318–2, which criminalize the provocation of suicide. This offence, which requires a form of incitement over and above merely aiding in the commission of a suicide, was adopted in response to the macabre impact of the book Suicide, mode d'emploi (1982).

Similarly, a few American jurisdictions take into account whether the accused caused the victim to commit suicide by coercion, force, duress or deception in deciding whether the charge should be murder, manslaughter or assisted suicide (Connecticut, Maine and Pennsylvania) or whether the person is guilty of even assisted suicide (Puerto Rico and Indiana). See C. D. Shaffer, 'Criminal Liability for Assisting Suicide' (1986), 86 Colum. L. Rev. 348, at pp. 351–53, nn. 25–26, 35–36. As is the case in Europe and the Commonwealth, however, the vast majority of those American states which have statutory provisions dealing specifically with assisted suicide have no intent or malice requirement beyond the intent to further the suicide, and those states which do not deal with the matter statutorily appear to have common law authority outlawing assisted suicide (Shaffer, supra, at p. 352; and M. M. Penrose, 'Assisted Suicide: A Tough Pill to Swallow' (1993), 20 Pepp. L. Rev. 689, at pp. 700–701). It is notable, also, that recent movements in two American states to legalize physician-assisted suicide in circumstances similar to those at bar have been defeated by the electorate in those states. On November 5, 1991, Washington State voters defeated Initiative 119, which would have legalized physician-assisted suicide where two doctors certified the patient would die within six months and two disinterested witnesses certified that the patient's choice was voluntary. One year later, Proposition 161, which would have legalized assisted suicide in California and which incorporated stricter safeguards than did Initiative 119, was defeated by California voters (usually thought to be the most accepting of such legal innovations) by the same margin as resulted in Washington – 54 to 46 percent. In both states, the defeat of the proposed legislation seems to have been due primarily to concerns as to whether the legislation incorporated adequate safeguards against abuse (Penrose, supra, at pp. 708–14). I note that, at least in the case of California, the conditions to be met were more onerous than those set out by McEachern C.J.B.C. in the court below and by my colleagues the Chief Justice and McLachlin J.

Overall, then, it appears that a blanket prohibition on assisted suicide similar to that in s. 241 is the norm among Western democracies, and such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights. Recent attempts to alter the status quo in our neighbour to the south have been defeated by the electorate, suggesting that despite a recognition that a blanket prohibition causes suffering in certain cases, the societal concern with preserving life and protecting the vulnerable rendered the blanket prohibition preferable to a law which might not adequately prevent abuse.

House of Lords (United Kingdom), *R. (on the Application of Mrs Dianne Pretty (Appellant))* v. *Director of Public Prosecutions (Respondent) and Secretary of State for the Home Department (Interested Party)*, judgment of 29 November 2001 [2001] UKHL 61, leading judgment by Lord Bingham of Cornhill:

23. It is evident that all save one of the judges of the Canadian Supreme Court were willing to recognise section 7 of the Canadian charter as conferring a right to personal autonomy extending even to decisions on life and death. Mrs Pretty understandably places reliance in particular on the judgment of McLachlin J. [who expressed a dissenting opinion], in which two other members of the court concurred. But a majority of the court regarded that right as outweighed on the facts by the principles of fundamental justice. The judgments were moreover

directed to a provision with no close analogy in the European Convention. In the European Convention the right to liberty and security of the person appears only in article 5(1), on which no reliance is or could be placed in the present case. Article 8 contains no reference to personal liberty or security. It is directed to the protection of privacy, including the protection of physical and psychological integrity: *X and Y* v. *Netherlands* [judgment of 26 March 1985]. But article 8 is expressed in terms directed to protection of personal autonomy while individuals are living their lives, and there is nothing to suggest that the article has reference to the choice to live no longer.

European Court of Human Rights (4th sect.), *Pretty* v. *United Kingdom* (Appl. No. 2346/02), judgment of 29 April 2002, para. 66:

In the case of *Rodriguez* v. *Attorney General of Canada* ([1994] 2 L.R.C. 136), which concerned a not dissimilar situation to the present, the majority opinion of the Supreme Court considered that the prohibition on the appellant in that case from receiving assistance in suicide contributed to her distress and prevented her from managing her death. This deprived her of autonomy and required justification under principles of fundamental justice. Although the Canadian court was considering a provision of the Canadian Charter framed in different terms from those of Article 8 of the Convention, comparable concerns arose regarding the principle of personal autonomy in the sense of the right to make choices about one's own body.

1.1. Questions for discussion: the role of comparative jurisprudence in human rights adjudication

1. What are the advantages and the dangers associated with an increased use of judgments or materials from other jurisdictions in human rights litigation? Are certain uses of comparative jurisprudence legitimate, while others are not?
2. If there is a need to distinguish between different functions of comparative jurisprudence in human rights litigation, is the typology proposed by Ch. McCrudden complete? Can you think of uses of foreign materials that are not captured by this typology?
3. Is there a risk of selectivity in the reference to foreign jurisprudence? Consider the use of foreign examples in the 1993 case of *Rodriguez* v. *Attorney General of Canada* decided by the Supreme Court of Canada. Why are examples from Europe or from the United States primarily referred to? Within Europe itself, why do certain countries seem to matter most in shaping a consensus? Is there a principled way to guide the reference to foreign jurisprudence, for instance the notion of 'Western democracies'?
4. Should the courts making use of comparative jurisprudence adopt a static or a dynamic approach to the material examined? Should they seek to identify some sort of mathematical average between jurisdictions, or should they instead seek to pay attention to the tendency identified in most recent changes?

5. Are the House of Lords and the European Court of Human Rights in disagreement about the relevance of the 1993 case of *Rodriguez* v. *Attorney General of Canada* decided by the Supreme Court of Canada, or do they differ, rather, on the interpretation to be given to that case?

4 HUMAN RIGHTS LAW AS PART OF INTERNATIONAL LAW

This section discusses the relationship of human rights law to general international law. It first examines the extent to which human rights are protected under general international law, beyond the specific treaties embodying them (section 4.1.). Whether they base their argument on the customary nature of the rights enumerated in the Universal Declaration of Human Rights, on the status of human rights as general principles of law, or on the recognition by the UN Charter of human rights and fundamental freedoms as objectives all the Members of the United Nations have to co-operate in achieving, most authors consider that human rights treaties are the embodiment, in treaty form, of obligations which are already imposed on States. This does not extend, of course, to the monitoring mechanisms which such treaties may include. But, insofar as the substantive rights are concerned, human rights treaties would simply codify already existing obligations: they would not create entirely new obligations for their States parties.

Next, this section examines the status of human rights norms in the hierarchy of international law (section 4.2.). Because of the combination of Articles 55 and 56 of the UN Charter and Article 103 of the Charter, and due to the *jus cogens* nature of at least certain of the internationally recognized human rights, human rights treaties may be considered to be hierarchically superior to other norms of international law, whether they have their source in treaties, in custom, or in general principles of law – all three of which are sources of international law, according to Article 38(1) of the Statute of the International Court of Justice. In addition, serious breaches of peremptory norms of international law – i.e. 'a gross or systematic failure by the responsible State to fulfil the obligation' forming part of *jus cogens* – entail specific obligations on other States to contribute to a cessation of the violation.

Third, human rights norms present certain characteristics which distinguish them from other rules of international law. Whether they are based on custom or on other sources of international law, and whether or not they have the nature of *jus cogens* norms, human rights are often considered to impose obligations *erga omnes* – obligations, that is, towards all the States of the international community (section 4.3.). In addition, human rights treaties are not concluded in order to grant reciprocal advantages to the contracting States: their object, rather, is to protect individuals under the jurisdiction of each State, and this may result in the Vienna Convention on the Law of Treaties being inadequate, in certain respects, as regards human rights treaties (section 4.4.). However, while there exists substantial agreement on these general propositions, both their precise significance and the consequences they entail remain disputed.

Finally, the issue of reservations to human rights treaties is included in this section, as it provides a good illustration of the unsettled relationship of international human rights law to general international law (section 4.5.).

4.1 Human rights beyond treaties

(a) Human rights in the UN Charter

Whether or not they have ratified the relevant treaties which have proliferated since the 1950s at international and regional levels, all States are bound to respect internationally recognized human rights. The Universal Declaration of Human Rights may be seen in this respect as simply clarifying the meaning of the provisions of the UN Charter which refer to human rights as a purpose to be achieved by the Organization and by its Member States. In particular, Article 55 of the Charter imposes on the United Nations a duty to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'; under Article 56, all Members of the United Nations 'pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55'.

Scholars have sometimes questioned whether these provisions in fact imposed legal obligations, or simply defined in general terms a programme of action for the organization (see, e.g. M. O. Hudson, 'Integrity of International Instruments', *American Journal of International Law*, 42 (1948), 105–8; H. Kelsen, *The Law of the United Nations* (London: The London Institute of World Affairs, 1950), pp. 29–32; in favour of seeing in these provisions of the UN Charter the source of legal obligations, see in particular H. Lauterpacht, *International Law and Human Rights* (New York; Frederick Praeger, Inc., 1950), at pp. 147–9). The sceptical views, however, were often confusing the question whether the Charter's provisions were self-executing, with the question whether they were legally binding; and they were premised on the indeterminate character of the content of the 'human rights and fundamental freedoms' referred to in the Charter, which the Universal Declaration of Human Rights precisely sought to make explicit. The International Court of Justice seems to have definitively put an end to the controversy when it delivered its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*, where it stated that 'to establish ..., and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter' (I.C.J. Reports 1971, 16). Although the statement was made in relation to the obligations of South Africa as a mandatory power in South West Africa, there is no reason to restrict it to this hypothesis: instead, it would seem to follow from the Opinion that the UN Charter imposes on all States that they comply, at a minimum, with a core set of human rights, which the Charter refers to without listing them exhaustively (see E. Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter', *American Journal of International Law*, 66, No. 2 (1972), 337–51, esp. 348–9).

Even if we accept that the UN Charter imposes compliance with human rights to all the Member States of the Organization, it still is only addressed, in principle, to States and the institutions of the UN, rather than to all subjects of international law. However, at the same time that they were codified in international treaties, human rights have also been recognized as binding upon all subjects of international law as part of general international law, either because they are part of customary international law, or because they constitute general principles of law.

(b) Human rights as part of customary international law

The growing consensus is that most, if not all, of the rights enumerated in the Universal Declaration of Human Rights have acquired a customary status in international law (see in particular L. Henkin, *The Age of Rights* (New York: Columbia University, 1990), p. 19; N. S. Rodley, 'Human Rights and Humanitarian Intervention: the Case Law of the World Court', *International and Comparative Law Quarterly*, 38 (1989), at 321, esp. 333; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989); L. B. Sohn, 'The Human Rights Law of the Charter', *Texas International Law Journal*, 12 (1977), 129 at 132–4; H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, 25 (1995–1996), 287). Custom in principle requires, to be established, both consistent identifiable state practice, and evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio juris sive necessitatis*). The classic definition is that adopted by the International Court of Justice in the *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark* and *Federal Republic of Germany* v. *Netherlands)* (I.C.J. Reports 1969, 44, para. 77): 'Not only must the acts concerned amount to settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to their legal obligation. The frequency or even habitual character of the acts is not in itself enough.'

It has been argued, however, that, in the field of human rights, evidence of custom could be based on the resolutions of the UN General Assembly and statements made within other international organizations, demonstrating a clear commitment of the international community towards certain values, while inconsistent State practice on the other hand would not be an obstacle to the identification of such custom. For instance, the fact that the universal periodic review performed by the UN Human Rights Council takes as a reference, in the review of each State, not only the Charter of the United Nations, but also the Universal Declaration of Human Rights, as well as the human rights instruments to which a State is party (appendix to the Human Rights Council Resolution 5/1 'Institution-building of the United Nations Human Rights Council' (18 June 2007): see further chapter 10), provides as least an indication of the expectation of the international community that all States should comply with a basic corpus

of human rights as contained in the UDHR, whichever treaties they have ratified. Some authors have gone so far as to suggest that State 'practice', for the purposes of custom determination in the field of human rights, is composed of official declarations and participation in the negotiation of human rights instruments, as well as of incorporation of human rights within the national legal orders. Consider for instance the attitude adopted by the 1987 *Restatement (Third) of the Foreign Relations Law of the United States* (for an exposé of the background assumptions underlying this position, see the Hague Academy course of Oscar Schachter: O. Schachter, 'International Law in Theory and Practice: General Course in Public International Law', *Recueil des cours*, 178 (1982–V), 2 at 333–42), or the position expressed by Theodor Meron:

American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, Minn.: American Law Institute Publishers, 1987):

[§701, n. 2] Practice accepted as building customary human rights law includes: virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles by states in regional organizations in Europe, Latin America, and Africa ...; general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and law; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states.

[Applying this criterion, the *Restatement* concludes in §702 that:] A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), p. 93:

[T]he initial inquiry must aim at the determination whether, at a minimum, the definition of the core norm claiming customary law status and preferably the contours of the norm have been widely accepted. In this context my own preferred indicators evincing customary human rights are, first, the degree to which a statement of a particular right in one human rights instrument,

> especially a human rights treaty, has been repeated in other human rights instruments, and second, the confirmation of the right in national practice, primarily through the incorporation of the right in national laws ... It is, of course, to be expected that those rights which are most crucial to the protection of human dignity and of the universally accepted values of humanity, and whose violation triggers broad condemnation by the international community, will require a lesser amount of confirmatory evidence.

Essentially two arguments have been put forward in favour of this position. First, it can be said that the 'practice' of a State towards its own population (the rights of which it is the purpose of the international human rights regime to protect) would be difficult if not impossible to ascertain for practical reasons (violations committed by a State within its borders frequently go unnoticed), so that customary international law could only be determined, not by reference to how States actually behave, but by the justifications they provide for the way they behave: in this view, 'even massive abuses do not militate against assuming a customary rule as long as the responsible author state seeks to hide and conceal its objectionable conduct instead of justifying it by invoking legal reasons' (C. Tomuschat, *Human Rights Between Idealism and Realism* (Oxford University Press, 2003), p. 34). Second, this view about the identification of practice as building customary human rights law is also related to the fact that States have no subjective interest in other States complying with their human rights obligations, except in those rare instances where the rights of the nationals of the first States are at stake. As a result, there is little State practice on the basis of which to identify the formation of a custom, since most instances of human rights violations do not give rise to protests by other States of the international community (O. Schachter, 'International Law in Theory and Practice: General Course in Public International Law', *Recueil des cours*, 178 (1982–V), at 334).

Thus, a 'modern' view of custom has gained some acceptance in the field of human rights (for a discussion, see M. Akehurst, 'Custom as a Source of International Law', *British Yearbook of International Law* (1974–5), 1 *et seq.*; L. Henkin, 'Human Rights and State 'Sovereignty'', 25 *Georgia Journal of International Law* 37 (1995–1996)). This view presents itself as a substitute to the classical view as reflected in Article 38(1) of the Statute of the International Court of Justice. In the 'modern' approach, State 'practice' in the usual sense of 'behaviour' is less determinative than authoritative statements made by governments or intergovernmental bodies. This turn is favoured in part by a general identity crisis of custom as a source of international law. It has been encouraged by well-intentioned authors, eager to provide human rights law with a standing in customary law which would compensate for what was perceived in the 1970s and 1980s as the lack of enthusiasm of States in the ratification of human rights treaties. However, this 'modern' view results in distorting the classical notion of custom in such a way that the notion is barely even recognizable under its new disguise. Philip Alston and Bruno Simma have also argued that it may be ideologically biased

towards the recognition of certain particular human rights as forming part of customary international law. The result of the 'new' approach, it turns out, which emphasizes deduction from statements instead of induction from State behaviour, is that those civil and political rights which are recognized in United States constitutional law and which the United States invokes against other States are included, while other rights, equally essential and whose status is identical within the international bill of rights, are excluded. These authors therefore suggest that a certain 'sub-conscious chauvinism' may be at work, for instance, in the list of human rights recognized as customary international law in the *Restatement*. They ask whether 'any theory of human rights law which singles out race but not gender discrimination, which condemns arbitrary imprisonment but not capital punishment for crimes committed by juveniles or death by starvation and which finds no place for a right of access to primary health care, is not flawed in terms both of the theory of human rights and of United Nations doctrine' (B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles', 12 *Australian Yearbook of International Law* 82 (1988–1989), at 94–5).

The dissatisfaction with the substitution of a 'modern' view of custom to the 'traditional' view has led, in turn, to two reactions. One part of the doctrine has sought to accommodate the competing claims of the 'traditional' and the 'modern' views of custom. Thus for instance, Frederic Kirgis has put the requirements of State practice and *opinio juris*, which compete for influencing the emergence of custom, on a sliding scale: whereas, at one end of the scale, highly consistent State practice should suffice to establish the existence of *opinio juris*, conversely and at the other end, strong indications that there exists a consensus among States about the unacceptability of certain forms of behaviour may establish custom, even if State practice is inconsistent (F. Kirgis, 'Custom on a Sliding Scale', *American Journal of International Law*, 81 (1987), 146; see also, for other attempts in this direction, J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', *Oxford Journal of Legal Studies*, 16 (1996), 85, and A. E. Roberts, 'Traditional and Modern Approaches to Customary International Law: a Reconciliation', *American Journal of International Law*, 95 (2001), 757). But, alternatively, we may turn to other arguments in order to ground human rights law in general international law. The most promising avenue in this direction, and the one preferred by P. Alston and B. Simma, is to identify human rights as general principles of international law.

(c) Human rights as general principles of law

This means of recognizing the Universal Declaration of Human Rights as a source of legal obligations is encouraged by the approach adopted by the International Court of Justice itself. The Court has refrained from stating that the Declaration as such, in the totality of its articles, should be considered as customary international law. But it did refer to the Declaration on a number of occasions, albeit always with respect to a specific right and without always clarifying the source of the authority

of the Declaration. For instance, alluding to the prohibition of arbitrary arrest or detention stipulated in Article 9 of the Universal Declaration of Human Rights, it stated in the *Tehran Hostages* case that 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights' (*United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran) (merits)* (I.C.J. Reports 1980, at 42). The language referring to such 'fundamental principles' is not new. Already in the *Corfu Channel* case, the Court mentioned 'obligations ... based ... on certain general and well-recognized principles', among which it mentioned what it labelled 'elementary considerations of humanity' (*Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland-Albania)* (I.C.J. Reports 1949, 4 at 22)). In the Advisory Opinion it delivered on the issue of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, it referred to 'the principles underlying the Convention' as 'principles which are recognized by civilized nations as binding on States, even without any conventional obligation' (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, 19 (28 May 1951)). Almost identical language may be found in later cases. In its Advisory Opinion on the *Legality of Threat or Use of Nuclear Weapons*, referring to the *Corfu Channel* dictum, the Court stated that 'it is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity"..., that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law' (I.C.J. Reports 1996, 226, at 257 (para. 79)). Similarly, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court had mentioned the 'fundamental general principles of humanitarian law' as the source of obligations for the defendant State (I.C.J. Reports 1986, 14, at 113–14). The *Case Concerning East Timor (Portugal* v. *Australia)* similarly referred to the 'principle' of self-determination as 'one of the essential principles of contemporary international law' (I.C.J. Reports 1995, 90, at 102 (para. 29)).

Although these statements refer, for the most part, to otherwise unspecified 'principles of international law' rather than to the 'general principles of law recognized by civilized nations' mentioned by Article 38(1)(c) of the Statute of the International Court of Justice, they nevertheless have been interpreted as implying that human rights should qualify among the latter principles, and thus as forming part of general international law (see B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles', cited above, at 102–8; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press,

1989), at p. 88). Indeed, enthusiastic as they are about the grounding of international human rights law in customary international law, the reporters of the *Restatement (Third) of the Foreign Relations of the United States* note that 'there is a willingness to conclude that prohibitions [against human rights violations] common to the constitutions or laws of many states are general principles that have been absorbed into international law' (para. 701, n. 1). This conclusion also may be seen to follow from the fact that the Universal Declaration of Human Rights has been implemented, or even sometimes almost literally reproduced, in a large number of bill of rights in the world (H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, 25 (1995–1996), 287, at 351–2).

(d) The significance of human rights as part of general international law

Does it matter that international human rights have their source both in general public international law, and in specific treaties concluded at universal or regional level? The expansion of the membership of States in international human rights treaties particularly in the 1990s – the Convention on the Rights of the Child has achieved almost universal ratification, and treaties such as the two 1966 Covenants or the International Convention for the Elimination of All Forms of Discrimination against Women have also been very widely ratified – may have created the impression that the controversy about how solid the foundations of human rights law are in general international law, as opposed to treaty law, is not worth the efforts of legal doctrine today, as it might have been in the 1980s. We should resist this impression, however. First, we are far from having achieved universal ratification for all human rights treaties. Second, ratifications by States may be accompanied by reservations about specific rights or about the scope of application of the treaty: grounding the guarantees of the treaty in customary international law or in other sources of general international law may serve to overcome such restrictions. Third, it is increasingly acknowledged that States are not the only addressees of human rights law. As subjects of international law, international organizations are bound by general international law (see further on this issue chapter 2, section 4), and some authors believe this could be extended to transnational corporations (see chapter 4, section 1.2.): in order to impose human rights obligations on such private non-State actors, these obligations must have their source elsewhere than in treaties, which as a rule only States may ratify.

The view that human rights treaties merely embody, in treaty form, pre-existing obligations of States – which have their source in customary international law or in the general principles of law, and which are not at the disposal of States – also has guided the approach of human rights bodies on the question of the denunciation of human rights treaties and of State succession, especially after the dismantling of the former Soviet Union or of the former Federal Republic of Yugoslavia, and the separation of Czechoslovakia into two distinct entities. Box 1.4. discusses this issue.

Box 1.4.

The continuity of human rights obligations

On 5 March 1993, the Commission on Human Rights adopted Resolution 1993/23, entitled 'Succession of States in respect of International Human Rights Treaties', in which it encouraged successor States to confirm officially that they continued to be bound by obligations under relevant international human rights treaties and urged those that had not yet done so to ratify or to accede to those international human rights treaties to which the predecessor States had not been parties. It also adopted Resolution 1994/16 of 25 February 1994, in which it emphasized the special nature of the treaties aimed at the protection of human rights and reiterated its call to successor States which had not yet done so to confirm that they continued to be bound by obligations under international human rights treaties. Probably emboldened by these resolutions, the Human Rights Committee expressed the following views on the question of denunciation of the International Covenant on Civil and Political Rights, as well as on the question of State succession:

Human Rights Committee, General Comment No. 26, *Continuity of Obligations* (8 December 1997) (CCPR/C/21/Rev.1/Add. 8/Rev.1):

1. The International Covenant on Civil and Political Rights does not contain any provision regarding its termination and does not provide for denunciation or withdrawal. Consequently, the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. On this basis, the Covenant is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty.
2. That the parties to the Covenant did not admit the possibility of denunciation and that it was not a mere oversight on their part to omit reference to denunciation is demonstrated by the fact that article 41(2) of the Covenant does permit a State party to withdraw its acceptance of the competence of the Committee to examine inter-State communications by filing an appropriate notice to that effect while there is no such provision for denunciation of or withdrawal from the Covenant itself. Moreover, the Optional Protocol to the Covenant, negotiated and adopted contemporaneously with it, permits States parties to denounce it. Additionally, by way of comparison, the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted one year prior to the Covenant, expressly permits denunciation. It can therefore be concluded that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation. The same conclusion applies to the Second Optional Protocol in the drafting of which a denunciation clause was deliberately omitted.
3. Furthermore, it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant codifies in treaty form the

universal human rights enshrined in the Universal Declaration of Human Rights, the three instruments together often being referred to as the 'International Bill of Human Rights'. As such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.

4. The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.
5. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.

This position expressed in General Comment No. 26 is clearly based on the view that human rights treaties are specific among international treaties (in favour of this view, see M. Kamminga, 'State Succession in Respect of Human Rights Treaties', *European Journal of International Law*, 7 (1996) 469, at 482–3; R. Higgins, 'The International Court of Justice and Human Rights' in K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy* (Leiden: Martinus Nijhoff, 1998), p. 691, at pp. 696–7; see also the separate opinion of Judge Weeramantry to the 11 July 1996 judgment of the International Court of Justice in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, I.C.J. Reports 1996, 595). But it seems to contradict the rule established under customary international law for other international law treaties in cases of succession of States, where the solution generally favoured is that succeeding States may choose whether or not to be bound by the treaties to which the predecessor State had acceded (see, for example, *Restatement (Third) of the Foreign Relations Law of the United States (1987),* para. 210(3), Reporters' Note 4; I. Brownlie, *Principles of Public International Law*, fifth edn (Oxford University Press, 1998), p. 663; A. Cassese, *International Law*, second edn (Oxford University Press, 2005), p. 78; M. Shaw, *International Law*, fifth edn (Cambridge University Press, 2003), p. 875; M. Koskenniemi and P. M. Eisemann (eds.), *State Succession: Codification Tested Against the Facts* (The Hague: Hague Academy of International Law, Martinus Nijhoff, 2000). Even the 1978 Vienna Convention on Succession of States in respect of Treaties, which is not generally considered to faithfully represent customary international law, does not anticipate automatic succession to treaties, at least as regards newly independent States. And, indeed, the General Comment of the Human Rights Committee on the continuity of obligations has been taken issue with, including from within the Committee itself.

Vienna Convention on Succession of States in respect of Treaties (23 August 1978) (excerpts):

Article 16. Position in respect of the treaties of the predecessor State

A newly independent State [defined by the Convention as 'a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible'] is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.

Article 34. Succession of States in cases of separation of parts of a State

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist: (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed; (b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.
2. Paragraph 1 does not apply if: (a) the States concerned otherwise agree; or (b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Human Rights Committee, *Kuok Koi* v. *Portugal,* Communication No. 925/2000 (final views of 22 October 2001) (CCPR/C/73/D/925/2000) (individual opinion of Mr Nisuke Ando):

Personally, I agree with the Committee's view [as expressed in para. 4 of General Comment No. 26 on the *Continuity of Obligations under the International Covenant on Civil and Political Rights*] as a matter of policy statement, but I cannot agree with it as a statement of a rule of customary international law. As far as State practice with respect to the Covenant is concerned, only in the cases of the dismemberment of the former Yugoslavia and that of Czechoslovakia, each of the newly born States in Central and Eastern Europe except Kazakhstan [which consistently refused to accept that it succeeded automatically to the human rights treaties concluded formerly by the Soviet Union] indicated that it 'succeeds to' the Covenant. All the other seceding or separating States indicated that they 'accede to' the Covenant, which implies that they are not succeeding to the former States' Covenant obligations but are newly acceding to the Covenant obligations on their own. The corresponding State practice with respect to the Optional Protocol makes it clear that only the Czech Republic and Slovakia 'expressly' succeeded to the Optional Protocol obligations. Certainly the State practice shows that there is no 'automatic' devolution of the Covenant obligations, to say nothing of the Optional Protocol obligations, to any State. A State needs to make an

'express' indication as to whether or not it accepts obligations under the Covenant and/or the Optional Protocol. Absent such an indication, it should not be assumed that the State has accepted the obligations.

1.2. Questions for discussion: custom and general principles of law as sources of human rights

1. Are there dangers associated with adapting the classic definition of custom as a source of international law to the specificity of human rights, considering especially the fact that the indivisibility, interdependence and equal importance of all human rights – including both civil and political and economic, social and cultural rights – have been regularly reaffirmed in various UN resolutions and at successive world conferences on human rights?
2. Should human rights, as part of general international law, be identified preferably as part of customary international law, or as part of general principles of law? Or does the best approach consist in seeing human rights – as listed in the Universal Declaration of Human Rights – as imposed under the UN Charter, particularly under Articles 55 and 56?
3. Does it follow from the fact that respect for human rights is obligatory for States, whichever the human rights treaties they have ratified, that States parties to a human rights treaty should not be allowed to denounce it unless the said treaty explicitly provides for this possibility? Does it follow that any successor State is bound by the human rights treaties concluded by the State to which it succeeds, even when it is a newly independent State? Consider that, as recalled by the International Court of Justice, '[t]he fact that the [principles of customary and international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions' (case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)* I.C.J. Reports 1984, 424, para. 73 (judgment of 26 November 1984 on the jurisdiction of the Court and on the admissibility of the application)), so that 'customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content' (concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)* I.C.J. Reports 1986, 14, para. 179 (judgment of 27 June 1986 on the merits)).

4.2. Human rights in the hierarchy of international law

It has sometimes been argued that human rights norms occupy a superior position in international law due to their specific status. The case of the *Sawhoyamaxa Indigenous Community* presented to the Inter-American Court of Human Rights provides a useful starting point. In this case, the State alleged it could not give effect to the indigenous community's right to property over their ancestral lands because, among other reasons,

these lands now belonged to a German investor, protected by a bilateral investment treaty. The Court answered:

Inter-American Court of Human Rights, case of *The Sawhoyamaxa Indigenous Community* v. *Paraguay* (judgment of 29 March 2006, Series C No. 146).

137. ... [The] Court has ascertained that the arguments put forth by the State to justify non-enforcement of the indigenous people's property rights have not sufficed to release it from international responsibility. The State has put forth three arguments: 1) that claimed lands have been conveyed from one owner to another 'for a long time' and are duly registered; 2) that said lands are being been adequately exploited, and 3) that the owner's right 'is protected under a bilateral agreement between Paraguay and Germany[,] which ... has become part of the law of the land.' ...

140. ... [W]ith regard to the third argument put forth by the State, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but, according to the State, said convention allows for capital investments made by a contracting party to be condemned or nationalized for a 'public purpose or interest', which could justify land restitution to indigenous people. Moreover, the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.

141. Based on the foregoing, the Court dismisses the three arguments of the State described above and finds them insufficient to justify non-enforcement of the right to property of the Sawhoyamaxa Community.

This position implies, albeit implicitly, that human rights treaties – due to their specific nature as having a 'normative' character, which distinguishes them from treaties which are merely an exchange of rights and obligations between States – occupy a superior position in international law, and that any treaties conflicting with them should therefore be set aside in situations of conflict. Which weight should we recognize to such an assertion?

(a) The arguments in favour of hierarchy

Two arguments are traditionally put forward in order to justify the view that human rights occupy a hierarchically superior position among the norms of international law (see generally I. Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (Antwerp-Oxford: Intersentia-Hart, 2001)). First, Article 103 of the UN Charter provides that 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' Since one of the purposes of the UN Charter is to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms

for all without discrimination (Art. 1(3)), and since Article 56 of the Charter clearly imposes obligations both on the organization itself and on its Member States to contribute to the fulfilment of this objective, it would follow, then, that any international obligation conflicting with the obligation to promote and protect human rights should be set aside, in order for this latter objective to be given priority.

Second, although the norms of international law (custom, treaties, and the 'general principles of law recognized by civilized nations', as expressed in the list of sources of international law by Art. 38(1) of the Statute of the International Court of Justice) are otherwise not hierarchically ordered according to their various sources, certain norms are specific in that they embody a form of international public policy. In the context of the law of treaties, the Vienna Convention on the Law of Treaties states that any treaty which, at the time of its conclusion, is in violation of a peremptory norm of general international law (also referred to as belonging to *jus cogens*), is to be considered void. A peremptory norm of general international law is defined as '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' (Art. 53; Art. 64 of the Vienna Convention on the Law of Treaties adds that 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'). The existing judicial practice shows that such *jus cogens* norms are those which ensure the safeguard of two fundamental interests of the international community: those of its primary subjects, the States, whose essential prerogatives are preserved by the recognition of their equal sovereignty and by the prohibition of the use of force in conditions other than those authorized by the UN Charter; and those of the international community in the preservation of certain fundamental human rights (P.-M. Dupuy, 'L'unité de l'ordre juridique international. Cours général de droit international public', *Recueil des cours*, 297 (2002), at 303).

In theory, the sanctions attached to the hierarchical principle will differ according to whether it is based on Article 103 of the Charter or on the nature of the superior norms recognized as *jus cogens*: whereas a treaty found to be in violation of a *jus cogens* norm becomes void, a treaty incompatible with obligations flowing from membership in the United Nations does not disappear, but shall not be applied to the extent of such an incompatibility (see the Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, cited above, para. 41). However, the logics under which each of these mechanisms operate are not systematically opposed to one another: where a treaty is not *per se* in violation of a *jus cogens* requirement but may lead to certain decisions being adopted which result in such a violation, only those decisions shall have to be considered invalid, while the treaty itself will remain in force (compare J. Combacau, 'Logique de la validité contre logique d'opposabilité dans la Convention de Vienne sur le droit des traités' in *Mélanges M. Virally* (Paris: Pedone, 1991), pp. 195–203). As noted by the International Law Commission in the course of the discussion of the Draft Articles on State Responsibility: 'one might envisage a conflict

arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen' (*Official Records of the General Assembly, Fifty-sixth Session, Supplement 10* (A/56/10), commentary to Art. 40 of the Draft Articles on State Responsibility, para. (3); also reproduced in J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, (Cambridge University Press, 2002), at p. 187).

Should the two mechanisms be ranked according to an order of priority? It has been stated that a conflict between the primacy asserted by Article 103 of the UN Charter – which extends to the decisions adopted by the Security Council acting under the Charter (International Court of Justice, Order of 14 April 1992 (provisional measures), *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)*, I.C.J. Reports 1992, 15, para. 39) – and *jus cogens* norms was difficult to contemplate. The Study Group of the International Law Commission on the fragmentation of international law for instance remarks that: 'The United Nations Charter has been universally accepted by States and thus a conflict between *jus cogens* norms and Charter obligations is difficult to contemplate. In any case, according to Article 24(2) of the Charter, the Security Council shall act in accordance with the Purposes and Principles of the United Nations which include norms that have been subsequently treated as *jus cogens*' (Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, cited above, at p. 24, para. 40 of the conclusions). This view is, unfortunately, too optimistic, for times such as ours when the UN Security Council may use its powers in ways which may lead to violations of internationally recognized human rights. When such conflicts do occur – as they do in fact – they should be resolved in favour of the primacy of *jus cogens* even over the UN Charter or measures adopted in accordance with the Charter. Article 103 of the UN Charter, after all, has the status of a provision included in a treaty establishing an international organization, whatever the unique character of this organization:

International Court of Justice, Order of 8 April 1993 on the request for the indication of provisional measures in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, separate opinion of Judge *ad hoc* Elihu Lauterpacht (I.C.J. Reports 1993, 440, para. 100):

The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and

jus cogens. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent.

This is also the reasoning followed by the Court of First Instance of the European Communities (now renamed the EU's General Court) when it was asked to annul Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, implementing UN Security Council Resolution 1390 (2002).

Court of First Instance of the European Communities, Case T-315/01, *Yassin Abdullah Kadi* v. *Council of the EU and Commission of the European Communities*, judgment of 21 September 2005:

226 [Although the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and although the Court has no authority to call in question, even indirectly, their lawfulness in the light of EU law, nonetheless] the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.

227 In this connection, it must be noted that the Vienna Convention on the Law of Treaties, which consolidates the customary international law and Article 5 of which provides that it is to apply 'to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation', provides in Article 53 for a treaty to be void if it conflicts with a peremptory norm of general international law (*jus cogens*), defined as 'a norm accepted and recognised 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'. Similarly, Article 64 of the Vienna Convention provides that: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'

228 Furthermore, the Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person. In the preamble to the Charter, the peoples of the United Nations declared themselves determined to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person'. In addition, it is apparent from Chapter I of the Charter, headed 'Purposes and Principles', that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms.

229 Those principles are binding on the Members of the United Nations as well as on its bodies. Thus, under Article 24(2) of the Charter of the United Nations, the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act 'in accordance with the Purposes and Principles of the United Nations'. The Security Council's powers of sanction in the exercise of that responsibility must therefore be wielded in compliance with international law, particularly with the purposes and principles of the United Nations.

230 International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.

231 The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, highly exceptionally, extend to determining whether the superior rules of international law falling within the ambit of *jus cogens* have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute 'intransgressible principles of international customary law' (Advisory Opinion of the International Court of Justice of 8 July 1996, *The Legality of the Threat or Use of Nuclear Weapons*, Reports 1996, p. 226, paragraph 79).

The Court of First Instance of the European Communities went on to examine whether the fact that there is no judicial remedy available to the organizations or individuals against which restrictive measures are taken, against the sanctions decided by the Sanctions Committee established under the authority of the Security Council, is in violation of *jus cogens* norms. It concluded that it is not, based on the consideration that the right of access to the courts is subject to certain limitations which, in this case, appear to be imposed for legitimate objectives and remain proportionate to the ends pursued. This question was not addressed again in subsequent proceedings before the European Court of Justice, since this Court took the view, based on its understanding of its role as defined in the European Treaties, that it has no competence to review the lawfulness of a resolution adopted by an international body such as the UN Security Council, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*. Rather, its role was to review the lawfulness of the implementing Community measure, in particular as regards the fundamental rights included among the general principles of Community law. On the basis of such a review, the European Court of Justice arrived at the conclusion that Regulation No. 881/2002 must be annulled so far as concerns the appellants, by reason of the breach of principles applicable in the procedure followed when the restrictive measures introduced by that regulation were adopted (Joined Cases C-402/05 P and C-415/05 P, judgment of 3 September 2008).

(b) Human rights as *jus cogens* norms

Reliance on the notion of *jus cogens* norms is made difficult, however, by two factors. First, the list of human rights included among norms of that nature remains ill defined. Norms which have the status of *jus cogens* are to be identified on the basis of the evolution of the understanding of the international community – the element of State practice plays here a far less significant role than for the emergence of custom. This list is therefore in constant evolution, and it would be both erroneous and counter-productive

to seek to provide an authoritative classification. There is a consensus, however, about the *jus cogens* nature of a number of prohibitions formulated in international human rights law (for an extensive discussion, see I. Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (Antwerp-Oxford: Intersentia-Hart, 2001), at pp. 66–105). These include at a minimum the prohibition of aggression, slavery and the slave trade, genocide (International Court of Justice, case of the *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, judgment of 3 February 2006 (Jurisdiction of the Court and Admissibility of the Application), para. 64), racial discrimination, apartheid and torture (see the references provided below in para. 153 of the judgment of 10 December 1998 delivered by the International Criminal Tribunal for former Yugoslavia (ICTY), Trial Chamber, in the case of *Prosecutor* v. *Anto Furundzija*, judgment of 10 December 1998), as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination (*Official Records of the General Assembly, Fifty-sixth Session, Supplement 10* (A/56/10), commentary to article 40 of the draft articles on State Responsibility prepared by the International Law Commission, paras. (4)–(6) (also reproduced in J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge University Press, 2003), at p. 188)). Other candidates for future recognition as peremptory norms of international law are the application of the death penalty to juveniles (if not the precise age of majority for purposes of capital punishment) (see Inter-American Commission on Human Rights, Resolution No. 3/87, Case 9647 [1987] *Inter-American Yearbook on Human Rights* 260) and the prohibition of refoulement, i.e. of returning a person to a territory where she runs a risk of torture or of being ill-treated: it is, indeed, well established that even where an extradition treaty would in principle allow for, or prescribe, the extradition of a person to another State, the extraditing State is prohibited from doing so in the presence of such a risk, the Institute of International Law noting in this respect that 'extradition treaties should not be enforced if enforcement would violate a human rights norm external to the treaty', and that 'the notion that there are certain higher norms in the field of human rights which take precedence over extradition treaties owes its origin to the notion of *jus cogens*' (*Yearbook of the Institute of International Law*, 60 (1983), p. 214, at pp. 223–4; see I. Seiderman, *Hierarchy in International Law* (Antwerp-Oxford: Intersentia-Hart, 2001), at pp. 101–5).

However, apart from the evolving nature of this list of norms having acquired *jus cogens* status, there are certain doctrinal uncertainties concerning the recognition criteria of such norms. It remains controversial, in particular, whether the emergence of peremptory norms could be regional, rather than universal and resulting from the consent of the international community as a whole. The Vienna Convention on the Law of Treaties seems to refer only to *jus cogens* of a universal nature. But this may be too restrictive: certain values may be central to a group of States of a particular region, and this may lead to the invalidation of treaties concluded by the States of that region which conflict with the said norm (see G. Gaja, '*Jus Cogens* beyond the Vienna Convention', *Recueil des cours*, 172–III (1981), 271 *et seq.*, at 284; F. Domb,

'*Jus Cogens* and Human Rights', *Israel Yearbook of Human Rights*, 6 (1976), 104, at 110; J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: a Critical Appraisal* (Vienna, New York: Springer, 1974), at pp. 107–8). For instance, in his concurring opinion to the judgment delivered on 7 July 1989 by the European Court of Human Rights in *Soering* v. *United Kingdom*, Judge De Meyer made the following comment about the second sentence of Article 2 §1 of the Convention, which states that 'no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law', thereby recognizing that the imposition of the death penalty may be acceptable:

European Court of Human Rights, *Soering* v. *United Kingdom*, judgment of 7 July 1989, concurring opinion of Judge De Meyer:

The second sentence of Article 2 §1 of the Convention was adopted, nearly forty years ago, in particular historical circumstances, shortly after the Second World War. In so far as it still may seem to permit, under certain conditions, capital punishment in time of peace, it does not reflect the contemporary situation, and is now overridden by the development of legal conscience and practice.

Such punishment is not consistent with the present state of European civilisation.

De facto, it no longer exists in any State Party to the Convention.

Its unlawfulness was recognised by the Committee of Ministers of the Council of Europe when it adopted in December 1982, and opened for signature in April 1983, the Sixth Protocol to the Convention, which to date has been signed by sixteen, and ratified by thirteen, Contracting States.

No State Party to the Convention can in that context, even if it has not yet ratified the Sixth Protocol, be allowed to extradite any person if that person thereby incurs the risk of being put to death in the requesting State.

Extraditing somebody in such circumstances would be repugnant to European standards of justice, and contrary to the public order of Europe.

The recognition criteria for *jus cogens* norms are sufficiently vague to allow for the list of human rights norms having this status to be permanently adapted. For instance, the Inter-American Court of Human Rights has asserted that the general principle of equality – understood as the obligation to implement human rights without discrimination – has reached the status of a peremptory norm of international law, because of its close link to human dignity and because of its universal recognition:

Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September 2003, requested by the United Mexican States on the *Juridical Condition and Rights of the Undocumented Migrants*:

97. The Court now proceeds to consider whether [the principle of equality and non-discrimination] is a *jus cogens* principle ...

100. In particular, when referring to the obligation to respect and ensure human rights, regardless of which of those rights are recognized by each State in domestic or international norms, the Court considers it clear that all States, as members of the international community, must comply with these obligations without any discrimination; this is intrinsically related to the right to equal protection before the law, which, in turn, derives 'directly from the oneness of the human family and is linked to the essential dignity of the individual'. The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons.

101. Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens.*

Uncertainty about the list of human rights which have acquired the status of peremptory norms of international law is further increased by the tendency of a number of commentators to base the inclusion of at least certain basic rights in the list of *jus cogens* prescriptions on statements by international courts – particularly the International Court of Justice – which do not mention *jus cogens*, although they do identify certain obligations as having an *erga omnes* character. Thus, in the *Barcelona Traction* Case, the International Court of Justice famously remarked in an *obiter dictum* that:

International Court of Justice, case concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, Second phase (judgment), judgment of 5 February 1970, I.C.J. Reports 1970, 3 at 32 (paras. 33–4):

An essential distinction should be drawn between the obligation of a State towards the international community as a whole, and those arising vis-à-vis another State … 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 agression, 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; others are conferred by international instruments of a universal or quasi-universal character.

International Court of Justice, case concerning *East Timor (Portugal* v. *Australia)*, judgment of 30 June 1995, I.C.J. Reports 1995, 90 at 102 (para. 29):

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. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court.

Although, as already mentioned, it seems beyond dispute that the rules referred to (if not all the 'principles and rules concerning the basic rights of the human person', at least the prohibition of aggression, of genocide, of slavery, of racial discrimination, and of the denial of the right of peoples to self-determination) have now acquired the status of *jus cogens* norms, these statements by the World Court in fact only pertain to their *erga omnes* character, implying that they are obligations owed to all States and which all States have a legal interest in seeking to enforce. But these notions are not interchangeable. They refer to different consequences: while the *jus cogens* character of a norm implies that it is hierarchically superior to any other norm of international law which does not possess the same character, the *erga omnes* nature of an obligation simply means that all States may be recognized as having a legal interest in the obligation being complied with. And, while all peremptory norms of international law also are owed to the community of States as a whole and thus are *erga omnes*, the reverse is not true, as 'not all *erga omnes* obligations are established by peremptory norms of general international law' (Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, cited above, para. 38).

A second obstacle to relying more systematically on *jus cogens* is that the consequences attached to the classification of certain human rights among *jus cogens* norms remain debated. Articles 53 and 64 of the Vienna Convention on the Law of Treaties prescribe that treaties which contradict peremptory norms of international law are void. But the Vienna Convention of course only refers to the consequences in the law of treaties of such a conflict. Unless we accept to take these provisions as mere tautologies (of the form 'no derogation shall be permitted to a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'), the *jus cogens* nature of a norm must be seen as based on something else than on the sense of the international community that no derogation is to be allowed

to those norms; and therefore, other consequences may follow, from the recognition that rules of that nature occupy a higher rank among the norms of international law – and indeed, as will be seen in paragraph (c) below in this section, it is recognized that serious breaches of peremptory norms of international law entail certain specific consequences in the area of State responsibility. It has been stated, for instance, that human rights prescriptions which figure among the *jus cogens* norms oblige States not only to respect, protect and fulfil the rights in question, but also to take measures ensuring that those rights will not be infringed, and that a State should be held in violation of its obligations whenever such measures are not adopted, *even if the violation does not materialize*: given the importance of the basic rights forming part of *jus cogens*, in other terms, State responsibility results not only from actual breaches, but also from merely *potential* breaches which result from State action or inaction. In addition, legal acts adopted by States seeking to legitimize or authorize a violation of *jus cogens* – for example, amnesty laws where acts of torture have been committed, or unilateral measures resulting in a violation of the right to self-determination – should not be recognized or given effect to by any other State. Third, where *jus cogens* violations are concerned, due both to the *erga omnes* character of the corresponding obligations and to their universal condemnation, the traditional restrictions to the extraterritorial jurisdiction of States may have to be disregarded: in particular, any State should have jurisdiction to prosecute and punish individuals responsible for *jus cogens* violations which are found on its territory, even where the violations have been committed outside the national territory and present no other connecting factor to the State exercising such extraterritorial jurisdiction. The following cases discuss certain of these implications of *jus cogens* norms.

International Criminal Tribunal for former Yugoslavia (ICTY), Trial Chamber, *Prosecutor* v. *Anto Furundzija*, judgment of 10 December 1998, paras. 147–57:

147. There exists today universal revulsion against torture: as a USA Court put it in *Filartiga* v. *Peña-Irala*, 'the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an enemy of all mankind' (*Filartiga* v. *Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980)). This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination. The prohibition against torture exhibits three important features, which are probably held in common with the other general principles protecting fundamental human rights.

(a) The prohibition even covers potential breaches

148. Firstly, given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in

place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in *Soering* [where the Court stated, in its *Soering* v. *United Kingdom* judgment of 7 July 1989: 'It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him, if implemented, be contrary to Article 3 [prohibiting torture and inhuman or degrading treatment] by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article' (para. 90)], international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.

149. Let us consider these two aspects separately. Normally States, when they undertake international obligations through treaties or customary rules, adopt all the legislative and administrative measures necessary for implementing such obligations. However, subject to obvious exceptions, failure to pass the required implementing legislation has only a potential effect: the wrongful fact occurs only when administrative or judicial measures are taken which, being contrary to international rules due to the lack of implementing legislation, generate State responsibility. By contrast, in the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, States must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.

150. Another facet of the same legal effect must be emphasised. Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (lato sensu) only when such legislation is concretely applied [see Mariposa Development Company and others, Decision, US-Panama General Claims Commission, 27 June 1933, UN Reports of International Arbitral Awards, Vol. VI, pp. 340–1; *German Settlers in Upper Silesia*, Advisory Opinion of 10 September 1923, PCIJ, Series B, No. 6, pp. 19–20, 35–8; the arbitral award of 1922 in the *Affaire de l'impôt sur les benefices de guerre*, in UN Reports of International Arbitral Awards, vol. I, pp. 302–5]. By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect.

(b) The prohibition imposes obligations *erga omnes*

151. Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

152. Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner.

(c) The prohibition has acquired the status of *jus cogens*

153. While the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules [see also the *General Comment No. 24: Issues relating to Reservations made upon Ratification or Accession to the Covenant [on Civil and Political Rights] or the Optional Protocol thereto, or in relation to Declarations under Article 41 of the Covenant*, issued on 4 November 1994 by the United Nations Human Rights Committee, para. 10 ('the prohibition of torture has the status of a peremptory norm'). In 1986, the United Nations Special Rapporteur, P. Kooijmans, in his report to the Commission on Human Rights, took a similar view (E/CN. 4/1986/15, p. 1, para 3). That the international proscription of torture has turned into *jus cogens* has been among others held by US courts in *Siderman de Blake* v. *Republic of Argentina*, 965 F. 2d 699 (9th Cir. 1992), cert. denied, *Republic of Argentina* v. *de Blake*, 507 U.S. 1017, 123L. Ed. 2d 444, 113 S. Ct. 1812 (1993); *Committee of US Citizens Living in Nicaragua* v. *Reagan*, 859 F. 2d 929, 949 (D.C. Cir. 1988); *Xuncax et al.* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Cabiri* v. *Assasie-Gyimah*, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996); and *In re Estate of Ferdinand E. Marcos*, 978 F. 2d 493 (9th Cir. 1992), cert. denied, *Marcos Manto* v. *Thajane*, 508 U.S. 972, 125L. Ed. 2d 661, 113 S. Ct. 2960 (1993)]. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

154. Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.

155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio* [Art. 53 Vienna Convention on the Law of Treaties, 23 May 1969], and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. [As for amnesty laws, it bears mentioning that in 1994 the United Nations Human Rights Committee, in its General Comment No. 20 on Art. 7 of the ICCPR stated the following: 'The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to

investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.']
If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: 'individuals have international duties which transcend the national obligations of obedience imposed by the individual State' [I.M.T., 1 (1946), p. 223].

156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court in *Demjanjuk*, 'it is the universal character of the crimes in question i.e. international crimes which vests in every State the authority to try and punish those who participated in their commission' [*Attorney General of the Government of Israel* v. *Adolf Eichmann*, 36 I.L.R. 298; *In the Matter of the Extradition of John Demjanjuk*, 612].

157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.

House of Lords (United Kingdom), *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 3)*, judgment of 24 March 1999 [2000] A.C. 147:

[In this case, the House of Lords held that the former President of Chile, Senator Pinochet, could be extradited to Spain in respect of charges which concerned conduct that was criminal in the

United Kingdom at the time when it was allegedly committed. The majority of the Law Lords considered that extraterritorial torture did not become a crime in the United Kingdom until section 134 of the Criminal Justice Act 1988 came into effect. As regards the crimes of torture committed outside the United Kingdom after that date, the argument was submitted by the defence of Pinochet that, since under Part II of the State Immunity Act 1978 a former head of State enjoyed immunity from the criminal jurisdiction of the United Kingdom for acts done in his official capacity, Mr Pinochet should benefit such immunity. The Law Lords rejected this argument. Instead, they took the view that torture was an international crime and prohibited by *jus cogens*, and therefore such immunity could not be invoked.]

Lord Browne-Wilkinson (leading judgment) (excerpts):

In general, a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries. If a person who is alleged to have committed a crime in Spain is found in the United Kingdom, Spain can apply to the United Kingdom to extradite him to Spain. The power to extradite from the United Kingdom for an 'extradition crime' is now contained in the Extradition Act 1989. That Act defines what constitutes an 'extradition crime'. For the purposes of the present case, the most important requirement is that the conduct complained of must constitute a crime under the law both of Spain and of the United Kingdom. This is known as the double criminality rule.

Since the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states. The most important of such international crimes for present purposes is torture which is regulated by the International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. The obligations placed on the United Kingdom by that Convention ... were incorporated into the law of the United Kingdom by section 134 of the Criminal Justice Act 1988. That Act came into force on 29 September 1988. Section 134 created a new crime under United Kingdom law, the crime of torture. As required by the Torture Convention 'all' torture wherever committed world-wide was made criminal under United Kingdom law and triable in the United Kingdom. No one has suggested that before section 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law. Nor is it suggested that section 134 was retrospective so as to make torture committed outside the United Kingdom before 29 September 1988 a United Kingdom crime. Since torture outside the United Kingdom was not a crime under UK law until 29 September 1988, the principle of double criminality which requires an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law at the date it was committed ...

[In] my view only a limited number of the charges relied upon to extradite Senator Pinochet constitute extradition crimes since most of the conduct relied upon occurred long before 1988. In particular, I do not consider that torture committed outside the United Kingdom before 29 September 1988 was a crime under UK law. It follows that the main question discussed at the earlier stages of this case – is a former head of state entitled to sovereign

immunity from arrest or prosecution in the UK for acts of torture – applies to far fewer charges. But the question of state immunity remains a point of crucial importance since, in my view, there is certain conduct of Senator Pinochet (albeit a small amount) which does constitute an extradition crime and would enable the Home Secretary (if he thought fit) to extradite Senator Pinochet to Spain unless he is entitled to state immunity. Accordingly, having identified which of the crimes alleged is an extradition crime, I will then go on to consider whether Senator Pinochet is entitled to immunity in respect of those crimes ...

I must ... consider whether, in relation to these two surviving categories of charge [torture and conspiracy to torture after 29 September 1988], Senator Pinochet enjoys sovereign immunity. But first it is necessary to consider the modern law of torture.

Torture

Apart from the law of piracy, the concept of personal liability under international law for international crimes is of comparatively modern growth. The traditional subjects of international law are states not human beings. But consequent upon the war crime trials after the 1939–45 World War, the international community came to recognise that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity. Although there may be legitimate doubts as to the legality of the Charter of the Nuremberg Tribunal, in my judgment those doubts were stilled by the Affirmation of the Principles of International Law recognised by the Charter of Nuremberg Tribunal adopted by the United Nations General Assembly on 11 December 1946. That Affirmation affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal and directed the Committee on the codification of international law to treat as a matter of primary importance plans for the formulation of the principles recognised in the Charter of the Nuremberg Tribunal. At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law. In the early years state torture was one of the elements of a war crime. In consequence torture, and various other crimes against humanity, were linked to war or at least to hostilities of some kind. But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became an international crime on its own: see Oppenheim's *International Law* (Jennings and Watts edition) vol. 1, 996; note 6 to Article 18 of the I.L.C. Draft Code of Crimes Against Peace; *Prosecutor* v. *Furundzija Tribunal for Former Yugoslavia*, Case No. 17-95-17/1-T. Ever since 1945, torture on a large scale has featured as one of the crimes against humanity: see, for example, UN General Assembly Resolutions 3059, 3452 and 3453 passed in 1973 and 1975; Statutes of the International Criminal Tribunals for former Yugoslavia (Article 5) and Rwanda (Article 3).

Moreover, the Republic of Chile accepted before your Lordships that the international law prohibiting torture has the character of *jus cogens* or a peremptory norm, i.e. one of those rules of international law which have a particular status [quoting from Furundzija].

The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution': *Demjanjuk* v. *Petrovsky* (1985) 603 F. Supp. 1468; 776 F. 2d. 571.

... [L]ong before the Torture Convention of 1984 state torture was an international crime in the highest sense. But there was no tribunal or court to punish international crimes of torture. Local courts could take jurisdiction: see *Demjanjuk* (supra); *Attorney General of Israel* v. *Eichmann* (1962) 36 I.L.R.S. But the objective was to ensure a general jurisdiction so that the torturer was not safe wherever he went. For example, in this case it is alleged that during the Pinochet regime torture was an official, although unacknowledged, weapon of government and that, when the regime was about to end, it passed legislation designed to afford an amnesty to those who had engaged in institutionalised torture. If these allegations are true, the fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power: a totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not dependent upon the local courts where the torture was committed. In the event, over 110 states (including Chile, Spain and the United Kingdom) became state parties to the Torture Convention. But it is far from clear that none of them practised state torture. What was needed therefore was an international system which could punish those who were guilty of torture and which did not permit the evasion of punishment by the torturer moving from one state to another. The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal – the torturer – could find no safe haven. Burgers and Danelius (respectively the chairman of the United Nations Working Group on the 1984 Torture Convention and the draftsmen of its first draft) say, at p. 131, that it was 'an essential purpose [of the Convention] to ensure that a torturer does not escape the consequences of his act by going to another country' [J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Leiden: Martinus Nijhoff, 1988)].

The Torture Convention

Article 1 of the Convention defines torture as the intentional infliction of severe pain and of suffering with a view to achieving a wide range of purposes 'when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiesence of a public official or other person acting in an official capacity.' Article 2(1) requires each state party to prohibit torture on territory within its own jurisdiction and Article 4 requires each state party to ensure that 'all' acts of torture are offences under its criminal law. Article 2(3) outlaws any defence of superior orders. Under Article 5(1) each state party has to establish its jurisdiction over torture (a) when committed within territory under its jurisdiction (b) when the alleged offender is a national of that state, and (c) in certain circumstances, when the victim is a national of that state. Under Article 5(2) a state party has to take jurisdiction over any alleged offender who is found within its territory. Article 6 contains provisions for a state in whose territory an alleged torturer is found to detain him, inquire into the position and notify the states referred to in Article 5(1) and to indicate whether it intends to exercise jurisdiction. Under Article 7 the state in whose territory the alleged torturer is found shall, if he is not extradited to any of the states mentioned in Article 5(1), submit him to its authorities for the purpose of prosecution. Under Article 8(1) torture is to be treated as an extraditable offence and under Article 8(4) torture shall, for the purposes of extradition, be treated as having been committed not only in the place where it occurred but also in the state mentioned in Article 5(1) ...

Universal jurisdiction

There was considerable argument before your Lordships concerning the extent of the jurisdiction to prosecute torturers conferred on states other than those mentioned in Article 5(1). I do not find it necessary to seek an answer to all the points raised. It is enough that it is clear that in all circumstances, if the Article 5(1) states do not choose to seek extradition or to prosecute the offender, other states must do so. The purpose of the Convention was to introduce the principle *aut dedere aut punire* – either you extradite or you punish: Burgers and Danelius p. 131. Throughout the negotiation of the Convention certain countries wished to make the exercise of jurisdiction under Article 5(2) dependent upon the state assuming jurisdiction having refused extradition to an Article 5(1) state. However, at a session in 1984 all objections to the principle of *aut dedere aut punire* were withdrawn. 'The inclusion of universal jurisdiction in the draft Convention was no longer opposed by any delegation': Working Group on the Draft Convention U.N. Doc. E/CN. 4/1984/72, para. 26. If there is no prosecution by, or extradition to, an Article 5(1) state, the state where the alleged offender is found (which will have already taken him into custody under Article 6) must exercise the jurisdiction under Article 5(2) by prosecuting him under Article 7(1).

I gather the following important points from the Torture Convention:

(1) Torture within the meaning of the Convention can only be committed by 'a public official or other person acting in an official capacity', but these words include a head of state. A single act of official torture is 'torture' within the Convention;
(2) Superior orders provide no defence;
(3) If the states with the most obvious jurisdiction (the Article 5(1) states) do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction.
(4) There is no express provision dealing with state immunity of heads of state, ambassadors or other officials.
(5) Since Chile, Spain and the United Kingdom are all parties to the Convention, they are bound under treaty by its provisions whether or not such provisions would apply in the absence of treaty obligation. Chile ratified the Convention with effect from 30 October 1988 and the United Kingdom with effect from 8 December 1988.

State immunity

This is the point around which most of the argument turned. It is of considerable general importance internationally since, if Senator Pinochet is not entitled to immunity in relation to the acts of torture alleged to have occurred after 29 September 1988, it will be the first time so far as counsel have discovered when a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes.

Given the importance of the point, it is surprising how narrow is the area of dispute. There is general agreement between the parties as to the rules of statutory immunity and the rationale which underlies them. The issue is whether international law grants state immunity in relation to the international crime of torture and, if so, whether the Republic of Chile is entitled to claim such immunity even though Chile, Spain and the United Kingdom are all parties to the Torture Convention and therefore 'contractually' bound to give effect to its provisions from 8 December 1988 at the latest.

It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself. The diplomatic representative of the foreign state in the forum state is also afforded the same immunity in recognition of the dignity of the state which he represents. This immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted *ratione personae*.

What then when ... the head of state is deposed? ... In my judgment at common law a former head of state ... loses immunity *ratione personae* on ceasing to be head of state: see Watts, 'The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers' [*Recueil des cours*, 247 (1994–III), 40, at 88] p. 88 and the cases there cited. He can be sued on his private obligations: *Ex-King Farouk of Egypt* v. *Christian Dior* (1957) 24 I.L.R. 228; *Jimenez* v. *Aristeguieta* (1962) 311 F. 2d 547. As ex head of state he cannot be sued in respect of acts performed whilst head of state in his public capacity: *Hatch* v. *Baez* [1876] 7 Hun. 596. Thus, at common law, ... the former head of state ... enjoy[s] immunity for acts done in performance of [his] functions whilst in office.

... Accordingly, in my judgment, Senator Pinochet as former head of state enjoys immunity *ratione materiae* in relation to acts done by him as head of state as part of his official functions as head of state.

The question then which has to be answered is whether the alleged organisation of state torture by Senator Pinochet (if proved) would constitute an act committed by Senator Pinochet as part of his official functions as head of state. It is not enough to say that it cannot be part of the functions of the head of state to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity ratione materiae. The case needs to be analysed more closely.

Can it be said that the commission of a crime which is an international crime against humanity and *jus cogens* is an act done in an official capacity on behalf of the state? I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function ... I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as jus cogens was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction. Further, it required all member states to ban and outlaw torture: Article 2. How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises? Thirdly, an essential feature of the international crime of torture is that it must be committed 'by or with the acquiesence

of a public official or other person acting in an official capacity'. As a result all defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention.

Finally, and to my mind decisively, if the implementation of a torture regime is a public function giving rise to immunity ratione materiae, this produces bizarre results. Immunity *ratione materiae* applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing the official who, for example, actually carried out the torture when a claim against the head of state would be precluded by the doctrine of immunity. If that applied to the present case, and if the implementation of the torture regime is to be treated as official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who actually did the torturing. Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the State of Chile is prepared to waive its right to its officials immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention – to provide a system under which there is no safe haven for torturers – will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.

For these reasons in my judgment if, as alleged, Senator Pinochet organised and authorised torture after 8 December 1988, he was not acting in any capacity which gives rise to immunity *ratione materiae* because such actions were contrary to international law, Chile had agreed to outlaw such conduct and Chile had agreed with the other parties to the Torture Convention that all signatory states should have jurisdiction to try official torture (as defined in the Convention) even if such torture were committed in Chile ...

For these reasons, I would allow the appeal so as to permit the extradition proceedings to proceed on the allegation that torture in pursuance of a conspiracy to commit torture, including the single act of torture which is alleged in charge 30, was being committed by Senator Pinochet after 8 December 1988 when he lost his immunity.

There exists a large literature surrounding the *Pinochet* case, including a number of important book-length publications (see, e.g. D. M. Ackerman, *Pinochet Extradition Case: Selected Legal Issues* (Washington DC: Congressional Research Service, 1999); H. Ahlbrecht and K. Ambos (eds.), *Der Fall Pinochet (S). Auslieferung Wegen Staatsverstärkter Kriminalität?* (Baden-Baden: Nomos Verlagsgesellschaft, 1999); S. Brett (ed.), *When Tyrants Tremble: the Pinochet Case* (New York: Human Rights Watch, October 1999); R. Brody and M. Ratner (eds.), *The Pinochet Papers: the Case of Augusto Pinochet in Spain and Britain* (The Hague: Kluwer Law International, 2000); H. Fischer, C. Kress, and S. R. Luder (eds.), *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin: Berlin Verlag Arno

Spitz, 2001); M. Lattimer and P. Sands (eds.), *Justice for Crimes against Humanity* (Oxford: Hart Publishing, 2003); S. Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press, 2004)). The case was widely seen as heralding a new era in international human rights, one in which national courts would be assuming new and far-reaching responsibilities in the prosecution of human rights violations, by relying both on the notion that human rights, due to their *jus cogens* status, could justify setting aside conflicting norms of international law that impose obstacles to such prosecution, and on the tool of extra-territorial (or in some cases universal) jurisdiction, allowing prosecutions against non-nationals for serious violations of international law committed abroad.

The question of the relationship between – on the one hand – the prosecution of human rights violations or the filing of civil claims by victims of such violations, and – on the other hand – international rules relating to immunity, was also discussed in other contexts. In the following case, the Grand Chamber of the European Court of Human Rights arrives at the conclusion that, although the prohibition of torture is of overriding importance and may be considered to have acquired the status of *jus cogens*, it does not follow that foreign States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The decision was adopted by a very narrow margin, nine votes against eight. Among the eight judges who dissented were a number of specialists of international law, who considered that the reasoning of the majority did not effectively recognize the primacy of *jus cogens* on any other norms of international law.

European Court of Human Rights (GC), *Al-Adsani* v. *United Kingdom* (Appl. No. 35763/97), judgment of 21 November 2001:

[The applicant, a dual British/Kuwaiti national, went to Kuwait in 1991 as a pilot to serve as a member of the Kuwaiti Air Force and, after the Iraqi invasion, he remained behind as a member of the resistance movement. During that period he came into possession of sex videotapes involving a Sheikh related to the Emir of Kuwait. By some means these tapes entered general circulation, for which the applicant was held responsible by the Sheikh. After the Iraqi armed forces were expelled from Kuwait, in May 1991, the Sheikh and others on two separate occasions took him at gunpoint in a government car and he was beaten and tortured. On 17 May 1991, the applicant returned to the United Kingdom, where he spent six weeks in a hospital recovering from the various ill-treatments inflicted upon him. On 29 August 1992 the applicant instituted civil proceedings in England for compensation against the Sheikh and the State of Kuwait in respect of injury to his physical and mental health caused by torture in Kuwait in May 1991 and threats against his life and well-being made after his return to the United Kingdom on 17 May 1991. The action failed, however, because as a sovereign foreign State, Kuwait could claim immunity of jurisdiction under the State Immunity Act 1978. Article 15 of the 1972 European Convention on State Immunity (Basle Convention), to which the United Kingdom is a party, provides that a Contracting State shall be entitled to immunity if the

proceedings do not fall within one of the exceptions exceptions stated in the Convention; Article 11 of the Basle Convention excludes State immunity for proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred: this exception is replicated in section 5 of the 1978 State Immunity Act. In its judgment of 21 November 2001, the majority of the Court takes the view that a) any positive obligation imposed on the basis of Article 3 ECHR, either to prevent violations of this provision or to provide a remedy when a violation does take place, does not extend to such violations which may have been committed outside the jurisdiction of the United Kingdom; and that b) the right of access to a court (under Art. 6 ECHR) may be limited where this is justified by the need to grant sovereign immunity to a State in civil proceedings, in accordance with the generally recognized rules of public international law on State immunity.]

[The alleged violation of Article 3 of the Convention (prohibiting torture and inhuman or degrading treatments or punishments)]

40. The applicant does not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence. In these circumstances, it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities.

41. It follows that there has been no violation of Article 3 of the Convention in the present case.

[The alleged violation of Article 6 of the Convention (right to a fair trial)]

53. The right of access to a court [implicit in the guarantees of Art. 6 of the Convention (right to a fair trial): see the *Golder* v. *United Kingdom* judgment of 21 February 1975, Series A No. 18, 13–18, §§28–36] is not [...] absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 §1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy* v. *Germany* [GC], No. 26083/94, §59, ECHR 1999–I).

54. The Court must first examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

55. The Court must next assess whether the restriction was proportionate to the aim pursued. It reiterates that the Convention has to be interpreted in the light of the rules set out

in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31 §3 (c) of that treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, *mutatis mutandis*, *Loizidou* v. *Turkey* (merits), judgment of 18 December 1996, *Reports* 1996–VI, 2231, §43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.

56. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 §1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

57. The Court notes that the 1978 Act, applied by the English courts so as to afford immunity to Kuwait, complies with the relevant provisions of the 1972 Basle Convention, which, while placing a number of limitations on the scope of State immunity as it was traditionally understood, preserves it in respect of civil proceedings for damages for personal injury unless the injury was caused in the territory of the forum State. Except insofar as it affects claims for damages for torture, the applicant does not deny that the above provision reflects a generally accepted rule of international law. He asserts, however, that his claim related to torture, and contends that the prohibition of torture has acquired the status of a *jus cogens* norm in international law, taking precedence over treaty law and other rules of international law.

58. Following the decision to uphold Kuwait's claim to immunity, the domestic courts were never required to examine evidence relating to the applicant's allegations, which have, therefore, never been proved. However, for the purposes of the present judgment, the Court accepts that the ill-treatment alleged by the applicant against Kuwait in his pleadings in the domestic courts, namely, repeated beatings by prison guards over a period of several days with the aim of extracting a confession ..., can properly be categorised as torture within the meaning of Article 3 of the Convention ...

59. Within the Convention system it has long been recognised that the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances ... Of all the categories of ill-treatment prohibited by Article 3, 'torture' has a special stigma, attaching only to deliberate inhuman treatment causing very serious and cruel suffering ...

60. Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. Thus, torture is forbidden by Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment requires, by Article 2, that each State Party should take effective legislative, administrative, judicial or other measures to prevent torture in any territory

under its jurisdiction, and, by Article 4, that all acts of torture should be made offences under the State Party's criminal law ... In addition, there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens.* For example, in its judgment of 10 December 1998 in *Furundzija* ..., the International Criminal Tribunal for the Former Yugoslavia referred, *inter alia*, to the foregoing body of treaty rules and held that '[b]ecause of the importance of the values it protects, this principle [proscribing torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules'. Similar statements have been made in other cases before that tribunal and in national courts, including the House of Lords in the case of *ex parte Pinochet (No. 3)* ...

61. While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in *Furundzija* and *Pinochet*, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred to (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Articles 2 and 4 of the UN Convention) relates to civil proceedings or to State immunity.

62. It is true that in its Report on Jurisdictional Immunities of States and their Property ... the working group of the International Law Commission noted, as a recent development in State practice and legislation on the subject of immunities of States, the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition on torture. However, as the working group itself acknowledged, while national courts had in some cases shown some sympathy for the argument that States were not entitled to plead immunity where there had been a violation of human rights norms with the character of *jus cogens*, in most cases (including those cited by the applicant in the domestic proceedings and before the Court) the plea of sovereign immunity had succeeded.

63. The ILC working group went on to note developments, since those decisions, in support of the argument that a State may not plead immunity in respect of human rights violations: first, the exception to immunity adopted by the United States in the amendment to the Foreign Sovereign Immunities Act (FSIA) which had been applied by the United States courts in two cases [this exception, introduced by section 221 of the Anti-Terrorism and Effective Death Penalty Act of 1996, applies in respect of a claim for damages for personal injury or death caused by an act of torture, extra-judicial killing, aircraft sabotage or hostage-taking, against a State designated by the Secretary of State as a sponsor of terrorism, where the claimant or victim was a national of the United States at the time the act occurred]; secondly, the *ex parte Pinochet (No. 3)* judgment in which the House of Lords 'emphasised the limits of immunity in respect of gross human rights violations by State officials'. The Court does not, however, find that either of these developments provides it with a firm basis on which to conclude that the immunity of States *ratione personae* is no longer enjoyed in respect of civil liability for claims of acts of

torture, let alone that it was not enjoyed in 1996 at the time of the Court of Appeal's judgment in the present case.

64. As to the amendment to the FSIA, the very fact that the amendment was needed would seem to confirm that the general rule of international law remained that immunity attached even in respect of claims of acts of official torture. Moreover, the amendment is circumscribed in its scope: the offending State must be designated as a State sponsor of acts of terrorism, and the claimant must be a national of the United States. The effect of the FSIA is further limited in that after judgment has been obtained, the property of a foreign State is immune from attachment or execution unless one of the statutory exceptions applies ...

65. As to the *ex parte Pinochet (No. 3)* judgment ..., the Court notes that the majority of the House of Lords held that, after the UN Convention and even before, the international prohibition against official torture had the character of *jus cogens* or a peremptory norm and that no immunity was enjoyed by a torturer from one Torture Convention State from the criminal jurisdiction of another. But, as the working group of the ILC itself acknowledged, that case concerned the immunity *ratione materiae* from criminal jurisdiction of a former head of State, who was at the material time physically within the United Kingdom. As the judgments in the case made clear, the conclusion of the House of Lords did not in any way affect the immunity *ratione personae* of foreign sovereign States from the civil jurisdiction in respect of such acts (see in particular, the judgment of Lord Millett ...). In so holding, the House of Lords cited with approval the judgments of the Court of Appeal in *Al-Adsani* itself.

66. The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

67. In these circumstances, the application by the English courts of the provisions of the 1978 Act to uphold Kuwait's claim to immunity cannot be said to have amounted to an unjustified restriction on the applicant's access to a court.

[The Court decided by nine votes to eight that Article 6 §1 ECHR has not been violated. A joint dissenting opinion was filed by Mr Rozakis and Mr Caflisch joined by Mr Wildhaber, Mr Costa, Mr Cabral Barreto and Mrs Vajić. Two separate dissenting opinions were filed, in addition, by Mr Ferrari Bravo and Mr Loucaides. Excerpts of the first dissenting opinion follow.]

Joint dissenting opinion filed by Mr Rozakis and Mr Caflisch joined by Mr Wildhaber, Mr Costa, Mr Cabral Barreto and Mrs Vajić:

By accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognise that it is hierarchically higher than any other rule of international law, be it general or particular, customary or conventional, with the exception, of course, of other *jus cogens* norms. For the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.

The Court's majority do not seem, on the other hand, to deny that the rules on State immunity; customary or conventional, do not belong to the category of *jus cogens*; and rightly so, because it is clear that the rules of State immunity, deriving from both customary and conventional international law, have never been considered by the international community as rules with a hierarchically higher status. It is common knowledge that, in many instances, States have, through their own initiative, waived their rights of immunity; that in many instances they have contracted out of them, or have renounced them. These instances clearly demonstrate that the rules on State immunity do not enjoy a higher status, since *jus cogens* rules, protecting as they do the '*ordre public*', that is the basic values of the international community, cannot be subject to unilateral or contractual forms of derogation from their imperative contents.

The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions. In the circumstances of this case, Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of that jurisdiction (the United Kingdom) cannot accept a plea of immunity, or invoke it *ex officio*, to refuse an applicant adjudication of a torture case. Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of *jus cogens*.

The majority, while accepting that the rule on the prohibition of torture is a *jus cogens* norm, refuse to draw the consequences of such acceptance.

In the following case, the dissenting opinion of ad hoc judge Van den Wyngaert relies on the *jus cogens* character of war crimes and crimes against humanity to conclude that the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs should be set aside in favour of allowing for prosecution to take place where such crimes are concerned. Her reasoning echoes to a large extent that of the House of Lords in the *Pinochet* case and that of the dissenting opinion appended to the judgment of the European Court of Human Rights in *Al-Adsani*.

International Court of Justice, case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v. *Belgium)*, I.C.J. Reports 2002, 3 (judgment of 14 February 2002):

[The DRC filed an application against Belgium following the issuance of an international arrest on 11 April 2000 by a Belgian investigating judge against the then Minister for Foreign Affairs