GILBERTO AMADO MEMORIAL LECTURE

"Human rightism" and international law

Lecture delivered on 18 July 2000
by Professor Alain Pellet
Professor of International Law at the
University of Paris X-Nanterre
Member of the International Law Commission

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The views expressed are those of the author and do not necessarily coincide with the views of the Organization

NOTE

During the consideration of the Report of the International Law Commission at the twenty-fifth session of the General Assembly, it was suggested in the Sixth Committee, in connection with the point concerning the International Law Seminar, that with a view to honouring the memory of Gilberto Amado, the illustrious Brazilian jurist and former member of the International Law Commission from its inception until his death in 1969, the possibility should be considered of naming a series of sessions after him or of establishing a permanent conference in his name within the Seminar.

The question was considered by the International Law Commission, which decided, at its 1146th meeting, that the memorial should take the form of an annual lecture to which the members of the Commission, the participants in the session of the International Law Seminar and other experts in international law would be invited.

The Government of Brazil, consulted by Mr. T.O. Elias, Chairman of the twenty-second session of the Commission, through H.E. Mr. José Sette Câmara, responded favourably to the idea and offered financial assistance to cover the cost of the implementation of the programme including the publication of the annual lecture.

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The first fourteen Lectures were given by:

H.E. Eduardo Jiménez de Aréchaga, Judge at the International Court of Justice, on 15 June 1972;

Professor Constantin Eustathiades, of the University of Athens, on 11 July 1973;

H.E. Mr. Manfred Lachs, President of the International Court of Justice, on 11 June 1975;

H.E. Sir Humphrey Waldock, Judge at the International Court of Justice, on 3 June 1976;

H.E. Mr. Taslim O. Elias, Judge at the International Court of Justice, on 7 June 1978;

H.E. Mr. Geraldo Eulalio do Nascimento e Silva, Ambassador of Brazil to Austria and Permanent Representative to the United Nations Office at Vienna, on 3 June 1983;

Professor Georges Abi-Saab, of the Graduate Institute of International Studies at Geneva, on 20 June 1985;

H.E. Mr. José Sette Câmara, Judge at the International Court of Justice and former Ambassador of Brazil, on 16 June 1987;

Professor Cançado Trinidade, Legal Adviser of the Ministry of Foreign Affairs of Brazil, on 16 June 1987;

Mr. Carl-August Fleischhauer, Under-Secretary-General, The Legal Counsel of the United Nations, on 14 June 1989;

H.E. Mr. Francisco Rezek, Minister of External Relations of Brazil, on 2 July 1991;

Professor Lucius Caflisch, The Legal Adviser, Federal Department of Foreign Affairs, Bern, on 2 June 1993;

H.E. Mr. Celso Lafer, Former Minister of External Relations of Brazil; Ambassador and Permanent Representative of Brazil to WTO and to the United Nations in Geneva, on 18 June 1996;

H.E. Mr. Ramiro Saraiva Guerreiro, Ambassador, Former Minister of External Relations of Brazil on 31 May 1998.

The fifteenth Lecture, the text of which is reproduced in the present document, was delivered by Professor Alain Pellet, Professor of International Law at the University of Paris X-Nanterre, member of the International Law Commission.

Your Excellencies, Ladies and gentlemen, Friends,

It is a great honour for me to deliver the Gilberto Amado lecture. And I owe that honour, I know, far less to any merits I may possess than to the friendship and favour that Ambassador Baena Soares has bestowed on me. I may perhaps owe it also to my special links with the countries of Latin America, particularly Brazil, which conferred on me a few years ago, again in an unmerited gesture, a professorship *honoris causa*—the first I have ever received and a source of great pride to me! It is, so to speak, my only "point of contact" with the man who gave his name to these lectures: he was similarly honoured, albeit on far more meritorious grounds, in 1968.

I am probably the second of the "Gilberto Amado lecturers" not to have known him, a fact I deeply regret (paradoxically, the first was the eminent Brazilian jurist A. A. Cançado Trindade[1]). Since being approached in this connection, I have tried to form a clearer idea of who he was—an endeavour that has enhanced my regret at not having met a man who seems to have been an extraordinary jurist and a no less extraordinary and engaging individual. Judge Sette Câmara drew a striking portrait of Amado in a lecture he gave here in 1987 on the hundredth anniversary of his birth. He enjoyed life's pleasures and he was not an easy customer—at least two reasons why I find him particularly endearing! His lack of dogmatism, his realism (which did not prevent him from espousing principles), his ability to admit his mistakes,[2] his eagerness to keep abreast of developments in international law, his independence of mind in the International Law Commission and his special interest in the question of reservations to treaties[3] are all characteristics that make him not only an illustrious predecessor, but also one with whom I feel I have many points in common.

Judge Sette Câmara says in his study, for instance, that "he had no time for theological matters".[4] It follows, to my mind, that Gilberto Amado would not have been a "human rightist", since "human rightism" bears the same rela-

[1] "La contribution de Gilberto Amado aux travaux de la Commission du droit international", in *Conférences commémoratives Gilberto Amado*, Fundação Alexandre de Gusmão, Ministerio das Relações Exteriores, Brasilia, 1998, p. 491.

[2] Ibid., especially pp. 511-514.

[3] See his Memorandum on the subject in the *ILC Yearbook*, 1951, vol. II, p. 17.

[4] "Gilberto Amado — Cent ans de plénitude", ibid., p. 479.

tionship to international law as theology or rather faith does to law in general: a virtue perhaps, but one that is alien to its object.

"Human rightism". People admittedly baulk at the term. I may cite as proof the fact that, when our Chairman announced this lecture, it caused a stir among some members of the Commission and left the interpreters stumped, although they are well accustomed to verbal challenges. Frédéric Dard is said to have coined at least 20,000 neologisms. I hope I may be forgiven for coining one, although I would not be so presumptuous as to compare myself with the progenitor of the famous San Antonio!

But what is this "human rightism" which has already achieved some measure of notoriety? Although I am not fully confident of my exclusive paternity, I used it for the first time in published form, I believe, at a symposium organized in 1989 by Hubert Thierry and Emmanuel Decaux at the Arche de la Fraternité.[5] To my mind, the term is a relatively neutral one; it was simply intended to characterize the state of mind of human rights activists, for whom I have the greatest admiration, while sounding a note of caution against the confusion of categories: law, on the one hand, human rights ideology, on the other.

The term has become quite popular in the meantime, although I found only one Internet entry for "human rightism" in *Lexis*. It refers to the review of a book on Tunisia and defines human rightism as "a peculiar manifestation of the moralistic strain in politics".[6] It has also acquired a pejorative connotation that I had not originally intended. I cite as evidence the following reaction by an eminent member of the Human Rights Committee who approached me at a reception last week with the remark: "I have received an invitation to your lecture, but I'm not going". "Oh? Why not?" "Because I gather from the title of your paper that you're going to disparage human rights!" Of course, I am not going to disparage them—in any case, as Michel Villey has written, "these days human rights only have friends",[7] but this type of reaction confirms me in my belief that, while "human rightists", be they human rights activists or specialists, may have many virtues, an inclination to be open to dialogue is not one of them—a paradoxical (or disturbing) state of affairs when one considers the cause they are defending, which should be better served.

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[5] Alain Pellet, "La mise en oeuvre des normes relatives aux droits de l'homme" in CEDIN (H. Thierry and E. Decaux, eds.), *Droit international et droits de l'homme — La pratique juridique française dans le domaine de la protection internationale des droits de l'homme*, Montchrestien, Paris, 1990, p. 126. I shall refer later to some of the points made in this paper, which I still find broadly valid.

[6] Andrew Boroviec, review of Roger Kaplan's book, *Tunisia: A Case for Realism*, *Washington Times*, 22 November 1998, Part B, Books; p. B7 (http://web.lexis-nexis.com/ln.uni).

[7] *Le droit et les droits de l'homme*, PUF, Paris, 1983, p. 17.

Allow me to tell a second anecdote, but one that sheds some light on our definition. At another reception (which are a common pastime in Geneva, though one I rarely indulge in!), I met a colleague for whom I have the greatest esteem and whom I can identify as Professor Theodor Meron. Apologizing for being unable to join us today, he added: "I believe you intend to talk about the issue of reservations to treaties - and indeed I propose to do so briefly - but, on that score, you cannot classify me among the human rightists. In my report to the Council of Europe,[8] I do not question the law applicable to reservations to treaties; I merely say that the rules in force raise problems as far as of human rights are concerned".

That to me is a typical human rightist attitude: it consists in thinking that the rules of general international law are sound, but totally unsuited to this branch of law (what do I mean "this branch of law"—I mean this supposedly fully fledged discipline of human rights protection), whereas, in my view, although the problems raised by reservations in the area of human rights may be real (or at least have been made real), they are no more and no less real than in other branches of international law such as, in particular, the protection of the environment, and this special status has less to do with the object of human rights treaties than with the existence of monitoring bodies, which are a more common feature than in other areas.

Let us say, therefore, that human rightism may be defined as the "stance" that consists in being absolutely determined to confer a form of autonomy (which, to my mind, it does not possess) on a "discipline" (which, to my mind, does not exist as such): the protection of human rights. This represents in a nutshell both the definition of human rightism and the argument that I propose to develop very briefly.

A broader definition of human rightism is also conceivable, one that includes human rights activism. To the extent that the term human rightism has acquired a pejorative connotation, I do not think that this would be appropriate: human rights activists "lay their cards on the table"; they fight for a cause (a profoundly just cause, to my mind) and they are entitled to focus their efforts on a particular goal, that of a world in which human rights prevail—just as ecologists direct their energy exclusively (in some cases, excessively) against pollution or anti-nuclear activists against nuclear weapons.

And yet . . . Even here, moderation is required. The NGOs that reflect international opinion and solidarity are certainly "positive counter-powers" to arbitrary State authority or to the "globalizing" domination of transnational

[8] "The implications of the European Convention on Human Rights for the development of public international law", report to the nineteenth meeting of CAHDI (Berlin, 13 and 14 March 2000), CAHDI (2000) 11, Annex III.

economic powers. Yet, despite the respect one may feel for many of them and the admiration inspired by the men and women who work for them so devotedly, it is doubtful whether they offer a genuine alternative to internationalization. Just as they may serve a very useful purpose as counterweights, as instruments of pressure and early warning, so also they may prove potentially dangerous if an inordinate amount of authority is conceded to them. The aims they pursue are, for the most part, highly respectable as such, but there are only two alternatives: either they are specialized, in which case, however important the issues involved—the cause of women, children, the poor, the environment, human rights—they cannot take the place of politics, the global project for a "world *polis*"; or, alternatively, their aim is to replace States and we are then in danger of being caught between Scylla and Charybdis, for, if they have a clear conscience because they are fighting for a just cause, they are liable to be more intolerant than the existing political authorities. I shudder at the thought of "politically correct" globalization!

While I believe that international protection of human rights is a fine cause and, for our present purposes, an essential ingredient of contemporary international law, I consider at the same time that human rights activism has no place in international law scholarship.

To be frank, I should say that the vast majority of international jurists of good standing are largely innocent of this fault, including those who rightly endeavour to secure for human rights the prominent, but not exclusive, place that they deserve in contemporary international law. I often tease some my colleagues in the Commission about their "human rightism", especially John Dugard and Bruno Simma, but I acknowledge that both of them—as well as others such as Ted Meron, whom I have mentioned, Louis Henkin (to whom I extend my respectful and affectionate good wishes), Rosalyn Higgins and many more—possess two outstanding qualities: technical rigour and manifest generosity.

The fact remains that even these eminent authorities on international law sometimes let their generosity get the better of their legal expertise. While they are not to be classified among human rightists in the pejorative sense of the term, they are sometimes carried away by what I would call "human rightist lapses of judgement" and occasionally give in to the temptation, thus demonstrating the veracity of the famous dictum of John Humphrey, a man well versed in human rights: "Human rights lawyers are notoriously wishful thinkers". [9]

[9] "Foreword", in R.B. Lillich, ed., *Humanitarian Intervention and the United Nations*, U.P. Virginia, Charlottesville, 1973, p. VII.

But with all due deference to Giraudoux, law is whatever we want, but surely not the "best school of the imagination". Although I am inclined to classify it as an "art" rather than a "science", it is a prescriptive discipline whose purpose is derived from the balance of power, which it reflects in what I would view as a reasonably faithful way. One may (and no doubt should) wish to change the balance of power, but, pending any such change, jurists have no choice but to describe legal rules as they are and not as they would like them to be, even if it means judging them severely. *Dura lex*!

Human rights law and, more specifically, international human rights law, with which we are solely concerned here, is no exception to the rule. It is and can only be the art of the possible. By asking it to do the impossible, human rightists are, to my mind, damaging rather than serving the cause they seek to defend. And they would often be well advised to leave the task of changing the law to "human rights activists", for whom it is a highly respectable function, instead of seeking to do so themselves at the risk of making no headway either in human rights or in international law.

Many different techniques result in these lapses of judgement and it would take more time than that available here to subject them to a serious analysis. However, I shall mention two procedures which constitute, in my view, the most dangerous lapses associated with human rightism:

First, believing (or promoting the belief) that a particular legal technique belongs specifically to human rights when it is well known in general international law; this amounts to an unjustified claim for special treatment;

Conversely, our human rightists have a tendency to indulge in wishful thinking and take sketchily emerging trends or, worse still, trends that exist solely in the form of aspirations, as legal facts.

Without claiming originality, I propose to illustrate these trends, which I view as pernicious, by means of a number of examples, first, of rule-making and, second, of rule implementation. I shall begin with rule-making.

International rules for the protection of human rights are traditionally the final product of formal processes (broadly speaking, what are known in the classical literature as the sources of international law), whose primary function is to ensure (or to lay the basis for ensuring) their conformity with legal principles. In contemporary international law, this function is performed primarily by means of treaties and human rights protection has not escaped the influence of this underlying trend: there are countless treaties on the subject —universal and regional, global and partial, according to sector or category of protected persons, etc. Some of these treaties are highly specific, but many remain vague and unclear in terms of scope. While some have been widely ratified, others have not or their ratification has been accompanied by so many

reservations that their authority has in some cases been seriously undermined as a result.

As far as reservations are concerned, I believe that, having had sufficient opportunity to express my views,[10] I need not go into the subject in great depth, unless to reiterate briefly a number of obvious facts or, at least, certain propositions that seem to me to be a matter of common sense:

1. I have always wondered how human rightists can be so persistent in their preference for an unratified treaty over a treaty ratified with reservations.

2. While ratification admittedly serves a purpose only where the reserving State does not divest the treaty of its content, the Vienna provisions in any case rule out that eventuality because a reservation that is incompatible with the object and purpose of the treaty is inadmissible.

3. With or without reciprocity, human rights conventions are treaties and, while one may have the strongest misgivings about legal proactivism, such misgivings are unacceptable in the case of treaties, which are, by their very nature, agreements based on consent.

4. It follows that a reservation may be inadmissible (as the human rights treaty monitoring bodies may note from the Vienna rules, even though their monitoring authority is not exclusive), but, in such cases, responsibility for taking action lies solely with the reserving State, as noted by the International Law Commission in paragraph 10 of its 1997 Preliminary Conclusions,[11] the only important point on which it parts company with the famous, but excessive, General Comment No. 24 of the Human Rights Committee.[12]

It may be noted in passing that the Committee's position, based on that adopted by the organs of the European Convention on Human Rights, did not fail to produce the perverse consequences I had feared, since one State, Trinidad and Tobago, eventually exercised its right to denounce the Optional Protocol to the 1966 Covenant on Civil and Political Rights after the Committee (rightly or wrongly) found, a reservation by that State to be inadmissible, maintaining that it was fully bound by the Protocol.[13] Something which, despite some hesitations by Switzerland and Turkey,[14] did not happen in

[10] See Alain Pellet, second report on reservations to treaties, A/CN.4/477 and Add.1, particularly paras. 164-260.

[11] Report of the International Law Commission on the work of its forty-ninth session, A/52/10, para. 157, p. 127.

[12] General Comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6, 11 November 1994.

[13] 31 December 1999, *Rawle Kennedy v. Trinidad and Tobago*, communication No. 845/1999, CCPR/C/67/D/845/1999.

[14] See Alain Pellet, second report on reservations to treaties, A/CN.4/477/Add.1, para. 230.

Strasbourg because of the European States, greater cohesiveness did take place in a universal context: Trinidad and Tobago withdrew the protection afforded to its entire population (and to foreigners) by the Protocol, a development that could (perhaps) have been avoided if the Committee had been less rigid . . .

Our human rightists are upset by the results of the treaty formula, which they find unduly slow and often disappointing, and seek consolation in custom, which is supposed to "harden" a law that is deemed excessively soft - especially if the treaties in question have not been ratified in the manner they feel is right and therefore retain the status of proposed rules for States that have not acceded to them.

This temptation has gained considerable ground in the writings of American jurists, who try to get around United States dilatoriness in ratifying human rights treaties by means of the wholesale "customarization" of the most debatable rules. Standards have slipped so much that human rights defenders, both Americans such as Ted Meron,in his book *Human Rights and Humanitarian Norms as Customary Norms*[15] (which is incidentally somewhat too "US-oriented" for my liking), and non-Americans such as Bruno Simma and Phillip Alston, in the article they wrote some time ago on the sources of human rights law,[16] have begun to get worried: they are strongly opposed to the tendency to bestow the blessing of custom on any rule deemed desirable *ad majorem gloriam* of human rights.

But the problem remains and our authors turn their attention, perhaps without due consideration, to the famous "third source" of international law, the "general principles of law recognized by civilized nations" mentioned in Article 38 of the Statute of the International Court of Justice. But they then proceed without hesitation to make radical changes in the very nature of these principles, which, it is generally agreed, must be recognized in *foro domestico* (by the domestic law of all States, of which they constitute the common heritage) and be capable of transplantation to the international plane. But that does not suit our friends, who know well that there are very many States (since it seems that all States are to be viewed as "civilized nations") whose legislation by no means guarantees, for example, freedom of expression or freedom of association, not to mention the fair trial requirement. Never mind, one can always decide that the principles in question are sufficiently well rooted, by *opinio juris*, in positive law, having decreed that they fall within its scope and

[15] Clarendon Press, Oxford, X-213 pp.

[16] "The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles", *Australian YBIL*, 1992, pp. 82-108; see also B. Simma, "International Human Rights and General International Law: A Comparative Analysis", *RCADI* 1993, vol. IV-2, pp. 153-256, especially pp. 213 et seq.

taking shelter, if need be, behind the authority of the International Court of Justice.[17] We have come full circle: in the process, our authors have reinvented a custom with no basis in practice or general principles of law that are not recognized in domestic legislation.

I am not sure whether the cause of human rights has benefited much as a result. What purpose is served by this kind of "violation" of States which do not wish to be bound by a treaty (or agree to be bound only after making sure that they can ignore it with impunity), which clearly demonstrate their opposition to the establishment of a general custom and which studiously refrain from recognizing the rights in question in their internal order?

I am not a proponent of human rights "relativism". Westerners have quite enough to blame themselves for without developing a bad conscience about human rights. This is an area in which we have something to offer to the rest of the world and I do not think we should evade the issue by indulging in a vain paternalistic search for vague traces of human rights ideology in (perfectly worthy) civilizations for which they have no value. But I also think that we should conduct a search in three directions:

1. We should certainly engage in a more vigorous effort to understand the roots of the marked indifference outside the industrialized world to what we call human rights and which are doubtless only part of the whole; for, while I maintain that we need no tutoring in civil and political rights, I fear that we are somewhat "weak" on the subject of economic, social and cultural rights and globalization is certainly no help in this regard. The fact is that "the right to be human" depends on the right to have enough to eat.

2. As Ms. Dundes Rentlein wrote in quite a discerning little book entitled *International Human Rights—Universalism Versus Relativism* published in 1990, "[i]nstead of chastizing nations for violating standards which they have not ratified or which they have but do not care about, the United Nations could condemn them for ignoring their *own* [emphasis in the original text] standards".[18]

3. While there can be no question of imposing our values on the rest of the world, as we are unduly inclined to do, there is nothing to prevent us from seeking to convince it of their merits (and here is where human rights activists —but not jurists—come into their own).

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[17] See B. Simma, *ibid.*, pp. 224-227; see also Jean-François Flauss, "La protection des droits de l'homme et les sources du droit international" *in* SFDI, Colloque de Strasbourg, *La protection des droits de l'homme et l'évolution du droit international*, Pedone, Paris, 1998, pp. 67-71.

[18] Sage Publications, Newbury Park, London, New Delhi, 1990, 205 pp.

At this point, I should like to say a few words about the enforcement of human rights.[19]

So we should not impose values which, falling outside the scope of positive law, do not constitute legal norms. But we should, on the other hand, be meticulous—as meticulous as the law allows—in ensuring respect for those which are now recognized as such by the international community as a whole and some of which have acquired peremptory status, given that human rights norms are undoubtedly a key component of *jus cogens*. But here again human rightists seem to err both in terms of excess (by trying in some cases to justify what is legally unjustifiable) and, paradoxically, in terms of timidity (by tending to bypass traditional international law institutions or else, curiously enough, by underestimating recent advances in general international law).

I have been struck, for example, by the indifference and, in some cases, the hostility of certain human rights specialists to the appreciable development of the notion of "threat to peace" as defined in broad outline by the Security Council since the end of the cold war. Of course, it is not a completely novel concept: in 1977, the abhorrent apartheid regime was described as a threat to peace.[20] But the movement has been gathering pace for the past decade and "human tragedies" or "humanitarian disasters" which show no sign of posing a serious threat to *international* peace (I am not referring to civil peace), for example, in Iraqi Kurdistan, Somalia, Rwanda and Sierra Leone, have been referred to as such under Article 39 of the Charter.

I am fully aware that the system is flawed and that the veto—or the threat to use the veto—has resulted in widely censured double standards. But it may be a case of throwing out the baby with the bathwater: the fact that other situations of humanitarian distress have been discreetly overlooked by the Council is not a ground for belittling these precedents which, after all, augur well for the advent of a real minimum humanitarian order. Failure to intervene on ten occasions does not mean that one should refrain from intervening on the eleventh, when the opportunity presents itself.

At the risk of shocking some of you, I propose to go even further: the NATO intervention in Kosovo was certainly not a model of orthodox conduct in legal terms. Nevertheless, when it comes to the defence of human rights, I find it more recommendable than the international community's inaction at Srebrenica. There is doubtless a middle way between the Munich principle and the Zorro-style action of the NATO member countries, but one may very well prefer Zorro to Daladier and Chamberlain.

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[19] For more details, see Alain Pellet, "La mise en œuvre des normes relatives aux droits de l'homme", op. cit., footnote 5, pp. 101-141.

[20] Resolution 418 (1977) of 4 November 1977.

Coming back to more technical problems, however, the human rightists have certainly been wrong to underestimate the enormous importance of the notion of an "international crime" of a State, as dealt with in article 19 of the draft articles on responsibility adopted on first reading by the International Law Commission. Of course, the concept is not restricted to the protection of human rights, but it constitutes a means of combating "serious breaches on a widespread scale of international obligations of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid", as stated in article 19, paragraph 3. To ensure that this means is effective, however, serious consequences must be drawn from the notion of crime—and this has not been done in articles 51 to 53 of the Commission's present draft articles, which overlook the most important effects of crimes on human rights and neglect to mention, in particular, State transparency, whereby those responsible for the crime may be targeted directly, in criminal terms, notwithstanding their status as organs of the State, and the possibility of an *actio popularis*, whereby, in direct application the *dictum* of the International Court of Justice in the *Barcelona Traction* case, any State may invoke the responsibility of the perpetrator of a crime, even without being the immediate victim.

Aside from these extreme cases, the traditional rules of international responsibility still serve a useful purpose in the area of human rights.

This is clearly so when the treaties guaranteeing them make no provision for a monitoring body (or when the rights in question are customary rights). In such cases, it can always be claimed that human rights are "objective", that international human rights law is not based on the principle of reciprocity, the sole guarantee of compliance consists of traditional inter-State mechanisms, first and foremost the institution—in this regard unjustly scorned—of diplomatic protection, which the Commission is currently discussing on the basis of the report of our colleague John Dugard, which is inspired by very worthy sentiments that I fully appreciate, but in which I could nonetheless not help finding some human rightist overtones. Although the Special Rapporteur seeks to show that, despite its drawbacks, the venerable institution of diplomatic protection may still perform a useful service, he bases it partly on mechanisms intended for the protection of human rights, thus depriving both, to my mind, of their distinctive character and leaving diplomatic protection *stricto sensu* with only a marginal role to play.[21] I think this is a mistake. One may certainly harbour misgivings about diplomatic protection, which has served in the past as an instrument of "dollar diplomacy", to use the term coined by Philip Jessup,[22] and of European and United States domination of the late nineteenth century and early twentieth century "third world"—the countries of

[21] First report on diplomatic protection, A/CN.4/506.

[22] See Philip Jessup, *A Modern Law of Nations*, MacMillan, New York, 1946, p. 96.

Latin America. Nevertheless, it can also be an effective means of protecting human rights (and not just property rights, with which it tends to be too closely associated).

In an article written 20 years ago, Eric David, referring to the hanging in Iraq of a Netherlands national accused of spying, noted that this (apparently internationally wrongful) act "would in the past have elicited a formal complaint from the Netherlands. Its present-day impassiveness betrays its powerlessness. It is not surprising that the traditional international complaint is being replaced by non-contentious mediation, and that, nowadays, the tendency is to request rather than to demand".

And a final quotation: "In human rights, diplomatic protection thus no longer carries the same weight as in the past".[23] It would do so if, instead of watering it down in general human rights mechanisms, an effort was made to cast it in a narrower mould and to use it more advisedly than in the past to obtain compensation for human rights violations suffered by the nationals of the State exercising it.

Yet human rightists take no interest in diplomatic protection, convinced as they are of the excellence or, at any rate, the superiority of human rights mechanisms. Of course, I am fully aware of the far-reaching and broadly beneficial innovative impact of these mechanisms on international law in the second half of the twentieth century. Nevertheless, for a number of reasons, they are neither a panacea nor a root-and-branch revolution.

Even the most sophisticated monitoring procedures are fact-finding mechanisms rather than of compensation or, above all, enforcement mechanisms. In that respect, they are firmly rooted in international law: while the findings of violations by human rights monitoring bodies may be—but are not always—binding, they are never enforceable. As Karel Vasak noted, "[t]here are no human rights institutions with punitive authority"[24] and international human rights law must rely on general international law for its enforcement. Admittedly, this is reminiscent of the parable of the blind man leaning on the paralytic, since international law is not renowned for the effectiveness of its enforcement mechanisms. It nevertheless has the potential, however marginal or imperfect, to provide "support for enforcement", either where the other States exercise the "traditional" right of international responsibility, i.e. take countermeasures with all the limitations they imply (or should imply) or else,

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[23] "Droits de l'homme et droit humanitaire", *Mélanges Fernand Dehousse*, vol. I, *Les progrès du droit des gens*, Fernand Nathan/Labor, Paris/Brussels, 1979, p. 179.

[24] "Les institutions internationales de protection et de promotion des droits de l'homme", *in* Karel Vasak, ed., *Les dimensions internationales des droits de l'homme*, UNESCO, Paris, 1978, p. 244.

in the most serious cases, where the mechanisms provided for in Chapter VII of the Charter of the United Nations are activated.

In this as in other areas, one must guard against "human rightist" blinkered vision and refrain from challenging the potential input of general international law into the enforcement of international human rights norms. In particular, monitoring mechanisms should not be viewed as self-contained regimes whose existence purportedly dispenses with the need to draw on the services, where appropriate, of "good old" international law - by which I mean, quite simply, the law of international law specialists! But while this plea has been taken up by leading human rights specialists, in the front ranks of whom I would again mention Bruno Simma[25] and also, among French authorities, Professor Cohen-Jonathan, although he often takes a more "rigidly human rightist" stance,[26] others[27] do not hesitate to view human rights mechanisms, quite wrongly, as self-contained, thereby depriving international human rights protection of a doubtless imperfect, but nonetheless supplementary source of support.

Human rightists thus align themselves, paradoxically, with totalitarian regimes such as the Soviet Union and its friends in the recent past, which used their status as parties to human rights treaties as a pretext to claim immunity from any other outside "intervention" (I place the word in quotes) in that area.

However that may be, we find ourselves again inevitably confronted with two characteristic features of international law: its inter-State nature and the primacy, not in law, but in fact, of domestic law.

For we should be under no delusion. It is certainly an exaggeration to claim that a State is bound only "to the extent it can, when it can, with the means it can afford, thus remaining quite free in terms of compliance with the international statement of rights to which it has subscribed and with obligations that are merely remote results and not means".[28] But it is true, on the other hand, as noted by René Cassin himself (somebody unlikely to be suspected of anti-human rightism . . .), that "basic responsibility for the enforce-

[25] "International Human Rights and General International Law: A Comparative Analysis", *RCADE* 1993, vol. IV-2, pp. 106-210 and 235-236.

[26] "Responsabilité pour atteinte aux droits de l'homme", *in* SFDI, Colloque du Mans, *La responsabilité dans le système international*, pp. 131-132.

[27] This also seems to be the view of the International Court of Justice (see Judgement of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua, Reports 1986*, para. 267, p. 134); see also article 62 of the European Convention on Human Rights.

[28] Jacques Mourgeon, *Les droits de l'homme*, PUF, Paris, "Que sais-je?" collection, No. 1728, 5th ed., 1990, p. 82.

ment of human rights (. . .) lies primarily with State action",[29] since the organs of State are responsible for the day-to-day application of human rights norms, even when such norms are defined internationally. In this area as in virtually all others, the State has the last word; it is the "secular arm" alone capable of instilling life into an international norm, since, as memorably stated by Michel Virally, "the international legal order is (. . .) incomplete: it needs domestic law to function".[30]

Moreover, as recently shown by John Dugard in a study of "The Role of Human Rights Treaty-Based Standards in Domestic Law" in the countries of southern Africa, human rights are undoubtedly better and more effectively protected in States whose domestic law contains effective human rights guarantees than in those which ratify international treaties, but fail to respect them even while recognizing the competence of the monitoring bodies; "[w]hile international protective measures are important, it is essential, in the first instance, that municipal law provide legal protection to the rights contained in international human rights conventions".[31]

In his excellent introductory report to the symposium on the protection of human rights and the development of international law held by the Société française pour le droit international in 1997, Jean-François Flauss, currently a professor at Lausanne University, divided the protagonists of the "full-scale scholastic dispute" raging about the difficult (and important) question of the relationship between general international law and human rights into three "camps". At one extreme, there are what he calls the "fundamentalists" or "traditionalists", who endeavour to preserve the integrity of traditional international law, and, at the other, the "autonomists" or "secessionists", who "tend to develop a messianic vision of human rights protection in international law" and claim that an independent branch of international law exists; between the two, there are the proponents of "moderate 'evolutionism'", who stress "that human rights protection would benefit from relying more on established rules of international law which should be taken into account more frequently", but who advocate at the same time "breaking down the application of the rules of international law to fit particular circumstances".[32]

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[29] "La Déclaration universelle et la mise en œuvre des droits de l'homme", *RCADI*, 1951-II, vol. 79, p. 327.

[30] "Sur un pont aux ânes: les rapports entre droit international et droits internes", *in Mélanges offerts à Henri Rolin*, Pedone, Paris, 1964, p. 498.

[31] "The Role of Human Rights Treaty-Based Standards in Domestic Law: The Southern African Experience", *in* Philip Alston and J. Crawford, eds., *The Future of Human Rights Treaty Monitoring*, 2000, p. 286.

[32] "La protection des droits de l'homme et les sources du droit international", *in* SFDI, Colloque de Strasbourg, *La protection des droits de l'homme et l'évolution du droit international*, Pedone, Paris, 1998, pp. 13-14.

Although I have criticized the advocates of "secessionism"—a term very well suited to extreme human rightists—in today's lecture and although I disapprove of excessive particularism when it can be avoided, I am not too much attracted (intellectually speaking) by the proponents of international law "fundamentalism" and I would not like to give the impression of underestimating the major shift in the traditional structure of international law that has been brought about by the "human rights revolution".

I unreservedly concur with analysts who note that human rights are no longer the preserve of States and that reciprocity, while not ruled out, plays a less prominent role in international human rights law than in more traditional fields[33] (but this also applies to environmental law and once applied—though unfortunately no longer—to international development law). I also fully agree that the individual is, today, a subject of public international law and that the individual's legal personality is asserted primarily in the area of human rights, though not exclusively in that area, a point on which, curiously enough, some supporters of moderate human rightism seem to harbour doubts.[34] I would even go further than many in this connection: I am convinced that the individual owes his international legal personality not (or at least no longer) to State recognition, but to the "objective" fact that he exists and can therefore impose his rights (certain rights) even where they have not been explicitly recognized.

However, I part company with the human rightists, or, at any rate, the most extreme among them, on two key points.

First, I do not believe that international human rights law constitutes an independent branch of general international law, still less a separate discipline. Granted, it makes it richer and more complex and adds a "spiritual" dimension, but it uses the same sources, draws on the same techniques and, on the whole, runs up against the same difficulties. This dispute about the autonomy of human rights calls to mind that which pitted Doyen Colliard against Prosper Weil in 1971. The former argued forcefully that international economic law existed as a separate entity from general international law, to which the latter responded, quite reasonably, that "in scientific terms, international economic law is only one of the many chapters of general international law".[35] The same applies to international human rights law. And while there is nothing to prevent jurists from specializing in a particular chapter of international law,

[33] See René Provost's excellent article, "Reciprocity in Human Rights and Humanitarian Law", *BYBIL*, 1995, p. 454.

[34] See, for example, Karel Vasak, "Vers un droit international spécifique des droits de l'homme", *in* K. Vasak, ed., *Les dimensions internationales des droits de l'homme*, UNESCO, Paris, 1978, p. 708; granted that these doubts were expressed more than 20 years ago and that the parameters of the issue have changed in the meantime.

[35] "Le droit international économique, mythe ou réalité?", *in* SFDI, Colloque d'Orléans, *Aspects du droit international économique*, Pedone, Paris, 1972, p. 34.

they should be careful to avoid cutting the branch from the tree, for it would wither.

Secondly, I do not believe that the recent thrust of human rights into the domain of international law presents a challenge to the principle of sovereignty, which to my mind remains (if correctly defined) a powerful organizational factor in international society and a highly instructive key to international legal phenomena. While this is a point on which a more cautious approach is now adopted than in the past, some human rights specialists, carried away by enthusiasm, have rashly predicted if not the death at least the "erosion" of sovereignty.[36]

They have perhaps been too quick off the mark and I suggest it is still too soon to insert a death notice. First, because, however fine and worthy human rights may be, they are not the whole story and, for the rest of the story, or the bulk of it, we still need international law to deal with the clash of sovereignties. But, secondly and above all, because, even in the area of human rights, sovereignty is still, to say the least, "well reserved".

Even in the case of "supranational" human rights instruments such as the European or American Conventions or the international labour conventions, the "sovereignty" element is still very much in evidence: at all events, these are treaties applicable with the States parties' consent, expressed in highly traditional fashion; reservations may be entered to the first two and there are many ways of getting round the putative impossibility of reserving on International Labour Organization conventions[37] by means of derogations, etc. This applies, a fortiori, to other international human rights instruments, which are often more thoroughly imbued with the concept of sovereignty than the all too exemplary instances just cited!

With regard to "objectivization", while the phenomenon certainly exists, it is by no means radical and prestigious authors, who cannot be charged with lack of sympathy for human rights (Mr. Vasak, for example), have quite rightly noted that, while it is applicable to the enjoyment of human rights, it is very limited in terms of their exercise.[38] As for lack of reciprocity, it exists in all "treaty laws" (albeit not necessarily with the same intensity), which nobody has ever suspected of sounding the death knell of sovereignty.

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[36] See, for example, Nicolas Valticos, "Droit international du travail et souverainetés étatiques", *Mélanges Fernand Dehousse*, vol. 1, *Les progrès du droit des gens*, Fernand Nathan/ Labor, Paris/Brussels, 1979, p. 124.

[37] See Alain Pellet, Fifth report on reservations to treaties, A/CN.4/508/Add.1, paras. 154-161.

[38] "Vers un droit international spécifique des droits de l'homme", *in* K. Vasak, ed., *Les dimensions internationales des droits de l'homme*, UNESCO, Paris, 1978, p. 711.

In 1950, during the drafting of the European Convention on Human Rights, Professor Pierre-Henri Teitgen expressed irritation at the fact that "State sovereignty [aspires to] assert itself against the sovereignty of the law".[39] While it is more than likely that modern human rightists share his irritation, it is not clear from the facts that such indignation is warranted. Sovereignty is a fact of life and one has no choice, at least as a jurist, but to grin and bear it. Indeed one may perhaps go a step further and argue that sovereignty and law, far from being incompatible, are an inseparable pair. Sovereignty represents power made subject to law and as such constitutes both the basis and the outer limit of the authority of the State. Viewed in this light, it may serve as a tool for the promotion and protection of human rights. A tool at once powerful and perfectible. So powerful that jurists cannot afford to disregard it; so perfectible that human rightists still have their work cut out if they wish to tame it more effectively than has been done by traditional international law. They have set their minds to the task and that is as it should be.

Long live human rights, ladies and gentlemen! And indeed, on reflection, long live human rightism, if, in its own way, it helps to promote human rights and provided that its champions refrain from confusing the issues and resist the temptation to present political projects—in the loftiest sense of the term—as scientific truths.

Thank you.

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[39] Records of the *travaux préparatoires* for the European Convention on Human Rights, vol. IV, p. 854, footnote 61.